IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL, Appellant, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	SUPREME COURT CASE NO: 82908

JOINT APPENDIX – VOLUME III

Appeal from Eighth Judicial District Court, Clark County
The Honorable David M. Jones, District Judge
District Court Case No. A-17-758501-W

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing JOINT APPENDIX – VOLUME III was filed electronically with the Nevada Supreme Court on the 14th day of September, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **PETITIONER'S OPENING BRIEF ON REMAND** **Hearing Date:** October 15, 2020 **Hearing Time:** 9:00 a.m.

Petitioner the Las Vegas Review-Journal ("Review-Journal") hereby submits this Opening Brief following remand from the Nevada Supreme Court.

DATED this the 27th day of August, 2020.

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I. INTRODUCTION

In its February 27, 2020, opinion, the Nevada Supreme Court affirmed this Court's prior findings that juvenile autopsy reports are public records pursuant to Nevada's public records act (the "NPRA").[1] The Court found the Coroner failed to justify withholding juvenile autopsy reports in their entirety. *See generally Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 59-60, 458 P.3d 1048, 1061 (2020). However, the Supreme Court found that the Coroner had articulated a nontrivial privacy interest that could be at stake for some information contained in the records, and remanded the matter to this Court to apply the two-part balancing test adopted in *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*"). Pursuant to the *CCSD* test, even if the government establishes a nontrivial privacy interest that applies to particular information in a record, the requester is still entitled to the information if the requester shows the public interest at issue is a significant one and the information sought is likely to advance that interest. *Id.* at 707-08, 320.

This Court must now evaluate the public interests to be advanced by access to the juvenile autopsy reports and determine what, if anything, should be redacted. *Id.* at 1059. While the *CCSD* test shifts the burden to the requester, the mandates of the NPRA still govern this Court's analysis on remand.[2] Once those mandates are applied and the interests advanced by access are examined, it becomes clear that the records should be produced in their entirety. Indeed, while the *CCSD* test only requires *a* significant public interest to be advanced by access, here, there are multiple significant public interests at stake. Moreover, access to the juvenile autopsy reports in their entirety is not merely *likely* to advance those public

[1] On July 17, 2017, the Review-Journal filed its Petition with this Court. Following briefing and a hearing, this Court entered a written order granting the Petition on November 9, 2017. The Coroner appealed that order.

[2] To the extent the Coroner advocates an interpretation of the *CCSD* test that cannot be reconciled with the text of the NPRA, the interpretation must be rejected.

interests—which is all the *CCSD* test requires to obtain access—disclosure is *very likely* to advance those public interests.

The first public interest comes from the text of the NPRA itself. The NPRA explains that access to public records in of and itself is presumed to be in the public interest. Nev. Rev. Stat. §239.001(1). Second, access to autopsy reports is important to ensuring coroners' offices do their taxpayer-funded jobs correctly and do not engage in malfeasance. Access serves several important social functions, including understanding how local coroners and medical examiners function and perform their work, assessing determinations made by coroners and medical examiners, and understanding important law enforcement and public health issues (each of which are of particular concern in these times).

Third—and perhaps most importantly—with regard to the specific juvenile autopsy reports at issue here, full access to the reports is very likely to advance the public interest of ensuring the autopsies of children in Clark County are performed correctly and that child deaths in our region are properly investigated. Access also allows the public to assess how well local child protective services are doing in protecting the vulnerable children who have been in contact with them. For example, the records can show whether children who have died had prior contact with Clark County's abuse and neglect system. Thus, access to juvenile autopsy reports is critical to informing the public about what state and local governments are doing to protect children who are or have been under the supervision of child protective services. Access to such information not only provides the public with a better understanding of the flaws in Nevada's child welfare systems—it can also lead to positive changes to those systems and, ultimately, help prevent future child deaths. In contrast to these very significant interests, the Coroner asserted only generalized concerns, which cannot outweigh the public interests at stake in this case.[3]

[3] As the Supreme Court explained, the Coroner's declaration "comports with a general understanding that autopsy reports ***may*** 'yield detailed, intimate information about the subject's body and medical condition,' . . . and ***may*** 'reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death,'" Coroner, 136 Nev. at 57, 458 P.3d at 1058 (emphasis added).

Further, access to the reports themselves is necessary to advance these interests. In its opinion, the Supreme Court expressed uncertainty about what additional information the Review-Journal "seeks to glean from the requested juvenile autopsy reports that, in unredacted form, would advance the public's interest" that would not be available in redacted reports, the spreadsheet prepared the Coroner or statewide statistical reports regarding child death reviews. *Coroner*, 136 Nev. at 58, 458 P.3d at 1059. Limiting the public to the narrow set of information in the sample, redacted autopsy reports and the spreadsheets from the Coroner, or government reports from the Child Death Review ("CDR") teams does not sufficiently further these goals because it deprives the public of important information. For example, limiting the public to accessing information about just the cause of death ignores that other information such as toxicology and observations by the examiner performing the autopsy a could reveal whether a child suffered from prior abuse. Having access to names is critical to be able to connect autopsy reports with other public records. Moreover, the whole point of the NPRA is to facilitate democracy through transparency so there are checks on government power. Thus, reporters and other members of the public are entitled to direct access to public records and need not rely on partial information filtered by the government.

Thus, as required by the Supreme Court, in this brief, the Review-Journal establishes that the public interest at issue is a significant one and the information sought is likely to advance that interest. *Id.* at 707-08, 320. The Review-Journal establishes herein that there are not one but several significant public interests that are likely to be furthered by unredacted (or minimally redacted) autopsy reports. The Review-Journal also explains why filtered information and redacted reports are not sufficient.

For all these reasons, the Court should now order the Coroner to produce the autopsy reports. consistent with the Supreme Court's order in this case and NPRA law.

II. STATEMENT OF FACTS

On April 13, 2017, Review-Journal investigative reporter Arthur Kane submitted a records request (the "Request") to the Coroner seeking all autopsy reports of all autopsies conducted on anyone under the age of 18 from 2012 through the date of the Request. (Exh.

1 to July 17, 2017, Petition, LVRJ006-007.) The Coroner responded to the Request on April 13, 2017, refusing to produce any of the requested autopsy reports, stating nothing more than it was "not able to provide autopsy reports." (*Id.*, LVRJ004.)

On April 14, 2017, the Coroner, while continuing to withhold the requested records, provided the Review-Journal a spreadsheet created by undisclosed persons, broken down by year, containing some information but missing critical information. (*See* **Exh. 1** to Petition, LVRJ009-014.) For example, the spreadsheet lists the cause of death and manner of death but omits information such as the opinions of the medical examiner and physical observations. The spreadsheet even omits the name of the medical examiner performing the autopsy. In addition to it being unclear who compiled the spreadsheet, it is unclear whether they are accurate. (*Id.*, LVRJ004.) On May 26, 2017, the Coroner, through its counsel, Deputy District Attorney Laura Rehfeldt, provided the same spreadsheet to the Review-Journal. (**Exh. 5** to Petition, LVRJ035-46.) Again, however, the Coroner provided no information about who compiled the spreadsheet. On May 26, 2017, the Coroner also provided a list of child deaths where autopsy reports were generated. (*Id.*, LVRJ048-71) As with the spreadsheet, while the list included the cause and manner of death, it omitted information regarding the identity of the examiner, the observations of the examiner, and the identity of the person(s) who compiled the list. Notably, the actual autopsy records sought were not provided with these documents.

On July 11, 2017, the Coroner informed the Review-Journal that it had begun compiling and redacting autopsy reports in response to the records request, and provided sample files of three redacted autopsy reports from child deaths that were not handled by a child death review team as an example of the redactions the Coroner intended to make to all the requested reports. (Exh. 9 to Petition, LVRJ095-122.) The files were heavily redacted. As detailed below, they omitted some pathological diagnoses and even parts of the opinion regarding cause of death. (*See, e.g.*, **Exh. 9** to Petition, LVRJ095, LVRJ113; *see also id.* at LVRJ087-088 (email from counsel for the Coroner explaining redactions).) After receiving

the extensively redacted autopsy reports, the Review-Journal filed its Petition with the Court on July 17, 2017.

III. ARGUMENT: LEGAL STANDARD

A. The *CCSD* Test.

In *CCSD*, the Review-Journal submitted a records request for, *inter alia*, public records pertaining to an internal investigation conducted by CCSD's Office of Diversity and Affirmative Action into the alleged misconduct of CCSD School Board Trustee Kevin Child. After CCSD refused to produce the records, the Review-Journal petitioned the district court pursuant to Nev. Rev. Stat. § 239.011. The district court granted the Review-Journal's amended public records petition and ordered CCSD to produce the records with only the names of direct victims of sexual harassment or alleged sexual harassment, students, and support staff redacted. *Id.*, 134 Nev. at 702, 429 P.3d at 316-17.

On appeal, CCSD had argued in part that it should be allowed to redact more information. *Id.* at 702, 317. In its opinion, the Supreme Court adopted a narrow two-part balancing test set forth in *Cameranesi v. U.S. Dep't of Defense*, 856 F. 3d 626 (9th Cir. 2017) based on FOIA Exemption 6[4], to be applied by courts in cases "in which the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction." That two-part balancing test "first requires the government to establish a personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial." *Id.* (citing *Cameranesi*, 856 F.3d at 637). "Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." *Id.* (internal quotation marks admitted).

FOIA decisions applying Exemption 6's privacy burden shifting—including in the context of autopsy reports—are instructive. In *Charles v. Office of the Armed Forces Med.*

[4] 5 U.S.C. § 552(b)(6) (exempting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

Exam'r, 935 F. Supp. 2d 86, 97 (D.D.C. 2013), the court explained that "Exemption 6 tilts the balance of disclosure interests against privacy interests in favor of disclosure, and creates a heavy burden for an agency invoking Exemption 6." (quotation and internal punctuation omitted; *see also United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Local 598 v. Dep't of Army Corps of Engineers, Walla Walla Dist.*, 841 F.2d 1459, 1463 (9th Cir. 1988)[5] ("Exemption (6) protects only against disclosure which amounts to a 'clearly unwarranted invasion of personal privacy.' That strong language instructs us to tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.") (quotation and internal punctuation omitted); *Sheet Metal Workers Int'l Assn., Local Union No. 19 v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891, 897 (3d Cir.1998)) (holding that when determining whether Exemption 6 applies, courts must balance the public interest in disclosure against the privacy interest protected by the exemption, and that "[t]here is a presumption in favor of disclosure" that the withholding agency has the burden of overcoming); *White Arnold & Dowd P.C. v. Dep't of Justice, Office of Prof'l Responsibility*, No. 2:15-CV-00837-RDP, 2017 WL 2405104, at *4 (N.D. Ala. June 2, 2017) ("The applicable burden of proof in [FOIA] cases reflects the principle that FOIA favors disclosure of government records. The court reviews *de novo* an agency decision to withhold its records, and the Government bears the burden of justifying any disputed exemption.").

The balancing test the Supreme Court adopted from case law applying FOIA Exemption 6 "ensures that the district courts are adequately weighing the competing interests of privacy and government accountability by shifting the burden onto the public record petitioner, once the government has met its burden." *CCSD*, 134 Nev. at 708–09, 429 P.3d at 32. As further discussed below, the NPRA places even greater weight on the value of disclosure than does the federal FOIA, and the NPRA places less emphasis on the weight given to privacy than FOIA Exemption 6. Thus, the *CCSD* balancing test tilts even more in favor of the party seeking disclosure than its similar federal counterpart.

[5] Abrogated on other grounds by *United States Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989).

B. *CCSD* Does Not Change the NPRA's Mandates and Cannot Be Applied Inconsistently with Legislative Mandates.

In *CCSD*, the Nevada Supreme Court explicitly recognized that any balancing of privacy interests must be applied consistently with the NPRA. *See CCSD*, 134 Nev. at 708-09, 429 P.3d at 321 (declaring that the "test coheres with both the NPRA and *Gibbons*" and reaffirming, as the court "explained in *Gibbons*[,] that NRS 239.0113 requires that the state bear the burden of proving that records are confidential") (citation omitted)). Thus, when evaluating whether, piece-by-piece, the redactions the Coroner wants to make are warranted, this Court is bound to follow the express statutory direction included in the NPRA regarding how its terms are to be interpreted and applied.

The version of the NPRA in effect when this lawsuit was filed states that "[its] purpose . . . is to foster democratic principles by providing members of the public with access to inspect and copy of public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1). The NPRA contains an express presumption in favor of access. As the Supreme Court explained in *Gibbons*, which, as noted above, the Supreme Court reiterated controls cases such as these, "[t]he NPRA provides that all public books and public records of governmental entities must remain open to the public, 'unless otherwise declared by law to be confidential.'" *Gibbons*, 127 Nev. at 877, 266 P.3d at 626 (quoting Nev. Rev. Stat. § 239.010(1)). Moreover, "the governmental entity has the burden of proving by a preponderance of the evidence that the public book or record, or a part thereof, is confidential." Nev. Rev. Stat.§ 239.0113(2).

Consistent with the fact that access in and of itself is presumed—and presumed to be in the public interest—the NPRA mandates that each and every provision of the Act "must be construed liberally to carry out [its] important purpose [of fostering democratic principles.]" Nev. Rev. Stat. § 239.001(2). In addition, "[a]ny exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3). In addition to the statutory mandate that any exception to disclosure under the NPRA, including balancing tests, must be applied narrowly in favor of disclosure, the common law requires that privacy

interests that the balancing test is based on are to be applied narrowly in any context. "It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *DR Partners v. Bd. of Cty. Comm'rs. of Clark Cty.*, 116 Nev. 616, 6 P.3d 465, 468 (2000). Further, Nev. Rev. Stat. § 239.010(3) requires governmental entities produce as much of a record as possible and requires redaction rather than wholesale non-disclosure wherever feasible.[6]

The Nevada Supreme Court has provided additional guidance regarding how to apply balancing tests and evaluate respective burdens under the NPRA. In *Reno Newspapers v. Sheriff*, 126 Nev. 211, 234 P.3d 922 (2010) ("*Haley*"), the Nevada Supreme Court specified how the mandates in Nev. Rev. Stat. § 239.001, which were added in 2007, impacted the applicable burden:

> Prior to the amendment of the Act, this court routinely employed the *Donrey* balancing test when a statute failed to unambiguously declare certain documents to be confidential. *Donrey of Nevada v. Bradshaw,* 106 Nev. 630, 635–36, 798 P.2d 144, 147–48 (1990). This balancing test equally weighed the general policy in favor of open government against privacy or law enforcement policy justifications for nondisclosure. *See id.* However, in light of the Legislature's declaration of the rules of construction of the Act—requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly—the balancing test under *Bradshaw* now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure to be weighed against the liberal policy for an open and accessible government. *See* NRS 239.001. We emphasize that the balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act. *See id.*

Haley, 126 Nev. at 217–18, 234 P.3d at 926. The Nevada Supreme Court has also held that because of the mandates contained in the text of the NPRA, conjecture, supposition, or "non-particularized hypothetical concerns" are never sufficient to overcome the right of access. *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 628, 6 P.3d 465, 472-73

[6] Here, the Supreme Court has already determined that the Coroner did not justify wholesale nondisclosure in this case and, instead, remanded this matter to determine whether redactions are warranted. *Coroner*, 136 Nev. at 54, 458 P.3d at 1057.

(2000) (citation omitted); *accord Haley*, 126 Nev. at 218, 234 P.3d at 927 ; *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011);[7] *see also id.* at 878, 626 ("In 2007, in order to better effectuate these purposes, the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access."). As the Nevada Supreme Court has recognized, in reaction to efforts by governmental entities to undermine the a prior version of the NPRA, the Legislature amended it in 2007 to require courts to err on the side of liberal disclosure and narrow application of exemptions to disclosure, and to keep in mind the central purpose of the NPRA: furthering democratic principles by ensuring access to public records.

These interpretive mandates apply in any NPRA case, even when privacy interests are raised. Here, while the burden has for the moment shifted to the Review-Journal, this Court must still liberally construe the public interests in disclosure and narrowly apply the privacy interests purported to be at stake, and this Court must err on the side of disclosure. To the extent the Coroner proposes an interpretation of *CCSD* irreconcilable with the NPRA's statutory mandates, that interpretation must be rejected.

C. The *CCSD* Test Cannot Be Interpreted to Require the Party Seeking Records to Reveal the Requester's Purpose.

Under the second prong of the *CCSD* test, it is incumbent upon the party seeking access to demonstrate a significant public interest that is likely to be advanced by access to the records. However, this does not mean the party seeking access has to divulge the particular reasons it wants the records. A newspaper like the Review-Journal cannot, consistent with the NPRA, be required to choose between maintaining the secrecy of the nature of its investigative reporting on governmental entities and its right to access public records. Any other rule would be inconsistent with the NPRA's central purpose of government accountability. As stated in the NPRA, itself, its "purpose" "is to foster

[7] Conjecture and hypothetical concerns are never sufficient to overcome the right of access in NPRA cases. In this case they are especially unavailing because the Review-Journal has provided detailed reasons in favor of access on top of the presumed right of access that attaches to every public record.

democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1).

It would not further government accountability if the government could make generalized claims of privacy in response to requests and thereby be able to find out what kind of scrutiny the governmental entity is facing. Such a rule would place investigative reporters in the untenable position of revealing their work product to the governmental bodies they are investigating. Public access to records in and of itself—regardless of the identity of the requester or their purpose—is the central "good" the NPRA is designed to further. Thus, again, records are *presumed* open—irrespective of purpose. Moreover, allowing the government or courts to delve into a requester's motives would not only undermine the NPRA's goals of transparency and accountability, it would lead to impermissible viewpoint discrimination in contravention of the First Amendment and equal protection clause.[8]

For these reasons, courts in states with public records acts similar to the NPRA have held that a requester's purpose is irrelevant to a determination of whether the requester is entitled to access. For example, Ohio courts have made clear that "[t]he purpose for which a public record is requested is irrelevant" and that the "supposed purpose for requesting the

[8] While courts have not had the opportunity to address the specific question posed here, case law makes clear that the government cannot take the identity of a requester into consideration or engage in discrimination. Indeed, doing so could invite governmental entities to deny a request based on the editorial intent motivating the request, which would constitute improper viewpoint discrimination. *Cf., McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) ("the refusal of the defendants to accord the plaintiffs their right of inspection [under state public records law] while granting such right to a competitor, the Pawtucket Times, constitutes a denial of equal protection of the laws which gives rise to a case or controversy within federal jurisdiction …"); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding ABC could not be excluded from post-election activities at campaign headquarters where other members of the press were granted access because "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable"); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102–04 (C.D. Cal. 2003) (granting Telemundo's "request for a preliminary injunction granting equal camera positioning, equal number of cameras, equal truck positioning, equal access to stage audio, equal 'access' credentials, equal access to production meetings, and equal access to rehearsal meetings").

record cannot be used to deny" a request. *State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St. 3d 211, 218, 41 N.E.3d 1203, 1211 (2015)[9]. In California, like Nevada, "the burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality"[10] and thus "[t]he purpose of the requesting party in seeking disclosure cannot be considered." *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1018, 88 Cal. Rptr. 2d 552, 559-60 (1999) (citations and internal punctuation omitted).

In California, even when applying a statutorily-permitted balancing test to consider non-statutory bases for nondisclosure[11], California courts compare the government's asserted interest in nondisclosure against the general, presumed public interest in favor of disclosure—and only permit withholding records if the interest in nondisclosure "clearly outweighs" the presumption of access. *Id.*

IV. ARGUMENT: APPLICATION OF THE BALANCING TEST

A. The Public Has Significant Interest in Access to Autopsy Reports.

Public access to autopsy reports—both in general and specifically with regard to juvenile autopsy reports—serves several important functions that cannot be satisfied with the sort of basic statistical and demographic information contained in the spreadsheet and annual reports. Those documents contain names and demographic information about the deceased juveniles, and general information about the cause and manner of death. The Supreme Court

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[9] *See* Ohio Rev. Code Ann. § 149.43(B)(4) ("Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.")

[10] This is consistent with the Nevada Supreme Court's holding in *Haley*, 126 Nev. at 216, 234 P.3d at 926 (holding that under the NPRA "open records are the rule, and . . . exceptions to the rule are narrowly construed"), as well as its holding in *DR Partners*, 116 Nev. at 621, 6 P.3d at 468) ("In balancing the interests ..., the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference") (quotation omitted).

[11] In California, engaging in such a balancing test is explicitly authorized by statute. As noted above, it is questionable whether any assertions of confidentiality can ever be relied in in Nevada unless a statute or other law provides an express basis for the claim.

remanded for a determination of what additional information not contained in the documents and that raises legitimate privacy concerns is nevertheless required to be disclosed because it is likely to advance a public interest. *Coroner*, 136 Nev. at 61-62, 458 P.3d at 1061-62.

In its analysis, this Court must adhere to the determination already made by the Supreme Court that "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant." *Id.* at 58, 1059. Notably, this determination was made even without the provision by the Review-Journal of information on the specific public interest in disclosure of juvenile autopsy reports detailed herein.[12] Consistent with the order on remand, the Review-Journal now provides further information about the interests at stake and how access will advance those public interests.

As explained below, in addition to the general presumption that access to information about the government's conduct is, in and of itself, a public good that furthers democracy, access to autopsy reports can increase public confidence in the work of local coroners and medical examiners. Access also allows the public to assess a coroner's conclusions, provides the public with important information affecting public health, and helps the public assess prosecutors' theories and charging decisions. With respect to juvenile autopsy reports in particular, access to those reports increases the public's understanding of childhood abuse and helps the public assess how well the public agencies charged with protecting vulnerable children are actually doing in fulfilling this important mission. Moreover, access to juvenile autopsy reports can help inform the public discussion about flaws in the social safety nets designed to protect children and how those flaws can be addressed through state and local reform.

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[12] The additional information was not provided because, of course, *CCSD* was decided after this case was briefed on appeal and, thus, the Review-Journal did not previously have the opportunity (or obligation) to explain the many ways now detailed herein that disclosure advances the public interest.

1. Access Itself Is a Significant Public Interest.

The Nevada Legislature has already determined that access to public records is in and of itself a significant public interest, because public access to the records of the government furthers democracy. This important public interest is enshrined in the text of the NPRA. Nev. Rev. Stat. § 239.001(1) ("The purpose of this chapter is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law.") Reflecting the importance of access to further democratic principles, the NPRA operates from the presumption that all government records must be open at all times for inspection and copying. Nev. Rev. Stat. § 239.010(1) ("[U]nless otherwise ***declared by law*** to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person") (emphasis added); *accord Pub. Employees' Ret. Sys. of Nevada v. Nevada Policy Research Inst., Inc.*, 134 Nev. 669, 672, 429 P.3d 280, 283 (2018).

Thus, the presumed significant public interest in access to any and all public records stated in the text of the NPRA itself must be considered when balancing the public interest against non-statutory interests—including privacy clams.

2. Access to Autopsy Reports Is Necessary to Assess Coroner Performance and Increase Public Confidence in Coroners and Official Accounts.

Consistent with the presumed public good in access that is enshrined in the NPRA, access to autopsy reports ensures that coroners' offices act do their taxpayer-funded jobs correctly and do not engage in malfeasance. Access to autopsy reports, including the juvenile autopsy reports at issue in this case, is vital because it fosters public confidence in the work of county coroners and medical examiners—and allows errors to be revealed and assessed. Coroners work for the public and are accountable to the public, consistent with Nev. Rev. Stat. 239.001(1)'s mandate that public records be available to the public to further democracy.

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The public depends on coroner's offices to provide answers when someone dies of unnatural causes. *See People v. Dungo*, 55 Cal. 4th 608, 621, 286 P.3d 442, 450 (2012), *as modified on denial of reh'g* (Dec. 12, 2012) (noting that "an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media"). Access to cause of death alone or information filtered by the Coroner is not sufficient to further these significant public interest goals of accountability and public confidence in the governmental authorities charged with determining causes of death.

Coroners do not always get it right and the public must have access to as much information as possible to be able to assess accuracy—and get to the truth. For example, access to autopsy photographs and related reporting have exposed inaccuracies in official accounts of deaths in a variety of deaths, from those of prisoners to an airline passenger. [13] As another example, the Coroner initial ruled the January 2015 death of Las Vegas attorney Susan Winters a death by suicide.[14] After Ms. Winters' parents raised doubts about this conclusion that were reported on by the Review-Journal, a grand jury opened an investigation into her death.[15] As a result of that investigation, the Coroner changed its ruling regarding Ms. Winters' cause of death to "undetermined"[16], and Mr. Dennis was indicted for open murder with a deadly weapon.[17]

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Likewise, access to autopsy records has led to reporting that has revealed

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[13] " Autopsy Photos Are Often Used to Refute Official Conclusions," first published in News Media & The Law, Spring 2001, available at https://perma.cc/ZP99-LZXC (last accessed August 14, 2020).

[14] https://www.reviewjournal.com/crime/parents-doubt-suicide-ruling-in-daughters-death-in-las-vegas/ (last accessed August 23, 2020).

[15] https://www.reviewjournal.com/crime/grand-jury-targets-husband-in-lawyers-2015-death/ (last accessed August 23, 2020).

[16] https://www.reviewjournal.com/crime/homicides/clark-county-coroner-changes-ruling-in-susan-winters-death/ (last accessed August 23, 2020).

[17] https://www.reviewjournal.com/crime/homicides/psychologist-booked-on-murder-charge-at-henderson-jail-in-wifes-death/ (last accessed August 23, 2020).

questionable practices at medical examiners' and coroner offices. For example, a *Los Angeles Times* reporter was able to review autopsy reports and other public records and ultimately report on the fact that a coroner's office was removing the corneas of large numbers of deceased individuals without seeking the permission of family members.[18] Ultimately and only after the *Los Angeles Times* published its article, the California legislature changed the law to require coroners to get permission from relatives before removing eye tissue for transplants. *Id.* Full access to reports can expose—and thus, avoid—wrongdoing by coroner's offices as well as other agencies.

Similarly, based on a review of autopsy records, the Orlando Sentinel was able to report on and raise questions about NASCAR's official explanation for the death of famed racecar driver Dale Earnhardt. [19] An expert retained by paper concluded that Earnhardt died because of violent head movement, not seat belt failure as NASCAR had indicated. That access to—and reporting on—autopsy records is in the public interest is reflected in the fact that, after extensive reporting on the case, NASCAR mandated that all drivers wear a head and neck restraint system. *Id.* That change has saved countless lives.

3. Access to Autopsy Reports Provides the Public with Vital Health Information and Protect Consumers.

Information gathered by coroners is often a vital tool in tracking trends in causes of death, thereby increasing the public's understanding of how trends like opioid deaths or deaths from the ongoing COVID-19 pandemic affect their community. For example, access to autopsy reports led to the determination of the first person who died as a result of contracting COVID-19, which helped shift the public's understanding of how and when the virus first appeared in California, and also provided information about how the virus affects

[18] *See* Ralph Frammolino, *Harvest of Corneas at Morgue Questioned*, L.A. Times, Nov. 2, 1997, https://perma.cc/RWB7-KW4A; *see also* See Henry Weinstein, *Families Keep Cornea Rights, Court Decides*, L.A. Times, Apr. 18, 2002, https://perma.cc/DPQ4-7NZU

[19] Robyn Suriano "Experts Agree on Skull Injury but Not Cause," Orlando Sentinel, Aug. 22, 2001, available at https://perma.cc/4397-26SR.

vital organs.[20] Access to reports allows a public window into matters of faulty medical devices or surgical procedures.[21] There are many further examples where access to autopsy reports has helped reporters engage in newsgathering and reporting that advances public health and protects lives.

4. Access to Autopsies Furthers the Integrity of Criminal Investigations.

In criminal cases involving the death of a victim, access to autopsy reports and reporting on autopsy reports can help the public assess prosecutors' theories and charging decisions—and can help exonerate the innocent. In the widely-reported shooting death of Ahmaud Arbery by armed white residents (one of which was a retired law enforcement officer) in Glynn County, Georgia, for example, the release of Mr. Arbery's autopsy report provided the public valuable information about how many times Mr. Arbery was shot by his assailant, the nature of death (homicide), and the fact that Mr. Arbery had no drugs or alcohol in his system at the time he was shot and killed.[22]

Access to coroner reports—newsgathering and reporting based on coroner records –had led to the exoneration and release of individuals wrongly convicted of murder and sentenced to death or life in prison. For example, over the course of eleven years, the late Peter Shellem, a journalist with Plaintiff The Patriot-News, used official records, including coroner records and autopsy reports, as part of investigative journalism that ultimately resulted in the exoneration of Patty Carbone, Steven Crawford, Barry Laughman and David Gladden.[23]

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[20] https://www.kqed.org/news/11816135/how-the-nations-first-covid-19-death-went-undetected-in-san-jose; https://www.mercurynews.com/2020/04/25/coronavirus-first-known-victim-in-u-s-died-of-burst-heart-pathologist-says/; https://www.latimes.com/california/story/2020-04-22/coronavirus-first-known-fatality-us-california (all last accessed August 10, 2020.)

[21] https://projects.seattletimes.com/2017/quantity-of-care/hospital/

[22] https://www.nytimes.com/2020/05/12/us/ahmaud-arbery-autopsy.html (last accessed 10, 2020).

[23] *See* Mario Cattabiani, The Sleuth, American Journalism Review, June-July 1997, https://ajrarchive.org/article.asp?id=4341

5. Access to Autopsies Promotes Law Enforcement Accountability and Confidence in Law Enforcement

Access to autopsy reports also promotes trust in law enforcement and promotes law enforcement accountability. This is so because access to and reporting on autopsy reports can both exonerate law enforcement accused of wrongdoing and shed light on police wrongdoing.

As an example of the former, the Dothan Eagle reported that a man who died after a law enforcement official used a Taser on him had — according to coroner records including autopsy and toxicology reports—actually died from excited delirium, likely caused by cocaine he had ingested.[24]

As an example of the latter, in October 2014, Chicago police shot and killed Laquan McDonald, a seventeen-year-old boy.[25] The official story from the police was that they had shot Mr. McDonald after he had lunged at an officer with a knife.[26] The autopsy report, however, showed that officers had shot Mr. McDonald sixteen times from several different angles.[27] Thus, access to the autopsy report shed light on law enforcement conduct in that case.

6. Access to Autopsy Reports Provides the Public with Information Regarding Crimes of Significant Public Interest.

Access to autopsy reports also serves the important public function of providing the public with information about crimes of significant public interest. In April 2016, media outlets around the country reported on the discovery of eight members of a family who were shot to dead in Pike County, Ohio.[28] Release of the autopsy reports for the family members

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[24] *See* Matt Elofson, Medical official: Taser didn't lead to man's death, The Dothan Eagle, Sept. 16, 2008, https://www.dothaneagle.com/news/medical-official-taser-didn-t-lead-to-man-s-death/article_61782a16-d80d-5395-b3a7-2a4ee93facfd.html

[25] *See* https://perma.cc/47VL-9P2A (last accessed July 10, 2020); *see also* https://chicago.cbslocal.com/wp-content/uploads/sites/15116062/2018/08/autopsy-laquan.pdf (copy of autopsy report; last accessed July 10, 2020).

[26] *Id.*

[27] *Id.*

[28] https://www.nytimes.com/2016/04/23/us/ohio-shooting-pike-county.html?smid=tw-nytimes&smtyp=cur (last accessed August 23, 2020).

provided the public with important information about how the murders were perpetrated.[29] And following the horrific mass shooting at the Route 91 Harvest Music Festival on October 1, 2017, access to the autopsy report of shooter Stephen Paddock provided the public with some answers about Mr. Paddock—specifically that he was not under the influence of any substances when he murdered 59 people and injured hundreds of others, and that he took his own life.[30]

7. The Myriad Policy Reasons Favoring Disclosure Requires a Clear Finding that Coroner Reports are Public Records, Without Exception.

For all these reasons, the public policy reasons to allow reporters to access and report on autopsy reports are myriad and extremely important—such that they outweigh privacy arguments in favor of restricting access. The various policy reasons that are set forth above, with some exceptions, apply with equal or greater force in the context of child deaths. As the Supreme Court concluded in its decision in this case, "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant." *Coroner*, 136 Nev. at 57, 458 P.3d at 1059; *see also id.* at 52-53, 1055-1056 (Reviewing the statutory scheme and legislative history of NRS Chapter 432B and concluding that "NRS Chapter 432B's legislative history demonstrates the Legislature's intent to make reports about, and information pertaining to, child fatalities publicly accessible as a matter of policy favoring transparency and as a matter of compliance with federal law requiring disclosure as a condition for child services grant funds.")

Access to juvenile autopsy reports is relevant to the public's interest in governmental transparency generally, as well as the public's interest in assessing abuse and neglect and assuring state and local governments continue to receive much-needed funds for child services. Critically, access to juvenile autopsy reports is also significant to allowing the

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[29] https://www.cincinnati.com/story/news/crime/crime-and-courts/2018/09/19/rhoden-family-massacre-preliminary-autopsy-reports-reviewed/1357318002/ (last accessed August 23, 2020).

[30] https://www.reviewjournal.com/investigations/las-vegas-shooters-autopsy-gives-no-clues/ (last accessed August 23, 2020).

public to understand and assess whether state and local governments are doing an adequate job protecting children who are or have been under the supervision of child protective services. Access to such information can not only provide the public with a better understanding of the flaws in Nevada's child welfare system, it can also lead to positive changes to those systems—and potentially save lives.

Case studies from other states illustrate the great benefit that comes from full access to records just like those at issue in this case. For example, in 2012, the Denver Post and Denver television news station KUSA ran an investigative series called "Failed to Death," which reported on the deaths children whose families or caregivers were known to social services before their deaths.[31] The news outlets focused on 72 cases involving children who were known to Colorado's child welfare system who died as a result of family abuse or neglect.[32] As part of that investigation, the news outlets obtained records related to those 72 cases from the Colorado Department of Human Services and local governmental entities, all of which are available through the Denver Post's website at http://childfatalities.denverpost.com/. The news outlets found that instead of removing children from dangerous homes, overburdened caseworkers conducted incomplete or inadequate investigations or failed to open investigations in response to allegations of abuse.[33] As a result of the Denver Post's and KUSA's reporting, Colorado made substantial reforms to its child welfare system, including a statewide hotline for reporting child abuse and neglect, new training on how to assess reports of abuse and neglect, a study of workloads and caseloads for child protection workers, and steering new resources to troubled families to help prevent abuse before it starts.[34]

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[31] The Failed to Death series and related articles are accessible online at https://www.denverpost.com/tag/failed-to-death-series/ (last accessed August 9, 2020).

[32] https://www.denverpost.com/2012/11/09/letter-from-the-editor-investigation-into-colorados-child-welfare-system/ (letter from the editor introducing the Failed to Death series) (last accessed August 9, 2020).

[33] https://www.denverpost.com/2012/11/10/abused-childrens-cries-for-help-were-ignored-2/ (last accessed August 9, 2020).

[34] https://perma.cc/DN9F-SAGX (last accessed August 9, 2020).

Similarly, in Texas, the Fort Worth Star-Telegram reviewed the autopsies conducted on two children after the children, who shared a caretaker, died two years apart in a strikingly similar manner.[35] The paper's analysis, which drew on the expertise of outside forensic pathologists who reviewed the autopsy reports, convinced local authorities to re-examine their findings.[36]

Here, Clark County's child protective services may suffer from some of the same issues as the child welfare agencies in Denver and Fort Worth. For example, as was recently reported in the Review-Journal, 13-year-old Aaron Jones was murdered sometime in January 2017 by his own father after suffering extreme abuse and neglect.[37] The Review-Journal's investigation of Aaron Jones's death revealed that child protection services had contact with Aaron's family approximately 100 times, but never took any action to protect Aaron or any of his siblings from abuse and neglect.[38] Because of this failure to act, Aaron was left living in a one bedroom apartment with his father, his stepmother, and 12 other children, and suffered horrific abuse up until the day his father murdered him and hid his body in the desert.[39]

As another example, in August 2018, 3-year-old Dejan Hunt was found dead in a duffel bag.[40] Her mother, Aisha Thomas, admitted to police that she had hit, kicked, and bit Dejan before her death.[41] On June 12, 2017, about a year before Dejan's body was found, the Clark County Division of Family Services received an allegation of abuse and neglect about

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[35] https://www.star-telegram.com/news/special-reports/article153573004.html (last accessed August 9, 2020).
[36] *Id.*
[37] https://www.reviewjournal.com/investigations/school-warned-childs-home-life-was-a-recipe-for-disaster-then-aaron-died-2071038/ (last accessed August 9, 2020).
[38] *Id.*
[39] *Id.*
[40] https://www.reviewjournal.com/crime/homicides/las-vegas-woman-faces-murder-charge-after-childs-body-found-in-bag/ (last accessed August 9, 2020).
[41] https://www.reviewjournal.com/crime/homicides/mom-told-police-she-hit-kicked-bit-daughter-on-day-she-died/ (last accessed August 9, 2020).

the family, but the division ultimately determined the allegations were unfounded.[42]

As yet another example, on December 28, 2014, Aralee Jo Ballance died when she was just under four months old after suffering repeated abuses at the hands of her mother.[43] An autopsy report from the Coroner revealed that when she was about a month old, Aralee's ribs had been fractured.[44] And, just like in the case of Dejan Hunt, the Clark County Division of Family Services had received an allegation of abuse about Aralee, but closed the case after concluding the allegation was unsubstantiated.[45]

These examples illustrate that there is substantial public interest in access to juvenile autopsy reports. The public has a strong interest in having an informed discussion about child welfare, what state and local governments do to protect children (particularly children who are vulnerable to abuse and neglect), and what state and local governments can do to better protect those children. Access to juvenile autopsy reports—particularly in those cases where the juvenile decedents were known to child protective services—can help inform that discussion, and perhaps even lead to reforms that keep the most vulnerable citizens of the State safer.

B. The Balancing Test Mandates Disclosure of the Juvenile Autopsy Records.[46]

In this case, the record shows that the public interests advanced by access to juvenile autopsy reports are significant and likely to be furthered by access—for the reasons already recognized in *Coroner*, 136 Nev. at 56, 458 P.3d at 1058, and for the many reasons set forth above. In contrast, the countervailing privacy interests are relatively minimal.

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[42] *Id.*

[43] https://www.reviewjournal.com/local/local-las-vegas/mother-boyfriend-deny-inflicting-injuries-that-killed-4-month-old-girl/ (last accessed August 9, 2020).

[44] *Id.*

[45] *Id.*

[46] To the extent that the reports contain such information, the Review-Journal does not object to the redaction of personal identifying information such as Social Security numbers, identification card or driver's license numbers, or other similar information.

1. The Redacted Samples Reflect the Need for Full Access.

In order for the Coroner to win on any application of the balancing test, the Court must find the particular proposed redaction clearly outweighs the public interest asserted by the Review-Journal. *Haley*, 126 Nev. at 219, 234 P.3d at 927. As explained above, on July 11, 2017, the Coroner provided sample files of heavily redacted autopsy reports as exemplars of the redactions the Coroner intended to make to the records it was (and still is) withholding. (Exh. 9 to Petition, LVRJ095-122.) The Coroner provided three redacted autopsy reports: two autopsy reports pertaining to the examination of stillborn fetuses (LVRJ095-106 [Salgado] and LVRJ107-112 [White]) and one autopsy report pertaining to the examination of a prematurely born infant. (LVRJ113-122 [Wickard].) Each of these three samples contain extensive redactions without any indication of the purported basis for concealing it, other than the generalized assertions set forth above.

