IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

REINSTATEMENT OF
WILLIAM A. SWAFFORD, ESQ.
STATE BAR NO. 11469

Case No:

Volume IV

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ABDUL MAJID Defendant.	CASE NO.: 3:18-cr-00077-MMD-WGC-2 **MOTION TO SUPPRESS EVIDENCE (EVIDENTIARY HEARING REQUESTED)**

CERTIFICATION

This motion is timely filed on or before **March 14, 2019**. Responses are due on or before **March 28, 2019**; replies are due on or before **April 4, 2019**.

MOTION

COMES NOW, Defendant ABDUL MAJID (hereinafter "Majid"), by and through his counsel, THE LAW OFFICES OF DAVID R. HOUSTON, David R. Houston, Esq., and hereby moves this Honorable Court for an Order suppressing the evidence seized between July 19, 2018 and July 20, 2018, from a white Commercial 2018 Freightliner Cascadia Tractor, bearing Alberta commercial registration E11142, and Vin # 3AKJGLDR8JSSHP7276, and from its passengers, Haseeb U. Malik and Majid, to wit: (i) all evidence obtained during warrantless searches of the vehicle; (ii) all evidence obtained during the execution of search warrants on the vehicle; (iii) all evidence obtained during searches of Majid's personal cell phones; (iv.) all evidence obtained

from Mr. Malik's cell phones; (v) all statements made by Majid and Mr. Malik subsequent to arrest. Defendant respectfully requests an evidentiary hearing, as some material facts may be in dispute.

POINTS & AUTHORITIES

I. STATEMENT OF FACTS

Based upon the police reports, affidavits, recordings and other items tendered in discovery, the facts appear to be as follows:

1. On July 19, 2018, at approximately 2104 hours, Nevada Highway Patrol ("NHP") Trooper Chris Garcia ("Tpr. Garcia") observed a commercial motor vehicle ("CMV") traveling northbound on Interstate 93 in White Pine County, Nevada near mile marker 58, traveling 71 mph, which was in excess of the posted 60 mph speed limit. (See Police Report of Tpr. Garcia ("Garcia Report") attached hereto as Exhibit 1.) Upon initial contact with the driver, Haseeb U. Malik ("Malik"), Tpr. Garcia informed him that he stopped the vehicle because it was driving in excess of the posted speed limit. (See Report of Investigation by DEA Special Agent Karen Rossi ("Rossi Report"), attached hereto as Exhibit 2, at ¶ 1.) Tpr. Garcia observed that the curtains to the sleeper area of the cab were closed and asked if anyone else was present in the vehicle. Rossi Report ¶2. Malik indicated that his co-driver, Majid, was in the sleeper area and Trooper Garcia had him open the curtains and reveal Majid. Rossi Report ¶2. Tpr. Garcia asked Malik to provide him with his driver's license and paperwork. While communicating with the occupants of the vehicle Tpr. Garcia detected the odor of burnt marijuana emitting from within the passenger compartment and/or the driver. Rossi Report ¶2. Tpr. Garcia asked the occupants whether they were in possession of marijuana and they both denied having any marijuana on them or inside of the vehicle. Rossi Report ¶2. Tpr. Garcia asked the occupants if they smoked marijuana, and they both replied that they do sometimes on their days off. Rossi Report ¶2. Tpr.

Garcia told the men that he could smell marijuana and asked whether there was still marijuana inside of the truck. Rossi Report ¶2. The driver, Malik, stated that he purchased a pre-rolled marijuana cigarette the previous day, smoked half of it and placed the remainder in his cigarette package; he then finished smoking it inside of the truck approximately six (6) to seven (7) hours earlier. Rossi Report ¶2. Tpr. Garcia asked Malik what he did with the joint when he was finished, and Malik responded that he threw the filter and any remaining portion of the joint outside of the vehicle. Rossi Report ¶2.

2. Tpr. Garcia was not trained or certified in CMV regulations and enforcement, and thus, he returned to his patrol vehicle and called NHP Tpr. A. Zehr to inquire about the situation involving the marijuana. Rossi Report ¶3. Tpr. Garcia informed Tpr. Zehr that the driver stated he has smoked marijuana earlier in the day and then threw the filter and "roach" out of the vehicle. Garcia Report. Tpr. Zehr advised that it was an automatic 24-hours out of service, and that Tpr. Garcia would be able to do a probable cause search of the vehicle. Rossi Report ¶3. Tpr. Zehr stated that he was currently finishing a traffic stop, and he would come to the scene when he was finished. Tpr. Zehr arrived on scene at approximately 2136 hours. Garcia Report. Tpr. Zehr's body camera recording demonstrates that when he arrived on scene he spoke to Tpr. Garcia, who told him that the driver admits to smoking marijuana earlier in the day, and stated that he smoked a joint and then threw it out of the vehicle, and both occupants denied possessing any additional marijuana. (See Tpr. Zehr Body Camera Video (USAO 000404 Malik.Majid 4 – Zehr.mp4) ("Zehr Body Cam.") beginning at 3:33 minutes.) The body camera recording shows that Tpr. Zehr told Tpr. Garcia that they would get the occupants out of the vehicle, pat them down, and then search the vehicle for the marijuana cigarette which could be stored anywhere. Id. Tpr. Garcia asked whether he should cite the driver for speeding now or later, and Tpr. Zehr

responded that it did not matter because there was probable cause to search and the driver was out of service. Id. Tpr. Zehr then stated, however, that *he was unsure if he could order the driver out of service if they could not find any marijuana*. Id.

3. The troopers went to the CMV and ordered the occupants to exit. Rossi Report ¶3. Tpr. Zehr asked the men who smoked the marijuana and the driver, Malik, admit that he smoked the marijuana approximately three to four hours previously. Rossi Report ¶3. Tpr. Zehr asked where the marijuana was, and Malik claimed that he was positive that he threw it out. Rossi Report ¶3. Tpr. Garcia advised dispatch that he was doing a probable cause search and began searching the inside of the CMV. Garcia Report. Tpr. Garcia located a garbage bag and searched it, and inside located an electronic vaping device. Garcia Report. Majid told Tpr. Garcia that it was his and it must have fallen into the garbage, and that is was nicotine only. Garcia Report. Tpr. Garcia continued his search into the sleeper area and opened a built in cabinet where he observed white plastic garbage bags containing numerous items that appeared to be similar in shape and size. Garcia Report. Tpr. Garcia believed that the bags contained paperback books, but as he manipulated the objects further it became apparent to him that the objects in the bags were not books. Garcia Report. Tpr. Garcia removed one of the objects from the bags and noticed that the packaging on the exterior of the object consisted of masking tape, and based on his experience and training, he concluded that the packaging was consistent with that of illegal narcotics packaging. Garcia Report. Tpr. Garcia placed the object back into the bag, exited the CMV and directed Tpr. Zehr to the cabinet to view the items. Garcia Report. The body camera of Tpr. Zehr reveals that Tpr. Garcia exited the CMV to speak with Tpr. Zehr at approximately 2151 hours. Tpr. Zehr located the items and asked for a knife. Garcia Report. Tpr. Garcia retrieved a knife from Tpr. Zehr's patrol vehicle and brought it to him. Garcia

Report. Tpr. Zehr made a small cut into one of the packages to reveal a white power substance. Garcia Report. Tpr. Zehr retrieved a NIK Type G test kit from his patrol vehicle and utilized the kit on a sample of the white substance from the package he cut into. Garcia Report. The substance tested positive for the presence of cocaine. Garcia Report.

4. Tpr. Garcia advised Malik and Majid that they were under arrest, and he read them their Miranda rights. Garcia Report. Both men invoked their rights and stated that they did not want to answer any questions. Garcia Report. NHP Tpr. Deeds arrived on scene and transported Malik to the White Pine County Jail. Garcia Report. Tpr. Deeds returned and transported Malik to the White Pine County Jail. Garcia Report. The troopers decided that based on the suspected amount of illegal narcotics present that they would stop the search, have the CMV transported to town, seal the CMV and apply for a search warrant. Rossi Report ¶6.

5. Tpr. Zehr placed the Nevada Highway Patrol trailer seal no. 0001433 on the CMV's trailer. Rossi Report ¶7. Battleborn Towing arrived on scene to transport the CMV to their tow yard located in Ely, Nevada. Rossi Report ¶7. Tpr. Garcia followed the CMV as it was transported to the tow yard, maintaining visual contact with the CMV until it arrived at its destination. Rossi Report ¶7. Tpr. Garcia sealed the CMV pending a search warrant. Rossi Report ¶7. Tpr. Garcia applied for a search warrant from the Ely Justice Court Justice of the Peace Steven Bishop. Rossi Report ¶7. Justice of the Peace Steven Bishop granted the search warrant of the 2018 Frieghtliner Cascadia Alberta commercial registration E11142 and the attached 53' white box trailer with Alberta commercial registration 5MR394. Rossi Report ¶7.

6. At approximately 12:49 a.m. on July 20, 2018, Tpr. Garcia and Tpr. Zehr executed the search warrant. Rossi Report ¶8. During the search, in the same cabinet the suspected cocaine was located in, there were packaging items including a box of white plastic trash bags, two pairs

of latex gloves, packing tape, and items possibly used to conceal odor including packs of cayenne pepper and three packages of Glade Air Freshener. Rossi Report ¶8. The located box of white plastic trash bags was consistent with that of which the suspected cocaine was located. Rossi Report ¶8.