With respect to the Salgado autopsy report, the Coroner selectively redacted one section of the Coroner's pathological diagnoses. (LVRJ095.) Given that the other pathological diagnoses—which include extreme prematurity and maternal methamphetamine use—are unredacted, it is impossible to discern why the Coroner has redacted one diagnosis. The Coroner also redacted the bulk of the Coroner's summary from the autopsy report (LVRJ096), large swaths of the Coroner's external examination, and all of the Coroner's observations about the internal examination, microscopic examination, and radiographical examination. (LVRJ099-103.)

The White autopsy report is also heavily redacted, although unlike the Salgado report it includes all the Coroner's pathological diagnoses in unredacted form. (LVRJ104.) The Coroner also redacted a paragraph of the Coroner's comments from the report without explanation (LVRJ105), as well as an addendum to those comments. (LVRJ106.) The Coroner also redacted the bulk of the information regarding the Coroner's external observations (LVRJ107-109), and all of the Coroner's observations about the internal examination, microscopic examination, and radiographical examination. (LVRJ109-112.)

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Finally, with respect to the Wickard autopsy report, the Coroner redacted three out of six pathological diagnoses (LVRJ113), an entire portion of the Coroner's opinion (LVRJ114), the bulk of the Coroner's external observations (LVRJ115-117), and all but a few small portions of the Coroner's internal observations. (LVRJ117-122.)

The autopsy reports the Coroner has steadfastly fought against disclosing (or has advocated disclosing with heavy redactions similar to the three samples) may contain information that is critical to assessing Clark County's child protective services, including:

- Factual information about the manner of death, and information about the decedent's history, such as prior abuse, involvement with child protective services or law enforcement.
- Pathological diagnoses about the cause(s) of death.
- External observations of a decedent's body that may reveal signs of older injuries, low body weight, or stunted growth, i.e., signs of past abuse or neglect.
- Observations about the body cavities and internal organs which could be consistent with past abuse, such as bruised or lacerated organs.
- Evidence of past broken bones, *i.e.*, possible past abuse.
- Toxicological information, including the presence of illicit substances in the blood stream which could indicate maternal substances abuse, household exposure to illicit substances, or substance abuse, all of which are indicative of child abuse or neglect.

This sort of information is critical to the goal of providing the public with a greater understanding of how state and local agencies tasked with protecting vulnerable children operate, identify any shortcomings in those agencies' operations, and identify what changes those agencies can and should make to prevent future deaths of children whose lives have been marked by abuse or neglect. Again, the NPRA explicitly states that its purpose is to promote democracy through access to public records (Nev. Rev. Stat.§ 239.001(1)). Access to information that can both help assess the Coroner's performance and the performance of

our abuse and neglect system is a very significant public interest and will be directly advanced by access.

2. The Coroner's Spreadsheet and the CDR Reports Are Not a Replacement for Access to the Reports.

The Supreme Court noted that the "[t]he Coroner's Office initially provided a spreadsheet to LVRJ identifying the case number; the decedent's name, gender, age, and race; and the cause, manner, and location of death for juveniles who were the subject of autopsies." *Coroner*, 136 Nev. at 58, 458 P.3d at 1059. It also noted that "the CDR teams exist in part to provide information that is used to '[c]ompile and distribute a statewide annual report, including statistics and recommendations for regulatory and policy changes.'" *Id.* (citing NRS 432B.409(2)(f); *see, e.g.,* Exec. Comm. to Review the Death of Children, Nev. Div. of Child & Fam. Servs., *2016 Statewide Child Death Report* (2016)).[47] The Court further noted "[i]t is unclear what *additional* information LVRJ seeks to glean from the requested juvenile autopsy reports that, in unredacted form, would advance the public's interest." *Id.* (emphasis in original). The Review-Journal now answers that question.

First, as set forth above, the autopsy reports do contain substantial information that is not included in the statewide annual report—in particular, information that is relevant to whether the child suffered from prior abuse. For example, external observations of a decedent's body may reveal signs of older injuries, low body weight, or stunted growth, i.e., signs of past abuse or neglect. Similarly, the reports could contain observations about the body cavities and internal organs which could be consistent with past abuse, such as bruised or lacerated organs, evidence of past broken bones and toxicological information, including the presence of illicit substances in the blood stream which could indicate maternal

[47] The statewide annual report required by Nev. Rev. Stat. § 432B.409(2)(f) includes statewide statistical information regarding the leading causes of child deaths, demographic information regarding child deaths, basic statistical and demographic information about deaths of children involved with child protective services, and information regarding the work of child death review teams. *See* http://dcfs.nv.gov/uploadedFiles/dcfsnvgov/content/Tips/Reports/2016_Statewide_Child_Death_Report_final.pdf (last accessed August 23, 2020).

substances abuse or household exposure to illicit substances. Access to all of this type of information that is included in an autopsy report—but was not included in the Coroner's spreadsheet and is not provided in CDR reports— would advance the public interest by ascertaining the efficacy of Clark County's abuse and neglect system, an important issue (as set forth above). Further, the name of the medical examiner (omitted from the spreadsheet) is a critical piece of information that helps assess the Coroner's performance.

Second, it is important to point out that, even if the autopsy reports did not include additional categories of information from the Coroner's spreadsheets or the CDR reports, access to the source material would still provide additional information as it would allow the Review-Journal to assess the accuracy of the information contained in the Coroner's spreadsheets and the CDR reports. The NPRA does not limit a requester's information to that information that the government choses to filter, repackage, and provide. Instead, the whole point is to provide the public with direct access to the government's records themselves. Limiting access to the direct source material would be antithetical to the central stated purpose of the NPRA: government accountability. Nev. Rev. Stat. § 239.001(1) ("Legislative findings and declaration") provides that "[t]he purpose of [NPRA] is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law." The NPRA further provides that all of its provisions "must be construed liberally to carry out this important purpose." Nev. Rev. Stat. § 239.001(2). In short, the NPRA reflects that the public is not required to trust the government. Instead, the public is entitled to public record so it can assess the conduct and effectiveness of government.

Access to autopsy reports themselves, rather than just to a coroner-provided spreadsheet showing the cause of death helps the public inspect and understand the basis for the coroner's findings. Moreover, direct access to autopsy reports allows members of the public to assess or refute a coroner's conclusion about an individual's cause of death.

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3. The Coroner's Asserted Interests Are Relatively Minimal, and Cannot Outweigh the Public Interests at Stake.

The Nevada Supreme Court described the Coroner's generalized assertions as follows:

> In his sworn declaration, Clark County Coroner John Fudenberg explained that an autopsy requires a complete physical examination of the decedent, including a review of blood samples and lab results. Fudenberg explained that an autopsy may incorporate review of medical records and health history completed prior to the physical examination, and that an autopsy report will generally include "detailed descriptions and medical evaluations of the condition" of the decedent and "references to specific medical records, specific medical or health information and personal characteristics about the decedent." Such private information and personal characteristics, according to Fudenberg, **may** include the decedent's sexual orientation, preexisting medical conditions, drug or alcohol addiction, and various types of diseases or mental illness, as well as other personal information that the decedent or the decedent's family might wish to remain private.

Coroner, 136 Nev. at 56, 458 P.3d at 1058 (emphasis added). As the Supreme Court observed, these assertions in Mr. Fudenberg's declaration "comport[] with a general understanding that autopsy reports may yield detailed, intimate information about the subject's body and medical condition." *Id.* (quotation omitted). Notably, many of Mr. Fudenberg's concerns—such as about sexual orientation or the incorporation of information from medical records that could include matters such as drug or alcohol addiction are of little applicability to this context (autopsies of juveniles) and, if they actually applied in the context of adult autopsies, could be met with suitable redactions, consistent with the Nevada Supreme Court's decision in this case as well as *CCSD*—and as required by Nev. Rev. Stat. § 239.010(3).

It is also notable that, in this case, the Coroner's evidence is limited to the generalized concerns set forth above. The Coroner has provided sample redacted autopsies but has never explained the specific reasons for any redaction. While the Supreme Court did determine that these generalized interests may be nontrivial enough to shift the burden to the Review-Journal, when balancing them against the demonstrated public interest that access will advance, the fact that they are so generalized must be taken into account. If conjecture,

supposition, or "non-particularized hypothetical concerns" cannot generally outweigh access,[48] certainly such concerns cannot outweigh access where the public interests at stake are so great.

A FOIA case addressing access to autopsy reports is instructive as to the application of the privacy balancing test. In *Charles v. Office of the Armed Forces Med. Exam'r*, 935 F. Supp. 2d 86 (D.D.C. 2013), the D.C. Circuit found that final autopsy reports showing whether any service member's death may have resulted from bullet wounds in torso areas that were usually covered by body armor and related records are not exempt from disclosure under the FOIA. Like *Cameranesi*, adopted in the *CCSD* test, *Charles* considered FOIA Exemption 6. *Id.* at 99-100. The D.C. circuit found that final autopsy reports showing whether any service member's death may have resulted from bullet wounds in torso areas that were usually covered by body armor and related records are not exempt from disclosure under the federal Freedom of Information Act (FOIA). *Id.* This finding was made even though FOIA has an express exception (Exemption 6) for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). *Id.* The court explained that "Exemption 6 tilts the balance of disclosure interests against privacy interests in favor of disclosure, and creates a heavy burden for an agency invoking Exemption 6." *Id.* at 97 (internal quotation marks and punctuation omitted) (citing and quoting from *Lardner v. Dep't of Justice*, 638 F.Supp.2d 14, 23–24 (D.D.C. 2009); *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C.Cir. 2007)). Thus, "[t]o determine whether disclosure would cause a clearly unwarranted invasion of personal privacy, courts consider whether disclosure would invade privacy, and if so, the seriousness of that invasion and the public interest in disclosing the information and "[then] they balance the individual privacy interests against the public interests." *Id.* (citation omitted).

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[48] *See DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 628, 6 P.3d 465, 472-73 (2000) (citation omitted); *accord Haley*, 126 Nev. 211, 218, 234 P.3d 922, 927 (2010); *Gibbons*, 127 Nev. at 880, 266 P.3d at 628.

Other circuits employ a two-part test similar to the test discussed in *Charles*. For example, in the Second Circuit, courts considering the applicability of Exemption 6 must first "determine whether the records in question are 'personnel,' 'medical,' or 'similar' files" and if so, then "balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." *Cook v. Nat'l Archives & Records Admin*., 758 F.3d 168, 174 (2d Cir. 2014) (quotation and internal punctuation omitted); *see also id.* at 173 (noting that "[b]ecause FOIA manifests a 'strong presumption in favor of disclosure,' . . . we construe exemptions narrowly, resolving doubts in favor of disclosure and imposing on the government the burden of showing that an asserted exemption indeed applies") (citations omitted). The Eleventh Circuit applies a similar test, and similarly recognizes that the government bears the burden of justifying nondisclosure. *See News-Press v. U.S. Dep't of Homeland Sec.,* 489 F.3d 1173 (11th Cir. 2007).

In *Charles* as in this case, the scales weigh in favor of access. There, non-identifiable, redacted autopsy reports were at issue and the court found that "without demonstrating that family members will encounter the disclosed information, and be able to discern that a redacted report relates to their family member, the defendants present no more than a mere possibility of an invasion of personal privacy and that is insufficient to find that Exemption 6 applies." *Id.* at 99 (citation omitted). However, the court explained that "even if the family members were able to determine which redacted record pertained to their deceased family member, the defendants have not demonstrated that the information in the records would shock the sensibilities of surviving kin." *Charles*, 935 F.Supp. 2d at 99. Here, for the reasons that Exemption 6 did not even apply in *Charles*, and because the NPRA even more strongly enshrines the presumptive right of access to public records, the scales must tip in favor of disclosure. The Coroner has only asserted generalized concerns, some of which are inapplicable, and none of which outweighs the extremely important interests access will further—especially protecting vulnerable children. Thus, the scales necessarily tip in favor of disclosure.

V. CONCLUSION

Access to records of governmental agencies serves a significant purpose: fostering democratic principles by allowing members of the public to review and assess the work of the governmental entities that are there to serve them. With access to public records, the public can identify areas where the work of governmental entities can be improved and advocate for necessary changes. This is true of any public record, but is particularly important here, where the records sought by the Review-Journal will provide the public with vital information about what local child protective services are doing to protect the most vulnerable citizens of all—children who have been subjected to abuse or neglect. With access to unredacted copies of those reports, the public can assess how effective those governmental entities are in fulfilling this important role. In fighting against disclosure, the Coroner has relied on generalized assertions about the privacy interests implicated by the release of juvenile autopsy reports. But generalizations cannot justify wholesale redaction of information from those autopsy reports that would assist the public in understanding whether local child protective services are doing enough to prevent vulnerable child from suffering additional abuse, neglect, or death.

Accordingly, the Review-Journal's Petition must be granted in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing PETITIONER'S OPENING BRIEF ON REMAND in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner,* Eight Judicial District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: 24 **Date of Hearing:** October 29, 2020 **Time of Hearing:** 9:00 A.M.

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF

Respondent, Clark County Office of the Coroner/Medical Examiner ("Coroner"), by and through their attorneys of record, Craig R. Anderson, Esq. and Jackie V. Nichols, Esq., of the law firm Marquis Aurbach Coffing and Laura C. Rehfeldt, Esq., Deputy District Attorney with the Clark County District Attorney/Civil Division, hereby submits their Answering Brief. This Answering Brief is made and based upon all papers, pleadings, and records on file herein, the

attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this matter.

Dated this 7th day of October, 2020.

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Coroner appealed this Court's decision that the Coroner failed to comply with the Nevada Public Records Act (NPRA) in relation to the disclosure of juvenile autopsy reports and the Supreme Court reversed and remanded, in part, the matter back to this Court. On remand, this Court must first determine whether Las Vegas Review-Journal ("LVRJ") has satisfied its obligation under the balancing test pertaining to individuals' nontrivial privacy interests.

Under the balancing test, the Coroner demonstrated that the decedents' medical and health information unrelated to the cause of death involved a nontrivial privacy interest that warrants protection. Now, the burden shifts to LVRJ to demonstrate: (1) the public interest sought to be advanced is a significant one; and (2) the information sought is likely to advance that interest. LVRJ hangs its hat on the fact that autopsy reports in general are public records, and therefore, the release of the juvenile autopsy reports in this case is necessary. This argument fails for numerous reasons. First, the Supreme Court expressly recognized that although autopsy reports are public records, the reports contain sensitive private information that warrant redaction. Thus, LVRJ must demonstrate how the specific information sought—the medical and health information unrelated to the cause of death—advances a public interest. LVRJ cannot meet this burden.

In support of its position, LVRJ claims that autopsy reports generally shed light on the function of the Coroner's office and criminal investigations, provides the public with vital health information, promotes law enforcement accountability, provides the public with information regarding crimes of significant public interest and sheds lights on the child welfare programs in Clark County. The myriad of examples cited by LVRJ do nothing to support its position. To the contrary, it demonstrates that LVRJ does not need access to medical and health information unrelated to the cause of death of the decedent. Every example noted by LVRJ specifically pertains to the cause and manner of death. As the Coroner explained previously, LVRJ has been provided with this information. Additionally, the Coroner agreed to provide LVRJ with redacted autopsy reports. Any information related to the cause and manner of death would not be

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redacted. Put simply, LVRJ has not demonstrated that there is a significant public interest that would be advanced by access to an individual's private medical and health information unrelated to the cause of death. Even so, any public interest in such information is so minimal that the balancing of the interests weighs in favor of the individuals and not public access.

Finally, in the event that the LVRJ does seek access to the redacted autopsy reports, the Coroner is entitled to charge 50-cents per page for preparing and producing the requested records. There are approximately 830 reports that were responsive to LVRJ's request. Previously, the Coroner estimated that each report is, on average, ten pages, equating to 8,300 pages. The Coroner also informed LVRJ that it would take approximately one hour to redact 4-5 reports. With 830 reports to prepare for production, that amounts to 166 hours to prepare the requested records. Undeniably, 166 hours amounts to extraordinary use of personnel, permitting the Coroner to charge 50-cents per page. As such, the Coroner seeks payment in the amount of $4,150.00 for the redacted reports.

II. PROCEDURAL HISTORY

A. THE CORONER MET ITS OBLIGATION UNDER THE NPRA PRIOR TO LVRJ FILING ITS PETITION.

On April 13, 2017, Arthur Kane and Brian Joseph, Investigative Reporters for the LVRJ, emailed a public records request to the Coroner for juvenile autopsy reports from January 1, 2012 to present. *See* LVRJ's Appendix of Exhibits in Support of Petition for Writ of Mandamus on file herein at LVRJ 0006. That same day, the Coroner's office explained that it would not provide the autopsy reports due to the fact that the autopsy reports contained medical and confidential information about the decedent's body and, instead, provided LVRJ with a spreadsheet identifying all deaths under the age of 18 that occurred within its jurisdiction. *See* LVRJ 001-014. This initial spreadsheet of data consisted of the Coroner case number, name of decedent, date of death, gender, age, race, location of death, and cause and manner of death. *See* LVRJ 009-014.

Unsatisfied with this data, LVRJ then reached out to the Clark County District Attorney's Office, Civil Division (D.A.'s Office) to obtain access to the juvenile autopsy reports. LVRJ

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015. In response, the D.A.'s Office reiterated that the juvenile autopsy reports contained sensitive information and the basis for non-disclosure was the legal analysis in AGO 82-12, as well as the policy of Assembly Bill 57, which was pending at the time of the request. LVRJ 018.

In an attempt to work with LVRJ in good faith, the Coroner, John Fudenberg, met in person with Mr. Joseph and Mr. Kane on May 7, 2017 to try to determine the specific information the reporters sought. *See* The Coroner's Response to Petition and Memorandum on file herein (Response), at Exhibit A, ¶ 7. After the meeting, Mr. Fudenberg compiled a second spreadsheet consisting of the same data as the spreadsheet sent on April 13, 2017, but listed only the cases on which autopsies were conducted. *Id.*; *see also* LVRJ 033, 047-071. LVRJ obtained this information on May 9, 2017. *Id.*

As the parties continued to work together, LVRJ provided the D.A.'s Office with a prioritized list of autopsy reports. LVRJ 075-077. In response, the D.A.'s Office explained that, due to the magnitude of the request, the records could not be provided within the five-day period required under the NPRA. LVRJ 088-092. After reviewing a portion of the autopsy reports, the D.A.'s Office informed LVRJ those autopsy reports could be provided within the next 30 days provided that LVRJ commits to the proposed fees. LVRJ 087-088. To that end, the D.A.'s Office gave LVRJ sample autopsy reports and clarified that the redactions consisted of "information that is medical, relates to the status of the decedent's health (or the mother of the baby), could be marked with stigmata or considered an invasion of privacy by the family." *Id*. On the other hand, the D.A.'s Office advised LVRJ that "[s]tatements of diagnosis or opinion that are medical or health related that go to the cause of death are not redacted." LVRJ 088; *see also* LVRJ 095-122.

Despite receiving the spreadsheets of data and the Coroner's proposal to provide redacted copies of the juvenile autopsy reports for a fee, LVRJ filed a petition for access to the records on July 17, 2017. *See* LVRJ's Petition for Writ of Mandamus on file herein. The Coroner contended that it satisfied its burden under the NPRA in demonstrating that the juvenile autopsy reports contained confidential information not subject to disclosure. *See* Response, *generally*.

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Relying on the recent *CCSD*[1] balancing test, the Nevada Supreme Court agreed. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020).

B. THE SUPREME COURT SHIFTED THE BURDEN TO LVRJ.

On appeal, the Supreme Court determined that the Coroner "demonstrated that a nontrivial privacy interest is at stake in the potential disclosure of juvenile autopsy reports." *Clark Cnty. Office of Coroner/Med. Exam'r*, 136 Nev. at 56, 458 P.3d at 1058. The Court reasoned that Mr. Fudenberg's declaration explained that an autopsy requires a complete physical examination of the decedent and typically incorporates review of medical records and health history completed prior to the physical examination. *Id.* As explained by Mr. Fudenberg, this may include the decedent's sexual orientation, preexisting medical conditions, drug or alcohol addiction, and various types of diseases or mental illness, as well as other personal information that the decedent or the decedent's family might wish to remain private. *Id.*; *see also*, Response at Exhibit A. This explanation and reasoning "comports with the general understanding that an autopsy report may 'yield detailed, intimate information about the subject's body and medical condition.'" *Id*. (citing *Globe Newspaper Co. v. Chief Med. Exam'r*, 404 Mass. 132, 533 N.E.2d 1356, 1357 (1989). Furthermore, such information may "reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death[.]" *Id.* (quoting *Penn Jersey Advance, Inc. v. Grim*, 599 Pa. 534, 962 A.2d 632, 638 (2009)).

The Supreme Court further concluded that the authorities relied on by the Coroner reflected a policy favoring the protection of private medical and health-related information. *Id*. at 56-57, 458 P.3d at 1058. In that respect, the Court approved of the Coroner's reliance the public policy considerations outlined in AGO 82-12. *Id*. Similarly, the Court recognized that although NRS 432B.4095 does not render juvenile autopsy reports entirely confidential, the

[1] *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). Notably, the opinion was issued subsequent to this Court's decision in granting LVRJ's Petition.

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penalty provision reinforces the Coroner's assertion that juvenile autopsy reports may include confidential information that should be redacted before disclosure. *Id*. at 57, 458 P.3d at 1059.

There is a public policy interest in disseminating information pertaining to child abuse and fatalities. *Id.* The Court cautioned, however, that it is entirely unclear what *additional* information LVRJ seeks from the redacted juvenile autopsy reports and how that information will advance a significant public interest. *Id*. at 58, 458 P.3d at 1059. On remand, the Supreme Court directed this Court "to determine, under the *Cameranesi*[2] test, what autopsy report information should be disclosed under the NPRA and what information should be redacted as private medical or health-related information."

III. LEGAL ARGUMENT

A. LEGAL STANDARD PURSUANT TO THE *CCSD* BALANCING TEST.

Nevada adopted the two-part test articulated in *Cameranesi v. United States Department of Defense*, 856 F.3d 626, 637 (9th Cir. 2017) (the *Cameranesi* test) for "determin[ing] if a government entity should redact information in a public records request." *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). The first step in a *Cameranesi* analysis requires the government to establish that disclosure implicates a personal privacy interest that is nontrivial or more than de minimis. *Id*. If the government shows that the privacy interest at stake is nontrivial, the requester must then show that the public interest sought to be advanced is a significant one and the information sought is likely to advance that interest. *Id*. If the second prong is not met, the information should be redacted. *Id*. The *Cameranesi* test thus balances "individual nontrivial privacy rights against the public's right to access public information." *Id.* at 708, 429 P.3d at 321. This balancing test approach "ensures that the district courts are adequately weighing the competing interests of privacy and government accountability." *Id.* at 709, 429 P.3d at 321; *see also Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (explaining that the Freedom of Information Act (FOIA) protects against "unwarranted 'invasions' of privacy" and that such invasions "trigger[ ]

[2] *Cameranesi v. United States Dep't of Def.*, 856 F.3d 626, 637 (9th Cir. 2017).

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a weighing of the public interest against the private harm inflicted," and concluding that "the release of photos of the decedent at the scene of his death and autopsy qualifies as such an invasion").

In *Cameranesi*, the Ninth Circuit explained:

> First, we evaluate the personal privacy interest at stake to ensure "that disclosure implicates a personal privacy interest that is nontrivial or ... more than [ ] de minimis." (citation omitted). Second, if the agency succeeds in showing that the privacy interest at stake is nontrivial, the requester "must show that the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." Lane v. Dep't of Interior, 523 F.3d 1128, 1137 (9th Cir. 2008) (alteration in original) (quoting Favish, 541 U.S. at 172, 124 S.Ct. 1570) (internal quotation marks omitted); see also Yonemoto, 686 F.3d at 694. "Otherwise, ***the invasion of privacy is unwarranted***." Favish, 541 U.S. at 172, 124 S.Ct. 1570.

(Emphasis added). That is, if the requester cannot satisfy its burden, there is no balancing test to be performed by the court—the inquiry ends. *See CCSD*, 136 Nev. at 56, 458 P.3d at 1058 ("If the second prong is not met, the information should be redacted.").

To determine whether LVRJ has met its burden, the Court must consider two factors in evaluating the public interest in disclosure. First, the court "examine[s] whether the public interest sought to be advanced is a significant one—one more specific than having the information for its own sake." *Cameranesi*, 856 F.3d at 640. (internal quotations omitted and citation omitted). Second, the court looks to "whether the requested information is likely to advance that interest." *Id*. (internal quotations omitted).

In considering whether the public interest is significant, "the only relevant public interest in the . . . balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* (citation omitted). The requested information must "contribute significantly to public understanding of the operations or activities of the government." *Id.* (citation omitted). "In other words, information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct is not the type of information" that is subject to disclosure for purposes of public record requests. *Id*. (internal quotation marks omitted).

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In examining whether the requested information is likely to advance a significant public interest, the Court considers whether it will appreciably further the public's right to monitor the agency's action. *Id.* (citation omitted and internal quotation marks omitted). If the information sought does not add significantly to the already available information concerning the manner in which the agency has performed its statutory duties, the court must give the public interest less weight. *Id. see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (holding that the public interest did not outweigh a nontrivial privacy interest where obtaining the names and personal information of the returnees "would not shed any additional light on the Government's conduct of its obligation").

To summarize, the Nevada Supreme Court concluded that the Coroner demonstrated that a nontrivial privacy interest existed within the juvenile autopsy reports, satisfying the first prong of the balancing test. Thus, it is for this Court to first determine whether LVRJ has met its obligation under the second prong. If it has not, the inquiry ends and the Coroner is entitled to redact the medical and health information as initially proposed. On the other hand, if the Court finds that LVRJ met its burden under the second prong, it must balance the individual's nontrivial privacy rights against public's interest in access.

Here, LVRJ cannot show that disclosure of each decedent's personal medical and health information advances a significant public interest. Rather than focusing on this specific inquiry, LVRJ contends in blanket fashion that autopsy reports generally serve a public interest. This assertion is insufficient to warrant disclosure of the private medical and health information of the decedents. Even if the Court finds that LVRJ established that the private medical and health information advances a significant public interest, upon weighing the interests involved, the Court must find that the privacy interests at stake outweigh the public interests in access. Finally, if LVRJ demands that the Coroner provide it with the redacted juvenile autopsy reports, the Coroner is entitled to charge 50-cents per page for preparing the requested records.

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B. LVRJ HAS NOT SATISFIED ITS BURDEN UNDER THE *CCSD* BALANCING TEST.

In spite of devoting nearly seven pages to the legal standard under the *CCSD* balancing test, LVRJ entirely ignores its obligation to demonstrate that the ***redacted information***, i.e., the medical and health information of the decedent, advances the public interest, and instead, argues that autopsy reports are public records. Based on the Supreme Court's opinion in the instant case, it is undisputed that autopsy reports are public records. The Supreme Court, however, also recognized that autopsy reports inherently contained sensitive medical and health information that warrant redaction. As a result of the Supreme Court's finding that the Coroner satisfied the first prong under the *CCSD* balancing test, the burden shifts to LVRJ to specifically articulate the redacted medical and health information advances a significant public interest. LVRJ's attempt to meet its burden fails and the Coroner is entitled to redact medical and health information that is unrelated to the cause and manner of death.

1. Access to Private Medical and Health Information Unrelated to a the Cause of Death does not Advance a Significant Public Interest.

The Supreme Court expressly concluded that autopsy reports are public records. That, however, is not the issue presented before this Court. The issue is what *additional information* is needed from the redacted autopsy reports to further the public policy interest in disseminating information pertaining to child abuse and fatalities. The detailed spreadsheet and the redacted autopsy reports satisfy this public policy interest. Unredacted autopsy reports will only exploit the personal privacy interests at stake and do little, if nothing, to advance public interest pertaining to child abuse and fatalities.

2. Access to Private Medical and Health Information Unrelated to a the Cause of Death is not Necessary to Assess Coroner Performance and Increase Public Confidence in Coroners and Official Accounts

To be clear, the Coroner has not refused to release autopsy reports altogether. Prior to the instant litigation, the Coroner provided LVRJ with sample autopsy reports and simply redacted private medical and health information that was unrelated to the cause of death. Again, LVRJ

fails to articulate what additional information from the redacted juvenile autopsy reports is necessary to assess the Coroner's performance and increase public confidence in the Coroner.

LVRJ cites to *People v. Dungo*, to argue that "an autopsy report may satisfy the public's interest in knowing the cause of death." 55 Cal. 4th 608, 621, 286 P.3d 442, 450 (2012), *as modified on denial of reh'g* (Dec. 12, 2012). However, in the instant matter, the cause of death, along with other information, was previously released to LVRJ in the form of a spreadsheet and redacted autopsy reports. *Dungo* does not support the proposition that additional private and health information is necessary to further other significant public interest goals.

LVRJ also cites to an article from the Los Angeles Times, but this is irrelevant as it does not even discuss the review and disclosure of autopsy reports to the public or how additional information would have effected this change. Opening Brief at 15. The article indicates that "[c]ornea removals are disclosed on public autopsy forms."[3] Nevada does not have a law requiring public autopsy forms.

LVRJ also directs this Court to an article involving the death of Dale Earnhardt, a famous racecar driver. Opening Brief at 15. That article discusses expert review of various documents related to Earnhardt's autopsy. It appears from a lawsuit initiated by the media for access to Earnhardt's autopsy photographs, that the coroner had *voluntarily* released the autopsy report and related documents to the public, however the court determined that the release of the photographs would constitute a serious invasion of privacy. *See Campus Commc'ns, Inc. v. Earnhardt,* 821 So.2d 388 (Fla. App. 2002). This actually supports the Coroner's position that the entirety of autopsy reports are not subject to public disclosure. Furthermore, an agency's decision to publish an autopsy report cannot be imputed to all other agencies, especially with respect to juvenile autopsy reports as in this case.

[3] *See* Ralph Frammolino, *Harvest of Corneas at Morgue Questioned,* L.A. Times, Nov. 2, 1997, https://perma.cc/RWB7-KW4A.

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3. Access to Private Medical and Health Information Unrelated to a the Cause of Death Would not Provide the Public with Vital Health Information and Protect Consumers.

LVRJ further argues that releasing full autopsy reports is necessary for tracking trends in causes of death. In support of this position, LVRJ relies on the COVID-19 pandemic as an example. Opening Brief at 15. However, as this Court is well aware, that type of information would be included in the redacted autopsy reports to the extent it relates to the cause of death. For example, if a juvenile's cause of death was COVID-19 or if COVID-19 was related to the cause or manner of death, this would not only be information provided on the spreadsheet, but would be information would remain unredacted in the autopsy report. Again, LVRJ fails to address the Nevada Supreme Court's question in that matter as to "what *additional* information LVRJ seeks to glean from the requested juvenile autopsy reports that, in unredacted form, would advance that public's interest." *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev at 58. The Coroner is simply protecting private medical and health information unrelated to the death of a juvenile. As already recognized by the Supreme Court, this information pertains to a nontrivial privacy interest.

4. Access to Private Medical and Health Information Unrelated to the Cause of Death do not Further the Integrity of Criminal Investigations.

LVRJ points to the shooting death of Ahmaud Arbery and how the "autopsy report provided the public valuable information about how many times Mr. Arbery was shot by his assailant, the nature of death (homicide), and that fact that Mr. Arbery had no drugs or alcohol in his system at the time he was shot and killed. Opening Brief at 16. The information LVRJ notes in the reference to the Ahmaud Arbery case would not be redacted from an autopsy report if it related to the manner and cause of death. In fact, the sample redacted autopsy reports provided to LVRJ by the Coroner included the nature of death, cause of death, and, if drugs or alcohol were related to the cause of death, that information was also provided.

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LVRJ also cites to a journalist from The Patriot-News who used official records, "including coroner records and autopsy reports", to aide in exoneration of multiple people. Opening Brief at 16. However, there is no mention of coroner's records or autopsy reports in the article or, as with all of the articles cited by LVRJ, how private medical or health information would advance the public's interest more than the information that the Coroner has already provided.

5. Access to Private Medical and Health Information Unrelated to the Cause of Death does not Promote Law Enforcement Accountability and Confidence in Law Enforcement.

LVRJ again generalizes the release of autopsy reports but does not address the issue in front of this Court. LVRJ cites to an example where law enforcement was believed to have been the cause of a man's death, but was exonerated after the coroner released the actual cause of death – excited delirium. Opening Brief at 17. Another example provided by LVRJ is a police shooting of a seventeen-year-old boy. The autopsy report showed officers had shot the teenager sixteen times. *Id.* Once more, the cause and manner of death is already within LVRJ's possession. The redacted juvenile autopsy reports would also reveal any information that was related to the cause and manner of death. Simply put, LVRJ fails to provide this Court reasoning about how the private medical and health information that is unrelated to the decedents' cause and manner of death advances a significant public interest that would warrant disclosure.

6. Access to Private Medical and Health Information Unrelated to the Cause of Death Does Not Provide the Public with Information Regarding Crimes of Significant Public Interest

In support of its brief, LVRJ cites to autopsy reports related to eight family members who were shot dead in Pike County, Ohio. Opening Brief at 18. LVRJ fails to mention that the issue of releasing the autopsy reports was addressed by the Ohio Supreme Court. *See State ex rel. Cincinnati Enquirer v. Pike Cty. Gen. Health Dist.,* 154 Ohio St. 3d 297, 114 N.E.3d 152 (2018). This case is irrelevant as the Ohio Supreme Court stated specifically that the case does not arise

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under the Ohio Public Records Act. *Id.* at 299. In Ohio, there is a specific statute which states "the records of the coroner . . . including . . . the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations filed in the office of the coroner . . are public records." *Id.* at 300. There is no such statute in Nevada and thus, this article is not relevant to the disclosure of complete, unredacted juvenile autopsy records in Nevada.

LVRJ further cites to the autopsy report of the 1 October shooter Stephen Paddock—specifically that he was not under the influence of any substances and he took his own life.[4] Yet again, this type of information would not be redacted. Suicide is a manner of death and the spreadsheet provided for the manner of death in all the decedents listed.

7. LVRJ Fails to Offer One Reason What Additional Information is Needed to Further a Significant Public Interest.

LVRJ argues that access to unredacted juvenile autopsy reports will somehow assist with public understanding on whether child protectives services is doing their job. To support their argument, LVRJ cites to a Colorado investigation. Opening Brief at 19. In Colorado, there was an investigation in which the news outlet focused on 72 children that were known to Colorado's child welfare system and who died as a result of family abuse or neglect. *Id.* Indeed, the focus of the report is on the state's child welfare system and interaction with the child. The report heavily relied on various Child Fatality Prevention Team Reports.[5] The disclosure of the Child Fatality Prevention Team Report, absent confidential information, is permitted by law in Colorado. *See* C.R.S. 26-1-139(4)(i)(III). In contrast, Nevada law expressly and unequivocally provides that

[4] It is also important to point out that the Coroner was ordered to produce the autopsy report of Steven Paddock. See Eighth Judicial District Court, Case No. A-17-764842-W. More importantly, the Court there determined that the Coroner did not establish by a preponderance of the evidence that any interest in nondisclosure outweighs the strong presumption in favor of public access. *See* Notice of Entry of Order. Also, the Court concluded that any privacy concerns could be addressed by redacting the names and identifying information from the reports. *Id.* In contrast, the names of the individuals here have been provided and the Supreme Court already concluded that the Coroner met its burden under the balancing test.

[5] *See generally* The Failed to Death series and related articles are accessible online https://www.denverpost.com/tag/failed-to-death-series/ (last accessed September 25, 2020).

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information acquired by and records created by a Child Death Review team are confidential. *See* NRS 432B.607. Thus, this argument is not persuasive, as Nevada maintains a statute that directly addresses the records at issue in Colorado.

LVRJ further cites to a Texas article which pertained to the coroner's findings (i.e., cause and manner of death), which have already been disclosed to LVRJ. Opening Brief at 20. Furthermore, unlike Nevada, Texas explicitly recognizes that autopsy reports are subject to public dissemination. *See* Tex. Atty. Gen. Op. 2001-2357. There is simply no Nevada authority or public policy that supports the notion that a juvenile decedent's personal medical and health information is subject to public disclosure.[6]

LVRJ then addresses Clark County and argues that Clark County's child protective services may be suffering from some of the same issues as the other cites' child welfare agencies. To the extent the juvenile autopsy reports reference child protective services or Department of Family Services, that information would not be redacted as it is not personal medical or health information. LVRJ references several juveniles as examples. First, LVRJ notes that Aaron Jones was murdered sometime in January 2017 by his own father after suffering extreme abuse and neglect. Opening Brief at 20. At the time of the request, Jones' autopsy was still pending further investigation. *See* LVRJ 071. Similarly, LVRJ's reference to Dejan Hunt who was found dead in August 2018 also falls outside the scope of the request. Opening Brief at 20. With respect to Aralee Jo Ballance, the spreadsheet provided to LVRJ notes that her death was a homicide stemmed from complications of a non-accidental injury. LVRJ 061. The article cited by LVRJ specifically provides that an allegation of abuse was reported on the first day she was born, but that allegation was unsubstantiated.[7] But, as the Coroner continues to represent, medical and health information specifically related to the cause and manner of death would not be redacted.

[6] Many of the articles cited by Petitioner were also cited by the Amici Brief filed in support of Petitioner with the Nevada Supreme Court in this matter. The Nevada Supreme Court was not persuaded by these articles and neither should this Court be.

[7] https://www.reviewjournal.com/local/local-las-vegas/mother-boyfriend-deny-inflicting-injuries-that-killed-4-month-old-girl/ (Last Accessed October 6, 2020).

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By way of example, Abygaile Bennett died in 2016 as a result of "blunt chest trauma due to assault due to **chronic physical abuse**." LVRJ 068 (emphasis added). As evidenced by the cause of death on the spreadsheet, Abygaile suffered from chronic physical abuse. Likewise, it was determined that Baby Girl Slazar's death was caused by birth asphyxia due to neglect of care of newborn. LVRJ 068. The spreadsheet data provided to LVRJ contains much of the very information it seeks. *See*, *e.g.*, LVRJ 049 (Dyon Johnson: cause of death blunt head trauma due to child abuse); 051 (Rayea Dawn Forsgren: cause of death abusive head trauma, manner of death homicide); 058 (Aiden James Leach: cause of death abusive head trauma, manner of death homicide); 059 (Devin Isaiah Aguilar, cause of death abusive head trauma, manner of death homicide; Draven Kierstead, cause of death abusive head trauma, manner of death homicide). LVRJ has information regarding the abuse and neglect of the juvenile decedents at its fingertips but has ignored, or refused to analyze, the very information already provided by the Coroner. While it is the Coroner's position that the spreadsheets provide LVRJ with sufficient information, the Coroner agreed to provide LVRJ with redacted autopsy reports so that it can confirm the information already provided to it within the spreadsheets.

In sum, although the LVRJ may articulate how autopsy reports in general are likely to advance that significant public interest, it does not address how the medical and health information unrelated to the decedents' cause of death advances a significant public interest. Most, if not all, of the rationales provided in LVRJ's brief relate to information that the Coroner has already provided or can be provided by the redacted autopsy reports. LVRJ did not meet its burden to show "that the public interest sought to be advanced is a significant one and the information sought is likely to advance that interest." *Clark Cty. Office of Coroner/Med. Exam'r* 136 Nev. at 55. Therefore, since the second prong is not met, "the [medical and health] information should be redacted." *Id.* at 56.

C. ALTERNATIVELY, THE BALANCING OF INTERESTS WEIGHS IN FAVOR OF REDACTION.

Alternatively, in the event the Court concludes that LVRJ has articulated that the redacted medical and health information of the decedents will advance a significant public interest, the

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Court must nonetheless balance the individual privacy interests against the public's interest in access. Courts have recognized that surviving family members retain an interest in the decedent upon passing. *See March v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (recognizing a common law right to non-interference with a family's remembrance of a decedent); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) ("Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."). Indeed, the Supreme Court recently recognized that "Nevada's common law protects personal privacy interests from unrestrained disclosure under the NPRA." *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018). To reach this conclusion, the Court relied on the common law tort of invasion of privacy. *Id.* While it is an issue of first impression in Nevada, California has recognized a decedent's family member's right to assert an invasion of privacy claim. *See Catsouras v. Dep't of Cal. Hwy. Patrol*, 181 Cal.App.4th 856, 874, 104 Cal.Rptr.3d 352, 366 (2010); *see also Montesano v. Donrey Media Grp.*, 99 Nev. 644, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984) (identifying the elements for a tort of invasion of privacy and relying on *Forsher v. Bugliosi*, 26 Cal.3d 792, 163 Cal.Rptr. 628, 608 P.2d 716 (1980)).

In *Reid v. Pierce County*, 136 Wash.2d 195, 198, 961 P.2d 333, 335 (1998), relatives of deceased persons sued a county for common law invasion of privacy with respect to allegations of appropriation and display of photographs of deceased relatives. In that case, the court discussed the privacy interest in autopsy records and held that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased." *See also Galvin v. Freedom of Info. Comm'n*, 201 Conn. 448, 461, 518 A.2d 64, 71 (1986) (autopsy reports are not accessible to the general public as information in autopsy reports could cause embarrassment or unwanted attention to the family of the deceased); *Larry S. Baker, P.C. v. City of Westland*, 627 N.W.2d 27, 15 (Mich. App. 2001) (notions of privacy in state law applied to

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deceased individuals and their families and outweighed public interest in accidents and injuries information).

Here, the balancing of interests tips in favor of the individuals' privacy interests at stake as any interest in the private medical and health information unrelated to a decedents' cause of death is minimal. First, LVRJ contends that the sample reports provided contain extensive redactions without any indication of the purported basis of redactions. Opening Brief at 22. When the sample reports were initially provided, it was specifically explained that the redactions pertained to medical and health information unrelated to the death of the decedent, and may include medical and health information related to the mother. LVRJ 088-089. To LVRJ's concerns about child welfare and abuse, each of the samples expressly note that there were not injuries identified on external and internal examination. LVRJ 095-122. While LVRJ contends that substantial portions of the sample reports were redacted, LVRJ provides no basis, let alone any explanation, as to why that information serves a significant public interest as it was not related to the cause of death.

Without any evidence, LVRJ asserts that the autopsy reports may contain information that is critical to assessing Clark County's child protective services. Opening Brief at 23. The list of information LVRJ believes would be provided in an autopsy report includes: factual information about manner of death, information about decedent's history (prior abuse), older injuries, and toxicological information. It bears repeating, the Coroner's position is that all information related to the cause and manner of death would be unredacted. An example may prove helpful for the Court. As indicated with Abygaile Bennett, the Coroner noted she suffered from chronic physical abuse because that was related to the cause of her death. On the other hand, for instance, had Abygaile suffered from congenital heart failure and died as a result, and her prior chronic physical abuse did not play a role in her death, that information would necessarily be redacted as that information would private medical and health information involving a nontrivial privacy interest.

Attempting to justify disclosure of the autopsy reports, LVRJ claims that this information is necessary to provide the public with a greater understanding of how state and local agencies

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protect vulnerable children and the shortcomings of the agencies. It is worth noting that the Coroner is not responsible for protecting vulnerable children. It is the responsibility of the Coroner to investigate death within Clark County that are violent, suspicious, unexpected or unnatural in order to identify and report on the cause and manner of death. Clark County Code § 2.12.060.

Finally, LVRJ asserts that the Coroner's interests are relatively minimal and cannot outweigh the public interest at stake. Opening Brief at 26. This argument is inherently flawed. It is not the Coroner's interest at stake. As the Supreme Court noted, the information contained in the autopsy reports pertain to a nontrivial privacy interest. The balancing test, therefore, pertains to the individual's interest in privacy against the public's interest in access. Then, LVRJ mistakenly contends that the Coroner has not satisfied its burden because its concerns are "non-particularized hypothetical concerns." This misrepresentation, however, directly conflicts with the Supreme Court's finding that the Coroner has, in fact, established a nontrivial privacy interest. As demonstrated by the case law cited above, there is a significant interest in protecting the medical and health information unrelated to a decedent's cause of death. LVRJ has not proved otherwise. Accordingly, the Coroner is entitled to disclose the juvenile autopsy reports in a redacted format as initially proposed.

D. THE CORONER IS ENTITLED TO CHARGE FOR REDACTED AUTOPSY REPORTS.

On appeal, the Supreme Court determined that NRS 239.055 provides a 50-cent cap for a government entity's extraordinary use of personnel and technological resources to prepare the requested information in response to a public records request. *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060 (2020). Accordingly, should LVRJ demand that the Coroner produce redacted autopsy reports, the Coroner is entitled to charge 50-cents per page.[8]

[8] It appears from LVRJ's brief that they only seek unredacted copies of the autopsy reports. As mentioned above, it is the Coroner's position that the spreadsheets have provided sufficient data to LVRJ. Nevertheless, prior to litigation the Coroner did agree to provide the autopsy reports in redacted format. In the event that LVRJ would like the redacted autopsy reports, the Coroner is seeking fees for the preparation of production of such records.

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1. NRS 239.055 is Applicable to this Case.

Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively. *Sandpointe Apts. V. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 853 (2013) (citations omitted). Deciding when a statute operates retroactively is not always a simple or mechanical task. *Id.* at 854. Broadly speaking, courts take a commonsense, functional approach in analyzing whether applying a new statute would constitute retroactive application. *Id.* (citations omitted). Central to this inquiry are fundamental notion of fair notice, reasonable reliance, and settled expectations. *Id.* (citations omitted). Thus, a statute has a retroactive effect when it takes away or impairs vested rights acquired after existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. *Id.* (citations omitted). In *Sandpointe Apts.*, the court determined NRS 40.459(1)(c) would have a retroactive effect because the trustee's sale occurred before the effective date of the enacted statute, impairing and limiting the rights of the assignee. 313 P.3d at 857.

The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Nevada has long viewed retroactive statues with disdain, noting that such laws are odious and tyrannical and have been almost uniformly discountenanced. *Sandpointe Apts.*, 313 P.3d at 858-59 (citing *Milliken v. Sloat*, 1 Nev. 573, 577 (1865). Thus, a statute will not be applied retroactively unless:

> 1. The Legislature clearly manifests an intent to apply the statute retroactively; or
>
> 2. It clearly, strongly, and imperatively, appears from the act itself that the Legislature's intent cannot be implemented in any other fashion.

Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008). In applying the above standard, the *Sandpointe Apts.* court determined that the legislature did not intend for the statute to apply retroactively because: (1) the Legislature provided that the statute would become effect upon passage and approval, which was not enough to overcome the presumption; and (2) nothing in the statute itself demonstrated that the

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Legislature's intent can only be implemented by applying the statute retroactively. 313 P.3d at 858-859. With respect to the second prong, the court found that although application of the statute would have a broader effect and would vindicate its purpose more fully, that is not sufficient to rebut the presumption against retroactivity. *Id.* The court held the newly enacted statute still had the ability to reach a large portion of the population when applied prospectively. *Id.* at 859.

During the 2019 legislative session, Senate Bill 287 ("SB 287") was introduced and made several amendments to the NPRA. In particular, the original bill made the following relevant amendments:

> NRS 239.005 Definitions. As used in this chapter, unless the context otherwise requires:
>
> 1. "Actual cost" means the direct cost ~~related to the reproduction~~ *incurred by a governmental entity in the provision* of a public record, *including, without limitation, the cost of ink, toner, paper, media and postage*. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record, *including, without limitation, any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record.*
>
> NRS 239.052 Fees: Limitations; waiver; posting of sign or notice.
>
> 1. Except as otherwise provided in this subsection, a governmental entity may charge a fee for providing a copy of a public record. Such a fee must not exceed the actual cost to the governmental entity to provide the copy of the public record unless a specific statute or regulation sets a fee that the governmental entity must charge for the copy. A governmental entity shall not charge a fee for providing a copy of a public record if a specific statute or regulation requires the governmental entity to provide the copy without charge.

See SB 287 (As Introduced). Additionally, SB 287 provided for the repeal of NRS 239.055 in its entirety. *Id.* By repealing NRS 239.055, and adding language to NRS 239.005(1) that expressly excluded "labor costs" from the definition of "actual costs," SB 287, as introduced, would have eliminated any argument that public entities could recoup labor costs. The initial provisions of SB 287 also included language that the bill would have applied to pending actions as well as to actions filed on and after October 1, 2019. *Id.*

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SB 287 was referred to the Senate Committee on Finance and the Committee on Finance heard and passed amendments to SB 287 on May 31, 2019. *See* Hearing on SB 287 Before the Senate Committee on Finance, 80 Leg. (Nev. May 31, 2019). Senate Amendment No. 1075 modified the proposed changes to NRS 239.005 as follows:

> NRS 239.005 Definitions. As used in this chapter, unless the context otherwise requires:
>
> 1. "Actual cost" means the direct cost ~~related to the reproduction~~ *incurred by a governmental entity in the provision* of a public record, *including, without limitation, the cost of ink, toner, paper, media and postage*. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record~~, *including, without limitation, any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record*~~.

Senate Amendment No. 1075 to SB 287 (Nev. June 1, 2019). There were no changes made to the repeal of NRS 239.055. *Id.* The Senate Committee on Finance, however, also modified the application of SB 287 to apply to all actions filed on or after October 1, 2019, which eliminated the immediate application of SB 287. *Id.* In other words, the Legislature expressly rejected the notion that the provisions of SB 287, including the repeal of NRS 239.055, would apply retroactively.

Amendment No. 1075 passed the Senate, and Senators Kieckhefer and Scheible then presented the first reprint of SB 287, which included the changes made by Senate Amendment No. 1075, to the Assembly Committee on Government Affairs. *See* Hearing on SB 287 Before the Assembly Committee on Government Affairs, 80 Leg. (Nev. June 3, 2019).[9] In particular, Senator Scheible discussed Amendment No 1075 in relation to NRS 239.005:

> …[W]e've tried to strike a balance here on Section 3, Subsection 1 to say that a government agency can recoup the costs that are actually incurred in procuring the records, so it spells out

[9] The minutes of the Hearing on SB 287 Before the Assembly Committee on Government Affairs on June 3, 2019 are not yet available. Therefore, the citations to this hearing reference the video of the hearing, made available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6505/Overview (last accessed June 10, 2020).

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> specifically ink, toner, paper, media and postage and it specifically exclude[d] any costs that would be incurred regardless of whether or not they had to procure the record…***[O]ne of the areas we had difficulty with was whether or not overhead, and personnel, and labor costs should be included in the definition of an actual cost***. And so you'll notice that Section 3, Subsection 1 does not address that question specifically because it was our determination that in some cases ***it's appropriate*** and in a lot of cases it's not. It's certainly not appropriate for a government agency to depend on fees for providing public records in order to pay their power bill and in order to make any portion of their annual budget. ***However, when a public record request comes in that is incredibly onerous, that is incredibly large*** – we heard testimony on the Senate side about organizations that for legitimate reasons were requesting tens of thousands of documents and cities, counties, local jurisdictions had to ***call their employees in over the weekend*** to work a Saturday or they had to ***invest in another printer*** to leave the copier and copy room available for all of their daily functions and still be able to complete a project of copying ten thousand pages of some of their records. ***And so we want to make sure they're able to account for those costs*** and that's why we came to the decision we did in Section 3, Subsection 1.

Id. at 6:29-9:15 (emphasis added).

Based on this representation, Assemblyman Carrillo inquired on the limitation of the production of records in relation to costs. *Id.* at 34:00 – 35:30. In response, Senator Kieckhefer explained:

> The government under this section will continue, as they are now, to be able to charge the requester to recover their actual cost. As Senator Scheible indicated, there are some terms that are not included in this definition [Section 3, Subsection 1], we would leave that to the process itself and the indication of those fees that can be charged relating to what is reasonable. But, the purpose is to say if there is a ***broad request that requires a lot of resources of the governmental entity, they can recoup those costs so that the cost is not passed on to the tax payers more broadly*** but are the responsibility of the requester.

Id. (emphasis added). Later, Assemblyman Smith pressed for more clarity on when a public entity could charge. *Id.* at 49:00-50:50. In asking his question, Assemblyman Smith wanted to know the line between what constitutes an "extraordinary" request of public resources and what does not. *Id.* Senator Kieckhefer responded:

> I think you'll notice at the back of the bill at page 11, we're

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> striking NRS 239.055 relating to extraordinary use, and we are hinging the ability to recoup costs on actual costs so that *any* actual costs incurred by an extraordinary request would *still* be able to be recouped under 239.010 [sic] *which is their ability to charge fees to recoup those costs*. [10] So we're trying to *simplify* it by not having that arbitrary line of what is extraordinary and what's not. *Whatever the cost is, they can recover*.

Id. (emphasis added). Ultimately, the Assembly Committee on Government Affairs passed SB 287. *See* SB 287 (As Enrolled).

The Legislative Counsel's Digest within SB 287 also sheds light on the Legislature's intent of SB 287. Explaining the provisions of SB 287, the summary provides:

> With certain exceptions, existing law prohibits a governmental entity from charging a fee for providing a copy of a public record that exceeds the actual cost to the governmental entity to provide the copy. (NRS 239.052) Section 3 of this bill clarifies that the actual cost to a governmental entity includes such direct costs as the cost of ink, toner, paper, media and postage. Section 13 of this bill eliminates the authority of a governmental entity to charge an additional fee for providing a copy of a public record when extraordinary use of personnel or resources is required. (NRS 239.055)
>
> . . .
>
> Section 11 of this bill provides that ***the provisions of the bill*** apply to actions filed on and after October 1, 2019, which is the effective date of this bill.

See SB 287. The only interpretation that can be obtained from this language is that SB 287, which includes the repeal of NRS 239.055, applies only to actions filed on and after October 1, 2019.

The same reasoning and logic used in *Sandpointe Apts.* must be used in this case. In an attempt to apply Senate Bill 287 retroactively, LVRJ will likely focus on the preamble and purposely ignore the express language regarding the application of the amended provisions. *See* Opp. at 11-13. Indeed, Section 11 of SB 287 explicitly provides:

> The amendatory provisions of this act apply to **all actions** filed **on or after October 1, 2019**.

[10] The ability to charge is in NRS 239.052.

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(emphasis added). By this very language, it is clear that the amendments, including the repeal of NRS 239.055, only applies to actions filed on or after October 1, 2019 and should not be applied retroactively.

Determining the extent to which existing legislation is repealed is ultimately an issue of statutory construction. Norman J. Singer, Sutherland Statutory Construction § 23:6 (7th ed. 2019); *see also Chapman Indus. v. United Ins. Co. of Am.*, 110 Nev. 454, 456–57, 874 P.2d 739, 740 (1994). Courts find that when a legislature passes a repealing act and does not substitute anything else for it the effect is to obliterate the act as if it had never been passed. *Id.* The intent of the legislature to set out the original act or section as amended is most commonly indicated by a statement that the original law is amended "to read as follows." *Id.* at § 23:12. This rule of construction is not absolute and does not apply when the intent of the legislature is otherwise. *Id.*

The legislative history demonstrates that the amendment to NRS 239.005 and repeal of NRS 239.055 were a cohesive revision to clarify the law on what a government entity could charge in procuring records in response to a public record request. The Legislative Counsel's Digest discusses the cost provisions, i.e., amendment to NRS 239.005 and repeal of NRS 239.055 together as a unified modification to the NPRA. The Legislative Counsel's Digest further indicates that the provisions of SB 287, including Section 13 (which repealed NRS 239.055) would not go into effect until October 1, 2019 and only applied to matters filed on or after October 1, 2019.

Moreover, as initially proposed, SB 287 not only repealed NRS 239.055 but also explicitly precluded a governmental agency from recovering overhead costs such as labor. The Legislature, however, recognized the detriment government agencies were likely to face if requests for records were broad and burdensome for the agency to produce and expressly rejected the language prohibiting an agency's ability to recoup labor costs. *McKay v. Bd. of Cty. Comm'rs*, 103 Nev. 490, 492 n.2, 746 P.2d 124, 125 (1987) (holding that the failure to adopt proposed language in a bill is evidence of the Legislature's intent to the contrary). Testimony from the Senators demonstrate that the repeal of NRS 239.055 was made in conjunction with

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amendments to NRS 239.005, resulting in the repeal of NRS 239.055 applying to matters filed on or after October 1, 2019.

Any other interpretation would produce absurd, unreasonable results. *See Rural Tel. Co. v. Pub. Utilities Comm'n,* 133 Nev. 387, 389, 398 P.3d 909, 911 (2017). The immediate repeal of NRS 239.055 creates a gap within the statutory scheme and allowed requesters a period of time to submit broad, burdensome requests without incurring labor costs. That is, if the "amendatory" provisions of SB 287 only apply to matters filed on or after October 1, 2019, including the modifications made to NRS 239.005, but the repeal of NRS 239.055 immediately went into effect the day Governor Sisolak signed the bill, government agencies would have been precluded from charging for extraordinary use of personnel for any pending case and newly filed action through October 1, 2019. Nothing in the legislative history reflects this intent. Rather, Senator Kieckhefer's testimony regarding the amendment to NRS 239.005 and repeal of NRS 239.055 illustrates the intent to simplify the law to allow government agencies to recoup costs they incur, including labors costs in certain instances. In other words, the repeal of NRS 239.055 was based upon, and in conjunction, with the amendment to NRS 239.005. With this legislative history, the Court must conclude that the Legislature intended for the repeal of NRS 239.055 and amendment to NRS 239.005 to take effect simultaneously—on matters filed on or after October 1, 2019. Therefore, NRS 239.055 applies to the instant case.

2. <u>The Coroner is Entitled to 50-Cents Per Page for its Extraordinary Use in Produce Records.</u>

a. The Coroner will incur extraordinary use of its personnel.

Prior to the recent amendment, the NPRA permitted government agencies to charge an additional fee in preparing records responsive to public record requests when the agency exerts extraordinary use of personnel. NRS 239.055. "Extraordinary use" is undefined within the NPRA. Accordingly, this Court must apply the plain and ordinary meaning of "extraordinary use" to NRS 239.055. *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006). "Extraordinary" is defined as "[b]eyond what is usual, customary, regular, or common." Black's Law Dictionary (11th ed. 2019). "Use" within the context of NRS 239.055 refers to the

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use of personnel or technological resources when preparing records in response to a request. NRS 239.055; *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060. Thus, for purposes of NRS 239.055, "extraordinary use" refers to an agency's unusual, irregular, or uncommon reliance on personnel or technological resources in preparing records responsive to a request.

On August 27, 2002, the Nevada Attorney General issued an opinion regarding Washoe County's questions about the fees to be charged in copying public records, specifically with extraordinary staff time. *See* Op. Nev. Att'y Gen. No. 2002-32. Relying on the legislative history of Assembly Bill 214 (1997), the Attorney General determined the authority granted to a governmental agency to recover actual costs for the "extraordinary use" of personnel in retrieving and copying public records may have, at least in part, been intended to make the agency whole in responding to nuisance inquiries or any inquiry that takes up an unusual amount of staff time. *Id.* at p. 245. In defining extraordinary use, the Attorney General found that public records requests should generally take no more than 30 minutes to respond and anything over the 30-minute mark was extraordinary. *Id.*

Here, the Coroner previously estimated that each Autopsy Report is approximately ten pages and it would take an hour to redact approximately 4-5 Autopsy Reports. *See* Exhibit A, ¶ 14. There are approximately 680 Autopsy Reports, and 150 external examinations, in response to LVRJ's request. *See* LVRJ 048-071. Accordingly, it would take the Coroner, at a minimum, 166 hours to review, redact, and quality control the requested records. This certainly surpasses the 30-minute benchmark and qualifies as extraordinary use of personnel as it would take a single person, on a full-time basis, over a month to prepare the requested records.

If this Court rejects the 30-minute benchmark announced in the Attorney General Opinion, it is nevertheless undeniable that the Coroner will exert extraordinary use of its personnel in producing the 830 documents (approximately 8, 300 pages) to LVRJ. The NPRA requires an agency to respond to the requester within five business days. NRS 239.0107. It then must follow that the reasoning of the 5-day rule is the Legislature determined that records can generally be provided to a requester within five business days, and if not, the requester should be

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given a date when the records can be produced. NRS 239.0107. Following this logic, if preparing records responsive to a request takes longer than the five business days allotted in NRS 239.0107(1), then it requires extraordinary use. Even adopting a five-day benchmark, the Coroner will utilize extraordinary use of its personnel in providing 830 documents in response to LVRJ's public record request.

a. The 50-Cent Fee is Reasonable and Actually Incurred.

The same Attorney General Opinion mentioned above explains that the extraordinary use of personnel should be based on the actual hourly wage of the lowest compensated individual reasonably available and qualified to respond to the public records request. *Id.* at 246. It was the Attorney General's belief that this standard comports with the definition of "actual costs" in Chapter 239 of NRS as being "the direct cost related to the reproduction of a public record." NRS 239.005(1). The hourly rate of lowest compensated employee who is qualified to prepare and produce the requested records is $45.00. *See* Exhibit A, ¶ 14. Furthermore, the Coroner typically charges $1.00 per page per copy in accordance with NRS 239.052. *Id.*, ¶ 13. The Supreme Court, however, concluded that NRS 239.055 caps an agency's fee to 50-cents per page. *Clark Cty. Office of Coroner/Med. Exam'r*, 136 Nev. at 59, 458 P.3d at 1060 (2020). Here, 50-cents per page is reasonable because the amount that the Coroner would actually incur in responding to LVRJ's request would be $7,470.00 for the staff time preparing the records and approximately $8,300.00 for the copies of the records. The 50-cent per page limitation allows the Coroner to recover a maximum of $4,150.00.[11] Thus, the Coroner is entitled to $4,150.00 should LVRJ demand that the Coroner produce all redacted juvenile autopsy reports.

IV. CONCLUSION

Based on the foregoing, Coroner requests the Court conclude that LVRJ did not satisfy its burden under the established balancing testing in demonstrating that the private medical and health information unrelated to the cause of death advances a significant public interest. Even if the Court somehow determines that LVRJ did meet its burden, upon the balancing of interests, it

[11] This number is an estimation of the 830 reports at approximately 10 pages per report.

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is clear that the individuals' privacy interests in their personal medical and health information outweigh any public interest in access. Finally, should LVRJ request that the Coroner produce the redacted autopsy reports, the Coroner is entitled to charge 50-cents per page.

Dated this 7th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S ANSWERING BRIEF** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of October, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[12]

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[12] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **REPLY IN SUPPORT OF PETITIONER'S OPENING BRIEF ON REMAND** **Hearing Date:** October 29, 2020 **Hearing Time:** 9:00 a.m.

Petitioner the Las Vegas Review-Journal ("Review-Journal") hereby submits this Reply in support of its Opening Brief following remand from the Nevada Supreme Court.

DATED this the 22nd day of October, 2020.

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I. INTRODUCTION

Consistent with the Nevada Supreme Court's order on remand, the Review-Journal has come forth with information and evidence demonstrating the public interest in access to the redacted information in the juvenile autopsy reports it originally requested in 2017. *See Clark Cty. Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020) ("*Coroner*"). As discussed in the Review-Journal's Opening Brief on Remand ("OB"), access to the juvenile autopsy reports—including the examination information the Coroner has asserted it should be entitled to redact—will help further the significant public interests in access to the records of government agencies (a fundamental public interest pursuant to the NPRA), assessing the work performed by the Coroner, and increasing transparency and accountability. Perhaps most importantly, access to the autopsy reports in unredacted (or minimally redacted) form will further the significant public interest in assessing how well state and local governments are fulfilling their obligations to protect vulnerable children.

In responding to the Review-Journal's Opening Brief, the Coroner invites this Court to adopt a faulty premise—namely, that the pathological examination information it asserts is subject to redaction is unrelated to the Coroner's determination of the cause of death for individual decedents. However, just like a medical doctor cannot diagnose a person with a broken arm without first conducting an examination, a coroner or medical examiner cannot reach a conclusion about a cause of death without first conducting a thorough examination. And as the Review-Journal pointed out, the Coroner can sometimes get a cause of death determination wrong. (*See, e.g.*, OB, p. 14:9-18 (discussing, *inter alia*, the Coroner's change of position in the cause of death for Susan Winters).)

The Coroner's cause of death determination only tells part of a decedent's history. Access to the Coroner's complete reports—including pathological observations and other information—can provide the public with a clearer understanding of whether a child who died after having been under the supervision of child protective services was subjected to

abuse, and when such abuse occurred. Having that information can in turn help the public identify and fix holes in the social safety nets designed to protect children.

To support its argument that it should be allowed to redact wide swaths of observations and conclusions from the requested records, the Coroner directs this Court to a series of inapposite cases dealing with access to autopsy and death scene photographs. (Answer, pp. 14:27 - 16:2.) But the Review-Journal is not seeking access to photographs—it is seeking access to the information the Coroner gathered during the examination of decedents so that the public can understand and assess the Coroner's conclusions, and in turn understand and assess flaws in child protective services programs.

The Coroner also asserts that it should be entitled to charge the Review-Journal a 50 cent per-page fee for production of the requested reports pursuant to Nev. Rev. Stat. § 239.055 because the work of redacting information from the reports will allegedly require "extraordinary use" of its personnel. There are several problems with this assertion. First, in 2019, the Nevada Legislature repealed Nev. Rev. Stat. § 239.055 in its entirety without any savings provision or qualification.

Second, even if the repealed statute were still applicable to this matter, the Coroner would not be entitled to extraordinary use fees because the only work the Coroner identified is the mere process of redacting information from the requested records. Redaction—even of a large amount of records—simply does not qualify as "extraordinary use" of the Coroner's personnel or resources.

Even if redaction were "extraordinary" for the purposes of Nev. Rev. Stat. § 239.055, the Coroner would still not be entitled to charge the Review-Journal a per-page fee under that statute because the Coroner has not produced any evidence that such charges are "reasonable" and "actually incur[red]" as required by (now-repealed) Nev. Rev. Stat. § 239.055. Instead, the Coroner's whole argument for why this per-page fee is "reasonable" is that it is less than the hourly fee the Supreme Court found the Coroner could not charge. *Coroner*, 136 Nev. 44, 59, 458 P.3d 1048, 1060 (holding the Coroner is prohibited from charging an hourly fee for redaction work). Simply being lower than the illegal fee the

Coroner initially demanded does not make this new fee request "reasonable." Moreover, the Coroner has come forth with no evidence that it will incur any actual costs in fulfilling the Review-Journal's request. Accordingly, the Court should hold that the Coroner is only entitled to recoup its actual costs for production of the requested records as defined by Nev. Rev. Stat. §§ 239.005(1) and 239.052.

II. REPLY TO THE CORONER'S ARTICULATION OF THE *CCSD* TEST

While the Coroner dedicates significant time to analysis of the federal FOIA case that informed the Nevada Supreme Court's formulation of the *CCSD* test, notably missing from the Coroner's brief is a discussion of the foundation upon which this test (and this entire matter) sits—the NPRA. As the *CCSD* Court explained, the *CCSD* test "coheres with both the NPRA and *Gibbons*[1]." *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 708-09, 429 P.3d 313, 321 (2018) (citation omitted). And as the Supreme Court has held many times, the NPRA must be construed liberally to facilitate access to public records—including the records at issue here—and any limitations on access must be construed narrowly. Nev. Rev. Stat. § 239.001(3); *see Gibbons*, 127 Nev. at 880, 266 P.3d at 628 ("Our jurisprudence has . . . established a framework for testing claims of confidentiality under the backdrop of the NPRA's declaration that its provisions 'must be construed liberally' to facilitate access to public records, and that any restrictions on access 'must be construed narrowly'"); *accord Pub. Employees' Ret. Sys. of Nevada v. Nevada Policy Research Inst., Inc.*, 134 Nev. 669, 671, 429 P.3d 280, 283 (2018); *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 50, 458 P.3d 1048, 1054 (2020).

Relying on solely on *Cameranesi* and one other FOIA case, the Coroner asserts that the only public interest this Court should consider is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." (Answer, p. 6:20-23 (quoting

[1] *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011).

Cameranesi v. United States Dep't of Def., 856 F.3d 626, 640 (9th Cir. 2017).) The information the Review-Journal seeks is necessary to shed light on the Coroner's—and child protective services'—performance of their statutory duties and to let citizens know what these crucial government agencies are up to. Despite the Coroner's arguments to the contrary, the Review-Journal has established that its interest in access to the information the Coroner seeks to redact outweighs the privacy interests it has articulated.

Moreover, unlike FOIA and the case law upon which *Cameranesi* is premised, the NPRA recognizes that access itself is a public interest. Nev. Rev. Stat. § 239.001(1). Thus, as the Review-Journal explained in its Opening Brief (OB, pp. 9:16-11:11), a requester's ultimate motive in seeking access to public records is not a relevant consideration. Were that not the case, the NPRA would not—as it does now—place the burden on the government in the first instance to demonstrate that public records are confidential or otherwise privileged.

III. ARGUMENT

A. The Review-Journal Has Established Significant Interests That Weigh In Favor of Access to Juvenile Autopsy Reports With Minimal Redaction.

In responding to the Review-Journal's detailed analysis of the significant public interests that access to the unredacted reports would advance, the Coroner presumes that the information it has previously attempted to redact is unrelated to the cause of death for individual decedents. (*See, e.g.*, Answer, p. 8:25-27 (asserting that the information the Coroner previously redacted from sample reports was "unrelated to the cause of death").) However, the public is entitled to information beyond that which is related to the cause of death for individual decedents. In any case, the redacted information—specifically, the Coroner's observations during post-mortem examinations of decedents—is undeniably related to the Coroner's determination of the cause(s) of death, and access to those observations is vital to assessing the Coroner's cause-of-death determinations.

As discussed in the Review-Journal's Opening Brief, prior to the initiation of the instant matter, the Coroner provided the Review-Journal with three redacted autopsy reports as an example of the redactions the Coroner intended to make to the requested records. (Exh.

9 to Petition, LVRJ095-122.) In each of those redacted sample reports, the Coroner redacted information regarding the Coroner's internal and external examinations, microscopic examinations, radiographical examinations, and other information that the Coroner would necessarily have to gather and review in making the ultimate determination about what caused a particular decedent's death. It would seem, in other words, that the Coroner believes the public should accept the Coroner's conclusions regarding cause of death without being able to review or assessing the examinations that informed those conclusions.

As the court in *People v. Dungo*, 55 Cal. 4th 608, 286 P.3d 442 (2012) observed, an autopsy report contains two types of statements: "(1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." *Dungo*, 55 Cal. 4th at 619, 286 P.3d at 449 (2012). That first category—the coroner's or pathologist's observations—"are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment." *Id.* Thus, to understand whether the Coroner appropriately identified the cause of death, the public needs access to the observations that informed that conclusion.

The public's ability to access and assess those observations is significant because sometimes the Coroner gets it wrong. As discussed in the Review-Journal's Opening Brief and left unaddressed by the Coroner, in the case of the 2015 death of Susan Winters, the Coroner's initial conclusion that Ms. Winters' cause of death was suicide was wrong, and that she was likely the victim of homicide. (OB, p. 14:13-18.) Had the Coroner's initial conclusions not been questioned and tested, Ms. Winters' alleged murderer would not be facing criminal prosecution for his alleged actions.

In its Opening Brief, the Review-Journal also pointed to the significance of access to autopsy records in the death of racecar driver Dale Earnhardt in leading to enhanced safety measures for NASCAR drivers. (OB, p. 15:9-15.) In its Answer, the Coroner argues that, because a Florida court blocked public access to photographs from Earnhardt's autopsy, that

"supports the Coroner's position that the entirety of autopsy reports are not subject to public disclosure." (Answer, p. 9:18-23 (citing *Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002).) This ignores two facts. First, unlike Nevada, Florida law exempts autopsy photographs from public disclosure. *See Campus Commc'ns*, 821 So.2d at 392-394 (discussing Fla. Stat. Ann. § 406.135). Thus, the Florida court's determination that Florida law specifically exempts autopsy photographs from disclosure is irrelevant to this Court's assessment of whether the particular records at issue here merit the over-redaction the Coroner seeks. Second, the Review-Journal is not seeking autopsy photographs in this case—it is seeking access to information regarding the Coroner's pathological observations.

In its Opening Brief, the Review-Journal also explained that access to juvenile autopsy reports furthers the public's significant interest in assessing how well state and local governments are doing their job of protecting vulnerable children. As examples of why this interest is salient and significant, the Review-Journal outlined several examples where children who had contact with child protective services (sometimes dozens and dozens of contacts) and were murdered by their parent or caregiver. (OB, pp. 20:6 - 21:7.)

In its Answer, the Coroner appears to be laboring under the assumption that the Review-Journal is citing to the tragic deaths of Aaron Jones, Dejan Hunt, and Aralee Jo Ballance in order to assert a right of access to those particular autopsy reports. (Answer, p. 13:16-18 (noting that the autopsies of Aaron Jones and Dejan Hunt "fall outside the scope of the request").) The Coroner misses the point. As the Coroner notes throughout its brief, under the *CCSD* test the Review-Journal currently bears the burden of establishing that the "public interest to be advanced is a significant one and that the information [sought] is likely to advance that interest." *CCSD,* 134 Nev. at 707-08, 429 P.3d at 320. As the Review-Journal explained, these examples illustrate that there is substantial public interest in access to juvenile autopsy reports so the public can have an informed discussion about child welfare, what state and local governments do to protect children, and what they can do better. (OB, p. 21:8-12.) The Coroner also misapprehends the Review-Journal's citation to the "Failed to Death" investigative series ran by the Denver Post and Denver news station KUSA. (*See* OB,

p. 19:7-22.) The Coroner attempts to distinguish this matter by arguing that Colorado law permits disclosure of Child Fatality Prevention Reports. (Answer, pp. 12:20 - 13:3.) This is beside the point. The point is that access to records related to child fatalities (including autopsy reports) in that investigation furthered a significant public interest—reform of child protective services that were failing Colorado's vulnerable children.

Part of understanding what state and local governments do to protect children includes being able to review and assess the pathological observations the Coroner relied on to determine a child's cause of death. As discussed in the Review-Journal's Opening Brief, those pathological observations would include external observations of the decedent's body, internal observations about the body cavities and organs, and toxicological observations—all of which not only inform the Coroner's conclusion regarding cause of death, but also can reveal whether the decedent was the victim of chronic abuse prior to his or her untimely death. Knowing whether child victims experienced chronic abuse—reported or otherwise—prior to their deaths can help the public assess the work its government is doing to protect vulnerable children.

B. The Court Should Not Permit the Coroner to Redact Information from the Autopsy Reports.

1. The Cases Cited by the Coroner Do Not Support Redaction of the Requested Records.

The Coroner cites several cases to support its assertion that it should be permitted to redact medical and health information from the requested autopsy reports. The cases cited by the Coroner, however, are inapposite to the facts and legal issues present in this case. The bulk of the cases cited by the Coroner pertain to family members' privacy interests in death images of a decedent—*i.e.*, crime scene photographs or autopsy photographs, which the Review-Journal has not requested in this case. As for those cases cited by the Coroner that involve autopsy reports, they are readily distinguishable.

The first death image case cited by the Coroner is *Marsh v. Cnty. of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (cited in Answer, p. 15:3-5). In *Marsh*, the appellant's two-year-old son died from a severe head injury while in the care of her boyfriend. *Id.* at 1151. The

boyfriend was convicted of second-degree murder; that conviction was eventually set aside in a habeas proceeding. *Id.* After his release, the boyfriend sued the County of San Diego and the medical personnel who conducted the autopsy on the deceased child. *Id.* During a deposition of the former district attorney who prosecuted him, the former district attorney disclosed that he had photocopied sixteen photographs of the child's corpse, that he kept one copy as a "memento," and that after his retirement he gave that copy, along with a memorandum he wrote about the case, to a newspaper and television station. *Id.*

The appellant filed suit against the district attorney and the county, alleging that the district attorney's copying and dissemination of her child's death images violated her Fourth Amendment substantive due process rights. In holding that the appellant had a substantive due process right in controlling images of her dead child, the Ninth Circuit's analysis focused strictly on family members' privacy rights in a decedent's death images. *Id.* at 1153-54.

Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157 (cited at Answer, p. 15:5-8) is also factually and legally inapplicable. In that case, the United States Supreme Court was tasked with deciding whether the Office of Independent Counsel properly withheld death scene photographs depicting the body of Vince Foster, former deputy counsel to President Clinton. *Id.* at 160-61. In affirming the propriety of the withholding, the Court focused its analysis on the common law right of family members to control death images of decedents. *Id.* at 167-69.

Catsouras v. Dep't of Cal. Hey. Patrol, 181 Cal. App. 4th 856 (2010) (cited at Answer, p. 15:14-15) is also distinguishable from the instant matter because, like the *Marsh* case, it involved the unauthorized dissemination of death scene photographs by two California Highway Patrol troopers. In that case, the decedent, an eighteen-year-old woman, was decapitated in a car accident. *Id.* at 563. According to a suit filed by the decedent's family, two troopers emailed photographs of the decedent's body to members of the public, allegedly sending the images "to their friends and family members on Halloween—for pure shock value." *Id.*

Despite how the Coroner attempts to spin the case, the California Court of Appeals did not recognize a broad "right to assert an invasion of privacy claim." (Answer, p. 15:13-14.) Rather, the Court recognized that, under "the extraordinary facts of this case," the family had grounds to sue the two troopers for invasion of privacy. *Id.* at 864. Moreover, the Court was careful to distinguish that its ruling pertained to the family members' interests in the death images only, noting that "surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying, the life of a decedent" and that "[a]ny cause of action for invasion of privacy in that context belongs to the decedent and expires along with him or her." *Id.* at 863-64. The Court was also careful to note that it was not addressing the news media's rights to access, explaining:

> We note that we do not have at issue here the freedom of the press. We address only the duties of CHP officers. The CHP here undertook to perform an investigation and to collect evidence. It was not in furtherance of the investigation, the preservation of evidence, or any other law enforcement purpose, to deliberately make a mutilated corpse the subject of lurid gossip.

Id. at 864. Thus, rather than a broad pronouncement regarding family members' rights to assert an invasion of privacy claim regarding the dissemination of information about a decedent, the Court was careful to explain that its holding was cabined by the particular facts of that case.

The final death image case the Coroner cites to is *Reid v. Pierce County*, 136 Wash.2d 195 (1998). (Answer, p. 15:19-24.) As with *Marsh*, *Favish*, and *Catsouras*, the tortious conduct at issue in *Reid* was the unauthorized appropriation of the death images of decedents by employees of a county medical examiner's office—including the death images of former Washington Governor Dixy Lee Ray—for grossly inappropriate actions like displaying at cocktail parties and creating scrapbooks. *Id.* at 198-201. While the Coroner hooks on to one errant line in the *Reid* decision to argue that the Washington Supreme Court discussed a broad privacy interest in autopsy records (Answer, p. 15:22-23), the Coroner overlooks that the Court's holding was directly informed by a Washington statute explicitly declaring autopsy reports and records confidential. *See id.* at 211 (citing Wash. Rev. Code § 68.50.150). As the Coroner has acknowledged, Nevada autopsy reports are public records.

(Answer, p. 1:14-15.) Thus, the *Reid* case is even less applicable here than the other death image cases the Coroner cites.