7. Tpr. Garcia raised the lowered bed which revealed a storage area under the bed. Rossi Report ¶9. Located in the center of the storage area were two large suitcases black and blue in color. Rossi Report ¶9. Upon opening the suitcases, both contained numerous packages wrapped in a saran wrap type plastic. Rossi Report ¶9. Both suitcases and their contents were taken as evidence. Rossi Report ¶9. On the top bunk in the sleeper, Tpr. Garcia observed blankets stacked on top of unknown items that were toward the passenger side of the sleeper area. Rossi Report ¶9. Upon moving the blankets Tpr. Garcia noticed three lack duffel bags. Rossi Report ¶9. The bags contained numerous packages sealed with Food Saver type packaging which was consistent with packaging of illicit controlled substances for transport. Rossi Report ¶9. The three duffel bags and their contents were taken for evidence. Rossi Report ¶9.

8. On July 20, 2018, Tpr. Garcia, along with Tpr. Deeds, Tpr. Barney, Tpr. Boynton, Sgt. Brewer and Det. Sifre processed the suspected controlled substances which included testing, weighing, labeling and sealing for evidence. The two substances identified by presumptive testing were cocaine and methamphetamine. Rossi Report ¶`10. At the conclusion of the packaging, testing and weighing process it was determined that a total of 135.36 lbs. of cocaine, and 114.27 lbs. of methamphetamine were collected from the CMV. Rossi Report ¶10.

9. Defendants Majid and Malik are charged with Possession with Intent to Distribute a Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(ii)(II) and (viii).

II. ARGUMENT

A. THE DURATION OF THE TRAFFIC STOP INVOLVING MAJID WAS UNLAWFUL UNDER THE FOURTH AMENDMENT BECAUSE LAW ENFORCEMENT OFFICERS LACKED THE INDEPENDENT REASONABLE SUSPICION NECESSARY TO PROLONG ITS DURATION

1. Majid Has Standing Under The Fourth Amendment To Challenge The Traffic Stop And Seizure Of His Person.

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their, persons, houses, papers, and effects, against unreasonable searches and seizures. As opined by the U.S. Supreme Court, "The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Wolf v. Colorado, 338 U.S. 23, 27-28 (1949). A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed, while a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A person may challenge the propriety of a search or seizure which violates the defendant's own reasonable expectation of privacy in the area searched or the items seized. Rakas v. Illinois, 439 U.S. 128 (1978). The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Katz v. U.S., 389 U.S. 347, 353 (1967).

Fourth Amendment jurisprudence recognizes three levels of contact between law enforcement officers and citizens: (i) consensual encounters, (ii) investigatory detentions, and (iii) arrests. United States v. Roberts, 2007 WL 1381776, *3 (D. Nev.). Although a consensual

encounter is not a seizure within the meaning of the Fourth Amendment, investigatory detentions and arrests are such seizures. Id. When a vehicle is stopped by a police officer and its occupants are detained, a seizure within the fourth amendment of the United States Constitution has occurred, even if the purpose of the stop is limited and the resulting detention is quite brief. Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976). It is well settled that a traffic stop constitutes a seizure within the purview of the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 661-663 (1979); United States v. Daniel, 804 F.Supp. 1330, 1334 (1992). (See Arizona v. Johnson, 129 S.Ct. 781, 788 (U.S. 2009): "a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.")

A vehicle passenger may challenge a traffic stop on Fourth Amendment grounds even if he lacks a property interest in the vehicle itself. USA v. Twilley, 222 F.3d 1092 (9th Cir., 2000). Even where a passenger cannot challenge a search directly, he or she may establish that a traffic stop was unlawful under the Fourth Amendment, and the evidence seized as a result of that stop is subject to suppression as 'fruit of the poisonous tree.' Id.; see United States v. Kimball, 25 F.3d 1, 5 (1st Cir., 1994) (Because passenger's interests are affected when a vehicle is stopped, he/she has standing to challenge the stop, and if illegal, evidence may be excluded as fruit of poisonous tree).

In this case, Mr. Majid was the co-driver of the commercial motor vehicle, was living in the vehicle during the trip back to Alberta, Canada, had personal possession in the cab, he was sleeping in its sleeper-compartment in the rear of the cab when the vehicle was stopped by NHP Trooper Garcia, and he has standing under the Fourth Amendment to challenge the legality of the prolonged warrantless detention following the initial traffic stop.

2. The Extended Duration of the Traffic Stop Involving Majid Was Unreasonable Under the Fourth Amendment to the U.S. Constitution.

"A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." Illinois v. Caballes, 543 U.S. 405, 407 (2005). In particular, a seizure that is justified solely by the interest in issuing a traffic ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Id. A traffic stop that extends beyond the time necessary to effectuate its initial purpose is not unreasonable per se. State v. Beckman, 305 P.3d 912, 917 (Nev., 2013). A prolonged stop may be reasonable in three limited circumstances: when the extension of the stop was *consensual*, the *delay was de minimis*, or the officer lawfully receives information during the traffic stop that creates a *reasonable suspicion of criminal conduct*. Id. A prolonged stop is obviously not unreasonable under the Fourth Amendment where it is consensual. Id. at 918. A modest delay may be reasonable, depending on the circumstances of the stop. Id. A prolonged stop is permissible if the results of the initial detention provide an officer with reasonable suspicion of criminal conduct, thereby creating a new Fourth Amendment event. Id., citing Estrada v. Rhode Island, 594 F.3d 56, 64 (1st Cir.2010) (recognizing that information gathered during a traffic stop may provide reasonable suspicion of criminal conduct that will justify extending the stop). Absent independent reasonable suspicion justifying each prolongation, a seizure is unreasonable and violates the Fourth Amendment. United States v. Evans, 786 F3d 779, 788 (9th Cir., 2015)).

In Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015), the U.S. Supreme Court opined that "[a] relatively brief encounter," a routine traffic stop is "more analogous to a so-called 'Terrystop' ... than to a formal arrest." "Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the

traffic violation that warranted the stop and attend to related safety concerns." Id. (Internal citations omitted.) The court in Rodriguez held, authority for the seizure ends "when tasks tied to the traffic infraction are — or reasonably should have been — completed." Id. at 1616. "Tasks not related to the traffic mission, such as dog sniffs, are therefore unlawful if they "add time" to the stop and are not otherwise supported by independent reasonable suspicion of wrongdoing. Id. An officer may prolong a traffic stop if the prolongation itself is supported by independent reasonable suspicion. Id. at 1615; United States v. Mendez, 476 F.3d 1077, 1080 (9th Cir. 2007).

i. The Extended Detention Failed to Conform to the Traffic Stop's Initial Purpose

Tpr. Garcia initiated the traffic stop of the CMV due to a speeding violation at approximately 2104 hours. Garcia Report. While communicating with the occupants of the CMV, Tpr. Garcia detected the odor of burnt marijuana inside of the vehicle and asked whether either of them had smoked marijuana or were otherwise in possession thereof. The driver, Malik, admit to smoking a pre-rolled marijuana cigarette ("joint") a few hours previously, and he further stated that he threw the remainder of the smoked joint out of the vehicle. Garcia Report. Tpr. Garcia returned to his patrol vehicle to issue a citation for speeding, and he because he had no training or certification in CMV regulation/enforcement he called Tpr. Zehr to inquire about the driver's admission to recently smoking marijuana. Garcia Report. Tpr. Zehr informed him that it was automatic out-of-service and that there was probable cause to search the CMV for marijuana. Garcia Report. Tpr. Zehr advised that he assist with the search as soon as he finished with his current traffic stop which was approximately five miles away. Garcia Report. Tpr. Zehr arrived at approximately 2136 hours, which was approximately 31 minutes after the traffic stop

was initiated. Rossi Report ¶3. The body camera video of Tpr. Zehr recorded the following dialogue between Tpr. Zehr and Tpr. Garcia:

> Tpr. Zehr: We'll get them out and pat them down, and then you can search, or you want me to search? I'll let you search.
>
> Tpr. Garcia: Should I give them the cite or give it to him last?
>
> Tpr. Zehr: It doesn't matter because it's P.C., he's out of service… Well, I think it's any detectible amount, but I don't know about putting him out of service if we don't find anything. Smell is one thing.
>
> Tpr. Garcia: He admit to using it this morning though. I don't know if that changes anything.
>
> Tpr. Zehr: Yeah I have to double check the out of service criteria.
>
> Tpr. Zehr: Yeah, we will just give that to them in the end.
>
> Tpr. Garcia: I'll just throw it in here, so I don't lose it.
>
> Tpr. Zehr: And then it's probably a user amount, so there is all sorts of places in there they can stash it.

See Zehr Body Cam.: 4:29 – 5:43.

Tpr. Zehr's body camera video shows that Tpr. Garcia had a ticket already prepared and was going to issue it to Malik until Tpr. Zehr told him that he could give it to him after the search because there was probable cause. The video shows Tpr. Garcia holding the ticket on his clipboard and then putting it back into his vehicle so that he would not misplace it during the search. Hence, in this case, the purpose of the traffic stop, the enforcement of a speeding violation, had already been completed, and the detention was prolonged in order to search the vehicle for marijuana. Tpr. Garcia waited approximately 30 minutes for Tpr. Zehr to arrive at the scene, and then the occupants were ordered out of the vehicle six (6) minutes later. See Zehr Body Cam. at 6:15. The troopers questioned the occupants about their marijuana use for three

(3) more minutes until Tpr. Garcia started searching the CMV at approximately 2145 hours; more than 40 minutes after the CMV was initially stopped. See Zehr Body Cam. at 9:22.

The officers in this case extended the traffic stop for more than 40 minutes so that they could search the CMV for marijuana. This prolonged detention was unreasonable unless Trooper Garcia had developed independent reasonable suspicion regarding unrelated criminal conduct during the course of the traffic stop. As stated below, he had not.

ii. Tpr. Garcia Had No Independent Reasonable Suspicion of Criminal Activity Necessary to Measurably Prolong the Detention

"Reasonable suspicion is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000); United States v. Gibson, *4 (D. Nev., 2017). Reasonable suspicion to extend the stop beyond its initial mission "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion" of *criminal activity*. United States v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc). While the reasonable suspicion standard requires more than a mere hunch, "the likelihood of *criminal activity* need not rise to the level required for probable cause." United States v. Arvizu, 534 U.S. 266, 274 (2002). Nevada statute, NRS 171.123, codifies *Terry* and provides in relevant part that "[a]ny peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person *has committed, is committing or is about to commit a crime*." NRS 171.123(1) (emphasis added).

In Nevada, the possession of a miniscule amount of marijuana is not a crime. Specifically, NRS 453D.110 states in relevant part:

> Notwithstanding any other provision of Nevada law and the law of any political subdivision of Nevada, except as otherwise provided in this chapter, it is lawful, in this State, and must not be used as the basis for prosecution or penalty by this State or a political subdivision of this State, and must not, in this State, be a basis for seizure or forfeiture of assets for persons 21 years of age or older to:
>
> 1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana.

The NHP troopers were told that the driver smoked a single marijuana cigarette a few hours before and had thrown the filter/"roach" out of the vehicle. The troopers had no reasonable suspicion that any crime had been, or was about to be committed, and they were not searching for any evidence of criminal conduct.

Rather, as stated by Tpr. Zehr in his police report:

> I advised Trooper Garcia that we had probable cause to search the CMV as it is a zero tolerance to possess or be under the influence of marijuana in a CMV and that according to Commercial Federal Regulations adopted by the state of Nevada under NAC 706.247, we should place the driver out of service for 24 hours. (See the Federal motor carrier safety administrations official website for the following information).
>
> According to the FMCSA, "Marijuana continues to be classified as a Schedule I controlled substance by the Drug Enforcement Administration (DEA) in 21 CFR § 1308.11. Under the Federal Motor Carrier Safety Regulations (FMCSRs), a person is not physically qualified to drive a CMV if he or she uses any Schedule I controlled substance such as marijuana. (49 CFR §§ 391.11(b)(4) and 391.41(b)(12)). In addition to the physical qualification requirements, the FMCSRs prohibit a driver from being in possession of or under the influence of any Schedule I controlled substance, including marijuana, while on duty, and prohibit motor carriers from permitting a driver to be on duty if he or she possesses, is under the influence of, or uses a Schedule I controlled substance. (*See* 49 CFR §§ 392.2 & 392.4.)"
>
> Furthermore, the legalization of marijuana by states and other jurisdictions does not supersede the federal regulations that govern the trucking industry. Based on this information, Trooper Garcia began a probable cause search of the CMV.
>
> (See Police Report of Tpr. Zehr ("Zehr Report"), attached hereto as Exhibit 3.)

Tpr. Zehr believed that there was probable cause that the driver of the CMV was in possession of marijuana, and that if marijuana was found in the vehicle he could order the driver out-of-service for violating FMCSRs prohibiting the possession of marijuana while on duty. It should be noted that cocaine and methamphetamine were found in the CMV, yet no criminal charges were filed for violating any FMCSRs. The violation of federal regulations mentioned in Tpr. Zehr's police report do not implicate criminal conduct, but merely potential administrative sanctions in the form of a temporary out-of-service order. Accordingly, even if Tpr. Zehr's analysis of the law was correct, there would be no reasonable suspicion of criminal activity by which to extend the duration of the traffic stop in this case.

Additionally, as explained below, the regulations cited by Tpr. Zehr do not authorize a search for marijuana to potentially justify an out-of-service order.

iii. The Troopers Could Not Have Removed Malik From Service Pursuant to the FMCSRs Adopted Under NAC 706.247 and Mentioned by Tpr. Zehr In His Report - As They Related to Possession of Marijuana

The Motor Carrier Safety Improvement Act of 1999 ("the Act"), established the Federal Motor Carrier Safety Administration ("FMCSA") as a division of the United States Department of Transportation ("DOT"). Under the Act, the Motor Carrier Safety Assistance Program (MCSAP), a federal grant program, was developed to provide financial assistance to States to reduce the number and severity of accidents and hazardous materials incidents involving CMVs. 49 C.F.R. § 350.101. The MCSAP also sets forth the conditions for participation by states and local jurisdictions and promotes adoption and uniform enforcement of safety rules, regulations and standards compatible with the FMCSRs. To be eligible for funding through the MCSAP, a state must adopt regulations consistent with the federal regulations. Id. § 350.201(a). The MCSAP, in conjunction with the Commercial Vehicle Safety Alliance ("CVSA"), an

organization of federal, state and provincial government agencies and private industry representatives, developed the North American Standard ("NAS") Training and Inspections program. 49 C.F.R. § 350.105. *This program is the "methodology used by State CMV inspectors to conduct safety inspections of CMVs*." Id.

Pursuant to the MCSAP, individual states are the primary enforcers of the highway safety regulations at roadside inspections. In return for their acceptance of the MCSAP grants, a state assumes responsibility for enforcing the FMCSRs or other compatible state rules. 49 C.F.R. § 350.201; see also Nat'l Tank Carriers v. Fed. Highway Admin. of the U.S. Dept. of Transp., 170 F.3d 203, 204-06 (D.C. Cir. 1999) (discussing the history of the MCSAP). Nevada ensures compliance with federal regulations through enactment of a Commercial Vehicle Safety Plan ("CVSP"), which complies with the MCSAPs requirements for receiving federal highway funding "by, inter alia , requiring Nevada Highway Patrol troopers to conduct inspections in a manner consistent with "the North American Standard ["NAS"] Inspection procedure."" United States v. Orozco, 858 F.3d 1204 (9th Cir., 2017); 49 C.F.R. § 350.211(d). Nevada's CVSP provides that the Nevada Highway Patrol's "enforcement activities" will include "scheduled and unannounced roadside inspections." Orozco, 858 F.3d at 1207.

Nevada's Legislature has charged the Nevada Transportation Authority ("the Authority") with regulation of motor carriers. Orozco 858 F.3d at 1207. The Department of Public Safety, and its subsidiary arm, the Nevada Highway Patrol, are charged with enforcing the regulations adopted by the Authority. NRS 706.151(1).

In relevant part, Nevada's Legislature set forth the duties of NHP officers as follows:

NRS 480.360:

> The duties of the personnel of the Nevada Highway Patrol include, without limitation:

> 1. To police the public highways of this State, to enforce and to aid in enforcing thereon all the traffic laws of the State of Nevada and to enforce all other laws of this State when:
>
> (a) In the apprehension or pursuit of an offender or suspected offender;
>
> (b) Making arrests for crimes committed in their presence or upon or adjacent to the highways of this State; or
>
> (c) Making arrests pursuant to a warrant in the officer's possession or communicated to the officer. …
>
> 4. To enforce the provisions of laws and regulations relating to motor carriers, the safety of their vehicles and equipment, and their transportation of hazardous materials and other cargo.

The Authority additionally enacted NAC 706.2472, which states in relevant part as follows:

> 1. The Department of Public Safety hereby adopts by reference the regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393, inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter III, Subchapter B, as those regulations existed on May 30, 2012, with the following exceptions: …
>
> 2. To enforce these regulations, enforcement officers of the Department of Public Safety may, during regular business hours, enter the property of a carrier to inspect its records, facilities and vehicles, including, without limitation, space for cargo and warehouses.

The Authority may employ compliance enforcement officers "whose duties shall include, without limitation, enforcement activities to ensure motor carriers are operating in compliance with state statutes and regulations, conducting operational inspections of motor carriers and investigating complaints against motor carriers." NRS 706.176 (4). Such officers may "examine, at any time during the business hours of the day, the books, papers and records of any fully regulated carrier, and of any other common, contract or private motor carrier doing business in this State to the extent necessary for their respective duties." NRS 706.171(1)(d).

Tpr. Zehr advised Tpr. Garcia that there was probable cause to search the CMV because it was illegal to possess marijuana in a CMV, and according to FMCSRs adopted by the state of Nevada pursuant to NAC 706.247, the driver could be placed out of service for 24 hours (Zehr Report), so long as marijuana was actually found during the search (Zehr Body Cam). In his report, Tpr. Zehr stated that under the FMCSRs, a person is not physically qualified to drive a CMV if he or she uses marijuana (49 CFR §§ 391.11(b)(4) and 391.41(b)(12)) and is prohibited from being on duty if he possesses marijuana (49 CFR §§ 392.2 & 392.4.).

Tpr. Zehr's advisement to Tpr. Garcia was wrong for the numerous reasons that follow.

First, pursuant to NAC 706.2472, the Department of Public Safety adopted 49 CFR §§ 390. 49 CFR §§ 390.5 defines an "out-of-service order" as "a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to §§ 386.72, 392.5, 392.9a, 395.13, 396.9, or compatible laws, or the North American Standard Out–of–Service Criteria."