The two cases cited by the Coroner which do not pertain to death images are also distinguishable from this case. The first case, *Galvin v. Freedom of Info. Comm'n*, 201 Conn. 448 (1986) (cited at Answer, p. 15:24-27), has no bearing here. In *Galvin*, the question presented to the Court was similar to the issue this Court and the Nevada Supreme Court have already addressed: whether autopsy reports compiled by the office of Connecticut's chief medical examiner were public records. Unlike this case, however, the Connecticut Supreme Court held that state administrative regulations that limited access to autopsy reports rendered the reports "not accessible to the general public." *Id.* at 462. Nevada's Administrative Code, by contrast, does not limit access to autopsy reports. Even if the Code did contain such a provision, the Nevada Supreme Court has routinely refused to interpret administrative regulations as having a limiting effect on the NPRA. *See, e.g., Comstock Residents Ass'n v. Lyon Cty. Bd. of Commissioners*, 134 Nev. 142, 147, 414 P.3d 318, 322 (2018) (holding that a provision of the NAC defining "legal custody" "do[es] not limit the reach of the NPRA"); *accord Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 704, 429 P.3d 313, 318 (2018) (same).

Larry S. Baker, P.C. v. City of Westland, 627 N.W.2d 27 (Mich. App. 2001) (cited at Answer, pp. 15:27-16:2) is both factually and legally distinguishable from this matter. In that case the appellant, a professional legal corporation, requested the City of Westland provide the names, address, injury codes, and accident dates of, *inter alia*, deceased accident victims who were involved in automobile accidents during a specified period and who were not at fault for the accident. *Id.* at 28. In its briefing to the Michigan Court of Appeals, the legal corporation acknowledged that "it sought the information in order to communicate with people who might need legal services." *Id.* at 31. In holding that the City properly declined to disclose the records, the Michigan Court found that—unlike the instant case—the "request for information about private citizens" was "unrelated to any inquiry regarding the workings of the government," and thus did not implicate the public interest. *Id.* at 31. The current

request by the Review-Journal is entirely related to an inquiry regarding the workings of the Coroner's office and agencies charged with protecting vulnerable children and, thus would implicate the public interest even under the analysis undertaken by Michigan courts.

Finally, the Coroner inexplicably cites to *Montesano v. Donrey Media Group*, 99 Nev. 644, 688 P.2d 1081 (1983) in its discussion of redaction. (Answer, p. 15:15-18.) While the Coroner is correct that the *Montesano* case outlines the elements of the tort of public disclosure of private facts, that case is irrelevant here. Notably, in *Montesano*, the Court found the appellant did not have grounds to bring a public disclosure claim. In that case, the appellant sued the respondent media entity after it published an article regarding officers who had died in the line of duty, which referenced the appellant's involvement in a hit-and-run accident that resulted in the death of a Las Vegas police officer. *Id.* at 646-67, 1083. The reporting on that accident was culled from a publicly available parole and probation report. *Id.* at 648, 1084. The Nevada Supreme Court held that reporting on public facts, however, does not give rise to a claim of invasion of privacy. *Id.* at 649, 1085 ("The courts have universally recognized that, for the purposes of the tort of invasion of privacy, materials properly contained in a court's official records are public facts.") (citations omitted). It is therefore unclear why the Coroner is citing to this case. Certainly, Nevada law does recognize a tort for public disclosure of private facts, but like the *Montesano* case, but that is simply not at issue here.

In sum, the Coroner's entire legal argument in favor of redaction is inapposite case law dealing with legal claims and issues that are not at play here. Unlike the cases the Coroner cites to, the Review-Journal is not seeking public records to further a pecuniary interest. Nor is the Review-Journal seeking to obtain or use death images at all, much less for the lurid or improper purposes exemplified by the cases the Coroner cites. The Review-Journal is instead exercising its rights under the First Amendment and the NPRA to obtain access to public records so that it can further its mission of informing the public about the workings of state and local governments, and the Court must reject the Coroner's efforts to stymie this important goal.

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2. The Balance of Interests Tips in Favor of Disclosure of The Records Without Redacting the Coroner's Pathological Observations.

For purposes of this remand, it is presumed that the records at issue implicate nontrivial privacy interests. Because no party can dispute that there is a significant public policy interest in disseminating information pertaining to child abuse and fatalities, generally, the question remaining for this Court is whether there is a significant public interest in the particular information the Coroner seeks to redact.

In arguing that the Review-Journal has not met its burden of demonstrating a significant interest in access that outweighs privacy concerns, the Coroner again labors under the incorrect assumption that the information it proposed redacting is unrelated to information about a decedent's cause of death. (Answer p. 16:7-8 (stating that the Coroner explained that the redactions to the sample reports was "medical information unrelated to the death of the decedent"); *id.* at p. 16:19-20 ("It bears repeating, the Coroner's position is that all information related to the cause and manner of death would be unredacted.").) But again, the Coroner's argument is premised on the incorrect assumption that the information redacted from those reports—the Coroner's external, internal, and other pathological observations[2]—are somehow unrelated to the cause of death. This is an absurd premise; the Coroner's conclusion as to a particular decedent's cause of death did not appear from thin air or spring from the Coroner's imagination. Rather, the cause of death determination is based on observations made during the Coroner's internal, external, microscopic, and toxicological examinations. The redacted information is inextricably linked to each decedent's cause of death.

In any event, the public's interest in access to the information is significant and multi-faceted. In addition to the important interests in increasing the public's understanding

[2] Redacted from the Salgado report (LVRJ099-103); redacted from the White report (LVRJ109-112); redacted in large part from the Wickard report (LVRJ115-122).

of the Coroner's decisions regarding causes of deaths and the accuracy of those decisions, providing the public with vital health information, furthering the integrity of the criminal justice system, and enhancing the public's understanding of crimes of significant public interest (like the murder of vulnerable children), it can help the public understand and assess state and local child welfare programs. The Coroner notes that it is not responsible for protecting vulnerable children as an attempt to undermine the significance of this public interest. (Answer, p. 17:1-2.) That is accurate but irrelevant. As the agency responsible for investigating suspicious deaths, the Coroner is necessarily the agency who makes receives and examines deceased juveniles, including juveniles who were or had been under the supervision of local child protective services. Thus, access to the information the Coroner gathers during the examination of a juvenile who died after having been under the supervision of child protective services can help the public understand and assess how well child protective service agencies are fulfilling their responsibilities to the County's vulnerable children.

The Review-Journal has amply established that there is a public significant interest in access to information regarding the observations and conclusions the Coroner makes during its examination of children who have died under unusual circumstances. Access to that information furthers not just the public's understanding of the work the Coroner performs, but also furthers the public's understanding of whether child protective services are effectively protecting vulnerable children. Thus, the Court should order the Coroner to produce the requested reports without the broad redactions the Coroner proposes.[3]

C. The Coroner is Not Entitled to Charge a Fee for Extraordinary Use.

1. The Legislature's Unqualified Repeal of Nev. Rev. Stat. § 239.055 Forecloses the Coroner from Seeking "Extraordinary Use" Fees.

Prior to June 13, 2019, the NPRA provided that if a request for a copy of a public record would require a governmental entity to make "extraordinary use of its personnel or

[3] As noted in the Review-Journal's Opening Brief, the Review-Journal does not object to the redaction of personal identifying information such as Social Security numbers, identification card or driver's license numbers, and other similar identifying information. (OB, p. 21, n.46.)

technological resources," the governmental entity could, in addition to any other fee authorized by the NPRA, "charge a fee" for costs it "actually incurred… for the extraordinary use," though "not to exceed 50 cents per page." Nev. Rev. Stat. § 239.055(1) (2013). On June 13, 2019, however, the Governor signed into law Senate Bill 287 ("SB 287"). (**Exh. 1**.) As stated in the preamble to SB 287, change in the law was intended in part to "revis[e] provisions governing the fees that governmental entities are authorized to charge for a copy of a public record." (*Id.*, p. 1.) As part of that revision, the Legislature specifically repealed Nev. Rev. Stat. § 239.055, the provision which permitted governmental entities to charge requesters a fee not to exceed 50 cents per page if a request required the "extraordinary use" of an entity's personnel or technological resources. While most of the provisions of SB 287 apply to actions "filed on or after October 1, 2019 (*id.*, p. 10, § 11), SB 287 stated that "NRS 239.055 is hereby repealed," providing no delay date (*id.*, p. 10, § 13), thus making its repeal both immediate and applicable to actions, such as the instant one, that were filed before October 1, 2019.

Contrary to the assertions by the Coroner, the plain language of SB 287 demonstrates that the Legislature intended that the repeal of Nev. Rev. Stat. § 239.055 take effect immediately. While the Coroner relies on a summary section of SB 287 (*see* Answer, p. 22:17) and legislative history gymnastics regarding amendments to a related provision of the NPRA (Answer, p. 19:7-28) to argue that the repeal of Nev. Rev. Stat. § 239.055 does not impact this case, these arguments fail when the plain language of SB 287 is considered in its entirety.

As the Coroner notes, Section 11 of SB 287 provides that the "amendatory" provisions of SB 287 would apply prospectively to cases filed on or after October 1, 2019. (**Exh. 1**, p. 10, § 11.) The amendments referred to in Section 11 included, among other things, adding a new civil penalties provision for willful violations of the NPRA (*id.*, pp. 2-3 § 1), adding language to the legislative findings of the NPRA, Nev. Rev. Stat. § 239.001 (*id.*, p. 3, § 2), changing the definition of "actual cost" in Nev. Rev. Stat. § 239.005 (*id.*, p. 3, § 3), amending the Act to clarify that a governmental entity is required to produce public records

in electronic format in an electronic medium (*id.*, pp. 5-8, § 5), and clarifying how and when a governmental entity must respond to a records request. (*Id.*, pp. 8-9, §§ 6-7.) Thus, the Legislature intended its *amendments* to the NPRA to apply only to new cases filed on or after October 1, 2019.

Section 13 is the provision of the Bill dealing with Nev. Rev. Stat. § 239.055 and refers to the removal of that statute as a "repeal." In the Section 13 repeal of the extraordinary use provision, the Legislature chose not to refer to it as an amendment and (unlike Section 11) chose not to include any savings clause or other proviso to delay its application. Section 13 merely states, clearly and simply, "NRS 239.055 is hereby repealed." (*Id.*, § 13.) "[I]t is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after." *State of South Carolina v. Gaillard*, 101 U.S. 433, 438, 25 L. Ed. 937 (1879); *accord French v. French*, 91 Nev. 248, 251, 533 P.2d 1357, 1359 (1975); *see also Napa State Hospital v. Flaherty* 134 Cal. 315, 317, 66 P. 322 (1901) ["It is a rule of almost universal application, that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause"]); *Quick v. City of Austin*, 7 S.W.3d 109, 125 (Tex. 1998) ("When a cause of action is based on a statute, the repeal of that statute without a savings clause for pending suits is usually given immediate effect.")

Where the Legislature has wanted to repeal a statute without affecting existing actions, it has made that clear (as it did with the rest of SB 287). For example, as described by the Supreme Court in *Gill v. Goldfield Consol. Mines Co.*, 43 Nev. 1, 176 P. 784, 786 (1918), in a 1915 act revising laws pertaining to civil suits, the Legislature included this language in a bill:

> "Sections 389, 390, 391, 392, 393, 394, 395, 396, and 397 of the above–entitled act, and all provisions of law in conflict herewith, are hereby repealed; but nothing contained herein shall affect or invalidate any proceedings already had in any action or special proceeding now pending,

> but said action or proceeding may be finally heard and determined upon the record made under the existing law."

Gill v. Goldfield Consol. Mines Co., 43 Nev. 1, 176 P. 784, 786 (1918), *aff'd*, 43 Nev. 1, 184 P. 309 (1919). SB 287, by contrast, did not provide any similar limitations to its repeal of Nev. Rev. Stat. § 239.055.

Additionally, Nevada follows the statutory interpretation maxim of *"expressio unius est exclusio alterius*"—that is, the expression of one thing is the exclusion of another. *Cramer v. State, DMV*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010) (citation omitted). Here, Section 11 of SB 287 set forth a specific effective date for its "amendatory provisions." Nev. Rev. Stat. § 239.055 was not, however, one of the "amendatory provisions" of SB 287. Nev. Rev. Stat. § 239.055 was dealt with in Section 13, which provided not for its amendment, but for repeal. Thus, the Legislature clearly intended to treat SB 287's amendments to the NPRA one way, but treat its repeal of Nev. Rev. Stat. § 239.055 differently by (1) expressing the repeal in a section separate from the amendatory provisions, and (2) not limiting the repeal to only cases filed after a specific date.

The Coroner attempts to avoid the Legislature's plain distinction between amendments to the NPRA and its repeal of Nev. Rev. Stat. § 239.055 by arguing that because SB 287 amended Nev. Rev. Stat. § 239.005—the definitional provision of the NPRA—the Legislature intended that the amendment of that section and the repeal of Nev. Rev. Stat. § 239.055 to both be applicable only to actions applied on or after October 1, 2019. (Answer, pp. 23:13 - 24:18.) This is a logical stretch the Court should not indulge.

The Coroner is correct that SB 287 amended the definition of "actual cost," but that amendment represented a clarification of the definition of "actual cost"—not a sweeping change to the definition. Prior to SB 287, Nev. Rev. Stat. § 239.005(1) defined "actual cost" as "the direct cost related to the reproduction of a public record. The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record." In other words, under the pre-SB 287 version of Nev. Rev. Stat. § 239.005(1) prohibited governmental entities from charging requesters overhead costs like staff time. SB 287 amended Nev. Rev. Stat. § 239.005(1) with enumerated examples of

what "actual costs" are (to wit, costs such as paper, toner, ink, postage, and media) without changing the fundamental principle that governmental entities cannot pass overhead costs on to a requester. As Senator Kieckhefer observed, even with the repeal of Nev. Rev. Stat. § 239.055, governmental entities would still be able to recoup their actual costs—something, again, was true under either the pre- or post-SB 287 version of the NPRA. (*See* Answer, pp. 21:28-22:5 (quoting Hearing on SB 287 Before the Assembly Subcommittee on Government Affairs, 80 Leg. (Nev. June 3, 2019).) Therefore, the changes to Nev. Rev. Stat. § 239.005 are irrelevant. Because Nev. Rev. Stat. § 239.055 was repealed, the Coroner cannot demand fees based on it.

2. Adhering to the Legislature's Repeal of Nev. Rev. Stat. § 239.055 Does Not Implicate Retroactivity.

Because SB 287 clearly demonstrates a legislative intent for the repeal of Nev. Rev. Stat. § 239.055 to apply to pending litigation, it must be applied to this case even if the application to this case is "retroactive" as that legal term of art is defined by the Nevada Supreme Court. However, since the application of the repeal to this case does not within the definition of "retroactive", the Coroner could not avail itself of the repealed statute even if the legislative intent were unclear.

Courts "take a 'commonsense, functional' approach" in analyzing whether applying a new statute would constitute retroactive operation. *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quotation omitted). A statute does not operate "retrospectively merely because it draws upon past facts or upsets expectations in prior law." *Id.*, 129 Nev. at 821, 313 P.3d at 854 (2013) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) and *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008) ("*PEBP*")). Instead, a statute has retroactive effect only when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,'" *Sandpointe Apts.*, 129 Nev. at 821, 313 P.3d at 854 (quoting *PEBP*, 179 P.3d at 553–54). "[W]hen a pending action

rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.'" *Governing Board v. Mann*, 18 Cal.3d 819, 829, 135 Cal.Rptr. 526, 558 P.2d 1 (1977) (citation omitted); *accord Beverly Hilton Hotel v. Workers' Comp. Appeals Bd.*, 176 Cal. App. 4th 1597, 1604, 99 Cal. Rptr. 3d 50, 54 (2009). A "vested right" "is some interest in the property that has become fixed and established." *Application of Filippini*, 66 Nev. 17, 202 P.2d 535, 537 (1949); *see also id.* ("The term 'vested rights', as that term is used in relation to constitutional guarantees, implies an interest it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice.")

The repeal of Nev. Rev. Stat. § 239.055 may have upset the Coroner's expectation that it would be entitled to seek "extraordinary use" fees for providing the Review-Journal the requested autopsy reports, but that does not mean applying the Legislature's repeal of the statute to this case implicates retroactivity, because Nev. Rev. Stat. § 239.055 did not create a vested right entitling the Coroner to fees. This is so because the Coroner was obligated to respond to the Review-Journal's records request, regardless of whether responding would require the so-called "extraordinary use" of personnel or technological resources. Nev. Rev. Stat. § 239.010(1) (providing that public books and records "must be open at all times" for inspection and copying).

Instead, Nev. Rev. Stat. § 239.055 provided a mechanism for governmental entities to recover "extraordinary use" fees based on a showing of reasonableness and evidence that it incurred actual costs—not a right to extraordinary use fees. *See Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 258, 956 P.2d 117, 120 (1998) (quoting *T.R.G.E. Co. v. Durham*, 38 Nev. 311, 316, 149 P. 61, 62 (1915)) ("the general rule against retrospective construction of a statute does not apply to statutes relating merely to remedies and modes of procedure"). Moreover, even if Nev. Rev. Stat. § 239.055 did create a "right" to extraordinary use fees, the Coroner has never provided the evidence of the costs that would make that right vested. *See Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (holding that developer had no vested rights in city's strict adherence to approved master

plan where applications for zoning, subdivision maps, architectural design, and building permits had yet to be submitted and approved, and the only discretionary act performed by the city was approval of the master plan.)

As further proof that the Coroner has no vested rights related to "extraordinary use" fees, the NPRA provides no mechanism for a governmental entity to seek fees from a requester. Pursuant to the now-repealed Nev. Rev. Stat. § 239.055, a governmental entity seeking "extraordinary use fees" was required "inform the requester, in writing, of the amount of the fee before preparing the requested information." Additionally, neither Nev. Rev. Stat. § 239.055 or the NPRA more generally permits a governmental entity to seek court resolution of any dispute pertaining to a records request, including fees disputes. Instead, the NPRA solely permits requesters to seek judicial intervention. Nev. Rev. Stat. § 239.011(1). Thus, even if a governmental entity believed it was entitled to "extraordinary use" fees under Nev. Rev. Stat. § 239.055, it had no recourse for obtaining those fees other than refusing to fulfill a request.

In addition the fact that the Coroner does not have a vested right to extraordinary use fees, the repeal of Nev. Rev. Stat. § 239.055 does not create any new obligation for the Coroner, does not impose any new duties on the Coroner, and does not attach any new disabilities to the Coroner. Thus, the repeal of that provision of the NPRA and the adherence to that repeal in this matter does not implicate retroactivity.

3. Even Assuming *Arguendo* That Nev. Rev. Stat. § 239.055 Applies to this Matter, the Coroner is Not Entitled to Extraordinary Use Fees for Review and Redaction.

The Coroner cites to the Supreme Court's decision in *Coroner* for the proposition that the Supreme Court "determined that NRS 239.055 provides a 50-cent cap for a government entity's extraordinary use of personnel and technological resources to prepare the requested information in response to a public records request." (Answer, p. 17:19-22.) However, the Court never held that the Coroner could charge such a fee in this case. Indeed, the Court noted that allowing the Coroner to charge a "for staff to review the requested reports before disclosing them, and to allow such costs as 'extraordinary use' costs, would

be to flatly ignore the plain language of NRS 239.055(1) explicitly limiting fees that may be assessed specifically for 'extraordinary use' of personnel." *Coroner*, 136 Nev. 44, 59, 458 P.3d 1048, 1060. While the Court recognized that governmental entities could charge an extraordinary use fee under proper circumstances (and under the then-extant version of the NPRA), the Court was careful to note that such a fee must be "based on the ***cost[s] [the Coroner's Office] actually incurs for the extraordinary use of personnel***" and stopped short of saying the Coroner was entitled to charge any extraordinary use fees in this matter. *Id.* (emphasis added; quoting Nev. Rev. Stat. § 239.055(1).)

a. Responding to Records Requests is an Ordinary Obligation for Governmental Entities.

As a preliminary matter, responding to public records requests—even ones involving multiple reports such as the instant matter—is not "extraordinary" because governmental entities have a mandatory duty to respond to public records requests. *See, e.g.*, Nev. Rev. Stat. § 239.010(1) (mandating that public records of a governmental entity "must be open at all times" for inspection and copying); Nev. Rev. Stat. § 239.0107(1) (outlining a governmental entity's mandatory obligations in responding to records requests). As the Coroner correctly points out, the term "extraordinary use" is not defined for the purposes of the NPRA. However, the Nevada Supreme Court's case law indicates that "extraordinary use" requires more than retrieval and redaction of information. *See PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 840, 313 P.3d 221, 225 (2013) (citing Nev. Rev. Stat. § 239.055 as a basis for reversing the district court's limitation of the fees PERS could charge for producing a report with certain information about retirees to actual costs under Nev. Rev. Stat. § 239.052 "to the extent that the district court ordered PERS to create new documents or customized reports"); *Pub. Employees' Ret. Sys. of Nevada v. Nevada Policy Research Inst., Inc.*, 134 Nev. 669, 678, 429 P.3d 280, 288 (2018) (noting that PERS had the ability to seek extraordinary use fees for searching of a database or the creation of a program to search for existing information).

Here, the Coroner premises its calculation that responding to the Review-Journal's request will require the "extraordinary use" of personnel based on the August 30, 2017,

declaration of Clark County Coroner John Fudenberg. (*See* Answer, p. 25:16-18 (citing Exh. A to its August 30, 2017, Response to the Review-Journal's Opening Brief).) In that declaration, the only "extraordinary" work Mr. Fudenberg identified was reviewing and redacting the requested reports. (*See* Exh. A to August 30, 2017 Response, ¶ 11 (discussing the Coroner's internal evaluation of what information would be redacted from the reports); ¶ 12 (alleging the redaction process is "tedious"); ¶ 14 (providing a calculation of the time required for redaction).) The Coroner does not allege that fulfilling the Review-Journal's request would require any sort of specialized equipment or technological resources—it just alleges that redaction takes time. But taking the time to redact records is not "extraordinary;" it is a routine facet of producing records that may contain confidential information.

As additional support for its argument that it is entitled to "extraordinary use" fees for redacting the requested reports, the Coroner cites to a 2002 Attorney General Opinion, AGO 2002.32. (Answer, p. 25:6-15.) As the Coroner acknowledges, "[r]elying on the legislative history of Assembly Bill 214 (1997)," the Attorney General opined that any request that took more than 30 minutes to fulfill qualified as "extraordinary."

Attorney General Opinions are not binding on the Court[4]; at most, they are persuasive authority which informs courts about how the executive branch interprets Nevada's laws. *Cannon v. Taylor*, 88 Nev. 89, 91-92, 493 P.2d 1313, 1314 (1972); *accord Coroner*, 136 Nev. at 57, 458 P.3d at 1058. The Attorney General's 2002 interpretation of the NPRA in this instance, however, is of no persuasive value given the sweeping changes that were made to the NPRA 5 years after its issuance. As discussed in *Gibbons*, in 2007 "the Legislature amended the NPRA to provide that its provisions must be liberally construed to maximize the public's right of access" and that "any limitations or restrictions on the public's right of access must be narrowly construed." *Gibbons*, 127 Nev. at. 878, 266 P.3d at 626 (citing Nev. Rev. Stat. § 239.001(1)-(3)). Further, the *Gibbons* Court explained, "the Legislature amended the NPRA to provide that if a state entity withholds records, it bears the

[4] *Univ. & Cmty. Coll. Sys. of Nev. v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001).

burden of proving, by a preponderance of the evidence, that the records are confidential." *Id.* (citing Nev. Rev. Stat. § 239.0113). In other words, with the 2007 amendments to the NPRA, the work that a governmental entity must do to justify nondisclosure of a public record increased—the government now bears the burden of proving a record is not confidential, and must do so against the backdrop of an increased emphasis on access. Thus, the 30-minute cut-off point for distinguishing between an "ordinary" and "extraordinary" use is a meaningless calculation under the new scheme of the NPRA.[5]

b. Requiring Requesters to Pay for a Governmental Entity to Withhold Public Records is Contrary to the Purpose of the NPRA.

Further, given the NPRA's mandate that its terms be interpreted consistently with promoting access, the Coroner's proposed charges are impermissible because they operate to deter access to public records. *See McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986) ("An ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended.") (quotation omitted). Indeed, as the Coroner acknowledges, the only work it would be required to do in this case is redaction; the Coroner has not produced evidence that it has created new documents, created novel software to facilitate access, or done anything that could conceivably be considered "extraordinary use" of personnel or technological resources.

Requiring a requester to pay a public entity to withhold documents (or parts thereof) would be an absurd result because the entire purpose of the NPRA is to *facilitate* access to records—not limit it. *See S. Nevada Homebuilders Assn v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (noting that courts must "interpret provisions within a common

[5] Moreover, the Coroner's estimate of the time it would take to redact the requested reports is premised on the Coroner's determination in 2017 of what information it was permitted to redact and how long it took to redact that information from the sample autopsy report. As discussed in the Review-Journal's Opening Brief and above, those redactions were unjustifiably overbroad. Assuming this Court agrees that the redactions were overbroad but still permits the Coroner to redact some information, that time calculation would no longer be a valid estimate, as the amount of time the Coroner would have to dedicate to redacting each report would be reduced.

statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent") (quotation omitted); *see also Cal. Commercial Enters. v. Amedeo Vegas I, Inc*., 119 Nev. 143, 145, 67 P.3d 328, 330 (2003) ("When a statute is not ambiguous, this court has consistently held that we are not empowered to construe the statute beyond its plain meaning, unless the law as stated would yield an absurd result.").

The Coroner is legally obligated to undertake a search and review of responsive records when it receives an NPRA request. *See, e.g.*, Nev. Rev. Stat. § 239.0107(1)(a). Further, "[t]he public official or agency bears the burden of establishing the existence of privilege based upon confidentiality." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty*., 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). Because it is the government's burden to establish a record is confidential, it would not make sense to require the requester to pay for the expenses a governmental entity incurs in meeting that burden. Moreover, allowing a governmental entity to charge fees for searching for, reviewing, withholding, and redacting records is not consistent with the mandates regarding statutory construction contained in the NPRA, which require this Court to interpret the terms of the NPRA liberally in favor of access and any restrictions on access to public records narrowly *See* Nev. Rev. Stat. § 239.001(2)-(3); *PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 837, 313 P.3d 221, 223 (2013) ("[I]n order to advance the Act's public access goal, the Act's 'provisions must be liberally construed to maximize the public's right of access,' and 'any limitations or restrictions on [that] access must be narrowly construed.'") (quoting *Gibbons*, 127 Nev. at 878, 266 P.3d at 626); *see also Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 203 (2005) ("[W]e will attempt to read [conflicting] statutory provisions in harmony, provided that this interpretation does not violate legislative intent."). It would be illogical and unfair to provide governmental entities a monetary incentive to take extra time to over-redact documents, which allowing them to charge for redaction would do. Accordingly, the Coroner should not be allowed to charge the Review-Journal a per-page fee for withholding information from the public.

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4. The Coroner Has Not Demonstrated That a 50-Cent Per-Page Fee Is Based on the Reasonable Use of Personnel or Resources or That It Will Incur Actual Costs in Fulfilling the Review-Journal's Request.

Strangely, although the Supreme Court rejected the Coroner's assertion that it was entitled to charge a $45.00 hourly fee for the production of the records in this matter (*see Coroner*, 136 Nev. at 58, 458 P.3d at 1059) the Coroner still seems to rely on that hourly rate to argue that its demand for "extraordinary use" fees is "reasonable." (Answer, p. 26:7-21.) According to the Coroner, the hourly rate of the lowest-compensated employee qualified to make redactions is $45.00 per hour, and its per-page printing fee is $1.00. (*Id.*, p. 26:12-14.) But the Supreme Court held that extraordinary use fees were capped at 50 cents per page, and therefore the Coroner could not charge at its desired rates—as the Coroner acknowledges. (*Id.*, p. 25:14-16.) So, the Coroner concludes, it is "reasonable" to allow it to charge the Review-Journal 50 cents per page for "extraordinary use" because that rate is not quite as unreasonable as the rate the Coroner originally purported it was entitled to charge. (*Id.* p. 12:17-20.)

But the mere fact that a 50-cent per page fee is less than what the Coroner originally wanted to charge does not make the fee "reasonable."[6] Instead, to be reasonable, any fee for extraordinary use must be based on *actual extraordinary* use of personnel or technological resources. Moreover, under the NPRA (both pre- and post-287), any fee for extraordinary use "'must be reasonable,' and it 'must be based on the cost[s] [the Coroner's Office] actually incurs for the extraordinary use of its personnel.'" *Coroner*, 136 Nev. at 59, 458 P.3d at 1060 (citing Nev. Rev. Stat. § 239.055(1); alteration in original). And under Nev. Rev. Stat. §

[6] Moreover, the Coroner appears to assume that Nev. Rev. Stat. § 239.055 entitles it to charge 50 cents per page, full stop. Nev. Rev. Stat. § 239.055, however, ***capped*** "extraordinary use" fees at 50 cents per page rather than setting a flat rate. And, as noted above, Nev. Rev. Stat. § 239.0585 specifically required that any "extraordinary use" fees requested by a governmental entity must be "reasonable"—and the burden is on the governmental entity to prove that its "extraordinary use" was in fact reasonable. Thus, Nev. Rev. Stat. § 239.055 did not automatically entitle the Coroner to charge the maximum 50 cents per page.

239.005(1) (both pre- and post-SB 287), those costs cannot include a "cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record"—like staff time.

Here, the only "cost" that the Coroner has identified is staff time. Staff time, however, is an overhead cost that the Coroner would incur regardless of whether or not the Review-Journal had ever made a records request. Thus, the Coroner has failed to demonstrate that it is entitled to charge the Review-Journal extraordinary use fees under the now-repealed Nev. Rev. Stat. § 239.055.

IV. CONCLUSION

Accordingly, the Review-Journal's Petition should be granted in its entirety.

DATED this 22nd day of October, 2020.

/s/ Margaret A. McLetchie

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MCLETCHIE LAW

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITIONER'S OPENING BRIEF ON REMAND in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner,* Eight Judicial District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

/s/ Pharan Burchfield
An Employee of McLetchie Law

INDEX OF EXHIBIT(S)	
Exhibit	**Description**
1	80th (2019) Session Senate Bill 287

MCLETCHIE LAW

EXHIBIT 1

Senate Bill No. 287–Senators Parks, Hansen, Spearman; Cancela, Denis, Kieckhefer, Scheible and Woodhouse

CHAPTER.....

AN ACT relating to public records; revising provisions relating to the manner of providing copies of public records; revising provisions governing the actions taken by governmental entities in response to requests for public records; revising provisions relating to the relief provided for a requester of a public record who prevails in a legal proceeding; revising provisions governing the fees that governmental entities are authorized to charge for a copy of a public record; providing civil penalties; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that all public books and public records of a state or local governmental entity, unless otherwise declared by law to be confidential, are required to be open at all times during office hours for the public to inspect, copy or receive a copy thereof. Existing law also authorizes a person to request a copy of a public record in any medium in which the public record is readily available. (NRS 239.010) The purpose of the existing law governing public records, as stated in the legislative declaration for that law, is, in part, to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law. (NRS 239.001) **Section 2** of this bill provides that the legislative intent is for such access to be provided promptly. **Sections 2 and 4** of this bill make changes to conform with existing law which provides that, in addition to the right to inspect and copy a public record, members of the public have the right to receive a copy of a public record upon request.

With certain exceptions, existing law prohibits a governmental entity from charging a fee for providing a copy of a public record that exceeds the actual cost to the governmental entity to provide the copy. (NRS 239.052) **Section 3** of this bill clarifies that the actual cost to a governmental entity includes such direct costs as the cost of ink, toner, paper, media and postage. **Section 13** of this bill eliminates the authority of a governmental entity to charge an additional fee for providing a copy of a public record when extraordinary use of personnel or resources is required. (NRS 239.055)

Section 5 of this bill specifically authorizes the electronic redaction of public books and records. **Section 5** also requires, with limited exception, a governmental entity, if requested, to provide a copy of a public record in an electronic format by means of an electronic medium unless the public record was requested in a different medium.

Under existing law, if a person requests to inspect or copy a public book or record or receive a copy of a public book or record which the governmental entity is unable to make available by the end of the fifth business day after the request was received, the governmental entity is required to provide written notice of that fact to the person who made the request and the date and time after which the public record or the copy of the public book or record will be available. (NRS 239.0107) **Section 6** of this bill clarifies that the date and time provided to the requester must reflect the earliest date and time after which the governmental entity reasonably believes the public book or record will be available. If the public book

or record is not made available by this date and time, **section 6** requires the governmental entity to provide to the requester, in writing, an explanation of the reason the public book or record is not available and a date and time after which the governmental entity reasonably believes the public book or record will be available. **Section 6** also requires a governmental entity that is unable to provide access to a public book or record within the prescribed time period to make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public book or record as expeditiously as possible.

If a request for inspection, copying or copies of a public book or record is denied, existing law authorizes a requester to apply to a district court for an order permitting the requester to inspect or copy the record or requiring the person who has legal custody or control of the public record to provide a copy to the requester. Existing law provides that if the requester prevails in such a proceeding, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record. (NRS 239.011) **Section 7** of this bill authorizes a requester of a public record to apply to a district court for a similar order if a request for inspection, copying or copies of a public record is unreasonably delayed or if a person who requests a copy of a public book or record believes that the fee charged by the governmental entity for providing the copy of the public book or record is excessive or improper. **Section 1** of this bill provides that if a court determines that a governmental entity willfully failed to comply with the existing law governing public books and records concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty.

Section 11 of this bill provides that the provisions of the bill apply to actions filed on and after October 1, 2019, which is the effective date of this bill.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 239 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In addition to any relief awarded pursuant to NRS 239.011, if a court determines that a governmental entity willfully failed to comply with the provisions of this chapter concerning a request to inspect, copy or receive a copy of a public book or record, the court must impose on the governmental entity a civil penalty of:

(a) For a first violation within a 10-year period, $1,000.

(b) For a second violation within a 10-year period, $5,000.

(c) For a third or subsequent violation within a 10-year period, $10,000.

2. A civil penalty imposed pursuant to subsection 1 must be deposited in and accounted for separately in the State General

Fund. The money is the account may be used only by the Division of State Library, Archives and Public Records of the Department of Administration to improve access to public records, and is hereby authorized for expenditure as a continuing appropriation for this purpose.

3. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.

Sec. 2. NRS 239.001 is hereby amended to read as follows:

239.001 The Legislature hereby finds and declares that:

1. The purpose of this chapter is to foster democratic principles by providing members of the public with ***prompt*** access to inspect , ~~[and]~~ copy ***or receive a copy of*** public books and records to the extent permitted by law;

2. The provisions of this chapter must be construed liberally to carry out this important purpose;

3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly;

4. The use of private entities in the provision of public services must not deprive members of the public access to inspect , ~~[and]~~ copy ~~[books and]~~ ***or receive a copy of books and*** records relating to the provision of those services; and

5. If a public book or record is declared by law to be open to the public, such a declaration does not imply, and must not be construed to mean, that a public book or record is confidential if it is not declared by law to be open to the public and is not otherwise declared by law to be confidential.

Sec. 3. NRS 239.005 is hereby amended to read as follows:

239.005 As used in this chapter, unless the context otherwise requires:

1. "Actual cost" means the direct cost ~~[related to the reproduction]~~ ***incurred by a governmental entity in the provision*** of a public record ~~[.]~~ , ***including, without limitation, the cost of ink, toner, paper, media and postage.*** The term does not include a cost that a governmental entity incurs regardless of whether or not a person requests a copy of a particular public record.

2. "Agency of the Executive Department" means an agency, board, commission, bureau, council, department, division, authority or other unit of the Executive Department of the State Government. The term does not include the Nevada System of Higher Education.

3. "Committee" means the Committee to Approve Schedules for the Retention and Disposition of Official State Records.

4. "Division" means the Division of State Library, Archives and Public Records of the Department of Administration.

5. "Governmental entity" means:

(a) An elected or appointed officer of this State or of a political subdivision of this State;

(b) An institution, board, commission, bureau, council, department, division, authority or other unit of government of this State, including, without limitation, an agency of the Executive Department, or of a political subdivision of this State;

(c) A university foundation, as defined in NRS 396.405;

(d) An educational foundation, as defined in NRS 388.750, to the extent that the foundation is dedicated to the assistance of public schools; or

(e) A library foundation, as defined in NRS 379.0056, to the extent that the foundation is dedicated to the assistance of a public library.

6. "Official state record" includes, without limitation:

(a) Papers, unpublished books, maps and photographs;

(b) Information stored on magnetic tape or computer, laser or optical disc;

(c) Materials that are capable of being read by a machine, including, without limitation, microforms and audio and visual materials; and

(d) Materials that are made or received by a state agency and preserved by that agency or its successor as evidence of the organization, operation, policy or any other activity of that agency or because of the information contained in the material.

7. "Privatization contract" means a contract executed by or on behalf of a governmental entity which authorizes a private entity to provide public services that are:

(a) Substantially similar to the services provided by the public employees of the governmental entity; and

(b) In lieu of the services otherwise authorized or required to be provided by the governmental entity.

Sec. 4. NRS 239.008 is hereby amended to read as follows:

239.008 1. The head of each agency of the Executive Department shall designate one or more employees of the agency to act as records official for the agency.

2. A records official designated pursuant to subsection 1 shall carry out the duties imposed pursuant to this chapter on the agency of the Executive Department that designated him or her with respect to a request to inspect , ~~[or]~~ copy *or receive a copy of* a public book or record of the agency.

3. The State Library, Archives and Public Records Administrator, pursuant to NRS 378.255 and in cooperation with the Attorney General, shall prescribe:

(a) The form for a request by a person to inspect , ~~[or]~~ copy *or receive a copy of* a public book or record of an agency of the Executive Department pursuant to NRS 239.0107;

(b) The form for the written notice required to be provided by an agency of the Executive Department pursuant to paragraph (b), (c) or (d) of subsection 1 of NRS 239.0107; and

(c) By regulation the procedures with which a records official must comply in carrying out his or her duties.

4. Each agency of the Executive Department shall make available on any website maintained by the agency on the Internet or its successor the forms and procedures prescribed by the State Library, Archives and Public Records Administrator and the Attorney General pursuant to subsection 3.