NRS 482.083 provides that an "out-of-service order" means a "temporary prohibition on operation by a motor carrier that is issued: (1) By a federal or state entity with authority to issue such a temporary prohibition; and (2) Pursuant to a provision of 49 C.F.R. Part 385 or 386 that is specified in regulations adopted pursuant to NRS 482.2914. Additionally, NRS 483.904 states that an "out-of-service order" means a "temporary prohibition against: (a) A person operating a commercial motor vehicle as such a prohibition is described in 49 C.F.R. § 395.13; or (b) The operation of a commercial motor vehicle as such a prohibition is described in 49 C.F.R. § 396.9(c)."

Under NAC 706.2472, the Department of Public Safety adopted 49 C.F.R. Part 385 but did not adopt Part 386. Part 385 establishes the FMCSA's procedures to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial action when required, and to prohibit motor carriers receiving "unsatisfactory" ratings from operating a CMV. This Part involves inspections of operators' records and not driver's and their vehicles at roadside inspections. This Part is inapplicable to the instant facts. 49 C.F.R. § 395.13 allows enforcement officers to place drivers out of service where they exceed maximum periods of time on duty and prohibits motor carriers from permitting drivers who have been declared out of service from driving. 49 C.F.R. § 396.9(c) provides, "[a]uthorized personnel shall declare and mark out-of-service any motor vehicle which by reason of its mechanical condition or loading would cause and accident or a breakdown." None of these parts under Title 49 allow an enforcement officer to place a driver out-of-service for possessing marijuana.

Additionally, while 49 CFR §§ 392.5 states that no driver shall be on duty while possessing alcohol and must be placed out of service immediately for 24 hours if found to be in violation, there is no requirement for placing a driver out of service who possesses a Schedule I controlled substance in violation of 49 CFR §§ 392.4. Concerning 49 CFR §§ 391.11(b)(4) and 391.41(b)(12), a driver is not physically qualified to drive a CMV unless he is first medically certified as physically qualified to do so, and if initial drug screening reveals use of Schedule I controlled substances, a driver will not be able to obtain a medical certification. In this case, Mr. Malik's admission to using marijuana earlier in the day did not provide grounds for an out-of-service order.

In this case, the NHP troopers believed that because the driver admitted to smoking a joint in the CMV a few hours earlier, and they detected the odor of burnt marijuana emitting

from the driver or the inside of the cab, there was reason to suspect that marijuana would be found inside of the vehicle. This would not have constituted evidence of any criminal conduct, as there was no evidence that more than one ounce of fresh marijuana would be located inside of the vehicle, and the troopers did not suspect that the driver was under the influence of marijuana. Secondly, this evidence would not have allowed the troopers to issue an out-of-service order, and there were no grounds at all to search the vehicle for marijuana. Thirdly, the odor of burnt marijuana and admission that the driver smoked a joint and threw it out of the vehicle did not support reasonable suspicion or probable cause to believe that the unused portion of the joint would be found somewhere inside of the vehicle.

iv. CMV Enforcement Officers Must Search For Evidence of Regulatory Violations Under Administrative Inspection Criteria

"Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). Among the "carefully defined classes of cases" for which no warrant is needed are administrative searches, that is, searches "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime." United States v. Davis, 482 F.2d 893, 910 (9th Cir.1973). Administrative inspections are "searches subject to the reasonableness standards of the Fourth Amendment." Donovan v. Dewey, 452 U.S. 594, 598 (1981). In general, therefore, a warrant is required to authorize an administrative inspection. Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978). In closely regulated industries, however, warrantless inspections are permitted in recognition of the reduced expectation of privacy that accompanies pervasive regulation. New York v. Burger, 482 U.S. 691, 702 (1987). To satisfy the Fourth Amendment

standard of reasonableness, such warrantless inspections must be necessary to further substantial governmental interest, and must be "carefully limited in time, place and scope." Id. at 703.

Commercial trucking is a closely regulated industry. United States v. Abreu, 736 F.Supp. 1018, 1028 (D.C. Colo. 1990). Close regulation of the trucking industry promotes an obvious and substantial government interest in maintaining highway safety. Further, warrantless inspection appears reasonably necessary to effectuate the regulatory purposes. See Dominguez-Prieto, 923 F.2d 464, 468 (6th Cir. 1991), cert. denied, 500 U.S. 936 (1991). "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential." United States v. Biswell, 406 U.S. 311, 316 (1972). Though permissible, warrantless inspections of closely regulated businesses are highly circumscribed.

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of the commercial property cannot help but be aware that his property is subject to periodic inspections undertaken for specific purposes." In addition, the discretion of the inspectors… must be "carefully limited in time, place, and scope."
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> New York v. Burger, 482 U.S. at 703 (citations omitted).

As discussed above, Nevada's CVSP requires NHP troopers to conduct inspections of CMVs in a manner consistent with NAS inspection procedure. 49 C.F.R. § 350.211(d). "Level I and Level II Inspections tend to primarily address commercial vehicles while Level III Inspections focus more on the driver." Owner–operator Indep. Driver Ass'n Inc. v. Dunaski, 763 F.Supp.2d 1068, 1074 (D. Minn., 2011). The regulatory guidelines for a Level III inspection authorize an officer to "[c]ollect the following documents: driver's license; medical examiner's certificate (and waiver, if applicable); records of duty status; driver's daily vehicle inspection report; documentation of periodic inspections; shipping papers and/or bills of lading, and receipts

or other documents that may be used to verify the log." U.S. v. Knight, 306 F.3d 534, 535 (8th Cir., 2002) citing 49 C.F.R. § 350.105. The guidelines also authorize an officer to "[c]heck the cab for possible illegal presence of alcohol, drugs, weapons or other contraband." Id. However, this check for illegal drugs, alcohol and contraband consists of a visual inspection for evidence that may be in plain view. State v McClure, 74 S.W.3d 362, 365 (Tenn. Crim. App., 2001). Further, although the regulations prohibit drivers from possessing narcotics or other substances "which render the driver incapable of safely operating a motor vehicle," 49 C.F.R. § 392.4(a), they contain no provision authorizing the inspection of passengers or their personal belongings for drugs. V–1 Oil Co. v. Means, 94 F.3d 1420, 1427 (10th Cir.1996) ("The [motor carrier safety] regulations make it clear the inspections are limited in scope to safety concerns. They do not authorize a general search by any law enforcement officer." (citation omitted)).

In this case, the search was not circumscribed by administrative regulations, and did not address safety concerns. Instead, the search in this case, for the "roach" of a marijuana cigarette was a general search of the entire contents of the CMV's cab, including cabinets, drawers and personal luggage. (As discussed by Tpr. Zehr with Trp Garcia in Zehr's body camera video, the small personal use amount could have been stashed anywhere in the vehicle.) While the purpose of the search was to uncover evidence of FMCSR violations, the officers did not inspect the vehicle pursuant to corresponding search criteria, claiming instead that they had probable cause.

The term "probable cause," within the context of a search, exists if "there is a fair probability that *contraband or evidence of a crime* will be found in a particular place," based on the totality of circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). Describing the "probable cause" standard, the 9th Circuit Court of Appeals previously stated that this standard "merely requires that the facts available to the officer would "warrant a man of reasonable

caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime." Dawson v. City of Seattle, 435 F.3d 1054 (9th Cir., 2006). A search based on probable cause can sometimes be an exception to the Fourth Amendment's warrant requirement. In Nevada, pursuant to NRS 179.035, "a warrant may be issued under NRS 179.015 to 179.115, inclusive, to search for and seize any property:

> 1. Stolen or embezzled in violation of the laws of the State of Nevada, or of any other state or of the United States;
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> 2. Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
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> 3. When the property or things to be seized consist of any item or constitute any evidence which tends to show that a criminal offense has been committed or tends to show that a particular person has committed a criminal offense.

There was no probable cause in this case to search under the automobile exception because the evidence sought could not have established that a criminal offense was committed. The troopers' intended to uncover evidence that FMCSRs had been violated so that they could order the driver out-of-service. However, the specific regulations pertaining to possession of marijuana discussed in Tpr. Zehr's police report would not have permitted the officers to order the drivers out of service. While an inspection of a CMV for evidence of regulatory violations is required to be made under the exacting NAS criteria, Tpr. Garcia was not even certified to perform said inspections and did not stop the vehicle or perform the necessary steps of an administrative inspection, and searched the vehicle based on purported probable cause of regulatory violations. Accordingly, there was no lawful basis to prolong the traffic stop for more than 40 minutes so that the troopers could search the CMV for a smoked joint that the driver repeatedly said he threw out of the vehicle after smoking it.

v. The Extended Duration of the Traffic Stop Was Unreasonable Under the Fourth Amendment

Tpr. Garcia stopped the CMV for speeding and returned to his vehicle to issue a citation. He waited for the arrival of Tpr. Zehr who arrived more than 30 minutes after the CMV was stopped. The troopers then questioned the occupants about the marijuana, and Tpr. Garcia started searching the vehicle for a "roach" that there was no reason to believe was inside of the vehicle. This extended detention (more than 40 minutes) was not supported by independent reasonable suspicion of criminal activity, and the assertion by the police that they had probable cause to search is bellied by the law.

B. THE NHP TROOPERS LACKED PROBABLE CAUSE TO SEARCH THE CMV

1. Majid Has Standing Under The Fourth Amendment To Challenge The Search of the Vehicle

Majid was a co-driver of the CMV who was sleeping in the sleeper area of the cab at the time of the traffic stop. The two drivers were from Alberta, Canada, and were transporting property between California and Alberta. Majid was temporarily residing in the vehicle, had personal belongings in the sleeper area, was sleeping in the bed when the vehicle was stopped and had an objectively reasonable expectation of privacy in the vehicle where he resided and drove while in route back to Alberta.