Sec. 5. NRS 239.010 is hereby amended to read as follows:

239.010 1. Except as otherwise provided in this section and NRS 1.4683, 1.4687, 1A.110, 3.2203, 41.071, 49.095, 49.293, 62D.420, 62D.440, 62E.516, 62E.620, 62H.025, 62H.030, 62H.170, 62H.220, 62H.320, 75A.100, 75A.150, 76.160, 78.152, 80.113, 81.850, 82.183, 86.246, 86.54615, 87.515, 87.5413, 87A.200, 87A.580, 87A.640, 88.3355, 88.5927, 88.6067, 88A.345, 88A.7345, 89.045, 89.251, 90.730, 91.160, 116.757, 116A.270, 116B.880, 118B.026, 119.260, 119.265, 119.267, 119.280, 119A.280, 119A.653, 119B.370, 119B.382, 120A.690, 125.130, 125B.140, 126.141, 126.161, 126.163, 126.730, 127.007, 127.057, 127.130, 127.140, 127.2817, 128.090, 130.312, 130.712, 136.050, 159.044, 159A.044, 172.075, 172.245, 176.01249, 176.015, 176.0625, 176.09129, 176.156, 176A.630, 178.39801, 178.4715, 178.5691, 179.495, 179A.070, 179A.165, 179D.160, 200.3771, 200.3772, 200.5095, 200.604, 202.3662, 205.4651, 209.392, 209.3925, 209.419, 209.521, 211A.140, 213.010, 213.040, 213.095, 213.131, 217.105, 217.110, 217.464, 217.475, 218A.350, 218E.625, 218F.150, 218G.130, 218G.240, 218G.350, 228.270, 228.450, 228.495, 228.570, 231.069, 231.1473, 233.190, 237.300, 239.0105, 239.0113, 239B.030, 239B.040, 239B.050, 239C.140, 239C.210, 239C.230, 239C.250, 239C.270, 240.007, 241.020, 241.030, 241.039, 242.105, 244.264, 244.335, 247.540, 247.550, 247.560, 250.087, 250.130, 250.140, 250.150, 268.095, 268.490, 268.910, 271A.105, 281.195, 281.805, 281A.350, 281A.680, 281A.685, 281A.750, 281A.755, 281A.780, 284.4068, 286.110, 287.0438, 289.025, 289.080, 289.387, 289.830, 293.4855, 293.5002, 293.503,

293.504, 293.558, 293.906, 293.908, 293.910, 293B.135, 293D.510, 331.110, 332.061, 332.351, 333.333, 333.335, 338.070, 338.1379, 338.1593, 338.1725, 338.1727, 348.420, 349.597, 349.775, 353.205, 353A.049, 353A.085, 353A.100, 353C.240, 360.240, 360.247, 360.255, 360.755, 361.044, 361.610, 365.138, 366.160, 368A.180, 370.257, 370.327, 372A.080, 378.290, 378.300, 379.008, 379.1495, 385A.830, 385B.100, 387.626, 387.631, 388.1455, 388.259, 388.501, 388.503, 388.513, 388.750, 388A.247, 388A.249, 391.035, 391.120, 391.925, 392.029, 392.147, 392.264, 392.271, 392.315, 392.317, 392.325, 392.327, 392.335, 392.850, 394.167, 394.1698, 394.447, 394.460, 394.465, 396.3295, 396.405, 396.525, 396.535, 396.9685, 398A.115, 408.3885, 408.3886, 408.3888, 408.5484, 412.153, 416.070, 422.2749, 422.305, 422A.342, 422A.350, 425.400, 427A.1236, 427A.872, 432.028, 432.205, 432B.175, 432B.280, 432B.290, 432B.407, 432B.430, 432B.560, 432B.5902, 433.534, 433A.360, 437.145, 439.840, 439B.420, 440.170, 441A.195, 441A.220, 441A.230, 442.330, 442.395, 442.735, 445A.665, 445B.570, 449.209, 449.245, 449A.112, 450.140, 453.164, 453.720, 453A.610, 453A.700, 458.055, 458.280, 459.050, 459.3866, 459.555, 459.7056, 459.846, 463.120, 463.15993, 463.240, 463.3403, 463.3407, 463.790, 467.1005, 480.365, 480.940, 481.063, 481.091, 481.093, 482.170, 482.5536, 483.340, 483.363, 483.575, 483.659, 483.800, 484E.070, 485.316, 501.344, 503.452, 522.040, 534A.031, 561.285, 571.160, 584.655, 587.877, 598.0964, 598.098, 598A.110, 599B.090, 603.070, 603A.210, 604A.710, 612.265, 616B.012, 616B.015, 616B.315, 616B.350, 618.341, 618.425, 622.310, 623.131, 623A.137, 624.110, 624.265, 624.327, 625.425, 625A.185, 628.418, 628B.230, 628B.760, 629.047, 629.069, 630.133, 630.30665, 630.336, 630A.555, 631.368, 632.121, 632.125, 632.405, 633.283, 633.301, 633.524, 634.055, 634.214, 634A.185, 635.158, 636.107, 637.085, 637B.288, 638.087, 638.089, 639.2485, 639.570, 640.075, 640A.220, 640B.730, 640C.400, 640C.600, 640C.620, 640C.745, 640C.760, 640D.190, 640E.340, 641.090, 641.325, 641A.191, 641A.289, 641B.170, 641B.460, 641C.760, 641C.800, 642.524, 643.189, 644A.870, 645.180, 645.625, 645A.050, 645A.082, 645B.060, 645B.092, 645C.220, 645C.225, 645D.130, 645D.135, 645E.300, 645E.375, 645G.510, 645H.320, 645H.330, 647.0945, 647.0947, 648.033, 648.197, 649.065, 649.067, 652.228, 654.110, 656.105, 661.115, 665.130, 665.133, 669.275, 669.285, 669A.310, 671.170, 673.450, 673.480, 675.380, 676A.340, 676A.370, 677.243, 679B.122, 679B.152, 679B.159, 679B.190, 679B.285, 679B.690, 680A.270, 681A.440, 681B.260, 681B.410, 681B.540, 683A.0873, 685A.077,

686A.289, 686B.170, 686C.306, 687A.110, 687A.115, 687C.010, 688C.230, 688C.480, 688C.490, 689A.696, 692A.117, 692C.190, 692C.3507, 692C.3536, 692C.3538, 692C.354, 692C.420, 693A.480, 693A.615, 696B.550, 696C.120, 703.196, 704B.320, 704B.325, 706.1725, 706A.230, 710.159, 711.600, sections 35, 38 and 41 of chapter 478, Statutes of Nevada 2011 and section 2 of chapter 391, Statutes of Nevada 2013 and unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.

2. A governmental entity may not reject a book or record which is copyrighted solely because it is copyrighted.

3. A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to subsection 1 to inspect or copy or receive a copy of a public book or record on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate ***, including, without limitation, electronically,*** the confidential information from the information included in the public book or record that is not otherwise confidential.

4. ~~[A person may request]~~ ***If requested, a governmental entity shall provide*** a copy of a public record in ~~[any]~~ ***an electronic format by means of an electronic*** medium . ~~[in which the public record is readily available.]~~ ***Nothing in this subsection requires a governmental entity to provide a copy of a public record in an electronic format or by means of an electronic medium if:***

(a) The public record:

(1) Was not created or prepared in an electronic format; and

(2) Is not available in an electronic format; or

(b) Providing the public record in an electronic format or by means of an electronic medium would:

(1) Give access to proprietary software; or

(2) Require the production of information that is confidential and that cannot be redacted, deleted, concealed or separated from information that is not otherwise confidential.

5. An officer, employee or agent of a governmental entity who has legal custody or control of a public record:

(a) Shall not refuse to provide a copy of that public record in ~~[a readily available]~~ *the* medium ***that is requested*** because the officer, employee or agent has already prepared or would prefer to provide the copy in a different medium.

(b) Except as otherwise provided in NRS 239.030, shall, upon request, prepare the copy of the public record and shall not require the person who has requested the copy to prepare the copy himself or herself.

Sec. 6. NRS 239.0107 is hereby amended to read as follows:

239.0107 1. Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written or oral request from a person to inspect, copy or receive a copy of the public book or record, a governmental entity shall do one of the following, as applicable:

(a) Except as otherwise provided in subsection 2, allow the person to inspect or copy the public book or record or, if the request is for the person to receive a copy of the public book or record, provide such a copy to the person.

(b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:

(1) Notice of ~~[that]~~ *the* fact ~~[:]~~ ***that it does not have legal custody or control of the public book or record;*** and

(2) The name and address of the governmental entity that has legal custody or control of the public book or record, if known.

(c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request ~~[, provide]~~ ***:***

(1) Provide to the person, in writing ~~[:~~

~~(1) Notice]~~ ***notice*** of ~~[that]~~ ***the*** fact ~~[:]~~ ***that it is unable to make the public book or record available by that date*** and

~~[(2) A]~~ ***the earliest*** date and time after which the ***governmental entity reasonably believes the*** public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person. If

the public book or record or the copy of the public book or record is not available to the person by that date and time, the ~~[person may inquire regarding the status of the request.]~~ ***governmental entity shall provide to the person, in writing, an explanation of the reason the public book or record is not available and a date and time after which the governmental entity reasonably believes the public book or record will be available for the person to inspect or copy or after which a copy of the public book or record will be available to the person.***

(2) Make a reasonable effort to assist the requester to focus the request in such a manner as to maximize the likelihood the requester will be able to inspect, copy or receive a copy of the public book or record as expeditiously as possible.

(d) If the governmental entity must deny the person's request because the public book or record, or a part thereof, is confidential, provide to the person, in writing:

(1) Notice of that fact; and

(2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

2. If a public book or record of a governmental entity is readily available for inspection or copying, the person who has legal custody or control of the public book or record shall allow a person who has submitted a request to inspect, copy or receive a copy of a public book or record ~~[.]~~ ***as expeditiously as practicable.***

Sec. 7. NRS 239.011 is hereby amended to read as follows:

239.011 1. If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied ~~[,]~~ ***or unreasonably delayed or if a person who requests a copy of a public book or record believes that the fee charged by the governmental entity for providing the copy of the public book or record is excessive or improper,*** the requester may apply to the district court in the county in which the book or record is located for an order:

(a) Permitting the requester to inspect or copy the book or record; ~~[or]~~

(b) Requiring the person who has legal custody or control of the public book or record to provide a copy to the requester ~~[,]~~ ***; or***

(c) Providing relief relating to the amount of the fee,

➥ as applicable.

2. The court shall give this matter priority over other civil matters to which priority is not given by other statutes. If the requester prevails, the requester is entitled to recover ~~[this]~~ ***from the governmental entity that has legal custody or control of the record***

his or her costs and reasonable attorney's fees in the proceeding . ~~[from the governmental entity whose officer has custody of the book or record.]~~

3. If the governmental entity appeals the decision of the district court and the decision is affirmed in whole or in part, the requester is entitled to recover from the governmental entity that has legal custody or control of the record his or her costs and reasonable attorney's fees for the appeal.

4. The rights and remedies recognized by this section are in addition to any other rights or remedies that may exist in law or in equity.

Secs. 8-10. (Deleted by amendment.)

Sec. 11. The amendatory provisions of this act apply to all actions filed on or after October 1, 2019.

Sec. 12. (Deleted by amendment.)

Sec. 13. NRS 239.055 is hereby repealed.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus | **COURT MINUTES** | **October 29, 2020**

A-17-758501-W Las Vegas Review-Journal, Plaintiff(s)
vs.
Clark County Office of the Coroner/ Medical Examiner, Defendant(s)

October 29, 2020 **9:00 AM** **Hearing** **Hearing on briefs re: Remand**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building
11th Floor 116

COURT CLERK: Rem Lord

RECORDER: Nancy Maldonado

PARTIES PRESENT:

McLetchie, Margaret A.	Attorney for Plaintiff
Shell, Alina	Attorney for Plaintiff
Nichols, Jacqueline	Attorney for Deft

JOURNAL ENTRIES

ALSO PRESENT: Benjamin Lipman, Counsel for the Las Vegas Review Journal, and Arthur Kane.

The original issue was Plaintiff sought unredacted juvenile autopsy reports from the Clark County Coroner's Office for investigative reasons. The case went up to the Supreme Court, and the Supreme Court issued an Opinion. The case was Remanded for Judge Crockett to apply the balancing test regarding a non-trivial privacy interest, and whether or not it is outweighed by the significant public interest. The Court addressed counsel. Argument by Ms. McLetchie.

The Court stated it appears that the Coroner's Office wants to also serve as the judicial decider by providing a spreadsheet and redacted records, and everyone should accept on face value the contention that it is everything that pertains to the cause of death. Anything redacted doesn't need to be seen. The Court addressed the value of transparency in our Government, and the value of public oversight. Argument by Ms. Nichols. The Court offered to perform an in camera review of unredacted juvenile autopsy reports with an explanation from a qualified expert. Ms. Nichols stated an in camera review would address her concerns. Colloquy.

Upon the Court's inquiry, Ms. McLetchie didn't know the number of juvenile autopsy reports. Argument by Ms. McLetchie. Judge Crockett FINDS the multiple significant public interests identified in Ms. McLetchie's brief SUBSTANTIALLY OUTWEIGHS the non-trivial privacy interests asserted by the Coroner's Office. Ms. Nichols believes there are 600 to 700 juvenile autopsy reports. Colloquy regarding the autopsy reports are not redacted.
Arguments by counsel.

COURT ORDERED, autopsy reports requested by the Las Vegas Review Journal will be produced in an UNREDACTED format within 30 days of today's date; the Coroner's Office can determine the charges as discussed; for hard copies, the charge is capped at fifty cents per page pursuant to the Supreme Court's Opinion (page 24). Argument by Ms. McLetchie. The Court alerted both sides that given today's ruling it is only a matter of time before the Court declares Plaintiff to be the prevailing party, and it will become relevant on the issue of fees and costs. Colloquy regarding actual costs must be disclosed by the Coroner's Office.

Ms. McLetchie addressed costs. The Court addressed counsel on the cost of medical records. Colloquy. The Court stated electronic copies are fine. COURT ORDERED, the Coroner's Office can charge for a digital medium (CD). Nothing further from counsel. Based upon today's ruling, COURT ORDERED, PLAINTIFF IS THE PREVAILING PARTY, and Plaintiff can submit a supplemental Application for fees and costs, including those previously awarded.
Ms. McLetchie to prepare the Order.

CLERK'S NOTE: Minute Order typed from JAVS. (jl 12-16-2020)

Electronically Filed
11/4/2020 2:45 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Plaintiff, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Defendant.	CASE#: A-17-758501-W DEPT. XXIV

BEFORE THE HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 29, 2020

RECORDER'S TRANSCRIPT OF VIDEO CONFERENCE HEARING
REGARDING BRIEFS ON REMAND

APPEARANCES (VIA BLUEJEANS):

For the Plaintiff:	MARGARET A. MCLETCHIE, ESQ. ALINA SHELL, ESQ.
For the Defendant:	JACQUELINE NICHOLS, ESQ.
Also Appearing:	BENJAMIN LIPMAN, ESQ. ART CAIN, REPORTER

RECORDED BY: NANCY MALDONADO, COURT RECORDER

INDEX

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[Case called at 9:31 a.m.]

THE COURT RECORDER: Page 7, A758501, Las Vegas Review Journal versus Clark County Office of the Coroner/Medical Examiner.

MS. MCLETCHIE: Good morning, Your Honor, Maggie McLetchie for the Las Vegas Review Journal, Inc., bar number 10931. On the telephone I have with me Benjamin Lipman, the general counsel for the Las Vegas Review Journal, as well as Art Cain [phonetic], a reporter for the Las Vegas Review Journal, and my co-counsel Ms. Alina Shell.

THE COURT: All right. Good morning.

MS. NICHOLS: Good morning, Your Honor, Jackie Nichols here on behalf of the Clark County Coroner's Office.

THE COURT: Okay. I think I'm hearing a young, future member of the bar on the phone somewhere. Okay. So --

MS. NICHOLS: Somebody's not on mute, Your Honor.

THE COURT: -- so these -- this matter's on for hearing on the briefs that were filed after remand. If you would, please, mute your microphones because we're getting feedback, just kind of an echo effect. I can hear my voice being repeated and that could be distracting.

THE COURT RECORDER: Judge --

THE COURT: So I've read the briefs and re-read the Supreme Court's opinion. And the issue was originally the Plaintiff

sought unredacted juvenile autopsy reports from the Clark County Coroner's Office for investigative reasons and in accordance with the law that allows obtaining that kind of information as public information.

The case went up to the Supreme Court. And the Supreme Court issued an opinion. And the bottom line is that there is a balancing test to be applied.

And the Supreme Court has remanded it with instructions for me to apply this balancing test with regard to what's called a non-trivial privacy interest, which would be the justification offered by the Coroner's Office for redacting or excluding information and whether or not that non-trivial privacy interest is outweighed by the significant public interest that is advanced by in this case the Review Journal.

The problem I see is, I mean, it's not a problem. It's just something that's going to require a lot of time and effort on the part of everybody.

In order for counsel for the Las Vegas Review Journal to see whether or not the claimed non-trivial privacy interest is something that's counterbalanced or they contend it is, they would need to have it articulated what the non-trivial interest is.

For example, there were references to three autopsy reports that was made in the briefs. One of them that was particularly horrific to read about had to do with the remains of a three-year old child that was discovered in a duffel bag.

The child was deceased and had had horrific, brutal physical injuries inflicted upon the child. I don't remember the child's gender.

And there were redactions made in the records supplied by the Coroner's Office on that, but not with any explanation, as I understand it, as to why that information was excluded.

Of course, it's hard to imagine something that wouldn't be relevant to cause of death, or evidence of previous child abuse injuries, or the possible aging of previous injuries.

And I don't mean where somebody can say that something happened on a particular day, but they can say whether or not there's evidence of healing fractures or bone callus, suggesting that the fracture happened a considerable length of time before.

And then correlating that information with complaints that were rendered to Child Protective Services, for example, to find out whether or not they adequately investigated and addressed concerns that were being expressed.

There definitely is a significant public interest that exists in knowing whether or not complaints of child abuse are being adequately addressed.

So that deaths and/or future child abuse can be prevented through the lawful efforts of government agencies that are entrusted with performing that service.

The members of the public trust and -- have confidence in or want to have confidence in the work being done by enforcement and investigative agencies that are designed to prevent serious injury and death. So it's a very significant interest.

But in my review of this, in the Supreme Court's opinion

regarding this balancing test, I have no problems applying the balancing test of course.

But I think it would require an evidentiary hearing on every juvenile autopsy record, where there are redactions that are not explained at all, okay, because presumptively, if there's no reason given for them, the presumption would be that the redactions are improper and would have to be removed, that that information would have to be provided.

On the other hand, wherever there are redactions and there is a reason offered for them that the Coroner's Office says is a non-trivial privacy interest, then the burden then shifts and we have to have the Review Journal provide proof there is a significant public interest that outweighs that non-trivial privacy interest.

So in the category of those that are redactions without explanation, I think the presumption is that those redactions are invalid and have to be removed. And the redactions have to be ablated.

And as to any other redactions, if there is an explanation offered, we would have to then go in an evidentiary hearing to conduct a balancing to see whether or not the Court feels that the non-trivial privacy entry -- interest permits the redaction or if the Court feels that the attempted redaction must be overruled and reversed on the basis of a significant public interest.

That's my understanding of what is the result of the Supreme Court's opinion, but I'd like to hear from each of you, particularly if you have a differing view.

So Ms. McLetchie, first of all, let me hear from you?

MS. MCLETCHIE: Thank you, Your Honor. Maggie McLetchie for the record. So, Your Honor, the way I view the decision from the Supreme Court is that the Court found that there was, albeit a generalized one, a non-trivial privacy interest and that it remanded this matter, shifted the burden to the Las Vegas Review Journal to establish that there was a public interest at issue that was significant as the information sought would advance that interest.

It's my view that we have now met that burden. And the Coroner's opportunity, if they were going to rely on anything other than the generalized sorts of assertions that they made previously in the declaration of John Hedenberg [phonetic], their opportunity to do so, Your Honor, was in their opposition.

As the Court is well aware, this is consistent with the fact that they -- although the burden shifts to us, they also have significant burdens in public records cases and public records cases are supposed be expedited.

While the issue of what the Review Journal's interest in access was was not previously before this Court because in its decision, the Supreme Court was looking at the CCFD decision and the Cameranesi test, which it had not adopted until after this Court made its decision.

As the Court just recognized, the Nevada Supreme Court also found that there was at least one significant interest at stake.

And I want to point out that in our opening brief, we explained

that there's not just one interest, but multiple interests that access will advance.

Just generally, Your Honor, access to autopsy reports does vindicate the dead, it protects the living, and it serves as a check on government.

Here, there's two important interests at stake, the one the Court recognized, which is assessing whether the child abuse and neglect system is working and whether there have been deaths of vulnerable children that could have and should have been prevented.

While the Coroner minimizes those interests at stake, it was exploitative, and improperly relies on cases regarding death images to support its effort to overcome access.

Public policy strongly favors access for the reasons the Court articulated. We explained, consistent with the order from the Supreme Court on remand, what specific information we needed and why we needed direct access to the complete picture of all of these autopsy reports, Your Honor, both the cause of death information and other observations to assess performance of both the Coroner and the child -- the Coroner and the child and abuse neglect system.

The Coroner in response didn't come forward with any more specific arguments. And it's our view that now the balancing necessarily weighs in favor of disclosure.

And there would not be a reason for a further evidentiary hearing, because they haven't come forward and said we do have other specific information that would outweigh the significant interests and

access in that -- in this case.

They just haven't done that. Instead, they chose to stand on their legal arguments and the prior evidence, which was limited to the Hedenberg Declaration.

Here, I also want to point out that the Coroner repeatedly argues in their opposition that this isn't really about government oversight, because these records don't pertain to the Coroner's performance, but rather, the abuse and neglect system.

But first, FOIA is much more limited than the Public Records Act. And as the Supreme Court has made clear, when applying the CCSD or Cameranesi test, this Court still needs to work within the framework of the NPRA, which is not limited to records that may provide as a -- provide a check on government authority.

I do recognize, however, that in fact in the NPRA, it does recognize the general interest and access to any public record for the very reason it does promote transparency and democracy, but there's just no basis for the Coroner's position that the idea that the child and abuse system is a separate system unrelated to the Coroner's Office that it doesn't further access.

Similarly, Your Honor, I also want to point out that while we didn't previously brief this issue and we have now, there's also a separate interest in just making sure the Coroner gets it right.

And that, Your Honor, I think is why it's so important that we -- that we're not limited to information that's filtered by either attorneys for the Coroner's Office or unknown personnel for the

Coroner's Office. We're entitled to direct access consistent with the Public Records Act to be able to assess this information.

The spreadsheet is highly insufficient. It just shows name, age, sex, race, location, manner, and cause of death, very minimal information.

The Supreme Court has already resolved the question of whether they have to provide information about cases that were referred to the Child Act's review team.

The answer to that question is, yes, there is no privilege that applies there. They previously did provide some information, but again, only for cases that went to the CDR team.

With regard to the reports, and that's what we need access to, Your Honor, full access to the reports. They have redacted significant information.

And as the Court has already recognized, we have very little information. They have not come forward with evidence to support the bases for these redactions.

And this is factual information about not just the manner and cause of death, but also information that may not in the Coroner's view be related to the cause of death.

The Coroner repeatedly argues, look, we will -- we provided information that we think is related to the cause of death. But as I pointed out, sometimes coroner's offices get it wrong.

And the public is entitled to assess whether or not the Coroner did get it wrong and to look at further information, like the toxicology

information, like the full observations to assess that question.

Further, there may be information about abuse that's not directly related to the specific cause of death, but is relevant to the history with this child and the broader questions the Review Journal has raised about the abuse and neglect system, information like evidence of broken bones.

Their effort to distinguish the Dehan Hunt [phonetic] case, I think, is somewhat telling. They say, look, it was found that the abuse in that case was not substantiated.

But just like coroner's offices and other branches of government, sometimes, the abuse and neglect system gets it wrong and the public is entitled to assess whether or not there was a history of abuse that findings were made that were unsubstantiated that should have been substantiated, and whether these cases should have been looked at more closely.

Again, we should not be limited to redacted information, a spreadsheet, or information that the Coroner picks and choose that it thinks is relevant to our analyses. We are entitled to full access.

With regard to the balancing, I think the time to do the balancing is now, Your Honor. And I don't think that the Coroner has come forward with anything that merits an evidentiary hearing.

All that they've come forward with is that they've met their initial burden and they're standing by the prior evidence that they submitted, again, the declaration of John Hedenberg.

We've now answered the Supreme Court question -- the

Supreme Court's questions about what significant interests are at stake, not just the child and abuse and neglect questions, but also questions regarding the performance of the Coroner. And we've demonstrated how full access furthers those interests.

In contrast, the interests asserted by the Coroner are very generalized. They may cause access and disclosure of information may cause privacy concerns is what they assert.

In contrast, the very significant public interest at stake here outweighed those generalized concerns. The Coroner claims the Review Journal has no evidence and that -- but we cannot be required to prove what's in autopsy reports that we haven't seen.

Instead, the duty was on them in their answering brief on remand, Your Honor, to come forward with information outlaying why we should have access.

The cases the Coroner relies on with regard to the balancing test are all cases about the interests of surviving kin. They're all cases about death images that are or cases about death images that are just inapplicable here.

And I do want to point out, Your Honor, that in this, while kin do have this, the family does have a right, a statutory right, to access information about autopsy reports.

Here, we're talking about some cases in which there may not be anyone to stand up for these vulnerable children to get the autopsy reports to see if the Coroner got it wrong.

The family members may be the very people that are

implicated in the abuse. And so, there's no one to stand for these children other than the public. Public interest is great, Your Honor.

And that's my -- those are the points I want to make on the access issues. If the Court would like me to address the extraordinary use fees, I'm happy to do so as well.

THE COURT: No, we'll get to that in a minute.

MS. MCLETCHIE: Okay.

THE COURT: Let me hear from Ms. Nichols regarding the Coroner's position. And let me alert you to the fact that it appears that the Coroner's Office wants to also serve as the judicial decider of this by providing a spreadsheet and then redacted records.

And we're supposed to accept on face value their contention that that's everything that pertains to the cause of death. Anything we've redacted, you don't need to see.

And this is all about the value of transparency in our government and the value of public oversight. When a public servant, someone in government, is performing a task, and is continually aware of the fact that their actions or inactions are subject to public scrutiny that they are always being exposed to the risk of being evaluated, having performance evaluations conducted on their work, I think that serves a very significant public interest, because the job of those of us who work in government is to serve the public. That's the reason for our existence.

We've been entrusted with certain authority and certain responsibilities, certain abilities to conduct investigations and command

performances in productions of documents and materials and testimony under the color of law.

And the public not only trusts that we will do that properly, but has the right to expect that we will do it properly also.

And so, the problem I see with the Coroner's almost glib redactions is that it's as if the Coroner's Office doesn't accept the fact that they are a public servant, who the public has entrusted with the very important function and who the public has a right to know if those public servants are in fact doing their job.

And the cross-pollination of information, for example with juvenile autopsies and the effectiveness of Child Protective Services and other governmental entities that are asked to investigate allegations of child abuse is inescapable in terms of the interrelationship and how the information from one can provide information that helps to assess the efficiency of the other.

So I suppose rather than an evidentiary hearing, because I -- hearing Ms. McLetchie speak, I think I'm inclined to agree that to suggest that we would have to go through an evidentiary hearing at this point is -- I don't think that's correct timing-wise.

So there is a possibility that the Coroner's Office could submit for in camera review its positions for redactions. And I realize when I offer that up, that there are many, many records that would need to be reviewed.

But my concern is that I don't want to make a decision that forces the parties to unnecessarily go back to the Supreme Court for

further guidance, when I think all that needs to be accomplished can be accomplished at this level.

So, with that in mind, Ms. Nichols, what is your view on behalf of the Coroner's Office?

MS. NICHOLS: Well, Your Honor, I'd like to start with the Coroner's position of the Supreme Court opinion. So the Supreme Court said that the Coroner satisfied its obligation under the balancing test, demonstrating that a non-trivial privacy interest existed in these reports and that non-trivial privacy interest is the interest of the juveniles in relation to their personal health information that is not related to the cause and manner of death.

And so, what we're looking at here is --

THE COURT: Here's the problem.

MS. NICHOLS: -- if a --

THE COURT: Here's the problem. That sounds as if it's a unilateral determination being made by the Coroner, that the Coroner is saying we've redacted this. Nothing to see here regarding cause of death.

And that is a position that would defy scrutiny and oversight because any time the Coroner makes that assertion, that would be the end of the inquiry.

And that's why what Ms. McLetchie says is that they feel, the newspaper feels, that they have met their burden by showing multiple significant public interest, which outweigh, even if we assume that you have established a non-trivial privacy interest.

She says the burden has now shifted back to the Review Journal, which means it would go to another level of analysis or you would need to be able to articulate how that non-trivial interest, which the Supreme Court said was sufficiently shown, which then gives rise to the newspaper saying we have shown multiple reasons how there are multiple significant public interests which outweigh that, which I agree with. I agree that they have done that.

And that to me means that it is now the Coroner's Office to be able to then refute that that significant public interest outweighs the non-trivial privacy interest.

And, of course, you can't do that by standing on what you said before. You can only do that by standing on evidence and information that's presented after the Court finds, as it does, that the Review Journal has established multiple significant public interests that greatly outweigh the non-trivial privacy interest that the Supreme Court found in terms of the if the child's interest and privacy as to personal health information.

So go from there, please.

MS. NICHOLS: Okay, Your Honor, so then the next step, I think, would be based off of my understanding of the Court's position is the question becomes how can the Coroner basically justify its redactions in the personal health information, making sure that this personal health information does not in fact actually relate to the cause and manner of death?

And I think the only way to demonstrate that is what this Court suggested is submitting these autopsy reports, one, in an redacted

format to the Court and then in a redacted format with the Coroner's proposed redactions, explaining those redactions that they are personal health information and that they do not relate to the cause and manner of death.

THE COURT: Okay, I'm willing to do that.

MS. NICHOLS: And I think that -- I think that's the appropriate step to take in order for the Court to properly balance the interests that are at issue here.

Because I do understand the Review Journal's public interests. And I do think that they are valid interests, but they don't apply to every single juvenile autopsy report.

So in the sense that a juvenile was not abused and just had their appendix burst, there -- the fact that they have a blood disease that a blood disease, or they're anemic, or they have some other underlying health condition that did not result in the cause of death, I don't think that that serves any public interest.

THE COURT: Yeah, except keep in mind the death certificates never list only one cause of death. They are usually three items that are listed on a death certificate.

There's a primary, secondary, and contributing or underlying medical condition. And in the world of proximate cause and legal cause, those do have a bearing on cause of death.

However, I would be willing to conduct an in camera review of the unredacted juvenile autopsy reports with an accompanying explanation on a redacted version by a qualified expert, whether it's the

Coroner's Office or someone in the Coroner's employ who's a medical doctor, somebody who's qualified to sign a death certificate opining as to why the redacted material was not relevant to the cause of death in this case.

And, of course, if the child had no evidence of trauma ever and died from a burst appendix, and there's no indication that there was any trauma related to the burst appendix, that's a pretty straightforward proposition.

But that's not what anybody's terribly concerned about here. So I hope that that's clear, too.

So with that in mind, Ms. Nichols, does that address your concerns in terms of what you would like to be able to do with regard to the redactions?

MS. NICHOLS: Yes, Your Honor.

THE COURT: All right, Ms. McLetchie, what are your thoughts regards me reviewing these in camera?

THE COURT RECORDER: Hold on. She's muted. She was the one giving --

MS. MCLETCHIE: Your Honor, here's -- just to be clear, the Supreme Court did not limit this Court's consideration to what information we can have about the cause and manner of death.

And I want to be clear that I think we're kind of having a circular problem here where the Coroner wants to now make proposed redactions of information that it believes are of information that is not related in its view to the cause and manner of death.

This is the central problem and I don't think this is something that the Court can resolve in camera. And I don't think it's something that we can litigate in the dark.

Here's the problem, Your Honor. First, what they believe may be the cause and may be related to the cause and manner of death, they may have gotten wrong.

They may have gotten the cause of death wrong. There may be information that's related to the cause and manner of death that they don't realize is related. Coroners do get it wrong.

THE COURT: I follow what you're saying.

MS. MCLETCHIE: Second --

THE COURT: I follow what you're saying, but we need to get off center here. And if I make a wholesale determination without having done a balancing as that meets the Supreme Court's directions, it's just going to send everybody back to the Supreme Court for another opinion and another remand.

I would like to get this handled here at the District Court level, so that if you do have to go back to the Supreme Court, it won't be for lack of effort in resolving this matter.

And so, you may be right. It may be that after I conduct an camera review, I am of the view that as to some of the contentions, I can make a determination that I agree with the redactions. They don't seem to have any relevance to cause of death or the suggestion of prior physical abuse leading up to a cause of death.

On the other hand, there might be some where I say, you

know, I think this is a self-serving effort to not make full disclosure of information.

And so, as to these, I want to conduct an evidentiary hearing, but the Supreme Court can't and won't be able to do this. It's just not something that an appellate court has the time or inclination to do.

I have both the time, inclination to do both. And I want to get the parties on a path, where the materials are being disclosed without unnecessary or improper redactions.

And yet, where redactions are appropriate, they would be upheld. If after my in camera review, I'm of the decision that there are some, which I cannot make a determination on the basis of only an in camera review, then I think those would need to be brought forth in an evidentiary hearing.

To do either polar opposite won't get us anywhere. It'll put the case in a stall position, and meanwhile, the object of this, which was to obtain this information, will be defeated and the expenses on both sides will only grow. So I'm trying to be practical here and bring about resolution that both parties can work with.

So with regard to with the -- how many juvenile autopsy reports are at issue?

MS. MCLETCHIE: Your Honor, this is Maggie McLetchie for the record. I don't have that exact number. But before we move on, I obviously have stated my concerns about delaying this and letting the Coroner have another bite at the apple, but before we move on to the number of autopsy --

THE COURT: Well, no, wait. This is not another bite at the apple. This is giving them the necessary opportunity, which they're entitled to, to try to rebut the position you're arguing, which I find compelling, that there is a significant public interest that greatly outweighs the non-trivial privacy interests, which the Coroner's Office has set forth.

So now we're going to the third phase. And in that third -- we can't simply have a case in chief, a defense case, and then no opportunity for rebuttal because that would defy logic.

So it's not another bite at the apple any more than any rebuttal case ever is. So start from there.

MS. MCLETCHIE: And I understand the point, Your Honor. And I understand the desire to get this case resolved in its entirety once and for all without further Supreme Court review.

My point is just that there's nothing in the Cameranesi test that then says and then, they can assert again some new privacy interest or more detailed privacy interest.

Essentially the way I see the Cameranesi test, Your Honor, they had the burden to come forward with some non-trivial privacy interest, and then, the Court found that they did.

And then, the burden shifts to us to show how our interest and access outweighs that asserted privacy interest. It doesn't now shift back to them to give them another opportunity in a more detailed manner establish any specific privacy concern. So that's my position, Your Honor.

THE COURT: Let me first say this.

MS. MCLETCHIE: With -- sure.

THE COURT: First of all, with regard to your position, I do find that your significant public interest substantially outweighs their non-trivial privacy interest.

So in terms of your record if this case goes up, I do find that the multiple significant public interests that have been identified in your briefs in my mind far outweigh the non-trivial privacy interest that the Coroner's Office has asserted.

However, I do think that if given the chance to look at a case that's in this posture, the Supreme Court is going to say, okay, but did the Coroner's Office come forward then and say, well, we would like to rebut that because we think we can?

And I think that given what's at stake with these public records, and the non-trivial privacy interest, and the significant public interest, it makes sense to me that the trial court should do everything it can to make sure that that non-trivial privacy interest is considered, that the significant public interest is considered.

And when it is found that the significant public interest outweighs the non-trivial privacy interest, it seems appropriate to me that the Court should give the Coroner's Office in this setting the opportunity having heard my view of why I think the significant public interest significantly outweighs the non-trivial privacy interest to articulate a justification for their otherwise generically explained redactions, which are only these -- this is a non-trivial privacy interest of the minors' health

information. So that's what I want to do.

So, Ms. Nichols, can you tell me how many juvenile autopsy reports we're talking about?

MS. NICHOLS: Your Honor, this is going to be an approximation. I don't have the exact number, but I believe it's based off of their request and their time period. It's 6- to 700 juvenile autopsy reports.

THE COURT: Okay, okay. And have you previously made redactions in each of these 6- to 700 autopsy reports that were requested?

MS. NICHOLS: No, Your Honor.

THE COURT: You haven't?

MS. NICHOLS: We have not. We did the sample that we initially provided them before the lawsuit --

THE COURT: Well, I understand --

MS. NICHOLS: -- came about.

THE COURT: -- I understand about the sample, but if you haven't made redactions on these reports other than the samples, then you haven't shown a non-trivial privacy interest as to those that were not sampled. You just haven't.

MS. NICHOLS: Well, Your Honor, it's my understanding that the Review Journal does not want them redacted. They want them unredacted.

And so, if the Court orders them to be redacted, my concern, of course, is that they're going to say that they don't want them, which --

THE COURT: Well, no, no.

MS. MCLETCHIE: -- goes to the second argument --

THE COURT: No, my point is if you haven't already made redactions prior to the Nevada Supreme Court's decision, then it's too late for you now to assert that as to those juvenile autopsy reports that have been requested.

MS. NICHOLS: Your Honor, I disagree because they haven't been produced. So we haven't waived our ability to argue that.

THE COURT: How so?

MS. NICHOLS: Because they haven't been produced. The other side doesn't know. So we reserve the right to redact those.

The Supreme Court dealt -- already made that finding that we did assert a privacy interest --

THE COURT: As to --

MS. NICHOLS: -- even though they weren't produced.

THE COURT: -- those where you redacted, but you couldn't have made that if you didn't already make the redaction.

The redaction was justified on the basis that it was a non-trivial privacy interest. If you haven't made redactions, then you haven't asserted a non-trivial privacy interest. Do you understand?

MS. NICHOLS: No, Your Honor, I'm sorry, I would have to disagree because they haven't been produced.

THE COURT: I know they haven't been produced.

MS. NICHOLS: And so, we know what redactions would be made to the report.

THE COURT: How could you know that if you haven't considered them and made them already?

MS. NICHOLS: Because it would be anything that's not related to the cause and manner of death.

THE COURT: Yeah, that's circular. That is circular. That should have already been done.

If you were going to stand on redactions and your claim of a non-trivial privacy interest, you needed to do that. And then, all those would come under the umbrella of the Supreme Court's decision that you have made a declaration of a non-trivial privacy interest that shifts the burden.

Having not done so, as to those other 6- or 700 reports, I think there's a very legitimate argument that you've waived the redaction opportunity as to all those that were other than the sample three or four cases.

Ms. McLetchie, what are your thoughts?

MS. MCLETCHIE: I would agree with that, Your Honor. And I think it illustrates the fact that whether under the CCSD test or any other test, the -- when looking at public records, the government is supposed to produce as much as possible.

And they're supposed to make case-by-case and information-by-information specific determinations of what can and can't be produced.

That's also consistent, for example, not just with their initial evidentiary burden in any public records case, but also with the statutory

mandate redact as little as possible and produce as much as possible.

They first relied in this case, Your Honor, on the general idea that they didn't -- that they were beyond the reach of the Public Records Act and autopsy reports weren't public records.

And now, they're -- and clearly they're -- that was never, other than a few sample reports they made, they never made a specific case-by-case determination that there's a privacy interest at stake that outweighs the interest in access.

And hearing Ms. Nichols speak, she is, I think, misreading the Supreme Court decision and taking the position that there's a bright line rule that says that all information concerning not related to the cause of -- cause and manner of death in the Coroner's determination is not a public record.

That is not what the decision says. And if those are the redactions they're going to make, I don't know what point there even would be to a review in camera.

If there were to be an in camera review, obviously, we would want two things. And that's as much information as possible on a privilege log through the inherent problems with in camera review.

And we'd want to reserve the right for direct access if -- at least by attorneys on the case and potentially an expert for the Las Vegas Review Journal, so that we can assess their determinations.

But again, the decision by the Supreme Court was not that any information that's not related to the cause and manner of death is properly redacted. That would have been a very easy decision for them

to make and they could have just remanded for that.

That the -- position of the Coroner's Office as Ms. Nichols has made clear today is that they're never going to produce any information that's in their determination not related to the cause and manner of death.

And for that reason, I think that the Court is right that they have waived any arguments that there are specific redactions and specific information that when the balancing test is now applied on remand, that that information specifically outweighs the interest and access as articulated by the Review Journal. Again, they could have made these arguments in their answering brief. Their position is abundantly clear.

And I think for that reason, no in camera review is needed. And I think that the -- we are -- we're entitled to full except perhaps for the sample autopsy reports the Court has indicated.

And I think it's time, Your Honor, to move on in the case. We requested this information back in 2017. And, obviously, there is a significant policy interest in assessing not just the Coroner's performance, but the child and abuse neglect system.

We've seen with reporting in other states like Colorado, that this kind of access has led to significant positive policy changes. And I think the time for delay is over, Your Honor.

THE COURT: Well, I agree. And the heel dragging that's gone on as a member of the community, it's just upsetting to see that there's this kind of heel dragging that would go on in a public records

case, but it has. And so, here we are today.