2. The Search for the Marijuana Cigarette Was Unlawful Under the Fourth Amendment

It was argued above that the NHP troopers lacked the independent reasonable suspicion necessary to extend the duration of the traffic stop in order to search the CMV for a personal use (arguably much less) quantity of marijuana. The police officers alleged that they had probable cause to search the vehicle, however, as previously argued, the officers lacked probable cause of criminal activity, and had no ability to issue an out-of-service order

even if the remainder of the marijuana joint would have been found. For the same reasons, the NHP troopers violated both the warrant and the reasonableness requirement of the Fourth Amendment. The Government shoulders the burden of establishing that the warrantless search of the CMV was reasonable. Yet, it cannot rely on the automobile exception because there was no probable cause to believe that the vehicle contained evidence of a crime or illegal contraband that it could seize. The Government cannot rely on the administrative search exception because Tpr. Garcia was not trained and certified, and the officers did not strictly follow the requirements and limitations of regulations circumscribing administrative safety inspections of CMVs.

C. THIS COURT SHOULD SUPPRESS ALL EVIDENCE CONSTITUTING FRUITS OF UNLAWFUL SEIZURES.

"The Fourth Amendment protects against the "overhearing of verbal statements" and "matters observed" during an unlawful search and seizure, as well as against the more traditional seizure of "papers and effects". Wong Sun v. United States, 371 US 471, 485 (1963).

"Once it is established that a search or seizure was illegal, all evidence, which was obtained by exploitation of that illegality, is "fruit of the poisonous tree", and such evidence is inadmissible unless the prosecution proves it was obtained "by means sufficiently distinguishable to be purged of the primary taint." Id. at 488. "Evidence obtained as the result of an unreasonable search and seizure is inadmissible." Mapp v. Ohio, 367 US 643 (1961).

If this Court finds that the prolonged detention and/or search of the CMV was unreasonable under the Fourth Amendment, it must order suppression of all evidence constituting fruits of the illegality. The initial search of the vehicle, statements/admissions of its passengers, evidence obtained from subsequently executed search warrants of the CMV and its

containers, cell phones and any other similar evidence proximately derived from unlawful seizures must be suppressed.

D. CONCLUSION

Mr. Majid was illegally detained during an unreasonable detention that was unduly extended without independent reasonable suspicion of criminal activity. The subsequent search of the CMV for evidence of regulatory violations was additionally unlawful under the Fourth Amendment. The subsequent searches and seizures of the items which are the subject of this motion are clearly fruits of the poisonous tree and must be suppressed.

Therefore, this Court should grant the within motion.

DATED: March 13, 2019.

Respectfully submitted,

/s/ David Houston
Law Office of David R. Houston, PLC
David R. Houston, Esq.
Attorney for Defendant Abdul Majid

CERTIFICATE OF SERVICE

The undersigned hereby affirms, under penalty of perjury, that I am an Employee of the Law Office of David R. Houston and that on this date, I caused to be delivered via e-filing system (CM/ECF) and/or electronic mail a true and correct copy of the within document, **MOTION TO SUPPRESS EVIDENCE (EVIDENTIARY HEARING REQUESTED)** that was filed March 13, 2019 to the below-named:

Megan Rachow, AUSA
United States Attorney's Office
100 West Liberty Street, Suite 600
Reno, Nevada 89501

DATED this 13th day of March 2019

/s/ Crystal Guardino
Crystal Guardino

INDEX OF EXHIBITS

Exhibit 1: Police Report of NHP Tpr. Garcia ("Garcia Report")

Exhibit 2: Report of Investigation by DEA Special Agent Karen Rossi ("Rossi Report")

Exhibit 3: Police Report of NHP Tpr. A. Zehr ("Zehr Report")

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, v. HASEEB MALIK and ABDUL MAJID, Defendants.	Case No. 3:18-cr-00077-MMD-WGC ORDER

I. SUMMARY

Odor is not the bedrock of probable cause in this case. Defendants Haseeb Malik and Abdul Majid's (collectively, "Defendants") have separately and jointly filed motions to suppress that are pending before the Court ("Defendants' Motions"). (ECF Nos. 40, 41, 42 (Majid's joinder).) In resolving Defendants' Motions, the Court grapples with the interplay of legal marijuana and the strictures of Fourth Amendment law in the context of a traffic stop by Nevada Highway Patrol ("NHP") troopers. Ultimately, that Nevada law legalizing possession of user amounts of marijuana conflicts with federal law is of no import here because of the NHP troopers' particular decision to search. Because the Court finds that even if there was independent reasonable suspicion to extend the duration of the traffic stop, the NHP troopers lacked probable cause to search the Commercial Motor Vehicle ("CMV") driven by Malik, the Court will grant Defendants' Motions. The NHP troopers' failure to enforce the law within the confines of the Fourth Amendment leads to one conclusion: that the ultimate fruits of their stop and search—the drugs found in the CMV—must be suppressed.

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II. RELEVANT BACKGROUND

A. Charge and Motion

Defendants have each been charged with one count of Possession with the Intent to Distribute a Controlled Substance—Cocaine and Methamphetamine—in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(ii)(II) and (viii) stemming from drugs found on July 19, 2018. (ECF No. 24.) Defendants filed their respective motions to suppress this drug evidence.[1] (ECF Nos. 40, 41, 42.) The Court also heard testimony from the Troopers[2,3] and argument on Defendants' Motions on April 25, 2019 ("Hearing").

B. Factual Findings[4]

The facts relating to Defendants' Motions are rather straight-forward and materially undisputed. They are based on the Troopers' reports, affidavits, and the Troopers' body camera ("Body Cam") recordings, all of which are exhibits admitted pursuant to the parties' stipulation. (ECF Nos. 58, 67.) The Court also considers the Troopers' testimony during the Hearing.

At approximately 9:04 p.m. on July 19, 2018, NHP Trooper Chris Garcia stopped the CMV being driven by Malik for speeding. (ECF No. 41-1 at 2.) Malik's co-driver, Defendant Majid, was in the living/sleeping quarters. (*Id.*)

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[1]Because Defendants' paramount objections are ultimately the same—that the prolongation of the traffic stop and search violated their Fourth Amendment rights under the U.S. Constitution, the Court considers the Defendants' motions to suppress collectively unless otherwise noted. The Court has also considered the government's response (ECF No. 45) and Defendants' replies (ECF Nos. 50, 52).

[2]Troopers collectively refer to Trooper Chris Garcia and Trooper Adam Zehr.

[3]The Court denied Defendants' motion to vacate the evidentiary hearing (ECF No. 55) to permit the government to offer the following testimony: (1) the facts Garcia was developing that led to his determination that there was reasonable suspicion to extend the traffic stop and probable cause to search the CMV; and (2) the Troopers' training and experience that led to both determinations. (ECF No. 62.)

[4]Fed. R. Crim. P. 12(d) provides: "Where factual issues are involved in determining a motion, the court must state its essential findings on the record."

Malik pulled over to the side of the road and Garcia approached the CMV's passenger side. (*Id.*) Malik opened the passenger door and the curtain to the living/sleeping quarters upon Garcia's request. (*Id.*) After asking Malik for his driver's license and paperwork, Garcia detected the smell of burnt marijuana emitting from the CMV. (ECF No. 40-2 at 3.) Garcia asked Defendants if they were in possession of marijuana on them or inside the vehicle and they said no. (ECF No. 41-1 at 2; ECF No. 40-2 at 3.) Malik subsequently admitted that he had bought a pre-rolled marijuana cigarette, but, explained that he had smoked part of it the day before, placed the remainder in his cigarette package, and smoked it about six or seven hours earlier then threw away the filter with any residuals. (ECF No. 40-2 at 3; ECF No. 41-I at 2; Garcia Body Cam (Exh. A-1) at 04:08:31–04:08:58.)

Garcia was not trained or certified in CMV regulations and enforcement, so he returned to his patrol vehicle and called another NHP trooper, Adam Zehr. (ECF No. 40-2 at 4; Garcia Body Cam (Exh. A-1) at 04:16:36–04:17:14.) Garcia inquired with Zehr about the situation involving the marijuana and informed him that that the driver stated he smoked marijuana earlier in the day and threw the rest out. (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) Garcia particularly relayed disregarding Malik's statement that he had thrown away the remnants of the marijuana cigarette. (*Id.* (Garcia speaking to Zehr: "He's saying he threw his last joint out. And I'm like, nobody throws their marijuana out, man. Come on. He is like, no, it was smoked. I didn't want to keep just a filter. And I'm like eh, I think there's some weed in here"). Zehr advised Garcia that it was an automatic 24 hours out of service for the CMV and that Garcia would be able to do a probable cause search of the vehicle. (Garcia Body Cam (Exh. A-1) at 04:16:36–04:17:27; ECF No. 40-2 at 4.)