So I do completely agree that there is a significant public interest, multiple significant public interests that are articulated in the Review Journal's briefing in this case, which I completely agree with. And that those outweigh the non-trivial privacy interest that has been asserted by the Coroner's Office in the sample cases.

For example, I think there were three, three or four. And so, even as to those cases, those reports should be produced in an unredacted form because I have -- I am finding that it's the significant public interests plural greatly outweigh the non-trivial privacy interest that is advanced by the Coroner's Office as to those samples.

Likewise, that is even more so as to the balance of the reports, which have not been produced or offered even in the redacted form, because that means that even at this late date, the Coroner's Office made no effort to provide redacted reports on the balance of the 6- or 700 reports that came within the description of the materials that were requested by the Review Journal.

Accordingly, I am finding that a significant public interest plural greatly outweigh the non-trivial privacy interests that have been argued and advanced by the Coroner as to all of the juvenile autopsy reports requested within the time frame that -- made by the Review Journal newspaper. And they therefore must be produced in unredacted form within 30 days from today's date.

Secondly, there is the issue of copy charges and what the Coroner's Office argues is their desire to be able to charge for

extraordinary use of personnel.

The Supreme Court was pretty clear on that and said the Coroner's Office can inform the records requester what those actual costs will be per hour, per person, what the estimated overall cost will be, et cetera. And they can charge them, but they are capped at 50 cents per page.

So you can -- you must inform the requester you're going to be charging $45 an hour for somebody to review them and that's going to require 14 hours of time by one person and $75 an hour and 10 hours for another person. And you can add up all those charges and tell the requester that they will be responsible for them.

And they will, but only up to a maximum charge that equates to 50 cents per page. And that's in the Supreme Court's opinion on page 24. So I think that addresses the extraordinary use of copy charges.

Any additional items that either side feels need to be addressed this morning following the Supreme Court's remand, Ms. McLetchie?

MS. MCLETCHIE: If -- just to be clear, Your Honor, and I don't know how -- we didn't raise the cost issue in our opening brief. I'm not sure that it was really properly addressed in the answering brief.

We did address it in brief form in the reply, but one thing I wanted to make clear about the extraordinary use, I would agree with the Court about the Supreme Court's findings.

It upheld this Court's ruling. It rejected the hourly rate

argument that the Coroner had previously made. And based on the law of the case doctrine, Your Honor, I think that the Court's order in the -- they did raise other arguments on appeal regarding the Court's determination as to what were the appropriate costs and fees in this case for the Coroner to charge.

And the Supreme Court implicitly rejected any other arguments. In this Court's order in my -- from my point of view, the November 9th, 2017 order, paragraph 52 to 57, those stand under the law of the case doctrine.

And the Court has already made those determinations. Even if it had not, we have other arguments that asked about why 5287 cannot be applied, why it's not retroactive.

And I also want to point out that the Supreme -- the Coroner seems to think that the -- that there's now a flat 50 percent fee that could be charged, assuming you could apply the now repealed extraordinary use provision, but the Supreme Court as the Court just made crystal clear never said there was a flat 50 cent per page fee.

Instead, the Court said that there was a cap.

THE COURT: That's a cap.

MS. MCLETCHIE: There were other limitations. Correct.

THE COURT: Okay. Okay.

MS. MCLETCHIE: And there were other limitations, Your Honor, as well, but it's been repealed.

And more importantly, the Supreme Court rejected their arguments on appeal as to this Court's determination regarding the cost

and fees the Coroner could charge in this case.

In fact, the only costs the Court -- the Coroner could charge, the Court has already determined is the cost of a medium that they provide records on.

THE COURT: All right. Agreed. Now I also want to alert both sides that given my ruling today, it seems only a matter of time before I declare the Plaintiff to be the prevailing party.

And that will become relevant on the issue of fees and costs. I think that the effect of today's ruling is that the Plaintiff becomes the prevailing party. I don't know if it's premature to make that determination, but I do know that it is a predicate to a determination on the fees and costs.

But before we get to that, Ms. Nichols, are there any other items which you feel need to be addressed in light of this case having been remanded from the Supreme Court?

MS. NICHOLS: So, Your Honor, I guess I was kind of confused by Ms. McLetchie's argument just now. Are you saying that the Coroner is not allowed to charge for extraordinary use of personnel?

THE COURT: No, the Supreme Court said that you are allowed to, but that when all is said and done regards to what those actual internal costs are, and they have to be actual costs, and they have to be disclosed to the requester, they cannot total more than 50 cents per page.

So, for example, if you had 500 pages of materials that you produced and you had internal costs, hourly and equipment wise and

perhaps special consultants that were $2,300, you would have to notify the requester that that's what it was going to be costing you to get this job done. But with 500 pages of records, the most you could actually charge them for would be $250. That's --

MS. NICHOLS: Understood, Your Honor.

THE COURT: Okay. All right.

MS. NICHOLS: Yeah, absolutely. I just want [indiscernible].

THE COURT: All right.

MS. MCLETCHIE: Your Honor, if I may, I think there are a few other remaining issues then on fees and costs that need to be addressed.

And that's that the -- the Supreme Court did say -- did talk about the prior extraordinary use fee provision and did say what the Court -- what the Coroner could charge for. However, it did not overturn anything about this Court's ruling on fees and costs and what the Coroner could charge.

And those rulings were that the Coroner could not charge for legal fees, for confidentiality claims, which obviously make sense in light of the Court's current rulings. There won't be redactions, so there can't be costs associated with that.

And it's hard to imagine what the extraordinary use costs would be now even if it were applicable since they can't redact information.

I don't think that there -- under certain circumstances, it's true. There was an extraordinary use provision that under which extraordinary

use fees could be charged.

But here, we have a different situation than what the Coroner articulated previously. Besides the debate between the hourly fee and the per page cap that applied, there was also litigation -- the litigation previously in this Court also addressed whether or not they could charge for privilege review. That was at the heart of the issues on appeal.

And this Court has found that they can't redact any information. So, obviously, there is no privilege review to charge for.

And their arguments on extraordinary use fall apart. There is no extraordinary use. Their extraordinary use demand was based on the idea that they had to --

THE COURT: All right --

MS. MCLETCHIE: -- do a privilege review and redact information.

THE COURT: Since I'm a very practically oriented person, let me just bring up a very practical point. For many years now, the cost for medical records under NRS 622.061 have been capped at 60 cents per page.

And that's because before that statute was enacted, sometimes if you made a request for medical records, even if the doctor only saw the person one time and had three pages of medical records, you would get a bill for $250 for the doctor's time in reviewing the records before they were copied. And so, a statute was enacted, so that the costs for medical records would be capped at 60 cents a page.

Now, obviously, when a doctor's office had to produce three

pages of records and mailed them back to you for $1.80, the doctor's office got the short end of the stick because it cost them a lot more $1.80 to have a staff member pull the chart, copy it, mail it, and so forth.

But when a hospital made a copy of 3,000 pages of records, they also charged 60 cents a page. And when they collected $1,800 for working a photocopy machine hard to produce materials at 5 or 6 cents per click, they did very well.

But it was considered that that was a trade-off. In order to avoid the overcharging on the small pages, people were willing to accept the fact it would be more on the -- now you would think that somebody could say, well, geez, you don't have to charge 60 cents a page. You could have charged us 25 cents a page when you were cranking out 1,800 pages of materials.

But as we know, when someone is told that's the maximum you can charge, they're going to charge the maximum. And so, I appreciate the arguments you're making, Ms. McLetchie, regarding whether they can charge for privilege or this or that, but if the maximum charge is 50 cents per page, they're going to charge you 50 cent per -- 50 cents per page.

And all of those considerations you're talking about now that could go into making up that number, they don't matter. You're going to get a bill for 50 cents a page. Whether that includes requested charges for privilege exam and expert consultant and all that, it won't matter. It's 50 cents per page.

And as the Supreme Court noted, the statute is very clear on

this and it makes no exceptions for that. So I don't think that the arguments about what goes into making up the charges that they throw at the requester is of any consequence, okay?

What else?

MS. MCLETCHIE: Your Honor, so I would just disagree with the analogy to the medical records, the medical record statute, because here, it specifically says that this 50 cent per page, this only applies assuming it even is still alive. I think it's not because it's been repealed, but it only ever applied, Your Honor, if there were extraordinary use of personnel.

Here, they're not redacting anything. There is no extraordinary use. The Public Records Act, all the provisions of the Public Record Act, have to be applied in a manner that's consistent with the mandates of the NPRA --

THE COURT: All right, I --

MS. MCLETCHIE: -- and the Court's already determined --

THE COURT: -- have to disagree with you. Putting together and copying 6- to 700 juvenile autopsy reports is an excessive use of personnel.

It's going to require people doing more than just incidentally making a copy of something that they generated. So I think it's an argument that's not worth making.

Anything else?

MS. MCLETCHIE: I would just point the Court to its prior ruling that the Las Vegas Review Journal indicated it was to receive

electronic copies of the requested records.

The LBG -- LBRJ is not requesting hard copies and the NPRA does not permit a per page fee to be charged for electronic copies. That's because the only cost for electronic copies is that of the media on a CD. The Court finds that the Coroner's Office may not charge any additional fee besides the cost of the CD.

THE COURT: That's fine. If electronic media is used --

MS. MCLETCHIE: I would argue that under the law of the case doctrine --

THE COURT: That's fine if electronic media's used, that's fine, but if we're talking about a per page --

MS. MCLETCHIE: And that's what we've requested, Your Honor.

THE COURT: -- for a hard copy, it's 50 cents per page max. All right, anything else?

MS. MCLETCHIE: I don't have anything else, Your Honor.

THE COURT: Ms. Nichols?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, so Ms. McLetchie, I need you to prepare the order finding that the significant public interests greatly outweigh the non-trivial privacy interests that were advanced by the Coroner's Office, as to both the sample autopsy reports that were provided in redacted form and as to the other 6- or 700, and that's an approximate number, juvenile autopsy reports that were not provided at all in either redacted or non-redacted form, such that the Review Journal

is entitled to receive and the Coroner's Office must provide unredacted copies, if it's in digital format, in digital format, of all of the juvenile autopsy reports that were originally requested by the Plaintiff back in I guess it was 2017. Or was it earlier?

MS. MCLETCHIE: Your Honor, it was April of 2017.

THE COURT: Okay, in April of 2017.

And with regard to extraordinary use, the -- if the juvenile autopsy reports are provided in hard copy paper format, the charges are capped at 50 cents per page.

If they are provided in digital format, wasn't there a digital media cost that was described?

MS. MCLETCHIE: Your Honor, your prior order did give them the right to charge us for the cost of a medium such as a CD.

THE COURT: Okay, so that'll be the order as to that also.

And then, finally, the order should provide that based upon today's ruling, the Court finds that the Plaintiff is the prevailing party and will consider its supplemental application for fees and costs, including those that were previously awarded.

Anything else for the Plaintiff?

MS. MCLETCHIE: No, I think I have that all down. Thank you, Your Honor.

THE COURT: Ms. Nichols, anything else from the Coroner's Office?

MS. NICHOLS: No, Your Honor.

THE COURT: All right, thank you.

[Proceedings concluded at 10:32 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Chris Hwang
Transcriber

NEOJ
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **NOTICE OF ENTRY OF ORDER ON REMAND**

TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 20th day of November, 2020, an Order on Remand was entered in the above-captioned action.

A copy of the Order on Remand is attached hereto as **Exhibit 1**.

DATED this 20th day of November, 2020.

/s/ Margaret A. McLetchie
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing NOTICE OF ENTRY OF ORDER ON REMAND in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner,* Eight Judicial District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

/s/ Lacey Ambro
An Employee of McLetchie Law

INDEX OF EXHIBITS	
Exhibit	**Description**
1	November 20, 2020 Order on Remand

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EXHIBIT 1

ORDR
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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **ORDER ON REMAND**

The Las Vegas Review-Journal's Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.001/Petition for Writ of Mandamus ("Petition"), having come on for hearing on remand from the Nevada Supreme Court on October 29, 2020, the Honorable Jim Crockett presiding, Petitioner the Las Vegas Review-Journal (the "Review-Journal") appearing by and through its counsel, Margaret A. McLetchie and Alina M. Shell, and Respondent the Clark County Office of the Coroner/Medical Examiner (the "Coroner") appearing by and through its counsel, Jackie V. Nichols, and the Court having read and considered all of the papers and pleadings on file and being fully advised, and good cause appearing therefor, the Court hereby makes the following findings of fact and conclusions of law:

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I.

PROCEDURAL HISTORY AND FINDINGS OF FACT

1. On April 13, 2017, the Review-Journal sent the Coroner a request (the "Request") pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001 *et seq.* (the "NPRA") seeking all autopsy reports of all autopsies conducted on anyone under the age of 18 from 2012 through the date of the Request.

2. The Coroner responded to the Request on April 13, 2017, refusing to produce any of the requested autopsy reports, stating nothing more than it was "not able to provide autopsy reports."

3. On April 14, 2017, the Coroner, while continuing to withhold the requested records, provided the Review-Journal a spreadsheet created by undisclosed persons, broken down by year, containing some information but missing critical information, such as opinions of the medical examiner, physical observations, and the identity of the medical examiner performing the autopsies.

4. On May 26, 2017, the Coroner also provided a list of child deaths where autopsy reports were generated. As with the spreadsheet, while the list included the cause and manner of death, it omitted information regarding the identity of the examiner, the observations of the examiner, and the identity of the person(s) who compiled the list.

5. The Coroner did not provide the actual autopsy reports that were responsive to the request.

6. On July 11, 2017, the Coroner informed the Review-Journal that it had begun compiling and redacting autopsy reports in response to the records request, and provided sample files of three redacted autopsy reports from child deaths that were not handled by a child death review team as an example of the redactions the Coroner intended to make to all the requested reports. The Coroner also provided the Review-Journal with a spreadsheet identifying juvenile deaths that occurred in Clark County from January 2012 to the date of the request which included each decedent's name, age, race, and gender, as well as the cause, manner, and location of death.

7. The sample files were heavily redacted, omitting pathological diagnoses and opinions regarding cause of death.

8. The Review-Journal filed its Petition on July 17, 2017.

9. After full briefing by the parties, this Court conducted a hearing on the Review-Journal's Petition on September 28, 2017, and granted the Review-Journal's Petition in its entirety.

10. The Court entered a written order granting the Review-Journal's Petition and ordering the Coroner to produce the requested autopsy reports on November 19, 2017.

11. The Coroner filed a notice of appeal challenging the Court's November 19, 2017, order on November 28, 2017.

12. On appeal, the Coroner argued that it may refuse to disclose a juvenile autopsy report once it has provided the report to a Child Death Review ("CDR") team under Nev. Rev. Stat. § 432B.407(6). The Coroner further argued that the Court erred in ordering the Coroner to produce the reports in unredacted form.

13. The Supreme Court issued a decision on February 27, 2020. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020).

14. In its opinion, the Supreme Court rejected the Coroner's broad interpretation of Nev. Rev. Stat. § 432B.407(6), holding that the statute "applies exclusively to a CDR 'team,' not to the broad categories of individual public agencies that may be part of a CDR team" such as the Coroner. *Coroner*, 136 Nev. at 51, 458 P.3d at 1055. Under a narrow construction of this statute as mandated by Nev. Rev. Stat. § 239.001(3), the Court found that "only a CDR team may invoke the confidentiality privilege to withhold information in response to a public records request, and NRS 432B.407(6) makes confidential only information or records 'acquired by' the CDR team." *Id.* at 50-51, 1055.

15. The Supreme Court further found that the statutory scheme of NRS Chapter 432B "reflects a clear legislative intent to make certain information concerning child fatalities publicly available." *Id.* at 52, 1055; *see also id.* at 52-53, 1055-56 (discussing

legislative history of Chapter 432B).

16. After considering the statutory scheme and legislative history of Chapter 432B, the Supreme Court found that "the public policy interest in disseminating information pertaining to child abuse and fatalities is significant." *Id.* at 57, 1059.

17. However, the Supreme Court found that the Coroner had articulated a nontrivial privacy interest that could be at stake for some information contained in the records, and remanded the matter to this Court to apply the two-part balancing test adopted in *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*") to determine what information in the autopsy reports must be disclosed under the NPRA and what information should be redacted. *Coroner*, 136 Nev. at 58, 458 P.3d at 1059.

18. The Review-Journal filed its Opening Brief on Remand on August 27, 2020.

19. The Coroner filed its Answering Brief on October 7, 2020. In its Answering Brief, the Coroner asserted that, in addition to the three sample redacted autopsy reports it previously produced to the Review-Journal, there are approximately 680 autopsy reports and 150 external examinations responsive to the Review-Journal's request.

20. The Review-Journal filed its Reply in support of its Opening Brief on Remand on October 22, 2020.

21. This Court conducted a hearing on the parties' briefs on remand on October 29, 2020.

22. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not reviewed or performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Recorder's Transcript of October 29, 2020, Hearing ("Transcript"), p. 23:8-14 (on file with this Court).)

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II.

CONCLUSIONS OF LAW

A. The NPRA

23. At its heart, this case is about the value of transparency in government and the value of public oversight. (Transcript, p. 13:15-16.) Governmental entities and their officers and employees exist to serve the public; thus, oversight of the actions and inactions of governmental entities is critical to ensuring that the public's interests are being served. (*Id*., p. 13:16-23.)

24. Governmental entities have been entrusted with certain authorities under the color of law to conduct the public's business. (*Id*., pp. 13:24 – 14:2.) The public entrusts governmental entities with that authority and has a right to expect and know that trust is not being abused. (*Id*., p. 14:3-4.)

25. The NPRA recognizes that access to the records of governmental agencies is critical to fostering democracy. Nev. Rev. Stat. § 239.001(1) (2017) ("The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law"); *see also Reno Newspapers, Inc. v. Gibbons,* 127 Nev. 873, 876, 266 P.3d 623, 626 (2011) (holding that "the provisions of the NPRA are designed to promote government transparency and accountability").

26. Given the central role access to public records plays in fostering democracy, the Legislature built certain presumptions into the NPRA. The NPRA starts from the presumption that all records of government must be open to inspection and copying. Nev. Rev. Stat. § 239.010(1); *see also Reno Newspapers, Inc. v. Sheriff*, 126 Nev. 211, 212, 234 P.3d 922, 923 (2010) ("*Haley*") (holding that the NPRA "considers all records to be public documents available for inspection and copying unless otherwise explicitly mad confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure").

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27. The NPRA also starts from the presumption that its provisions must be construed liberally in favor of access, Nev. Rev. Stat. § 239.001(2), and that "any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly." Nev. Rev. Stat. § 239.001(3).

28. Because the NPRA starts from the presumption that all records of governmental entities are public records and that its provisions must be interpreted liberally to increase access, if a governmental entity seeks to keep all or some part of public record secret, the NPRA places the burden of governmental entities to prove, by a preponderance of the evidence, that any information it seeks to keep secret is confidential. Nev. Rev. Stat. § 239.0113(2).

29. Further, a governmental entity seeking to withhold public records on the grounds that they are confidential must prove by a preponderance of the evidence that the interests in nondisclosure outweigh the strong presumption in favor of public access. *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011); *see also Donrey of Nevada, Inc. v. Bradshaw*, 106 Nev. 630,635, 798 P.2d 144, 147-48 (1990).

30. The Nevada Supreme Court has held that because of the mandates contained in the text of the NPRA and its overarching purpose of furthering access to public records, governmental entities cannot meet their burden under Nev. Rev. Stat. § 239.0113(2) by relying on conjecture, supposition, or "non-particularized hypothetical concerns." *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 628, 6 P.3d 465, 472-73 (2000); *accord Haley*, 126 Nev. at 218, 234 P.3d at 927; *Reno Newspapers Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011).

31. In balancing those interests, "the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference." *DR Partners*, 116 Nev. at 621, 6 P.3d at 468 (quoting *MacEwan v. Holm*, 226 Or. 27,359 P.2d 413, 421-22 (1961)).

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B. The CCSD Test

32. In *Clark County School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 429 P.3d 313 (2018) ("*CCSD*"), the Nevada Supreme Court adopted a two-part balancing test courts are to employ in cases in which the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction.

33. Under the first prong of the *CCSD* test, the governmental entity seeking to withhold or redact public records must "establish a personal privacy interest stake to ensure that disclosure implicates a personal privacy interest that is nontrivial or ... more than [ ] de minimis." *CCSD*, 134 Nev. at. 707, 429 P.3d at 320 (internal quotations omitted).

34. If—and only if—the governmental entity succeeds in showing that the privacy interest at stake is nontrivial, the burden shifts to the requester to show that "the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." *CCSD*, 134 Nev. at 707-08, 429 P.3d at 320 (internal quotations omitted).

35. In adopting this two-part test, the Supreme Court was careful to note that its new test did not alter a governmental entity's obligations under the NPRA or the Court's interpreting case law:

> This test coheres with both NRS 239.0113 and *Gibbons*, 127 Nev. at 877-78, 266 P.3d at 625-26. It is merely a balancing test—in the context of a government investigation—of individual nontrivial privacy rights against the public's right to access public information. *Carlson v. U.S. Postal Serv.*, 2017 WL 3581136, at *28 (N.D. Cal. Aug. 18, 2017). We explained in *Gibbons* that NRS 239.0113 requires that the state bear the burden of proving that records are confidential. *Gibbons*, 127 Nev. at 878, 266 P.3d at 626. The *Cameranesi* test does that, but also gives the district courts a framework to weigh the public's interest in disclosure, by shifting the burden onto the public record petitioner, once the government has met its burden. This ensures that the district courts are adequately weighing the competing interests of privacy and government accountability.

CCSD, 134 Nev. at 708–09, 429 P.3d at 321.

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C. Application of the CCSD Test to The Redacted Autopsy Reports

36. The Review-Journal has requested the Coroner produce, in unredacted form, autopsy reports for all decedents under the age of 18 who died between 2012 and the date of the Review-Journal's request.

37. In remanding this matter back to this Court, the Nevada Supreme Court found the Coroner had established the autopsy reports at issue here implicate a nontrivial personal privacy interest. Relying on a declaration of Clark County Coroner John Fudenberg, the Supreme Court found that the autopsy reports may contain medical or health-related information that may be entitled to protection. *Coroner*, 136 Nev. at 56, 458 P.3d at 1058.

38. The Supreme Court further noted that while "the public policy in disseminating information pertaining to child abuse and fatalities is significant," the "nature of the information contained in the juvenile autopsy reports that LVRJ seeks and how that information will advance a significant public interest" was "unclear." *Id.* at 57-58, 1059. Accordingly, the Supreme Court remanded this matter to this Court "to determine, under the [*CCSD*] test, what information should be redacted as private medical or health-related information." *Id.* at 58, 1059.

39. Having reviewed the post-remand briefings submitted by the parties, the Court finds that there are multiple significant public interests that would be served by release of the autopsy reports which outweigh the nontrivial privacy interests articulated by the Coroner. (Transcript, p. 28:2-6; *id.*, p. 28:18-22.)

40. Access to public records is always presumed to be in the public interest. *See* Nev. Rev. Stat. § 239.001.

41. In this case, access to autopsy reports generally furthers a number of significant policy interests which the Review-Journal has sufficiently established overcome the nontrivial privacy interests at stake.

42. For example, access to autopsy reports can provide the public with vital health information and protect the public. Information gathered by coroners is often a vital tool in tracking trends in causes of death, thereby increasing the public's understanding of

how trends like opioid deaths or deaths from the ongoing COVID-19 pandemic affect their community.

43. Access to autopsy reports and reporting on autopsy reports can help the public assess prosecutors' theories and charging decisions—and can help exonerate the innocent.

44. Access to autopsy reports also promotes trust in law enforcement and promotes law enforcement accountability. This is so because access to and reporting on autopsy reports can both exonerate law enforcement officers accused of wrongdoing and shed light on police wrongdoing.

45. Access to autopsy reports serves the important public function of providing the public with information about crimes of significant public interest.

46. More fundamentally, access to autopsy reports, including the specific juvenile autopsy reports at issue in this case, provides the public with access to information about the Coroner's conduct. Given that the Coroner is a public servant and its work on behalf of the public investigating suspicious deaths is a matter of vital public concern, access to information about the Coroner's work furthers democracy. Nev. Rev. Stat. § 239.001(1).

47. Relatedly, access to autopsy reports ensures that coroners' offices do their taxpayer-funded jobs correctly and do not engage in malfeasance. Access to autopsy reports, including the juvenile autopsy reports at issue in this case, fosters public confidence in the work of county coroners and medical examiners—and allows errors or wrongful behavior to be revealed, assessed, and corrected.

48. Further, with respect to the juvenile autopsy reports at issue in this matter, access to the reports as requested by the Review-Journal will serve a significant public interest in assessing how well state and local child protective agencies are doing their job of protecting children who have been the victims of abuse and/or neglect. Thus, not only will access further the NPRA's central purposes of transparency and accountability regarding one government agency, but it will also further transparency and accountability regarding multiple government agencies which share information. (Transcript, p. 14:10-15.)

49. While the Coroner is not charged with the protection of vulnerable children, as the agency responsible for investigating suspicious deaths, the Coroner is necessarily the agency who receives and examines deceased juveniles, including juveniles who were (or had been) under the supervision of local child protective services. Thus, access to the information the Coroner gathers during the examination of a juvenile who died after having been under the supervision of child protective services can help the public understand and assess how well child protective service agencies are fulfilling their responsibilities to Clark County's vulnerable children. (*Id.*)

50. In its decision, the Supreme Court noted that in addition to the three heavily redacted reports, the Coroner had provided the Review-Journal a spreadsheet containing the names, genders, ages, race, and the cause and manner of death for juveniles, and also noted that the CDR Teams provide information that is used to compile a statewide annual report. *Coroner*, 136 Nev. at 58, 1059. The Court then expressed uncertainty as to what "additional information" the Review-Journal seeks to obtain from the autopsy reports that would advance the public's interest. *Id.*

51. In its Supplemental Opening Brief on Remand, the Review-Journal provided myriad examples of how and why access to autopsy reports would advance the public interest. With respect to the juvenile autopsy reports at issue here, the Review-Journal has demonstrated that access to information about the Coroner's observations—and not just the Coroner's conclusions regarding the cause and manner of death—is critical to assessing the efficacy of child protective services.

52. A coroner's ultimate conclusion about the cause and manner of death for a decedent does not occur in a vacuum. In reaching a conclusion regarding cause and manner of death, a coroner necessarily assesses a wide array of information about the decedent, including the decedent's personal history such as a history of past abuse, prior involvement with child protective services or law enforcement, external and internal observations of a decedent's body that may be indicative of prior abuse, toxicological information, and evidence of past injuries like broken bones or damaged organs.

53. This sort of information is critical to the important goals of providing the public with a greater understanding of how state and local agencies tasked with protecting vulnerable children operate, identifying any shortcomings in those agencies' operations, and identifying what changes those agencies can and should make to prevent future deaths of children whose lives have been marked by abuse or neglect.

54. The spreadsheet provided by the Coroner and the CDR annual statewide reports are not sufficient replacements for direct access to this information. First, the annual statewide reports do not contain the Coroner's external or internal observations. Access to all of this type of information that is included in an autopsy report—but was not included in the Coroner's spreadsheet and is not provided in CDR reports—would advance the public interest by ascertaining the efficacy of Clark County's abuse and neglect system, an issue of great public importance.

55. Second, even if the autopsy reports did not include additional categories of information from the Coroner's spreadsheets or the CDR reports, access to the source material would still provide additional information as it would allow the Review-Journal to assess the accuracy of the information contained in the Coroner's spreadsheets and the CDR reports.

56. The NPRA does not limit a requester's information to that information that the government choses to filter, repackage, and provide. Instead, the NPRA is intended to provide the public with direct access to the government's records themselves. Limiting access to the direct source material would be antithetical to the central stated purpose of the NPRA: government accountability. Nev. Rev. Stat. § 239.001(1) provides that "[t]he purpose of [NPRA] is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law." The NPRA further provides that all of its provisions "must be construed liberally to carry out this important purpose." Nev. Rev. Stat. § 239.001(2). In short, the NPRA reflects that the public is not required to trust the government. Instead, the public is entitled to public record so it can assess the conduct and effectiveness of government.

57. Accordingly, the Court hereby finds and concludes that the Review-Journal has established that the public interests in access far outweigh the nontrivial personal privacy interests advanced by the Coroner. (Transcript, p. 22:6-9.)

D. The Coroner Must Disclose the Juvenile Autopsy Reports in Unredacted Form

58. As noted above, prior to litigation the Coroner provided the Review-Journal with three sample autopsy reports as an example of the redactions the Coroner intended to make to all the requested reports.

59. In its Answering Brief, the Coroner represents that there are many more autopsy records responsive to the Review-Journal's request, including approximately 680 autopsy reports and 150 external examination. (*See* Coroner's October 7, 2020, Answering Brief, p. 25:18-19.)

60. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Transcript, p. 23:8-14.)

61. The Coroner has never made redactions to the approximately 680 autopsy reports and 150 external examinations or considered whether, record by record, there is specific information that merits protection.

62. This is particularly troubling given that—as this matter was initiated in 2017 when the Review-Journal made its records request—the Coroner has had years to meet that burden. (Transcript, pp. 27:23 - 28:1; *id.*, p. 28:12-17.)

63. While the Court is satisfied that the Review-Journal has met its burden of establishing that there is a significant interest in access, it offered the opportunity to the Coroner to conduct an *in camera* review of proposed redactions. However, at the hearing, the Coroner remained steadfast that it would simply redact all information that the Coroner deems is not related to the cause of death. Such an approach is not consistent with the need for the information that the Review-Journal has demonstrated. First, one of the significant interests access will advance is ensuring the proper functioning of the Coroner's Office. It is

not possible to ensure that the Coroner reached the correct conclusion regarding cause of death if it refuses to produce any information it deems unrelated to the cause of death. Second, another significant interest in access advanced by access is ensuring oversight and accountability of the abuse and neglect system. There may be information that the Coroner deems unrelated to the cause of death that is nonetheless relevant to that inquiry, such as signs of historical abuse.

64. Moreover, the Court notes that the significant interests established by the Review-Journal can only be met by direct access to the records sought; the reports and spreadsheets otherwise available not only do not contain the information that is needed to advance the significant interests in access, it would undermine accountability to limit the Review-Journal to information filtered by the Coroner or other government employees and officials.

65. For these reasons, the Court finds and concludes that the Coroner's planned redactions would not satisfy the very significant public interests the Review-Journal has demonstrated that overcome the nontrivial but generalized privacy interests articulated by the Coroner.

66. Further, in light of the fact that the balancing test weighs heavily in favor of disclosure and the Coroner has made no effort to meet its burden of establishing a specific nontrivial privacy interest with respect to any of the specific information contained in those approximately 680 autopsy reports and 150 external examinations, the Court finds and concludes that the Coroner has waived its ability to redact any information contained within those reports. *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992) ("A waiver is an intentional relinquishment of a known right.")

67. Thus, the Coroner must provide directly to the Review-Journal the requested records in unredacted form and must do so within 30 days of the Court's October 29, 2020, hearing in this matter.

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/ / /

E. Reproduction Costs

68. When the Review-Journal filed its Petition in 2017, the NPRA permitted governmental entities to charge requesters a fee—not to exceed 50 cents per page—for the "extraordinary use" of personnel and technological resources. Nev. Rev. Stat. § 239.055 (2017 version).

69. In its opinion, the Nevada Supreme Court rejected the Coroner's argument that it was entitled under Nev. Rev. Stat. § 239.055 to charge the Review-Journal a $45.00 hourly fee for staff to review the requested autopsy reports, and held that the plain language of the statute capped such fees at 50 cents per page. *Coroner*, 136 Nev. at 59, 458 P.3d at 1060.

70. Thus, to the extent the Coroner produces hard copies of the requested juvenile autopsy reports in this matter, it may charge not more than the lesser of its actual costs or the 50-cent cap set by Nev. Rev. Stat. § 239.055 (2017 version).

71. The Review-Journal has requested the Coroner produce the juvenile autopsy reports in electronic format.

72. Unless it is technologically infeasible, the Coroner must produce the juvenile autopsy reports if the format and medium requested by the Review-Journal. If the Review-Journal's chosen format and medium are infeasible, the Coroner must work with the Review-Journal to produce the records in another format and medium of the Review-Journal's choice unless no such choice is feasible.

73. Pursuant to Nev. Rev. Stat. § 239.052(1), the Coroner may only charge a requester for the actual costs it incurs in reproducing public records.

74. Thus, if the records are produced in an electronic format, the Coroner may charge the Review-Journal for only the actual cost of the medium it uses to produce the records.

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/ / /

III.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court hereby ORDERS as follows:

IT IS HEREBY ORDERED that the Coroner shall produce directly to the Review-Journal the requested juvenile autopsy reports in unredacted form by November 30, 2020. The Coroner should produce records on a rolling basis.

IT IS HEREBY FURTHER ORDERED that unless technologically infeasible, the Coroner is to produce the requested juvenile autopsy reports in the electronic format and medium requested by the Review-Journal or such alternate format and medium as requested by the Review-Journal.

IT IS HEREBY FURTHER ORDERED that the Coroner may charge the Review-Journal a fee for the cost of producing the requested juvenile autopsy reports in electronic format not to exceed the actual cost of the medium on which the juvenile autopsy reports are produced.

IT IS HEREBY FURTHER ORDERED that, to the extent the Coroner produces any of the requested records to the Review-Journal in a hard copy format, it may not charge more than the lesser of the actual costs of production or 50 cents per page for the reproduction of those records.

Dated this 20th day of November, 2020

70B 2FA DB77 008D
Jim Crockett
District Court Judge

_____ _____

Date DISTRICT COURT JUDGE

Respectfully submitted,

/s/ Margaret A. McLetchie

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Plaintiff(s) vs. Clark County Office of the Coroner/ Medical Examiner, Defendant(s)	CASE NO: A-17-758501-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: 24 **[OST HEARING REQUESTED]**

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S MOTION TO STAY ON AN ORDER SHORTENING TIME

Respondent, Clark County Office of the Coroner/Medical Examiner ("Coroner"), by and through their attorneys of record, Craig R. Anderson, Esq. and Jackie V. Nichols, Esq., of the law firm Marquis Aurbach Coffing and Laura C. Rehfeldt, Esq., Deputy District Attorney with the Clark County District Attorney/Civil Division, hereby submit their Motion to Stay on an Order Shortening Time.

This Motion is made and based upon all papers, pleadings, and records on file herein, the attached Memorandum of Points and Authorities, the Declaration of Jackie V. Nichols and any oral argument allowed at a hearing on this matter.

Dated this 20th day of November, 2020.

MARQUIS AURBACH COFFING

By /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
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ORDER SHORTENING TIME

Upon the Declaration of Jackie V. Nichols, Esq., and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the time for hearing of the above-entitled matter will be shortened and will be heard on the 10th day of December, 2020, at the hour of 9:00 am. in Department 24 of the Eighth Judicial District Court, located at the Regional Justice Center, ~~200 Lewis Avenue~~ 330 S. 3rd Street, 11th floor, Las Vegas, Nevada 89155.

Plaintiff's Opposition, if any, must be filed by the 30th day of November, 2020.

Dated this 20th day of November, 2020

Defendants' Reply in Support of Motion, if any, must be filed by the 7th day of December, 2020.

DISTRICT COURT JUDGE

Respectfully Submitted by:

MARQUIS AURBACH COFFING

B8A F0B 4187 BC30
Jim Crockett
District Court Judge

By: /s/ Jackie V. Nichols
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DECLARATION OF JACKIE V. NICHOLS, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

Jackie V. Nichols, Esq. declares as follows:

1. I am an associate with the law firm of Marquis Aurbach Coffing, duly licensed to practice law in all courts of the State of Nevada. This declaration is made of my own personal knowledge except where stated as being made upon information and belief, and as to those statements, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law.

2. Marquis Aurbach Coffing represents Respondent, Clark County Office of the Coroner/Medical Examiner ("Coroner") in the above referenced matter.

3. I am submitting this Declaration in support of Motion to Stay on an Order Shortening Time.

4. This case involves a public records request for autopsy reports. In April 2017, the Las Vegas Review Journal ("LVRJ") made a public records request to the Coroner for autopsy reports relating to juvenile deaths dating back to January 2012. The Coroner denied the access to the records and the LVRJ filed a Public Records Act Application Pursuant to NRS § 239.001/Petition for Writ of Mandamus ("Petition"). The Court ultimately ordered the Coroner to disclose the autopsy reports in unredacted format and the Coroner appealed.

5. On appeal, the Supreme Court ruled that the Coroner demonstrated that the autopsy reports contain personal health and medical information that involved a nontrivial privacy interest. As such, the Court remanded the matter back to the district court for LVRJ to demonstrate that the information sought, i.e., the personal health and medical information unrelated to the cause and manner of death, advances significant public interest.

6. On remand, this Court determined the Coroner waived its ability to assert any privileges because the Coroner had not yet performed any redactions on the juvenile autopsy reports and required the Coroner to produce the juvenile autopsy reports by November 30, 2020.

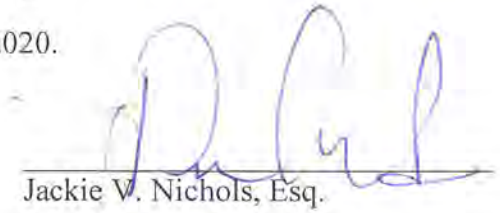
7. The Coroner intends to appeal the Court's decision and it will seek approval from the Board of County Commissioners on December 1, 2020 for the appeal.

8. For purposes of ensuring ample opportunity for briefing and hearing this Motion prior to the November 30, 2020 deadline, shortened time to hear this Motion is required.

9. Additionally, shortened time to hear this Motion is required so that, if denied, the Coroner may file a Motion before the Nevada Supreme Court upon approval from the Board of the County Commissioners.

Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 20th day of November, 2020.



Jackie V. Nichols, Esq.

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MEMORANDUM OF POINTS & AUTHORITIES

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In April 2017, the LVRJ made a records request to the Coroner for autopsy reports of juvenile deaths dating back to January 2012. The Coroner denied access to these reports. On July 17, 2017, the LVRJ filed its Petition for access to autopsy reports of juvenile deaths dating back to January 2012. Ultimately, the Court ordered disclosure of the juvenile autopsy reports in unredacted format. *See* Order dated November 9, 2017 on file herein. The Coroner appealed this Court's decision. *See* Notice of Appeal on file herein.

On appeal, the Supreme Court concluded that the *CCSD* balancing test[1] pertaining to individuals' privacy interests apply to the instant case. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 54, 458 P.3d 1048, 1056 (2020). In applying the balancing test, the Court ruled that the Coroner satisfied its obligation under the *CCSD* balancing test in demonstrating that the juvenile autopsy reports contain personal health and medical information that involves a nontrivial privacy interest. *Id.* The Court then remanded the matter back to the district court for the LVRJ to prove that the information sought, i.e., the personal health and medical information unrelated to the cause and manner of death, advances significant public interest. *Id.*

The Review-Journal filed its Opening Brief on Remand on August 27, 2020. The Coroner filed its Answering Brief on October 7, 2020. The Review-Journal filed its Reply in support of its Opening Brief on Remand on October 22, 2020. This Court conducted a hearing on the parties' briefs on remand on October 29, 2020. At the hearing, the Coroner conveyed that it had not performed redactions on the outstanding 680 autopsy reports sought by LVRJ. The Court then concluded that the Coroner had waived its ability to assert any privileges as to those reports. As such, the Court ordered that the Coroner provide all the requested autopsy reports in unredacted format by November 30, 2020. The parties have submitted competing orders to the

[1] *Clark Cty. School Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 707-08, 429 P.3d 313, 320-21 (2018).