About 30 minutes after the stop, at around 9:36 p.m., Zehr arrived on scene.[5] (ECF No. 41-1 at 2.) Zehr's Body Cam shows that Garcia again explained to him, upon his

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[5]Garcia testified that he was preparing the paperwork relating to the traffic stop while he waited for Zehr.

arrival, that Malik admitted to smoking earlier in the day and that both Malik and Majid denied possessing any additional marijuana. (Zehr Body Cam at 04:37:21–04:38:16.) Zehr then told Garcia that they would get Defendants out of the CMV, pat them down, and then search the vehicle. (*Id.* at 04:38:16–04:38:28.) Garcia asked whether he should issue a citation for the speeding first and Zehr told him it did not matter because there was probable cause to search and the driver was out of service. (Garcia Body Cam (Exh. A-1) at 04:38:05–04:38:15.) However, Zehr then mentioned that he was not sure the driver could be ordered out of service if they could not find any marijuana. (*Id.* at 04:38:15–04:38:28; Zehr Body Cam at 04:38:28–04:38:56.) The Troopers expressed wanting to search the vehicle to look for a remaining user amount of marijuana. (Garcia Body Cam (Exh. A-1) at 04:38:51–04:39:07; Zehr Body Cam at 04:39:16–04:39:25.) Zehr explained it was "probably a user amount so they probably – there's all sorts of places in there they can stash it." (*Id.*)

The Troopers went to the CMV and ordered Malik and Majid to exit. (ECF No. 40-2 at 4.) Zehr asked Defendants who smoked the marijuana. (*Id.*) Malik again admitted that he smoked the marijuana, but provided the timeframe of approximately three to four hours earlier. (*Id.*) Zehr asked where the marijuana was, and Malik again informed that he threw it out. (*Id.*) Garcia advised dispatch that he was doing a probable cause search. (ECF No. 41-1 at 3.) At no point did the Troopers conduct a sobriety test on Malik or Majid.

Garcia commenced search of the CMV's cab. (*Id.*) During his search of the driver and passenger seating area, Garcia found a vape that he asked about. (*Id.*) Majid explained that it was his and that it only had nicotine in it and the exchange ended. (*Id.*) Nothing else is noted as being found in the cab. (*See id.*) Garcia resumed the search and ultimately made his way into the living/sleeping quarter. (*Id.*) In there, Garcia looked inside, among other things, the built-in cabinet and bags within. (*Id.*) He manipulated the items inside the bags to confirm whether they were books and determined they were not. (*Id.*) He took a package out of one of the bags and based on his training and experience concluded it was consistent with illegal narcotic packaging. (*Id.*)

The Troopers ultimately got a knife and cut into a package. (*Id.*) A white powdery substance was revealed (*id.*). After detaining Malik and Majid (Zehr Body Cam at 04:54:38–04:57:46), Zehr expressed shock, stating: "[t]here was not even any indicators. Was there any nervousness?" to which Garcia responded, "No." (Zehr Body Cam at 05:05:00–05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.)

Zehr conducted a preliminary test of the white substance and found it to be "presumptively" cocaine. (ECF No. 41-1 at 3; Zehr Body Cam at 05:06:52–05:07:19.) Zehr then informed that they needed to get a warrant. (Zehr Body Cam at 05:07:34–05:07:53; Garcia Body Cam (Exh. A-1) at 05:07:42–05:07:46.) The Troopers arrested Malik and Majid and read them their *Miranda*[6] rights. (ECF No. 41-1 at 3.) Zehr and Garcia decided to stop the search at the located items, had the CMV towed, and applied for a search warrant from the Ely Justice Court's Justice of Peace Stephen Bishop. (*Id.*) Justice Bishop granted the search warrant. (*Id.*) Zehr and Garcia executed a search on the CMV at approximately 12:49 a.m. the following day. (*Id.*) Upon search, the Troopers found what was later determined to be significant quantities of suspected cocaine and suspected methamphetamine that Defendants now seek to suppress. (*Id.* at 41-1 at 4.)

III. LEGAL FRAMEWORK

A. Fourth Amendment Law Regarding Traffic Stops and Reasonable Suspicion

"The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted); *see also* U.S. Const. amend. IV. The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a

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[6] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

legitimate expectation of privacy in the invaded place. *Katz v. U.S.*, 389 U.S. 347, 353 (1967).

When a vehicle is stopped by a police officer and its occupants are detained, a seizure within the Fourth Amendment has occurred, even if the purpose of the stop is limited and the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976). But a court need not determine the reasonableness of a temporary detention if it determines that the officer had reasonable suspicion to conclude that a traffic violation occurred. *See U.S. v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996)). However, "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "The reasonableness of a seizure . . . depends on what the police in fact do." *Rodriquez v. U.S.*, 135 S. Ct. 1609, 1616 (2015). This inquiry particularly focuses on whether the officer's conduct "adds time" to the stop. *Id.* at 1616.

An officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615; *see also U.S. v. Landeros*, 913 F.3d 862, 866 (9th Cir. 2019) (quoting *Rodriguez*). On one hand, an officer may, in issuing a traffic ticket also conduct "inquiries incident to [the traffic] stop." *Rodriguez*, 135 S. Ct. at 1614 (quoting *Caballes*, 543 U.S. at 404). On the other, "[o]n-scene investigation into other crimes . . . detours from [an officer's traffic stop] mission." *Id.* at 1616 (citation omitted). Therefore, *any* prolongation of the duration of the applicable traffic stop outside the scope of that traffic stop's mission violates the Fourth Amendment—warranting suppression—unless the applicable officer had independent reasonable suspicion for that prolongation. *Landeros*, 913 F.3d at 868. Reasonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized

suspicion." *Id.* (citing *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) and *U.S. v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015)) (internal quotation marks omitted).

"The requirement of *particularized* suspicion encompasses two elements. First, the assessment must be based upon the totality of the circumstances. Second, that assessment must arouse a reasonable suspicion that *the particular person being stopped* has committed or is about to commit a crime." *Montero-Camargo*, 208 F.3d at 1129 (emphasis in original, internal citations and footnotes omitted). In determining the totality of the circumstances, the Court must avoid nitpicking factors or disregarding factors altogether unless context renders those factors non-probative. *See U.S. v. Cotterman*, 709 F.3d 952, 970 (9th Cir. 2013) (en banc); *U.S. v. Valdes-Vega*, 738 F.3d 1074, 1079 (9th Cir. 2013).

Further, the applicable standard of review requires the Court to defer to the inferences drawn by the officers on the scene. *See Valdes-Vega*, 738 F.3d at 1077. Thus, courts in the Ninth Circuit have taken the analytical approach of weighing each factor individually and then collectively to satisfy the totality of the circumstances test. *See, e.g., Thomas v. Dillard*, 818 F.3d 864, 884 (9th Cir. 2016), *as amended* (May 5, 2016). "The nature of the totality-of-the-circumstances analysis also precludes us from holding that certain factors are presumptively given no weight without considering those factors in the full context of each particular case." *Valdes-Vega*, 738 F.3d at 1079 (citing *Arvizu*, 534 U.S. at 274). "We may conclude that 'some factors in a particular case are more probative than others,' but this evaluation cannot be done in the abstract by divorcing factors from their context in the stop at issue." *Id.* (quoting *Arvizu*, 534 U.S. at 277).

Finally, "[t]he reasonable-suspicion standard is not a particularly high threshold to reach." *Id.* at 1078. "Although . . . a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* (quoting *Arvizu*, 534 U.S. at 274). "Reasonable suspicion is a 'commonsense, nontechnical

conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id*. (quoting *Ornelas v. U.S.*, 517 U.S. 690, 695 (1996)).

B. Fourth Amendment Law Regarding Warrantless Searches

Additionally, "[w]arrantless searches by law enforcement officers 'are per se unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions.'" *United States v. Cervantes*, 703 F.3d 1135, 1138-39 (9th Cir. 2012) (quoting *Katz*, 389 U.S. at 357). The government bears the burden of showing that a warrantless search or seizure falls into one of these exceptions. *Id.* at 1141. Here, the pertinent exception is the automobile exception. Under this exception to the warrant requirement, officers are required to possess "probable cause" to believe that the vehicle or its containers within contain contraband or evidence of a crime. *California v. Acevedo*, 500 U.S. 565, 580 (1991). "An officer will have probable cause to search if there is a fair probability that contraband or evidence of a crime will be found in *a particular place*, based on the totality of circumstances." *Cervantes*, 703 F.3d at 1139 (internal quotations and citations omitted) (emphasis added).

C. Nevada Law

In Nevada, it is now legal for individuals 21 years of age or older to possess an ounce or less of marijuana anywhere in Nevada, including vehicles. NRS §§ 453D.100, 453D.110. NRS § 453D.110 provides, in relevant part:

> Notwithstanding any other provision of Nevada law and the law of any political subdivision of Nevada, except as otherwise provided in this chapter, it is lawful, in this State, and must not be used as the basis for prosecution or penalty by this State or a political subdivision of this State, and must not, in this State, be a basis for seizure or forfeiture of assets for persons 21 years of age or older to:
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> 1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana.

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Nonetheless, an individual cannot drive while under the influence of marijuana or while impaired by marijuana. NRS § 453D.100(1)(a).

IV. DISCUSSION

Considering the relevant legal framework, the Court begins by clarifying what this case is not about. Based on the pertinent facts—as they occurred on the day of the traffic stop and not after-the-fact explanations—the following is evident. Neither the prolongation of the traffic stop nor search of the CMV were premised on the smell of marijuana alone, contrary to the government's insistence at the Hearing.[7] The Troopers clearly acted under the supposition that smell alone was not enough in this case, otherwise they would have arrested Defendants upon detecting the marijuana odor and Malik's admission that he had used albeit hours earlier, or they would have searched the vehicle for contraband based on the marijuana odor instead of going on a hunt for the marijuana remnants to take the CMV out of service. The Troopers, without reasonable basis, went in search of the "enough" that they needed. As such, the Troopers' actions impermissibly abridged Fourth Amendment protections.

The Court's inquiry here is two-fold. First, did Garcia have independent reasonable suspicion to extend the stop for speeding violation after he smelled marijuana and Malik admitted using marijuana? Second, even if Garcia had reasonable suspicion to prolong the initial traffic stop, did he and Zehr also have probable cause to undertake a search of the CMV's driver and passenger seating areas as well as the living/sleeping quarters? The Court discusses each issue in turn.