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Court. However, the Court has not yet entered an Order. The Coroner intends to appeal the Court's order upon approval from the Board of County Commissioners on December 1, 2020.

II. LEGAL ARGUMENT

Pending appeal to the Supreme Court, a party is entitled to request a stay of the proceedings below, pending disposition of the appeal, and such a request must first be made in the district court. NRAP 8(c) states:

> In deciding whether to issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

With respect to the first factor, the object of the appeal will be lost if a stay is not entered. The purpose of the appeal is to challenge the District Court's Order to the Coroner to disclose autopsy reports to the LVRJ. Without a stay, the Coroner must comply with the Court Order requiring disclosure of these reports by November 30, 2020. Disclosure of these reports would be contrary to the purpose of the Coroner's appeal, which is to request review by the Nevada Supreme Court of the District Court's Order finding that the LVRJ satisfied its burden in demonstrating that the personal health and medical information within the reports of individuals advances a significant public interest. Furthermore, it is the Coroner's position that this Court erred in concluding that the Coroner has waived its ability to assert any privilege because it has not performed the redactions. Thus, disclosure of the autopsy reports in unredacted from prior to the completion of the appeal process would undermine the Coroner's argument and render the appeal moot.

As to the second factor, without a stay, irreparable or serious injury will result because once the autopsy reports, and the information contained therein, are disclosed to the LVRJ, there is no way to retract that information. The information which the Coroner seeks to protect concerns personal health and medical information relating to children that is otherwise not related to the cause or manner of death. The LVRJ is arguably the largest transmitter of information in Nevada. and once it gets information there is nothing to keep it from disseminating it. If released, information that the Coroner argues is confidential by law, will be

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open to the public, thus breaching Nevada Public Records Law protections of confidential information. Without a stay, the information that will be argued on appeal as confidential will have been divulged to the media, and, consequently, to the public at large. Dissemination could also result in an unwarranted invasion of privacy. Therefore, the public interest favors a stay.

With respect to the third factor, there is no corresponding prejudice to the LVRJ. The LVRJ requested in April 2017 autopsy reports of juveniles dating back to January 2012. Failure to request these one, two, three, four and five year old documents at an earlier date ddemonstrates that this matter is not urgent. Additionally. the LVRJ has not stated that it would be or is prejudiced or damaged by delay in the release of the reports. If accessing these reports was an urgency. the LVRJ would not have waited so long to make its requests. If it is determined by the Nevada Supreme Court that the LVRJ is entitled to these documents, the LVRJ can move forward with its news story relating to these records at that time. The fact that the LVRJ is still interested in these particular records demonstrates that its interest in the story continues to exist.

The fourth factor for consideration is whether the Coroner is likely to prevail on the merits of the appeal. While it is difficult to quantify the likelihood of prevailing on the merits, it is worth noting the standard of review on appeal is de novo. Further, the Nevada Supreme Court has held that a movant for a stay need not always have to show a probability of success on the merits.

> [W]hen moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting of the stay.'

Fritz Hansen A/S v. Eighth Judicial Dist. Court, 116 Nev. 650, 658, 6 P.3d 982. 987 (2000). The Coroner presents a substantial case on the merits with a serious legal question. As discussed above, the issue is whether autopsy reports are confidential or subject to disclosure under Nevada Public Records Law. The Supreme Court previously concluded that the Coroner satisfied its obligation in demonstrating that a nontrivial privacy interest existed in the decedent's personal health and medical information unrelated to the cause and manner of death. The Court

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then remanded the matter back to the district court for the LVRJ to show that the information sought—specifically the decedent's personal health and medical information unrelated to the cause and manner of death—advanced a public interest. On remand, this Court reached the conclusion that the Coroner waived its ability to assert any privileges because the Coroner had not yet performed any redactions. This conclusion directly contradicts the Nevada Supreme Court's holding that the NPRA does not permit a waiver of any privileges. *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 32, 458 P.3d 328, 332 (2020) ("Waiving LVMPD's assertion of confidentiality would lead to an absurd penalty resulting in the public disclosure of Nevadans' private information . . . . [Waiver] undermines the NPRA's expressly listed exceptions for confidential information.").

This subject matter involves an unsettled and contentious area of Nevada Public Records Law. This factor, combined with the other factors, that the object of the appeal will be lost. and irreparable injury will be sustained if the reports are disclosed prior to completion of the appeal process with no corresponding prejudice to the LVRJ, demonstrate the necessity of the stay.

III. CONCLUSION

For the foregoing reasons, a stay should be entered for the release of autopsy reports dating back to January 2012 relating to children who have died in Clark County and whose deaths were investigated by the Coroner, pending the disposition of the Coroner's appeal. In the event this Court determines that a stay is not warranted, then the Coroner respectfully requests that the Order be stayed long enough to allow the Coroner to obtain approval from the BCC for an appeal and seek this relief from the Nevada Supreme Court.

Dated this 20th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S MOTION TO STAY ON AN ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 20th day of November, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[2]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Krista Busch
An employee of Marquis Aurbach Coffing

[2] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Plaintiff(s) vs. Clark County Office of the Coroner/ Medical Examiner, Defendant(s)	CASE NO: A-17-758501-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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OPPS

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **OPPOSITION TO MOTION TO STAY ON AN ORDER SHORTENING TIME** **Hearing Date: December 10, 2020** **Hearing Time: 9:00 A.M.**

Pursuant to this Court's November 20, 2020, Order, the Las Vegas Review-Journal (the "Review-Journal") hereby submits this Opposition to the Motion for a Stay filed by the Clark County Office of the Coroner (the "Coroner"). This Opposition is supported by the attached memorandum of points and authorities, any attached exhibits, and the pleadings and papers on file with this Court.

DATED this 30th day of November, 2020.

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I. INTRODUCTION

Throughout this matter, the Coroner has taken a heel-dragging approach entirely at odds with its obligations under the NPRA. The Coroner has never engaged in any balancing of the interests at stake, despite being required to do so, and has never provided this Court with evidence or argument that would support such a balancing, even after the Nevada Supreme Court remanded this case for that specific purpose. The Coroner's motion for a stay of the order that would finally allow the Review-Journal to assess the autopsy reports and investigate important matters of public policy is just another effort to delay and should be rejected.

On April 13, 2017, well over three and a half years ago, the Review-Journal sent the Coroner a request (the "Request") pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.001, *et seq.* (the "NPRA") seeking all autopsy reports conducted on anyone under the age of 18 from 2012 through the date of the Request. In response to the Request, the Coroner refused to provide any records, simply asserting in violation of the NPRA that it was "not able to provide autopsy reports." After the Review-Journal insisted on access, the Coroner provided cursory information regarding the autopsies in spreadsheet form and three heavily redacted sample autopsies. However, the Coroner continued to withhold the autopsy reports in their entirety and did not provide any of the information the public needs to assess the Coroner's performance of child death autopsies or to assess the performance of the abuse and neglect system in Clark County.

After the Review-Journal filed suit on July 17, 2017, the Coroner asserted a number of claims in an attempt to continue to thwart access, including that autopsy reports are entirely exempted from the NPRA. This Court and the Nevada Supreme Court rejected the Coroner's categorical approach. In the appeal, the Nevada Supreme Court then applied its newly adopted *CCSD* test and found both that the Coroner had established a nontrivial privacy interest and the Review-Journal had established a significant interest in access. The Nevada Supreme Court remanded so that the parties and this Court could engage in a balancing test with regard to the specific information on the various records the Coroner alleged it had

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reviewed and determined implicated the nontrivial privacy interest it asserted.

Rather than engage in the process ordered by the Supreme Court, the Coroner stubbornly refused to abandon the categorical approach it had taken since April of 2017, even though the Nevada Supreme Court had already rejected it. At the recent hearing on this matter, despite this Court's expressed willingness to examine the records and proposed redactions *in camera*, the Coroner chose to simply rely on generalized privacy claims. Specifically, the Coroner took the approach it was entitled to withhold anything it determined in its discretion was "unrelated" to the cause and manner of death—even though the Review-Journal met its burden of establishing that access to information unrelated to the cause of death both to assess the performance of the Coroner and to assess the efficacy of the region's abuse and neglect system.

At the hearing, this Court noted the Coroner's failure to provide evidence to counter the Review-Journal's established interests (and that of the public) in the records. The Coroner claims this Court improperly determined that the Coroner waived a right it had to present evidence. However, the cases the Coroner relies on have nothing to do with this circumstance as they address whether, under certain conditions, a governmental entity can make arguments in litigation it failed to raise prior to litigation. Here, the Court did not bar the Coroner from making arguments that were not raised prior to the litigation. Rather, the Court ruled the Coroner had chosen not to timely provide legal arguments and the basis for them and could not later provide them for *in camera* review (not requested by the Coroner), because the Coroner had not engaged in any review of the vast majority of the reports at issue, and the Coroner made clear it would not do anything other than make categorical redactions, despite the Court's ruling. Now, despite its refusal to engage in the balancing process on remand, the Coroner wants yet more delay in its duty to provide the autopsy reports, this time by a stay of the Court's order.

As the Coroner largely concedes, the factors courts consider in determining whether a stay should be granted do not favor a stay. As set forth in Nev. R. App. P. 8(c), in determining whether a stay of an order or judgment is warranted, courts generally consider

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"(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition."

The Coroner is not likely to prevail on appeal. The Coroner continues to rely on a wholly categorical approach to autopsy reports and ignore the strong public interests in access to autopsy reports, even though this approach has been rejected once by the Nevada Supreme Court and twice by this Court. Indeed, the Coroner does not even argue that it is likely to prevail and instead contends that it raises a significant legal issue on appeal, relying on the *Hansen* alterative formulation of the likelihood of success factor. (Motion, pp. 8:15-9:3 (citing *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982. 987 (2000)). However, the Nevada Supreme Court has already addressed the Coroner's asserted legal issue on appeal; the only question on appeal will be the rather unremarkable one of whether this Court abused its discretion in evaluating the facts and finding that the Review-Journal established that access to the information it seeks would advance the public interest. Even if the Coroner did establish that this case involves a serious legal question, it must also show that "the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987. In fact, the balance of the equities weighs heavily against granting the stay.

As for the harm to the Coroner, the Coroner implicitly concedes it faces no harm and instead speculatively argues that dissemination could lead to an unwarranted invasion of someone else's privacy. However, as discussed above, the Supreme Court remanded this matter so ***this Court*** could determine whether—despite the privacy interests at stake—the Review-Journal's need for access merited production of the records. Because the Review-Journal established that the need for access overcame the generalized privacy interests asserted by the Coroner, there is no unwarranted privacy invasion.

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As for the harm to the Review-Journal, the Coroner pretends there is none, a glib argument that ignores the importance of expeditious access to records, the need to report on the news promptly, and the obvious urgency associated with ensuring accountability of the child abuse and neglect system. Thus, the Review-Journal faces irreparable harm, the public interest would be harmed by a stay, and the balance of equities weighs heavily against a stay.

With regard to the final factor—whether the object of the appeal will be defeated—this matter it is capable of repetition yet evading review and thus justiciable even if the Review-Journal has been provided the documents. Even if that were not the case, a stay is not automatic even where the object of an appeal will be defeated. *See, e.g. Las Vegas Metro. Police Dep't v. Am. Broad. Co., Inc.*, Nevada Supreme Court Case No. 75518. Doc. No 18-16064 (order denying motion for stay pending appeal of order directing Las Vegas Metropolitan Police Department to release public records pertaining to the 1 October mass shooting).) In this case, the other factors vastly favor denying a stay. The Nevada Supreme Court has already resolved the legal issues and the Court properly applied the *CCSD* test, and the very public interests that this Court found will be advanced by access will be gravely harmed by further delays. Thus, the Court should decline to stay its order.

II. PROCEDURAL HISTORY

The Review-Journal filed its Opening Brief on Remand on August 27, 2020. The Coroner filed its Answering Brief on October 7, 2020. In its Answering Brief, the Coroner asserted that, in addition to the three sample redacted autopsy reports it previously produced to the Review-Journal, there are approximately 680 autopsy reports and 150 external examinations responsive to the Review-Journal's request. The Review-Journal filed its Reply in support of its Opening Brief on Remand on October 22, 2020. This Court conducted a hearing on the parties' briefs on remand on October 29, 2020. At the October 29, 2020, hearing on remand, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not reviewed or performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Recorder's Transcript of October 29, 2020, Hearing ("Transcript"), p. 23:8-

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14 (on file with this Court).)

This Court found that the Review-Journal met its burden and that access to autopsy reports, including direct and full access the specific juvenile autopsy reports at issue in this case, advances multiple public interests. Of most note are two key public interests that access advances: providing the public with access to information about the Coroner's conduct and how well it performs autopsies and providing checks and balances regarding the abuse and neglect system.

Consistent with the Nevada Supreme Court's instructions on remand, the Review-Journal met its burden of establishing that access to the autopsy reports was necessary to advance the significant public interests in access. The Coroner failed to come forward with any specific evidence or analysis on remand as to how the information nonetheless merited protection, instead choosing to rely on the generalized arguments and declaration provided in the initial litigation. Nothing in that declaration or those arguments explained any specific privacy concern that attached to any particular autopsy report. Nor did the Coroner engage in any balancing, choosing instead to reply on the categorical position that autopsy reports should never be produced and to ignore the specific interests in access at issue here.

Nonetheless, over objection from the Review-Journal, the Court offered in an abundance of caution to perform an *in camera* review of the reports and specific information from the Coroner as to why protection of any particular information was necessary and still outweighed the interests in access. The Court offered this despite the fact that it was not required by the Supreme Court in its decision, and despite the fact that the Coroner had failed to come forward with any specific information or analysis in its Answering Brief on remand.

At the hearing, counsel for the Coroner effectively rejected this opportunity, and revealed in the process just how thoroughly it had neglected its duties under the NPRA. In response to the Court's offer to conduct an *in camera* review, the Coroner argued it would just redact whatever information it unilaterally deemed unrelated to the cause or manner of death. (Transcript, p. 15:6-11; *see also id.*, pp. 24:24-25:4.) Further, demonstrating just how little effort the Coroner put into meeting its burdens under the NPRA, the Coroner

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acknowledged that although it had withheld 600 to 700 autopsy reports on the grounds that they contained confidential medical or personal information, it had never actually reviewed any of those reports for privilege. (Transcript, p. 23:4-14.)

In its November 20, 2020, Order on remand, the Court found the Review-Journal established that there are "multiple significant public interests that would be served by release of the autopsy reports which outweigh the nontrivial privacy interests articulated by the Coroner." (Order, ¶ 39; *see also id.* at ¶¶ 40-49 (outlining the public interests served by access to the reports).) With regard to redactions to the reports, the Court found that—despite having over three years to do so—the Coroner had never considered, record by record, whether there is specific information contained within those reports that merits protection. (*Id.*, ¶ 61.) After rejecting the Coroner's argument that it should be permitted to redact information the Coroner unilaterally determined was "unrelated" to the cause and manner of death, the Court ordered the Coroner to produce the autopsy reports to the Review-Journal in unredacted form. (*Id.* ¶¶ 63-67.) While the Review-Journal agrees with the Court's determination that the records must be produced without the redactions proposed by the Coroner, the Review-Journal has maintained throughout this matter that it does not oppose redaction of personal identifying information such as Social Security numbers, identification card or driver's license numbers, or other similar state-issued information. (*See*, *e.g.*, August 27, 2020, Opening Brief on Remand, p. 21, n.46.) Thus, the Review-Journal does not oppose—and the Order does not prohibit—limited redaction of this sort of personal identifying information.

As the Coroner admits, at the time it filed its motion requesting a stay pending appeal, the Court had not entered the order the Coroner seeks to stay, and the Coroner had not yet obtained approval from the Clark County Board of Commissioners (the "BCC') to appeal that order. (Mot., p. 7:1-2.) However, BCC approval is needed for yet another appeal by the Coroner.

This Court made its decision clear at the hearing held on October 29, 2020 (Transcript, pp. 27:23-28:22), and this Court ordered the Coroner to produce the records by November 30, 2020, within thirty days of the October 29, 2020, hearing. (*Id.*, p. 28:22-23

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(stating that the autopsy reports "must be produced in unredacted form within 30 days from today's date"); *see also* Order, p. 15:5-7 (ordering the Coroner to produce the requested reports in unredacted form on November 30, 2020, with production to occur on a rolling basis).) As the Coroner noted in its Motion to Stay filed an on order shortening time, the written Order had not yet been entered when the Coroner sought relief. Thus, if it was appropriate to seek a stay before the Order was entered and without actual authority to do so, it is entirely unclear as to why the Coroner did not file its Motion to Stay earlier. Likewise, it is unclear as to why the Coroner did not seek BCC approval earlier.[1]

Perhaps more so than the Coroner's counsel, the Review-Journal is cognizant of the fact that the BCC is a governmental entity, and that formal, transparent processes must be followed before the Coroner can file a notice of appeal. However, delays in doing so do not justify forcing the Court to consider a stay on an emergency basis when that emergency is of the Coroner's own making. Nor do such delays give the Coroner a free pass to violate this Court's Order. Thus, the Coroner will be in contempt if it does not comply with the Order as required on November 30, 2020.

III. LEGAL ARGUMENT

A. Legal Standard for a Motion to Stay

Even if it would defeat the purpose of an appeal, a stay is not automatic. Instead, "[a] decision to grant a stay of an order pending appeal always involves an exercise of judicial discretion and is dependent upon the circumstances of the particular case." *See* 5 Am. Jur. 2d Appellate Review § 397. (Applying the federal analogue to NRAP 8 (footnotes omitted.) "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* The Coroner has the burden, and it is not a light burden. Instead, "[t]he party requesting a stay pending appeal bears the burden of showing that circumstances

[1] For example, the Clark County Board of County Commissioners ("BCC") met on November 17, 2020. (*See* https://www.clarkcountynv.gov/government/board_of_county_commissioners/commission_meeting_agendas.php.)

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justify exercise of the court's discretion, and that the injury is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation."[2]

As noted above, to evaluate whether the Coroner has met its burden in this case, this Court must consider four factors: (1) "whether the object of the appeal will be defeated if the stay is denied;" (2) "whether appellant will suffer irreparable or serious injury if the stay is denied;" (3) "whether respondent will suffer irreparable or serious injury if the stay is granted;" and (4) "whether appellant is likely to prevail on the merits in the appeal." Nev. R. App. P. 8(c); *accord Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); *accord Mikohn Gaming Corp. v. McCrea,* 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). In addition, as the United States Supreme Court has held, courts must also consider "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted); *accord NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2015 WL 3489684, at *4 (D. Nev. June 3, 2015). While it is true that "when moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (citing *Ruiz v. Estelle,* 650 F.2d 555, 565 (5th Cir.1981). The Nevada Supreme Court has "not indicated that any one factor carries more weight than the others". *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38 (citing *Hansen*, 116 Nev. 650, 6 P.3d 982 (2000)).

Here, the four factors of Nev. R. App. P. 8(c) weigh against a stay. And even if denying a stay would effectively render the Coroner's appeal moot, the fact that the other factors weigh so heavily against a stay requires this Court to nonetheless deny it. The

[2] Recently, the Nevada Supreme Court made clear that, particularly where an appeal can be expedited, a stay or injunction pending appeal will not be granted—even when some portions of the appeal will be defeated—where the likelihood of success is low due to a failure to come forward with evidentiary support. *Kraus v. Cegavske*, No. 82018, 2020 WL 6483971, at *1 (Nev. Nov. 3, 2020)

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Coroner's glib approach to this matter left it without much likelihood of success on appeal. The Review-Journal would be irreparably harmed by the impingement on First Amendment rights to report the news. And the very significant interests in access that the Review-Journal established would be advanced by access—including transparency and government accountability—would be effectively thwarted if the Court granted a stay. Relatedly, the NPRA and the case law interpreting its provisions demonstrate that the public interest lies with disclosure of the public records the Coroner has fought tooth and nail to withhold. While the Review-Journal does not minimize the fact that the Supreme Court has recognized that nontrivial privacy interests are implicated by the reports, as this Court has determined, the interests advanced by the Review-Journal significantly outweigh the very generalized interests that the Coroner asserted.

On those bases and stay in light of the unique nature of this case and its procedural posture, the Court should decline to grant a stay.

B. The Review-Journal and the Public Face Irreparable Harm if a Stay Is Granted, and the Public Interest Weighs in Favor of a Stay.

What the Coroner ignores—but this Court should not—is that the Coroner's continued withholding of the requested autopsy reports will harm not just the Review-Journal but, far more importantly, vulnerable children and families. And the Coroner also ignores or perhaps just does not understand how reporting works.

1. A Stay Will Harm the Public.

In its Motion, the Coroner argues that a stay will not harm the Review-Journal because of the nature of its long-delayed request. According to the Coroner, because the Review-Journal in 2017 requested records dating back to 2012, "this matter is not urgent;" specifically, the Coroner reasons that if access to the autopsy reports from the prior years was urgent, "the [Review-Journal] would not have waited so long to make its request." (Mot., p. 8:6-10.) This of course ignores the nature of reporting generally and investigative reporting in particular. The role of reporters is to follow issues in the news (such as the unnatural deaths of children who were or had been under the supervision of child protective services), and to

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investigate and report on the causes and possible solutions to those trends.

Here the Review-Journal is investigating issues that have significant importance to the public: the functioning of the Coroner's office and, more importantly, the deaths of vulnerable children. Perhaps what is most galling about the Coroner's delay and intractability throughout the years of litigation in this case is that the Coroner's efforts to prevent the public from accessing the requested records has also delayed the beneficial effects that transparency and oversight can have on the lives of the State's vulnerable children. There is no better example of the positive effects of access than the "Failed to Death" investigative series ran by the Denver Post and Denver news station KUSA. As discussed in the Review-Journal's Opening Brief on Remand, the reporting done by the Denver Post and KUSA on the deaths of 72 children who were known to Colorado's child welfare system identified numerous problems in that system, including overburdened caseworkers conducting incomplete or inadequate investigations into allegations of abuse, or completing failure to conduct any investigation whatsoever into abuse allegations. (OB on Remand, p. 19:6-18.) That reporting in turn lead to substantial reforms to Colorado's child welfare system—reforms that saved children from further abuse, neglect, or death.

Thus, although the Coroner asks the Court to focus on the putative lack of harm a stay would have on the Review-Journal, what this Court should focus on is the harm a stay would have on the public the Coroner is responsible to. Each day that goes by without access to the requested records serves is another day where the actions of governmental entities like the state and County's child protective services will be hidden from scrutiny, and is another day where children will continue to suffer—and perhaps even die—in a system that may be in dire need of reform.

2. A Stay Will Harm the Review-Journal's Right of Access as Guaranteed by the NPRA and the First Amendment.

As to the Coroner's short-sighted arguments about the lack of harm to the Review-Journal, every day the Coroner is permitted to continue withholding the autopsy reports irreparably damages the Review-Journal's and the public's rights under the NPRA and the

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First Amendment. The NPRA and the First Amendment guarantee the public swift access to as much information as possible about the operation of government, and also guarantee the Review-Journal's right to report on those topics, Moreover, the NPRA mandates that courts expedite NPRA matters. A stay is unwarranted in light of this framework. Thus, the Court must deny the Coroner's motion.

The NPRA is premised on the principle that access to the records of government furthers democratic principles. Nev. Rev. Stat. § 239.001(1). To further the important goal of fostering democracy, and to increase governmental transparency, the NPRA requires that its terms be construed liberally, and that any restrictions limiting access be construed narrowly. Nev. Rev. Stat. § 239.001(2) and (3); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011) (stating same). The NPRA also presumes that all governmental records must be open to the public at all times for inspection and copying unless specifically declared confidential by statute or law. Nev. Rev. Stat. § 239.010(1).

As another means to further the goal of fostering democracy, the NPRA requires that access to public records be swift.[3] As noted above, the presumption is that all records must be open to inspection or copying at all times, thus reflecting a presumption of swift access. Nev. Rev. Stat. § 239.010(1). Additionally, the presumption of swift access is reflected by the NPRA's strict mandates about when and how a governmental entity must respond to a records request, *see* Nev. Rev. Stat. § 239.0107(1)(a)-(d), as well as the requirement that courts expedite consideration of any public records matters. Nev. Rev. Stat. § 239.011(2). The NPRA's mandate to further prompt access to public records is also consistent with the First Amendment right of prompt access to information that can shed

[3] Although not applicable to the instant matter, the importance of quick access to public records was a central focus of the 2019 Legislature in amending the NPRA. For example, the Legislature amended Nev. Rev. Stat. § 239.001(1) to state that the purpose of the NPRA ". . . is to foster democratic principles by providing members of the public with ***prompt*** access to inspect, copy or receive a copy of public books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1) (2019) (emphasis added). This provision was specifically amended in 2019 by Senate Bill 287 ("SB 287") to make clear that providing prompt access to public records is part of the NPRA's central purpose. (*See* Exh. 1 to Review-Journal October 22, 2020, Reply at § 2.)

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light on newsworthy events. Courts around the country have recognized that the First Amendment requires swift access to public records because "the public interest in obtaining news is an interest in obtaining ***contemporaneous news***." *Courthouse News Services v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (emphasis added) (citing *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1352 (D.C. Cir. 1985) (Skelly Wright, J., concurring); *see also Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (holding that "each passing day may constitute a separate and cognizable infringement of the First Amendment" and that "any First Amendment infringement that occurs with each passing day is irreparable"); *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment").

Here, the Court is not faced with a delay of one to two days, but a delay of over three years. This is a far cry from the prompt access mandated by the NPRA and the First Amendment. The harm caused to the Review-Journal and the public by this delay is incalculable. Accordingly, the balance of harms weighs strongly against a stay pending appeal.

C. The Coroner's Harms Are Speculative, and Do Not Support a Stay.

In contrast the real harms that the Review-Journal and public will face, the harms articulated by the Coroner are largely speculative, and do not support a stay. As noted above, the Coroner bears the burden of demonstrating that it is entitled to a stay pursuant to NRAP 8(c). In its Motion, the only "irreparable harm" the Coroner articulates is that information it has unilaterally deemed "unrelated" to the cause or manner of death could be open to public inspection. As the United States Supreme Court has held, however, the ***mere possibility*** of

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irreparable injury is not sufficient to warrant a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (citing *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 22 (2008)); *accord In re R & S St. Rose Lenders, LLC*, No. 2:17-CV-01322-MMD, 2017 WL 2405368, at *3 (D. Nev. June 2, 2017).[4]

All the Coroner has articulated here is a mere possibility of harm premised entirely on its own determinations of what is and is not relevant to the cause or manner of death for a particular decedent. The Court has already found that the Review-Journal has met its burden of overcoming the privacy interest that may generally attach to such information. What the Coroner has never presented, however, is any concrete, identifiable harm that outweighs the specific need for the information established by the Review-Journal and that will occur if the reports are released unredacted—something it should have done in responding to the Review-Journal's Opening Brief on Remand. Nor, more fundamentally, has it presented any evidence to explain or justify its determination of what information is "unrelated" to the cause and manner of death—something again it had on opportunity to do in the pleadings on remand. As addressed by the Court at the hearing and in its Order, the public is entitled to probe such determinations, which it cannot do if the Coroner excludes such information.

In short, the Court has found that the countervailing significant interests likely to be advanced by full access to the autopsy reports outweighs the nontrivial but generalized harms the Coroner asserted in this case—and, as discussed above, further delays in access will undermine those interests. When it comes to access, time is of the essence—and when it comes to the Coroner's delays and heel dragging, enough is enough.

D. The Coroner Has Not Demonstrated a Likelihood of Success, or Even a Substantial Legal Question on Appeal.

While the Coroner contends that the legal issue at hand "is whether autopsy reports are confidential or subject to disclosure under Nevada Public Records Law" (Motion, p.,

[4] This parallels the Nevada Supreme Court's mandate that a governmental entity cannot rely on conjecture or hypothetical concerns to justify nondisclosure of public records. *DR Partners v. Bd. of County Comm'rs of Clark County*, 116 Nev. 616, 628, 6 P.3d 465, 472–73 (2000) (County cannot meet its burden by voicing non-particularized hypothetical concerns") (citation omitted).

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8:15-26), the Nevada Supreme Court has already resolved the overarching legal questions at hand. It rejected the Coroner's arguments that the juvenile autopsy reports are always confidential and exempt from the NPRA and established the legal framework applicable to this case. This Court has now properly applied that framework based on the arguments and evidence the parties presented on remand. The Review-Journal met is burden and the Coroner effectively refused the Court's offer of a further opportunity to establish why the balancing test might still favor secrecy. In light of this procedural posture, the Coroner cannot establish a likelihood of success (as it appears to concede because it never argues it is likely to succeed on the merits)[5] or even the more forgiving standard of a substantial legal question where the relative harms favor a stay.

1. The Court's Decision Will Be Evaluated for Abuse of Discretion.

Where a governmental entity succeeds in showing that the privacy interest at stake is nontrivial, the burden shifts to the requester to show that "the public interest sought to be advanced is a significant one and that the information [sought] is likely to advance that interest." *CCSD*, 134 Nev. at 707-08, 429 P.3d at 320 (internal quotations omitted). The Nevada Supreme Court remanded this matter to this Court "to determine, under the [*CCSD*] test, what information should be redacted as private medical or health-related information." *Id.* at 58, 1059. Thus, the Nevada Supreme Court left it to the sound discretion of this Court to balance the interests at stake and evaluate the factual questions that remained after the Supreme Court determined that the *CCSD* test applied to this case.

While the Nevada Supreme Court generally considers legal questions appeals of district court decisions on petitions seeking enforcement of the NPRA *de novo,* factual determinations are reviewed for an abuse of discretion. *See City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) ("A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard. However, questions of statutory construction, including the meaning and scope of a statute, are

[5] *See* Mot, p. 8:15-9:12 (arguing instead that the case presents a substantial legal question, while ignoring the balance of equities, as it has consistently done throughout this matter).

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questions of law, which this court reviews de novo.") (internal quotation marks and citations omitted). More broadly, a district court's balancing of harms is reviewed for abuse of discretion. *See, e.g.*, *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (holding that a court's decision to grant or deny a preliminary injunction—which requires the balancing of harms—"will not be disturbed absent an abuse of discretion").

Here, the Court made factual determination that the Review-Journal met its burden on remand pursuant to the test set forth by the Nevada Supreme Court. This is a factual determination subject to abuse of discretion review. The Court considered exercising its discretion to nonetheless consider any specific, further arguments the Coroner might wish to make in connection with an *in camera* review. The Court abandoned that approach when the Coroner made clear such an endeavor would be fruitless because the Coroner refused to do anything other than assert that it was entitled to follow a black-and-white rule that all information unrelated to the cause of death could be redacted, untethered to the specific nature of the information in any specific report or the need for the information.[6] In short, the Court found the Review-Journal met its burden but gave the Coroner a second bite at the apple to come forward with more specific bases to support withholding information in the reports. The Coroner effectively declined the offer to do so.

2. The Coroner Is Unlikely to Prevail, Regardless of the Standard of Review.

The Coroner has failed to establish a likelihood of success in this matter, largely because the "error" it has identified for its potential (but not yet approved or noticed) appeal is nonexistent. In its Motion, the Coroner asserts that "this Court reached the conclusion that the Coroner waived its ability to assert any privileges because the Coroner had not yet

[6] For example, the Coroner could have made an argument in the alternative as to why specific information merited protection even though the Court found that the Review-Journal met its burden.

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performed any redactions." (Mot., p. 9:3-5.) This is a distortion of the Court's Order[7]—and ignores that the Court found that the Review-Journal met its burden and that the Coroner essentially refused the opportunity to get a second bite at the apple.

The Review-Journal has now established multiple public interests that would be furthered by access to the requested records, and thus met its obligations under the *CCSD* test on remand. The Coroner hung its hat in its prior generalized assertions. The Court found that the Review-Journal's articulated interests in access outweighed the Coroner's generalized privacy assertions. Although the Court was satisfied that the Review-Journal had met its burden of establishing that there are significant interests in access, it considered letting the Coroner having another bite at the apple and offered to conduct an *in camera* review of proposed redactions.

The Coroner, however, remained steadfast on remand that it would simply redact all information the Coroner deemed "unrelated" to the cause and manner of death. At the October 29, 2020, hearing, the Coroner stated that it had only redacted the three sample autopsy reports it provided to the Review-Journal pre-litigation and had not reviewed or performed redactions to the balance of the approximately 680 autopsy reports and 150 external examinations. (Transcript, p. 23:8-14.) Because it had never reviewed or performed redactions to the withheld reports, the Coroner never made the required record-by-record determination of whether those reports contain specific information that merits protection.

Thus, the Court's determination that the Coroner failed to present argument or evidence to support keeping the records secret was not premised on the Coroner's extreme tardiness in making redactions; rather, it was premised on the Coroner's decision to rely on its generalized privacy assertions and circular position that the Coroner can redact all information it believes is unrelated to the cause and manner of death. While the Court used the word "waiver" in its decision not to give the Coroner an opportunity the Coroner

[7] It is hoped that outside counsel for Metro is being forthcoming with the BCC about what the Order actually says and regarding the Court's observations regarding the Coroner's conduct in this case.

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indicated it would not take advantage of, the Court never found that any arguments the Coroner actually came forward with had been waived. Accordingly, contrary to the Coroner's assertions, this Court's finding does not conflict with the Supreme Court's decision in *Republican Attorneys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 458 P.3d 328 (2020) ("*RAGA*").

In *RAGA*, the Republican Attorneys General Association petitioned the district court for a writ of mandamus under the NPRA seeking body camera footage and other related records regarding juveniles and then-State Senator Aaron Ford's interaction with Las Vegas Metropolitan Police Department ("Metro") officers during an incident at a property which resulted in the arrest of several juveniles. *RAGA*, 458 P.3d at 330. Metro refused to provide the records on the grounds that they pertained to an active criminal investigation but failed to identify any statutory or legal authority to justify its denial as required by Nev. Rev. Stat. § 239.0107(1)(d). *Id.* In rejecting RAGA's waiver argument, the Supreme Court held that the body camera footage fell within one of the enumerated exceptions to the NPRA's presumption of access, Nev. Rev. Stat. § 62H.025—a statute which renders juvenile justice information confidential—and a waiver based on noncompliance with the NPRA's response requirement could "undermine[] the NPRA's expressly listed exceptions for confidential information." *RAGA*, 136 Nev. at 32, 458 P.3d at 332.

Unlike the records at issue in *RAGA*, there are no "expressly listed exceptions" rendering the requested records confidential. On the contrary, the records here are presumptively public. *Coroner*, 136 Nev. at 53, 458 P.3d at 1056 (holding that the legislative history of statutes pertaining to Child Death Review Teams "demonstrates the Legislature's intent to make reports about, and information pertaining to, child fatalities publicly accessible as a matter of policy favoring transparency and as a matter of compliance with federal law requiring disclosure as a condition for child services grant funds"). Thus, the Supreme Court's holding in *RAGA* does not prohibit the Court from finding the Coroner waived its ability to further assert privileges as to the records the Coroner never made a showing contained information warranting redaction—and which the Review-Journal already

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established the interests in access overcame the interests the Coroner asserted.

As noted above, nothing in *Coroner* required giving the Coroner another (third) opportunity to overcome the showing that the Review-Journal made. Nonetheless this Court considered doing so—and only determined not to when the Coroner made its intent to refuse to make any specific showing as to why, even though the Review-Journal met its burden of showing the need for full access to the autopsy reports, there might still be information that was so sensitive that redaction was still needed. This matter is an adversarial proceeding, and the Court was not required to do that work for the Coroner where it insists on taking a black-and-white approach to the production of autopsy reports (an approach explicitly rejected by the Nevada Supreme Court) and where it refuses to review and consider specific information in reports instead.

3. The Coroner Does Not Present a Substantial Case to Justify a Stay.

As noted above (III(A) ("Legal Standard for a Motion to Stay")), the Nevada Supreme Court has held that a stay may be issued without a showing of likelihood of success if the proponent of a stay "present[s] a substantial case on the merits when a serious legal question is involved and show[s] that the balance of equities weighs heavily in favor of granting the stay." *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982. 987. Here, however, there is no serious legal question. Contrary to the Coroner's contention, the issue is not "whether autopsy reports are confidential or subject to disclosure under Nevada Public Records Law" (Mot., p. 8:25-26). The Nevada Supreme Court has already answered that question and determined autopsy reports are subject to the NPRA. *See, e.g., Coroner,* 136 Nev. at 54, 458 P.3d. at 1056 (the Coroner "may not rely on NRS 432B.407(6) to withhold juvenile autopsy reports or claim that such reports are categorically exempt from disclosure by virtue of a confidentiality"); *id.* at 54, 1057 (neither HIPAA nor Nev. Rev. Stat. § 629.031 NRS 629.031 "justify categorically withholding juvenile autopsy reports in their entirety"). The Nevada Supreme Court has also determined that a privacy balancing test applies that may justify redacting some information (136 Nev.

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at 55, 458 P.3d at 1057[8]) and that the Coroner has asserted a nontrivial privacy interest and the Review-Journal articulated a significant interest in access pursuant to that test (136 Nev. 44, 57–58, 458 P.3d 1048, 1058–59).

Thus, again, the only question left on remand was a factual one: whether the balancing of the interests at stake favors disclosure; specifically, whether the Review-Journal could meet its burden of establishing that its need for access outweighed the privacy interests asserted. On remand, this Court applied the balancing test properly and its decision, which will be reviewed for an abuse of discretion, cannot be said to raise any substantial legal question.

Even if some significant legal question were at issue, the Coroner misapplies the *Hansen* test, which—in addition to a significant legal question—requires that "the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987. Here, though, the balance of equities weighs heavily *against* a stay. As detailed above, the Coroner has not established irreparable harm and the equities cannot be said to favor the Coroner where it expressly refused the opportunity to take a less categorical approach and show how specific information might still need protection via an *in camera* review. In contrast, the Review-Journal and the public both face irreparable harm from further delays—and the public interest heavily weighs against a stay.

E. Even If Denying a Stay Would Defeat a Possible Appeal, the Court Should Still Reject Efforts to Delay.

With respect to the whether the object of the appeal will be defeated absent a stay, the Coroner asserts that disclosure of the reports as ordered by the Court prior to resolution of the Coroner's as-yet unapproved and unnoticed appeal would "undermine the Coroner's argument and render the appeal moot." (Mot., p. 7:20-21.) Even assuming the Coroner is correct that disclosure would moot its appeal, this factor does not weigh in the Coroner's

[8] Finding that "[t]he authorities the Coroner's Office invokes do not authorize categorically withholding juvenile autopsy reports, they do implicate a significant privacy interest in medical information such that the reports may contain information that should be redacted."

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favor because the claims at issue in this matter fall within the "capable-of-repetition-yet-evading-review" exception to the mootness doctrine, which applies when the duration of a challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (quotation omitted); *see also Binegar v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996) (providing that the matter must "present[] a situation whereby an important question of law could not be decided because of its timing").

The issues the Coroner tentatively intends to present to the Nevada Supreme Court in its as-yet unapproved and unnoticed appeal are extremely likely to arise in the future. As the Coroner points out (with some degree of unnecessary snark), the Review-Journal is the largest news media entity in Nevada. As the paper of record for the state, the Review-Journal routinely requests public records from governmental entities, including records pertaining to unnatural deaths. Indeed, as the Coroner is aware, in addition to this matter, the Review-Journal was required to seek judicial intervention pursuant to Nev. Rev. Stat. § 239.011(2) in *Las Vegas Review-Journal v. Clark Country Office of the Coroner/Medical Examiner*, Case No. A-17-764842-W, after the Coroner refused to disclose autopsy records for the victims and suspect in the October 1, 2017 mass shooting at the Route 91 Harvest music festival on some of the same rejected grounds it relied on in this matter.

Moreover, as evidenced at the October 29, 2020, Hearing before this Court, the Coroner is deeply entrenched in its position regarding what information it believes it can redact from the requested records, i.e., its categorical approach to withholding information in autopsy reports. It is therefore highly likely that the Review-Journal or another requester will request autopsy records in the future and be required to seek judicial intervention when the Coroner once again refuses to disclose them or asserts that it can redact large swathes of information it has unilaterally deemed as "unrelated" to the cause and manner of death. Thus, even assuming that the object of the Coroner's appeal would be mooted in the absence of a stay, this matter still falls within the capable-of-repetition-yet-evading-review exception to the mootness doctrine. Accordingly, this factor does not weigh in favor of a stay.

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Even if it that were not the case, the mere fact that this factor may weigh in favor a stay does not suffice to satisfy the Coroner's burden under NRAP 8(c) to prove that a stay is warranted. In assessing the NRAP 8(c) stay factors, the Supreme Court has declined to ascribe particular weight to any of the factors and has instead held that "if one or two factors are especially strong, they may counterbalance weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citation omitted). In this case, however, the appeal does not raise a substantial legal question, there is little support for the contention that irreparable harm would occur if the records are disclosed, and—in contrast—irreparable harm would result from a stay, which outweighs this factor even if this factor were especially important. *Cf id.* at 251–52, 89 P.3d at 38 (in the arbitration context, noting that even where the factor pertaining to defeating the purpose of the appeal "takes on added significance and generally warrants a stay of trial court proceedings pending resolution of the appeal," because of the unique context of an appeal of a denial of a motion to compel arbitration, "[t]he other stay factors remain relevant, but absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of the appeal.")

Indeed, if the Court did grant a stay here, it would entirely undermine the NPRA. The Review-Journal requested the records at issue close to four years ago. The Coroner took the categorical position that the reports were beyond the reach of the NPRA, an approach that was soundly rejected by both this Court and the Nevada Supreme Court. On remand, this Court and the Review-Journal engaged in the specific balancing of the interests at hand as directed by the Nevada Supreme Court. The Coroner refused to do so, instead pretending that there are no public interests in access and that it could continue to just take a categorical approach and refuse to provide any information other than that which it determined was not related to the cause and manner of death, despite the fact that the Court found that access to the other information in the reports advances multiple public interests. It would defeat those interests and the very purpose of the NPRA if, on these facts, a stay were issued just to avoid defeating the purpose of the Coroner's appeal.

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IV. CONCLUSION

The Court should reject the Coroner's motion for a stay pending appeal for what it is—an attempt to further delay production of the records it has withheld since April 2017 and a refusal to accept that the NPRA does not allow it to categorically withhold autopsy reports—or whole categories of information contained therein. The Coroner has failed to establish that it will suffer irreparable harm absent a stay pending appeal and has not established a likelihood of success on appeal. Indeed, it may not even actually appeal. In contrast, the continued withholding of the autopsy report has caused and will continue to cause irreparable harm to the Review-Journal and, more importantly, the public. Accordingly, this Court should deny the Coroner's request for a stay pending appeal.

DATED this 30th day of November, 2020.

/s/ Margaret A. McLetchie
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing OPPOSITION TO MOTION TO STAY ON AN ORDER SHORTENING TIME in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner,* Eight Judicial District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

/s/ Pharan Burchfield
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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: 24 **Date of Hearing:** December 10, 2020 **Time of Hearing:** 9:00 A.M.

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S REPLY IN SUPPORT OF MOTION TO STAY ON AN ORDER SHORTENING TIME

Respondent, Clark County Office of the Coroner/Medical Examiner ("Coroner"), by and through their attorneys of record, Craig R. Anderson, Esq. and Jackie V. Nichols, Esq., of the law firm Marquis Aurbach Coffing and Laura C. Rehfeldt, Esq., Deputy District Attorney with the Clark County District Attorney/Civil Division, hereby submit their Reply in Support of Motion to Stay on an Order Shortening Time.

This Reply is made and based upon all papers, pleadings, and records on file herein, the attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this matter.

Dated this 7th day of December, 2020.

MARQUIS AURBACH COFFING

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MEMORANDUM OF POINTS & AUTHORITIES

I. LEGAL ARGUMENT

A. THE COURT MAINTAINS BROAD DISCRETION TO STAY PROCEEDINGS.

The Court has broad discretion to stay proceedings. The Coroner's Motion for Stay pending resolution of an appeal to the Nevada Supreme Court should be granted. The object of the appeal would be defeated without a stay, the balance of the hardships strongly favors the Coroner, and there is likelihood that the Coroner will prevail on the merits in the underlying appeal. This matter involves confidentiality issues related to Autopsy Reports of juveniles, which contain information pertaining to the decedents personal medical and health information that the Supreme Court recognized involves a nontrivial privacy interest and could merit redaction.

As set forth in the Coroners Motion for Stay, a motion for stay is analyzed by applying the factors listed in NRAP 8(c). *See* NRAP 8(c): *Fritz Hansen A/S v. Eighth Judicial District Court*, 116 Nev. 650, 6 P.3d 982 (2000). One or two factors strongly in favor of appellant can be sufficient to grant a stay. While no one factor is more important, if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v.*

McCrea, 120 Nev. 248, 251, 89 P.3d 36 (2004). The Nevada Supreme Court recognizes that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Maheu v. Eighth Judicial Dist. Court*. 89 Nev. 214. 216-17. 510 P.2d 627. 629 (1973) (quoting *Landis v. North American Co.,* 299 U.S. 248. 254-55 (1936)): *see also Karuk Tribe of California v. United States Forest Serv.*, 2006 U.S. Dist. LEX1S 5908. *4 (N.D. Cal. 2006) (the court "has broad discretion to stay proceedings as an incident to its power to control its own docket") (quoting *Clinton v. Jones*, 520 U.S. 681, 707-08 (1997)). This case involves an unsettled and contentious area of Nevada Public Records Law, and in order for the Coroner to pursue its right to appeal, a stay of the District Court Order requiring the release of the Autopsy Reports in unredacted format requested by the LVRJ must be issued.

B. THE CORONER HAS SATISFIED THE NRAP 8(C) FACTORS FOR GRANTING A STAY.

1. <u>The Object of the Appeal will be Defeated if a Stay is Denied.</u>

As the Coroner argued in its initial Motion. the purpose of the appeal will be undermined lithe stay is not entered. This is because without the stay, the Coroner must comply with the Court order requiring disclosure in unredacted format which means personal medical and health information within the hundreds of Autopsy Reports of children will be disseminated to the LVRJ, which in turn could he revealed to the public at large. The release of the Autopsy Reports in unredacted format pending appeal results in intangible items, consisting of personal medical and health information about children that the Supreme Court has expressly deemed involves nontrivial privacy interests that merit a balancing of interests. Disclosure of this information in unredacted form as ordered by this Court could result in the information transmitted to the media, read or listened to by the public at large, and cannot be returned, or forgotten, or treated as confidential once released. Once disseminated, this information cannot be collected and taken back by the families of the decedent.

In other words, once the information is released, the object of the appeal is entirely undermined. There is nothing to protect the information as confidential after it has been

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disclosed. Release of the Autopsy Reports in unredacted format pending appeal renders the Coroner's right to appeal moot as the information it seeks to protect under Nevada Public Records Law will have been disseminated. There would be no purpose to the appeal as the subject matter the Coroner argues as confidential would no longer be. Thus, a stay should issue to avoid defeating the purpose of the appeal.

2. Irreparable Injury will Result if the Stay is Denied

Again, as the Coroner argued in its initial motion, without a stay irreparable or serious injury will result because once the Autopsy Reports in unredacted format are released, that information is exploited and dissemination cannot be reversed. And again, once this information is disclosed, there is no way to repair the harm. The Coroner does not dispute that the Supreme Court has deemed autopsy reports to be public records. The LVRJ's arguments, however, ignore the Supreme Court's conclusion that the requested Autopsy Reports contain nontrivial privacy interests, including personal medical and health information of the decedents. Here, it is the Coroner's position that this Court erred and did not properly apply the balancing test. That is, the LVRJ failed to articulate how the information it seeks, the confidential health and medical information of the decedent unrelated to the cause or manner of death, advances a significant public interest. While the LVRJ continues to misinterpret the Coroner's proposed redactions, it is important that the Court recognizes that the only information the Coroner sought to protect via redaction was the confidential health and medical information—not all information—unrelated to the cause or manner of death. And, as the Coroner argued and articulated in its brief on remand, any information pertaining to child welfare or Department of Family Services would not be redacted as that information is not confidential medical or health information, even if it is unrelated to the manner or cause of death. And, the if the Supreme Court agrees, and this Court declines to enter a stay, the entire appeal is moot and any privacy interests the Supreme Court may deem more significant than the public's interest in access is waived. If the Autopsy Reports are released in unredacted format pending stay of the Coroners appeal to the Nevada Supreme Court irreparable harm would be of paramount concern.

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3. There is no Harm to the Public and the RJ if a Stay is Granted.

In support of its argument that it would be harmed should the Motion for Stay be granted, the LVRJ accuses the Coroner of obstructionist tactics. It claims that by granting the stay it would encourage governmental entities to essentially arbitrarily refuse access to records and undermine the NPRA. The LVRJ continues to completely miss the point of the Coroner's position with respect to these Autopsy Reports of juveniles. The Coroner takes this issue very seriously and it seeks to protect only confidential health and medical information unrelated to the cause or manner of death. And, the Supreme Court expressly recognized that Autopsy Reports inherently contain private medical and health information unrelated to the cause and manner of death. If the stay is not granted pending appeal, then the protections in place with respect to information about children are undermined and breached. Second, this particular information about a decedent—the confidential health and medical information—if disseminated, could cause embarrassment to a family and an invasion or privacy. To suggest that the Coroner is engaged in obstructionist tactics is absurd and offensive.

The RJ indicated that it desires to use the Autopsy Reports to disseminate information affecting positive changes that might prevent juvenile deaths. As the Supreme Court point out, while it is unclear how the unredacted Autopsy Reports will assist with that article, considering the LVRJ already has the cause and manner of death of each decedent, such a topic would not seemingly lose relevance overtime, and unsuccessful on appeal, presumably the LVRJ will have the opportunity to report it. The same is true if the Board of County Commissioners does approve of the appeal.[1] Moreover, the public has already been privy to reports on several deaths that were identified within the spreadsheet, including those from the LVRJ.[2] If the RJ is not

[1] The Board of County Commissioners is scheduled to hear and make a decision on this matter on December 15, 2020 via an open meeting pursuant to Nevada's Open Meeting Law. The Notice of Entry of Order in this case was filed on November 20, 2020. Under NRAP 4, the Coroner has until December 18, 2020 to file a Notice of Appeal. And, as LVRJ is aware, prior to filing a notice of appeal, the Coroner must obtain approval by the Board of County Commissioners.

[2] *See* https://www.reviewjournal.com/crime/courts/litany-of-torture-abuse-preceded-death-of-henderson-mans-3-year-old-daughter-prosecutor-says/; https://www.reviewjournal.com/crime/courts/las-vegas-police-investigate-death-of-baby/; https://m.lasvegassun.com/news/2014/feb/20/nellis-staff-sergeant-now-

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successful on appeal, or sooner, it can find a way to report on that topic without the unredacted Autopsy Reports, if it so desires, as, again, the Coroner provided the RJ with the cause and manner of death of each decedent. Thus, the LVRJ and the public is not harmed should the stay be granted.

4. The Coroner Presents a Substantial Case on the Merits and Serious Legal Questions.

This Court specifically reached the conclusion that the Coroner had waive its ability to make any privilege arguments because the Coroner had not yet performed the redactions. And, the Nevada Supreme Court—on two separate occasions—has reiterated its position that the NPRA does not permit waiver of a privilege. *See Rep. Atty's Gen. Assoc. v. Las Vegas Metro. Police Dep't*, 136 Nev. Adv Op. 3 (February 20, 2020). There, the Supreme Court determined that despite the fact that LVMPD failed to comply with the provisions set forth in NRS 239.0107 (the statutory five-day period), ***waiver is not an enumerated remedy, and such a remedy cannot be read into the NPRA statutes***. *Id.* (Emphasis added).

In doing so, the Court reasoned that NRS 239.011 unambiguously provides a remedy for when a governmental entity fails to comply with response requirements in NRS 239.0107(1)(d) and when a statute such as the NPRA "expressly provides a remedy, courts should be cautious in reading other remedies into the statute." *Id.* That remedy is to petition to the district court and obtain costs and attorney fees upon prevailing. *Id.* As a result, while the five-business-day-response requirement is mandatory, the remedy available to requesting parties is judicial intervention and not waiver. *Id.*

In addition to expressly rejecting this waiver argument, the Court further explained that the Legislature expressly rejected the idea of a waiver:

> "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93, 100 S.Ct. 1723, 64

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charged-murder-after-3-m/; https://lasvegassun.com/news/2012/mar/14/attorneys-ask-delay-hearing-dad-charged-child-abus/

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> L.Ed.2d 354 (1980) (Stewart, J., dissenting)); *see also Russello v. United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 732-33, 100 P.3d 179, 194 (2004). The Legislature added NRS 239.0107 to the NPRA during the 2007 legislative session. 2007 Nev. Stat., ch. 435, § 4, at 2061-62. Section 4(2) of the bill as introduced provided for an explicit waiver. S.B. 123, 74th Leg. (Nev., Feb. 20, 2007). ***However, the waiver provision was later stricken*** by Amendment No. 415. S.B 123, Amendment no. 415, § 4, 74th Leg. (Nev., Feb. 20, 2007); *see also* Hearing on S.B. 123 Before the Subcommittee of the Senate Comm. on Gov't Affairs, 74th Leg. (Nev., Apr. 9, 2007) (expressing concern that the Department of Corrections would not have time to address inmates' requests for confidential records). Accordingly, we hold that LVMPD did not waive its assertion of confidentiality by failing to timely respond to RAGA's requests.

Id. (Emphasis added). So, contrary to LVRJ's improper analysis, the Supreme Court's conclusion that waiver does not apply is not limited in any fashion to statutory exemptions. Second, in the very case before this Court, the Supreme Court reversed this Court's prior ruling that the Coroner waived its ability to assert a particular privilege because it was not raised in the initial response to the LVRJ. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 48-49, 458 P.3d 1048, 1053 (2020). Thus, there is a serious legal question as to whether a government agency waives its ability to assert a privilege when it does not perform redactions without ever disclosing the subject records.

Second, the Court did not properly perform the balancing test. The Supreme Court concluded that the Coroner satisfied its obligation and demonstrated that the Autopsy Reports contain personal medical and health information that pertain to nontrivial privacy interests. On remand, the Supreme Court directed this Court to conduct a balancing test upon LVRJ's showing that the information sought—the medical and health information unrelated to the cause and manner of death—would advance the public's interest. *Id.* at 1059. Instead of focusing on the redacted material, the LVRJ, and the Court, emphasized on access to Autopsy Reports in general. LVRJ neglected to provide any basis for seeking medical and health information—including, pre-existing medical conditions, diseases, and mental illness—that was unrelated to the cause and manner of death. Accordingly, it is the Coroner's position that the Court did not properly balance the interests at stake.

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II. CONCLUSION

For the foregoing reasons, a stay should be entered for the release of autopsy reports dating back to January 2012 relating to children who have died in Clark County and whose deaths were investigated by the Coroner, pending the disposition of the Coroner's appeal. In the event this Court determines that a stay is not warranted, then the Coroner respectfully requests that the Order be stayed long enough to allow the Coroner to obtain approval from the BCC for an appeal and seek this relief from the Nevada Supreme Court.

Dated this 7th day of December, 2020.

MARQUIS AURBACH COFFING

By /s/ Jackie V. Nichols
Craig R. Anderson, Esq.
Nevada Bar No. 6882
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S REPLY IN SUPPORT OF MOTION TO STAY ON AN ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[3]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Rosie Wesp
An employee of Marquis Aurbach Coffing

[3] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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NEO

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **NOTICE OF ENTRY OF MOTION FOR AN ORDER TO SHOW CAUSE ON AN ORDER SHORTENING TIME**

TO: THE PARTIES HERETO AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the 8th day of December, 2020, a Motion for an Order to Show Cause on an Order Shortening Time was entered in the above-captioned action.

A copy of the Motion for an Order to Show Cause on an Order Shortening Time is attached hereto as **Exhibit 1**.

DATED this 8th day of December, 2020.

/s/ Margaret A. McLetchie
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
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Email: maggie@nvlitigation.com
Attorneys for Petitioner Las Vegas Review-Journal

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2020, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing NOTICE OF ENTRY OF MOTION FOR AN ORDER TO SHOW CAUSE ON AN ORDER SHORTENING TIME in *Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner,* Eighth Judicial District Court Case No. A-17-758501-W, to be served electronically using the Odyssey File&Serve system, to all parties with an email address on record.

/s/ Pharan Burchfield
An Employee of McLetchie Law

INDEX OF EXHIBITS	
Exhibit	**Description**
1	December 8, 2020 Motion for an Order to Show Cause on an Order Shortening Time

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EXHIBIT 1

OST
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS REVIEW-JOURNAL, Petitioner, vs. CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.	Case No.: A-17-758501-W Dept. No.: XXIV **HEARING REQUESTED** **PETITIONER LAS VEGAS REVIEW-JOURNAL'S MOTION FOR ORDER TO SHOW CAUSE ON ORDER SHORTENING TIME**

Petitioner Las Vegas Review-Journal (the "Review-Journal") hereby submits this Motion for an Order to Show Cause for why Respondent Clark County Office of the Coroner/ Medical Examiner (the "Coroner") should not be held in contempt. This Motion is supported by the attached memorandum of points and authorities, any attached exhibits, and the pleadings and papers on file with this Court.

DATED this 7th day of December, 2020.

/s/ Margaret A. McLetchie
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Attorneys for Petitioner Las Vegas Review-Journal

ORDER SHORTENING TIME

TO: ALL INTERESTED PARTIES.

Upon the Declaration of Margaret A. McLetchie, and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the time for hearing the above-entitled matter will be shortened and will be heard on the 10th day of December 2020, at the hour of 9:00 a.m./~~p.m.~~., in the above-entitled Court or as soon thereafter as counsel may be heard.

Dated this 8th day of December, 2020

85B 577 958B FD6C
Jim Crockett
District Court Judge

Respectfully submitted,

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
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DECLARATION OF MARGARET A. MCLETCHIE IN SUPPORT OF ORDER SHORTENING TIME

Margaret A. McLetchie declares as follows:

1. I am an attorney duly licensed to practice before this Court.

2. I am counsel for the Las Vegas Review-Journal (the "Review-Journal") in this matter.

3. This case involves a petition for public records filed pursuant to the Nevada Public Records Act ("NPRA"), Nev. Rev. Stat. § 239.001 *et seq.* filed by the Review-Journal.

4. The November 20, 2020, Order entered by the Court in this case required Clark County Office of the Coroner / Medical Examiner (the "Coroner") to produce records to the Review-Journal. Specifically, the order mandated that the Coroner "produce directly to the Review-Journal the requested juvenile autopsy reports in unredacted form by November 30, 2020."

5. As of the current date, December 7, 2020, the Coroner has not provided any such autopsy reports to the Review-Journal.

6. The Review-Journal asked the Coroner to at least produce the records in the redacted form it urged was appropriate at the hearing on this matter. I emailed counsel for the Coroner on December 1, 2020, requesting that the Coroner provide the requested autopsy reports in any format—redacted or unredacted. A true and correct copy of that email is attached hereto as **Exhibit 1**.

7. That same day, after waiting several hours for a response from counsel for the Coroner, I again emailed to ask that the Coroner produce the records. A true and correct copy of that email is attached hereto as **Exhibit 2**.

8. Counsel for the Coroner responded via email on December 1, 2020, that she was waiting to hear back from the Coroner. A true and correct copy of that email is attached hereto as **Exhibit 3**. I never heard anything further from counsel for the Coroner.

9. **Immediate relief is needed so that the Review-Journal can get information about records and plans for production**. The Coroner has not meaningfully

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engaged in meet and confer efforts. The Coroner has refused to provide the Review-Journal with information about the records at issue, costs, or plans for production.

10. **Immediate relief is needed so that the Review-Journal can obtain records consistent with the Order**. I am aware that the Coroner has moved for a stay of this Court's November 20, 2020, Order and that the motion for stay is set for hearing on December 10, 2020. However, the existence of this pending motion does not relieve Coroner of its obligation to comply with this Court's orders.

11. **Court intervention is also necessary to protect the Review-Journal's First Amendment rights and ensure compliance with the letter and spirit of the NPRA**. Every day that the Coroner is in violation of this Court's Orders is a violation of the First Amendment and the NPRA, as the Coroner's noncompliance deprives the Review-Journal of its ability to timely report the news. *See e.g.*, *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a 48-hour delay in access was "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *see also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment").

12. Through this emergency motion, the Review-Journal requests this Court issue an order directing the Coroner to show cause as to why it should not be held in contempt and sanctioned for violating this Court's November 20, 2020, order.

13. If this emergency motion were set in ordinary course, the Review-Journal would not be able to seek the relief it requests. The Review-Journal is entitled to the access it won through this litigation and cannot be in a position where it is in the dark about production, unable to control its possible costs, and denied access while the Coroner contemplates whether to appeal (and the County contemplates whether to authorize such an appeal).

14. Above and beyond the requirements of Eighth Judicial District Court Rule 2.26 and contrary to the practices of counsel for the Coroner, I will provide a courtesy copy of this motion to counsel for the Coroner via email after delivering it to the Court.

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Pursuant to Nev. Rev. Stat. § 53.045(1), I declare under the penalty of perjury that the foregoing is true and correct.

EXECUTED on this the 7th day of December, 2020.

/s/ Margaret A. McLetchie
Margaret A. McLetchie

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELEVANT FACTS

The Coroner's dilatory conduct in this Nevada Public Records Act (NPRA) matter has kept this matter languishing in the Nevada courts since 2017 and deprived the Review-Journal (and the public) of information that serves many important public interests. As this Court noted: "it's just upsetting to see that there's this kind of heel dragging that would go on in a public records case, but it has." (Transcript of October 29, 2020, Hearing, on file with this Court, pp. 27:24 – 28:1.) The Coroner's heel-dragging continues to this day, and this Court should order the Coroner to show cause why it should not be held in contempt for its noncompliance with this Court's order mandating disclosure of juvenile autopsy records.

This Court's November 20, 2020, Order mandates that the Coroner must "produce directly to the Review-Journal the requested juvenile autopsy reports in unredacted form by November 30, 2020 … in the electronic format and medium requested by the Review-Journal" with caps on the fees the Coroner may charge for reproduction. (November 20, 2020, Order, on file with this Court, p. 15:3-19.) That date has passed, and the Coroner has not complied with this Court's Order. Therefore, the Coroner is obligated to comply with this Court's unambiguous order, and this Court should order the Coroner to show cause for its failure to comply.

Underscoring the need for sanctions, the Coroner has refused to even provide the Review-Journal with the records in the redacted form in which the Coroner argued it should be allowed to produce. The Coroner knew it would be obligated to produce the requested records within 30 days[1] as soon as the October 29, 2020, hearing on remand concluded. Yet, it apparently could not be bothered to take steps toward complying with this Court's order or even the lesser step of producing the requested records in the manner the Coroner argued was

[1] "[THE COURT]: Accordingly, I am finding that a significant public interest plural greatly outweigh the non-trivial privacy interests that have been argued and advanced by the Coroner as to all of the juvenile autopsy reports requested within the time frame that -- made by the Review Journal newspaper. And they therefore must be produced in unredacted form within 30 days from today's date." (Transcript of October 29, 2020, Hearing, p. 28:18-23.)

appropriate at hearing.

Rather, the same day the November 20, 2020, Order was entered, the Coroner moved this Court for a stay of the Order, which the Review-Journal opposed. The hearing on that Motion is set for December 10, 2020, and no stay has been entered. The mere pendency of the Coroner's motion to stay does not excuse non-compliance with this Court's November 20, 2020, Order.

Moreover, counsel for the Coroner has indicated that, as of the filing of this motion, the Board of County Commissioners ("BCC") has not authorized an appeal of this Court's Order (Motion for Stay, p. 6:1-2), and it is unclear if the BCC will authorize an appeal. The Coroner's refusal to provide documents in any form by the deadline set by this court reflects its *modus operandi* in this case: delay. And any claim that the stay should be granted (and, more importantly, that the Coroner's contempt of this Court's Order should be excused) *because* the BCC has not yet decided whether to appeal should be rejected. The Coroner has not diligently and expeditiously sought the needed approval. As detailed below, approval for the appeal the Coroner intends to seek was not placed on the BCC agenda until December 1, 2020, and the item was pulled from the agenda at that meeting, purportedly to be placed on the agenda again for consideration on December 15, 2020. However, the Coroner could have attempted to gain authorization for an appeal at, for example, the regular BCC meeting held on November 17, 2020. This delay reflects a bad faith intent to violate the Review-Journal's rights under the NPRA and underscores the need for sanctions.

The Coroner was required to produce the records no later than November 30, 2020. It has failed to do so and its only reason for doing so is because it has asked for a stay pending an appeal it has not been authorized to file. Demonstrating that improper delay is the true motive behind the Coroner's refusal to follow this Court's Order, the Coroner has not even produced the documents in the redacted form it claimed it was willing to produce them even before this Court's Order requiring unredacted production. Not only does the Coroner's refusal to attempt to comply with the Order demonstrate the appropriateness of sanctions. That appropriateness is bolstered by the Coroner's refusal to even communicate with the

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Review-Journal to resolve this matter. Thus, this Court should order the Coroner to show cause for its noncompliance and award sanctions to the Review-Journal for the fees and costs incurred in litigating the instant Motion.

II. LEGAL ARGUMENT

A. Legal Standard for an Order to Show Cause.

As the Nevada Supreme Court articulated, "parties are not at liberty to disobey notice, orders or any other directives" issued by district courts. *Weddell v. Stewart*, 127 Nev. 645, 652, 261 P.3d 1080, 1085 (2011). Nevada law defines contempt as, inter alia, "[d]isobedience or resistance to any lawful writ, order, rule or process issued by the court." Nev. Rev. Stat. § 22.010(3). Courts have inherent power to enforce their decrees through civil contempt proceedings…." *In re Determination of Relative Rights of Claimants & Appropriators of Waters of Humboldt River Stream Sys. & Tributaries*, 118 Nev. 901, 909, 59 P.3d 1226, 1231 (2002) (citing Noble v. Noble, 86 Nev. 459, 463, 470 P.2d 430, 432 (1970)). Civil contempt is "prosecuted to enforce the rights of private parties and to compel obedience to orders or decrees for the benefit of opposing parties." *Warner v. Second Judicial Dist. Court In & For Cty. of Washoe*, 111 Nev. 1379, 1382–83, 906 P.2d 707, 709 (1995) (citing *Marcisz v. Marcisz*, 65 Ill.2d 206, 2 Ill.Dec. 310, 312, 357 N.E.2d 477, 479 (1976)). "When a contempt proceeding is civil in nature, any allegations need only be proven by clear and convincing evidence." *Bohannon v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 2017 WL 1080066 (2017) (citing *In the Matter of Battaglia*, 653 F.2d 419, 422 (9th Cir. 1981)).

The Court has authority to punish civil contempt in two ways. First, the Court may impose a fine "not exceeding $500" on the contemnor. Nev. Rev. Stat. § 22.100(2). Second, and more pertinent to the instant matter, "if a person is found guilty of contempt pursuant to subsection 3 of NRS 22.010, the court may require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney's fees, incurred by the party as a result of the contempt." Nev. Rev. Stat. § 22.100(3). Here, the Review-Journal seeks an award of sanctions and the fees and costs incurred in

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litigating the instant Motion.

B. The Coroner Is Not in Compliance with this Court's Order.

This Court entered a written order on November 20, 2020, mandating that the Coroner "produce directly to the Review-Journal the requested juvenile autopsy reports in unredacted form by November 30, 2020 … in the electronic format and medium requested by the Review-Journal" with caps on the fees the Coroner may charge for reproduction. (November 20, 2020, Order, p. 15:3-19.) Although the Coroner moved for a stay of proceedings, set for hearing on December 10, 2020, while it considers whether to appeal, it is not entitled to a stay of these proceedings as a matter of right. As of the instant date, the Coroner has not complied with this Court's Order as it has not produced any responsive records to the Review-Journal. Therefore, the Review-Journal now moves this Court for an order to show cause why the Coroner should not be held in contempt for failure to obey this Court's order.

It is a "basic proposition that all orders and judgments of courts must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). "An order on which a judgment of contempt is based must be clear and unambiguous, and must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him. *Cunningham v. Eighth Judicial Dist. Court of State of Nev., In & For Clark Cty.*, 102 Nev. 551, 559–60, 729 P.2d 1328, 1333–34 (1986) (citing *Southwest Gas Corp. v. Flintkote Co.*, 99 Nev. 127, 659 P.2d 861 (1983)). In the instant case, the Court's Order could not be clearer: produce the unredacted juvenile autopsy reports by November 30, 2020.

C. The Fact that the Coroner Filed a Motion to Stay and Might Appeal (If It Obtains BCC Approval) Does Not Excuse Noncompliance.

The Coroner has chosen to disobey this Court, and its motion for a stay in the hope of being allowed to take yet another appeal in this matter does not absolve it of its duty to comply with this Court's Order. The Coroner acknowledged in its November 20, 2020, Motion that it has not obtained approval from the BCC to appeal the Court's Order. (Motion,

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p. 6:2-3.) In its Motion, the Coroner indicated it would be seeking approval for yet another appeal at the Board's December 1, 2020, meeting. (*Id.*) What the Coroner did not include in its Motion, however, is any explanation as to why it did not seek approval for an appeal from the Board during an earlier BCC meeting.

In any case, as courts across the country have held, "a motion to stay any district court order pending appeal does not excuse compliance with that order until and unless the Court grants a timely-filed motion." *Jeld-Wen, Inc. v. Nebula Glass Int'l, Inc.*, No. 05-60860CIV-TORRES, 2007 WL 1625721, at *2 (S.D. Fla. May 26, 2007) (citing *Maness v. Meyers,* 419 U.S. 449, 458, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) ("all orders and judgments of court must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal."); *Nascimento v. Dummer*, 508 F.3d 905, 910 (9th Cir. 2007) ("No stay of the district court proceedings pending resolution of the appeal had been sought or granted, and so [plaintiff] remained under an obligation to comply with the district court's orders …; notwithstanding his appeal. His failure to comply with court orders was properly sanctionable[.]"); *Carlucci v. Piper Aircraft Corp., Inc.,* 775 F.2d 1440, 1448 (11th Cir.1985) (failure to comply with discovery order absent a stay of that order justified substantial Rule 37 sanctions). Thus, this Court must hold the Coroner in contempt notwithstanding its pending motion for stay.

D. The Coroner's Refusal to Even Produce the Records in the Manner It Argued They Should Be Produced Reflects Willful Disregard of Its Duty to Produce the Records.

During the prior appeal proceedings, the Coroner contended that the records at issue were categorically exempted from the NPRA. (November 20, 2020, Order, ¶ 12.) The Nevada Supreme Court rejected that argument (*id*, ¶¶ 13-16) and on remand this Court found that the public interests in disclosure asserted by the Review-Journal significantly outweighed any non-trivial privacy interests asserted by the Coroner. (*id.*, ¶¶ 39, 57; *see also* Transcript of October 29, 2020, hearing, p. 22:6-9; *id.*, p. 28:2-23.) Nevertheless, at the

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October 29, 2020, hearing on remand, the Court attempted to address possible concerns regarding privacy interests, suggesting that the Coroner submit both unredacted copies and proposed redactions for *in camera* review. (Transcript of October 29, 2020, Hearing, pp. 17:23 – 18:10.) The Coroner represented that it would simply redact anything unrelated to the cause of death, which the Court found problematic. (*Id.*, p. 15:15-21.) Furthermore, the Coroner did not respond to a request from the Review-Journal that it provide the autopsy reports in that form while the motion for stay was pending. (McLetchie Decl., ¶ 6.) Thus, sanctions for the Coroner's willful noncompliance are warranted.

E. The Coroner Delayed Seeking BCC Approval to Appeal and Still Does Not Have Authorization to Appeal.

The Coroner's failure to timely seek BCC approval underscores its lack of respect for this Court's authority and undermines any argument that it should have been entitled to violate the Court's Order pending the hearing on the Motion to Stay. As noted above, this Court conducted the hearing on remand on October 29, 2020. During that hearing, the Court orally directed the Coroner to produce the long-awaited autopsy reports to the Review-Journal within 30 days of the October 29, 2020, hearing. (Transcript of October 29, 2020, hearing, p. 28:18-23.) Thus, at the time of the hearing, the Coroner knew that it was facing a mandatory production deadline that it might want to appeal. At the same time, the County Commissioners were scheduled to conduct a regular Board meeting on November 17, 2020.[2]

Given that the Coroner was aware of the Court's decision on October 29, 2020, and knew that it had a mandatory deadline to begin production of the autopsy reports, it had ample time to seek placement of an action item on the November 17 Board meeting agenda to obtain a decision on whether it would be allowed to appeal while still complying with the notice requirements outlined by Nevada's Open Meeting Law. *See, e.g.*, Nev. Rev. Stat. § 341.020(3) (requiring that "[e]xcept in an emergency, written notice of all meetings must be given at least 3 working days before the meeting"). But the Coroner did not, instead waiting

[2] https://agenda.co.clark.nv.us/sirepub/mtgviewer.aspx?meetid=2147&doctype=agenda (Nov. 17, 2020, Board meeting agenda) (last accessed December 7, 2020).

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until after the November 17, 2020, BCC meeting to place its request for approval of an appeal before the Board.

The item was finally placed on the agenda for a BCC meeting held on December 1, 2020; however, adding further delay and undermining the Coroner's claim that it will appeal this matter, the Board declined to take action on the Coroner's request for approval to appeal this Court's Order, and tabled action on the request until the Board's December 15, 2020, Board meeting.[3] Thus, because of the Coroner's delay in obtaining approval for appeal from the BCC, when the Court conducts the December 10, 2020, hearing on the Coroner's Motion for Stay Pending Appeal, the Coroner will still not even know if the BCC will approve the Coroner's latest endeavor to evade disclosure of public records.

III. CONCLUSION

For these reasons, the Review-Journal respectfully requests that this Court issue an order directing the Coroner to show cause why it should not be held in contempt and be sanctioned in amount appropriate—$500.00 and the fees and costs incurred by the Review-Journal in litigating the instant Motion—for its failure to comply with the November 20, 2020, Order.

DATED this 7th day of December, 2020.

/s/ Margaret A. McLetchie

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Attorneys for Petitioner Las Vegas Review-Journal

[3] *See* Summary of Final Action for December 1, 2020, Board Meeting at Item 25 (noting that action on the request to approve and authorize appeal held to December 15, 2020), available online: https://clark.granicus.com/MinutesViewer.php?view_id=17&clip_id=6923&doc_id=75d3b9d8-342a-11eb-bc32-0050569183fa (Last accessed December 7, 2020).

EXHIBIT 1

From: Maggie
To: Jackie V. Nichols
Cc: Alina; Laura.Rehfeldt@clarkcountyda.com; Pharan
Subject: LVRJ v Coroner (Case No. A-17-758501-W)
Date: Tuesday, December 1, 2020 10:21:00 AM
Attachments: image001.png

Hi, Jackie –

As you know, the deadline to produce the autopsy records was yesterday and the Coroner is now in violation of the order. Since, at the hearing, you indicated that it was your view that the reports should be produced with anything unrelated to the cause of death redacted, would you please simply produce the records in that form by close of business tomorrow? Please get back me so I can let my client know. While we are entitled to the full reports and full access will advance the public interest, my client is eager for access to as much information as possible now to reduce the harms (somewhat) caused by delays. The LVRJ of course is not waiving its rights with regard to enforcement of the order or with regard to any of our arguments.

Maggie McLetchie

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EXHIBIT 2

From: Maggie
To: jnichols@maclaw.com
Cc: Krista Busch; Pharan; Alina
Subject: Misc. / unaddressed items
Date: Tuesday, December 1, 2020 3:19:49 PM
Attachments: RE External A775378 Las Vegas Review-Journal vs. Las Vegas Metropolitan Police Department - RESCHEDULING Petitioner Las Vegas Review-Journal"s Motion for Reconsideration or in the Alternative Alter or Amend.msg
LVRJ v Coroner (Case No. A-17-758501-W).msg
image001.png

Jackie – I need to hear back from you on these 2 matters. Please get back to me. We are looking at the order you sent.

Maggie McLetchie
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701 E. Bridger Ave., Suite 520, Las Vegas, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
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Maggie McLetchie

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EXHIBIT 3

From:	Jackie V. Nichols
To:	Maggie
Cc:	Krista Busch; Pharan; Alina
Subject:	RE: Misc. / unaddressed items
Date:	Tuesday, December 1, 2020 3:45:50 PM
Attachments:	image003.png

Maggie,

I gave you my availability. The soonest I am available is the 30th.

As to the autopsy reports, I am waiting to hear back from my client.

MARQUIS AURBACH COFFING

Jacqueline V. Nichols, Esq.
10001 Park Run Drive
Las Vegas, NV 89145
t | 702.207.6091
f | 702.382.5816
jnichols@maclaw.com
maclaw.com

From: Maggie <maggie@nvlitigation.com>
Sent: Tuesday, December 01, 2020 3:20 PM
To: Jackie V. Nichols <jnichols@maclaw.com>
Cc: Krista Busch <kbusch@maclaw.com>; Pharan <pharan@nvlitigation.com>; Alina <Alina@nvlitigation.com>
Subject: [External] Misc. / unaddressed items

Jackie – I need to hear back from you on these 2 matters. Please get back to me. We are looking at the order you sent.

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Plaintiff(s) vs. Clark County Office of the Coroner/ Medical Examiner, Defendant(s)	CASE NO: A-17-758501-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 12/8/2020

Krista Busch	kbusch@maclaw.com
Alina Shell	alina@nvlitigation.com
Margaret McLetchie	maggie@nvlitigation.com
Jackie Nichols	jnichols@maclaw.com
Leah Dell	ldell@maclaw.com
Sherri Mong	smong@maclaw.com
Craig Anderson	canderson@maclaw.com
LAURA Rehfeldt	laura.rehfeldt@clarkcountyda.com
Shannon Fagin	shannon.fagin@clarkcountyda.com

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus	**COURT MINUTES**	**December 10, 2020**

A-17-758501-W Las Vegas Review-Journal, Plaintiff(s)
vs.
Clark County Office of the Coroner/ Medical Examiner, Defendant(s)

December 10, 2020 **09:00 AM** **All Pending Motions**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Chambers, Jill

RECORDER: Maldonado, Nancy

REPORTER:

PARTIES PRESENT:

Jacqueline Nichols	**Attorney for Defendant**
Margaret A. McLetchie	**Attorney for Plaintiff**

JOURNAL ENTRIES

RESPONDENT CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER'S MOTION TO STAY ON AN ORDER SHORTENING TIME...PETITIONER LAS VEGAS REVIEW JOURNAL'S MOTION TO ORDER SHOW CAUSE ON ORDER SHORTENING TIME

Court reviewed its notes with counsel. Upon the Court's inquiry, Ms. Nichols stated she had nothing to add. Ms. McLetchie argued.

COURT ORDERED, as to the Motion to Stay, DENIED, stated findings and directed Ms. McLetchie to prepare the order.

As to the Motion to Order Show Cause, COURT ORDERED, DENIED and extended the deadline to produce un-redacted autopsy reports to no later than 12/30/20. Ms. Nichols to prepare the order.