A. Prolonged Stop

The Court's reasonable suspicion analysis is narrowed by the government's concession at the start of the Hearing that reasonable suspicion was developed by Garcia before Zehr arrived about 30 minutes after the stop. Pertinently, Majid argues that Garcia

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[7]For this reason, the government's argument that the Court must apply current Ninth Circuit caselaw providing that marijuana odor constitutes probable cause to search has no application to the facts here.

lacked independent reasonable suspicion to prolong the duration of the stop of the CMV. (ECF No. 40 at 7–14, 22–23.) In its opposition, the government argues that the smell of marijuana and Malik's admission to having smoked marijuana provided reasonable suspicion to prolong the traffic stop (ECF No. 45 at 5, 16–17).[8] However, at the Hearing, the government refined its argument based on Garcia's testimony. Garcia testified that his independent reasonable suspicion to think there was more marijuana in the CMV is not only based on the smell and Malik's admission to having smoked marijuana, but additionally because he did not believe Malik based on the six to seven-hour timeframe Malik provided. Garcia testified to believing that such timeframe was inconsistent with the smell of marijuana emitting from the CMV. While the record does not support Garcia's claimed timeframe basis for disbelief as provided in his testimony,[9] given the low threshold

[8]The government's reliance on *United States v. Sanders*, 248 F. Supp. 3d 339 (D. R.I. 2017) to support this argument (ECF No. 45 at 5) is misguided. As Majid points out, a review of *Sanders* shows that the finding of reasonable suspicion there required more than the odor of marijuana and admission to having smoked marijuana (ECF No. 50 at 13–14). *See Sanders*, 248 F. Supp. 3d at 346–47. Further, an application of *Sanders* here is problematic to the extent its consideration in entirety appear more akin to a probable cause analysis. *See* probable cause discussion *infra*. In any event, *Sanders* leads to the conclusion that, at minimum, in a state where a user amount of marijuana is legal, the smell of burnt marijuana *and* admission to using marijuana do not support a finding of independent reasonable suspicion. *See id.*

[9]As an initial matter, it appears Garcia did not decide reasonable suspicion exists to extend the stop as evidence by his communication with Zehr. In particular, he relayed what he found to Zehr to seek guidance on what to do—he explained the marijuana odor, the driver's admission of having smoked earlier in the day and his incredulity that the driver would throw out the rest of the "joint." (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) It was Zehr who stated that was an automatic 24 hours out of service and they would be able to do a probable cause search.

Further, during the relevant exchange with Zehr, Garcia made no mention of not believing Malik because of the timeframe Malik provided. (Garcia Body Cam (Exh. A-1) at 04:16:11–04:17:49.) Nor does his narrative report support that he had questions regarding the mentioned timeframe. (ECF No. 41-1 at 2.) Moreover, when pressed by defense counsel about his reason for his lack of belief, Garcia testified that he could not specifically tell why he believed the timeframe was inconsistent with the smell of marijuana and admitted that he received no training to help ascertain how marijuana smell dissipates over time and conceded knowledge that a user amount of marijuana is not illegal in Nevada. Thus, Garcia's subjective timeframe belief is unsupported by any articulated reasonable objective basis.

for finding reasonable suspicion, the Court finds that the record suggests that Garcia did not believe Malik had thrown out the remainder of the marijuana. (Garcia Body Cam (Exh. A-1) at 04:17:18–04:17:42.) Albeit the latter belief being borderline flummoxing,[10] the Court finds it is arguably enough in conjunction with the smell and admission to warrant a finding of reasonable suspicion.

However, has explained below, the same cannot be said for a finding of probable cause to search. The Court now turns to that issue.

B. Search of the CMV

Even if there was independent reasonable suspicion for prolonging the traffic stop, there was a glaring absence of probable cause for the search, much less the extent of the search of the CMV—going beyond the cab.

To reiterate, the facts in the record do not support the government's argument, as illuminated at the Hearing, that the probable cause to search here was grounded on the smell of marijuana alone, or in conjunction with Malik's admission to having smoked marijuana or any basis of disbelief. The Troopers undertook the search based on the assumption that they could put the CMV out of service for 24 hours only if they found evidence of marijuana and more particularly a user amount of marijuana. Thus, the search here was merely undertaken as a means to justify the desired end of putting the CMV out of service, presumably out of safety reasons. But, as the defense points out in briefing and at the Hearing, the Troopers were not concerned with Malik's sobriety as a driver—as evidenced by the fact that they never administered a sobriety test (ECF No. 41 at 2, 11–12). Instead, the Troopers dubiously at once conducted a search of the CMV in order to rely on federal regulations, discussed *infra*, while at the same time positing that the not-yet-found violation of those regulations provided probable cause to search the CMV. As

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Accordingly, the record supports only that at the point where Garcia decided to prolong the stop, all he had was the marijuana odor and his disbelief of the claim that the "joint" had been discarded.

[10]Common sense suggests that individuals ordinarily throw away leftovers or remnants of items they do not want.

the Court next explains, the government's circular reliance on federal law or federal regulations to justify the search of the CMV turns the Fourth Amendment on its metaphorical head.

1. Reliance on Federal Law and Federal Regulations as Basis for Searching the CMV

a. Federal Marijuana Law as Basis to Search the CMV

The government largely argues that probable cause to search the CMV existed under federal law—because marijuana remains illegal under federal law. (ECF No. 45 at 3–11.) Defendants argue, *inter alia*, that there is no basis in the record to support a finding that Garcia and Zehr were even attempting to enforce federal marijuana law or were tasked to enforce such law. (*See, e.g.*, ECF No. 52 at 9–15.) The Court agrees with Defendants that the government's argument suggesting the Troopers relied on federal marijuana law is not supported by the record.

Absent evidence in the record that Garcia conducted the search of the CMV pursuant to federal marijuana law, it is irrelevant whether there was probable cause to search based on that law. *See, e.g.*, *United States v. $186,416.00 in U.S. Currency ("US Currency")*, 590 F.3d 942, 948 (9th Cir. 2010) ("Nothing in the documents prepared at the time the warrant was obtained from the state court or in the procedure followed to obtain that warrant supports the proposition that the LAPD thought it was pursuing a violation of federal law."); *Kidder v. County of Los Angeles*, No. 14-06218, 2015 WL 13439812, at *3 (C.D. Cal. Mar. 9, 2015), *aff'd sub nom. Kidder v. Los Angeles County*, 684 F. App'x 642 (9th Cir. 2017) (relying on *US Currency* and holding that the "[l]ogical extension of this case to warrantless searches suggests that probable cause is governed by the parameters of state law when the officer is a state agent participating in a purely state operation" and that "[s]ince the incident in this case lacks any hint of federal authority, it appears that Deputy Draper could not have relied on [federal law] to form his probable cause"); *Kruesi v. Linn Cty.*, No. 6:14- 1465, 2015 WL 5829839, at *2 (D. Or. Oct. 6, 2015) ("Although the defendants contend that the grow 'violated Oregon and federal law' the application was

for a state search warrant, was made to a state circuit judge, was premised on the grow site containing more plants than permitted under the Oregon Medical Marijuana Act, and the warrant was executed solely by state law enforcement officers. Thus federal law, which does not provide a safe harbor for medical marijuana growers, is not implicated in this case.").[11]

b. Federal Regulations as Basis to Search the CMV

The government's probable cause contention is also unavailing to the extent the government's federal law claim is based on its argument that federal regulations prohibit the possession or use of marijuana by commercial drivers. The government rests this argument on Nevada's adoption of federal motor carrier safety regulations via Nevada Administrative Code 706.2472(1). (ECF No. 45 at 14–16.) NAC 706.2472(1) provides:

> 1. The Department of Public Safety hereby adopts by reference the regulations contained in 49 C.F.R. Parts 40, 382, 383, 385, 387, 390 to 393, inclusive, 395, 396 and 397, and Appendices B and G of 49 C.F.R. Chapter III, Subchapter B, as those regulations existed on May 30, 2012, with the following exceptions: …
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> 2. To enforce these regulations, enforcement officers of the Department of Public Safety may, during regular business hours, enter the property of a carrier to inspect its records, facilities and vehicles, including, without limitation, space for cargo and warehouses.

The government argues that under the Federal Motor Carrier Safety Administration ("FMCSA"), specifically 49 C.F.R. § 392.4, drivers of a commercial motor vehicle are prohibited from being in possession of or under the influence of any controlled substances listed under Scheduled I of 21 C.F.R. § 1308.11—which includes marijuana (ECF No. 45 at 14). *See* 49 C.F.R. § 392.4 ("No driver shall be on duty and possess, be under the

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[11]Additionally, the government fails to pinpoint any federal law—including 21 U.S.C. §§ 844(a) and 812(c) which the government relies on (ECF No. 45 at 3)—authorizing state law enforcement officers to investigate violations of federal marijuana law. *See generally* 21 U.S.C. §§ 844(a) and 812(c). Further, as a matter of policy it would be antithetical for Nevada to both legalize recreational use of a certain amount of marijuana, but nonetheless direct its officers to enforce federal marijuana law—which has not legalized the use of marijuana in any amount.

influence of, or use, any of the following drugs or other substances . . ."). The government contends that this regulation provided probable cause to search the CMV based on the smell of and admission to having smoked marijuana (*id.* at 16) because marijuana constitutes contraband under the regulations.[12] Defendants essentially respond that the government's position improperly conflates administrative searches with probable cause searches under the criminal code. (*See, e.g.*, ECF No. 41 at 2–3, 3–15.)

The Court finds that the government's leap to probable cause based on 49 C.F.R. § 392.4 (ECF No. 45 at 14) obscures the bounds of regulatory searches and ultimately loosens Fourth Amendment protections.

First, the government concedes that the administrative search exception is inapplicable here; yet, claims that the Troopers' basis to search was grounded in Nevada's adoption of 49 C.F.R. § 392.4.[13] The government's argument is particularly grounded in Zehr's advise to Garcia after Garcia contacted Zehr regarding the combination of marijuana and the CMV (ECF No. 41-1 at 2). As noted, Zehr advised Garcia that there was probable cause to search the CMV apparently because it was illegal to possess marijuana in a CMV, and according to FMCSRs adopted by Nevada pursuant to "NAC 706.247[,]"[14] the driver could be placed out of service for 24 hours (ECF No. 41-5 at 2), so long as marijuana was actually found during the search (Zehr Body Cam at 04:38:37–04:38:49).[15]

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[12]The latter part of this argument was provided at the Hearing.

[13]The government also cites to 49 C.F.R. § 391.5 as supporting the "disqualification" of an on-duty commercial motor vehicle driver (ECF No. 45 at 14). However, § 391.5's disqualification comes into play only where a driver has already lost his driving privileges, or after a driver "is convicted of" the following: a disqualifying offense; violating an out-of-service order; violation of the prohibition of texting while driving; or using a hand-held mobile telephone while driving. 49 C.F.R. § 391.5(a)–(f).

[14]Renumbered 706.2471.

[15]Although Zehr's report provides statements regarding use being prohibited under the regulations, the Body Cam footage after Zehr arrived on scene supports that Zehr's out-of-service advise depended on finding marijuana in the CMV. To the extent the narrative report suggests otherwise, the Court defers to the Body Cam footage.

As Majid argues, Zehr's out-of-service advisement was wrong (ECF No. 40 at 14–19). Because the government pinpoints 49 C.F.R. § 392.4, the Court notes that the section is devoid of any requirement for placing a driver out of service for possessing a controlled substance. *See* 49 C.F.R. § 392.4. The absence of such requirement means Zehr could not have legally put the CMV out of service and search it under this regulatory section. *Cf.* 49 C.F.R. § 392.5 (applicable to alcohol, providing that no driver shall be on duty while possessing alcohol *and* must be placed out of service immediately for 24 hours if found to be in violation).

Second, the Court agrees with Defendants that in relying on the regulations as providing probable cause to search, the government appears to aggregate two areas of law—that pertaining to an administrative search and that pertaining to probable cause outside the purview of an administrative search. The government's position is mind-boggling given its apparent lack of reliance on the administrative search exception (*see* ECF No. 45 at 15 ("[T]his case does not involve a random, suspicionless stop or a random, suspicionless inspection of the defendants' tractor trailer.")). Moreover, the government's position is undermined by the very function of a search based on the regulations. This is because the government's position requires the problematic conclusion that a search may in its nature be both an administrative regulatory search and a probable cause search at once. *But see U.S. v. Knight*, 306 F.3d 534, 536 (8th Cir. 2002) (quoting *New York v. Burger*, 482 U.S. 691, 703 (1987) ("The regulatory statute serves the function of a warrant because it explicitly limits the 'time, place, and scope' of the authorized search as the fourth amendment requires, but it does not provide probable cause.")).

Third, Majid rightly points out that the very regulations the government relies on must be enforced within the framework of particular criteria and the framework of warrantless automobile searches under the Fourth Amendment (ECF No. 40 at 19–22). *See id.* While the Supreme Court has held that a warrantless search of closely regulated industries may be constitutional, such is the case where *inter alia*, the rules governing the search offer adequate substitute for the Fourth Amendment's warrant requirement.

Burger, 482 U.S. at 702–03. Adequate substitute means that the regulatory rules must provide notice to owners that their property may be searched for a specific purpose, and they "must limit the discretion of the inspecting officers." *Id.* at 703. The inspecting officer's discretion must be 'carefully limited in time, place, and scope.' *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

Here, Nevada ensures compliance with federal regulations through enactment of a Commercial Vehicle Safety Plan ("CVSP"), which conforms to the federal Motor Carrier Safety Assistance Program's ("MCSAP") requirements for receiving federal highway funding "by, inter alia, requiring [NHP] troopers to conduct inspections in a manner consistent with 'the North American Standard [("NAS")] Inspection procedure.'" *United States v. Orozco*, 858 F.3d 1204 (9th Cir., 2017); 49 C.F.R. § 350.211(d). The state's CVSP provides that NHP's "enforcement activities" include "scheduled and unannounced roadside inspections." *Orozco*, 858 F.3d at 1207. Under NAS inspection procedure, "Level I and Level II Inspections tend to primarily address commercial vehicles while Level III Inspections focus more on the driver." *Owner–operator Indep. Driver Ass'n Inc. v. Dunaski*, 763 F. Supp. 2d 1068, 1074 (D. Minn., 2011). The guidelines under Level III—applicable here—authorize an officer to "[c]heck the cab for possible illegal presence of alcohol, drugs, weapons or other contraband." *Knight*, 306 F.3d at 535.[16] Compliance enforcement is done by NHP troopers "who *are trained to conduct NAS inspections* but are also charged with *enforcement of Nevada's criminal laws*." *Orozco*, 858 F.3d at 1207 (emphasis added). Moreover, "[t]he [motor carrier safety] regulations make it clear the inspections are limited in scope to safety concerns. They do not authorize a general search by any law enforcement officer." *V–1 Oil Co. v. Means*, 94 F.3d 1420, 1427 (10th Cir. 1996) (internal citation omitted). Nor do they permit the search of personal belongings. *Knight*, 306 F.3d at 535–36.

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[16]The check of the cab may be limited to a visual view of drugs, alcohol, or other contraband in plain view. *See, e.g.*, *State v McClure*, 74 S.W.3d 362, 365 (Tenn. Crim. App. 2001).

It is undisputable that the search here went beyond the search of the CMV's cab, and particularly items in plain view within the cab. Further, Garcia lacked the foundational NAS training to conduct search of the CMV and thus was not authorized to conduct the search of the CMV under NAS regulations. Additionally, as the defense argues, if the Troopers were concerned about highway safety and Malik's level of sobriety, in light of Malik's admission to having smoked marijuana, they could have: inquired into whether he smoked while driving; examined how long he had been driving compared to when he admitted to smoking; and/or conduct a sobriety test. (ECF No. 40 at 11–12.) But, the Troopers did none of these. This absence of enforcement in accordance with the regulatory criteria and guidelines by the Troopers strongly suggests that 49 C.F.R. § 392.4 was merely being used as pretext to search the CMV for contraband or evidence of a crime. Likewise, even if the evidence supported that the Troopers were exercising authority under NAS inspection guidelines, it is clear that the Troopers exceeded that authority and thus exceeded the scope of a constitutionally permissible regulatory search. *See, e.g.*, *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998), as amended (Nov. 16, 1998) (explaining the administrative search exception and noting the role of the courts in "ensur[ing] that an administrative search is not subverted into a general search for evidence of crime").

2. Whether the Troopers Had Probable Cause to Search Based on Nevada Law

In any event, the government presents an alternative argument—that the Troopers had probable cause to search the CMV "for a violation of state law" because Nevada continues to criminalize the use of marijuana in a wide range of circumstances. (ECF No. 48 at 11–13.)

As indicated, in undertaking its probable cause inquiry the Court also considers the totality of the circumstances. Specifically, the Court examines whether under the totality of the circumstances, a fair probability existed that a search of the CMV would reveal

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contraband or evidence *of a crime*. *See, e.g.*, *Cervantes*, 703 F.3d at 1139 (quoting *Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006).

To begin, the Court is unpersuaded by the government's first argument regarding probable cause to search the CMV based on possible—but not articulated at the relevant time—violations of state law. (*Id.* at 12–13.) The government essentially reargues that the Troopers had probable cause to search based on the odor and Malik's admission to smoking marijuana earlier in the day because (1) smoking marijuana before driving is a state crime, (2) smoking marijuana in a truck while moving or parked is a state crime, and (3) if Malik or Majid possessed any more than one ounce of marijuana, they committed a state crime. (*Id.*) Importantly, in its briefing the government provided nothing more than the odor and admission as supporting a finding of probable cause, and as indicated *supra* and *infra*, these alone are not enough. Next, the first two basis the government argues—smoking before driving and smoking while parked—without inquiry into the particular provisions the government cites[17]—would suggest the Troopers did not need to search the CMV at all to charge Malik for violating Nevada law. Yet, the fact here is that the Troopers searched the CMV to look for something more than the odor and admission and made no inquiry into Malik's existing sobriety. Further, the Court considers the odor and smoking admission here within the permissible possession of an ounce or less of marijuana under Nevada law.

The Court's probable cause analysis is aided by three decisions from other states where recreational marijuana is now legal in some amount: *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016); *Colorado v. Cox*, 401 P.3d 509 (Colo. 2017) and *State v. K.C.-S*, No. 73036-3-I, 2016 WL 264960 (Wash. Ct. App. Jan. 19, 2016). The parties respectively contend that this authority supports their position. (ECF No. 41 at 22–24; ECF No. 45 at 13; ECF No. 52 at 7–9.) Based on this caselaw and the record here, several factors counsel against a finding of probable cause.

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[17] *See* ECF No. 45 at 12–13 (citing NRS §§ 453D.100(1), 453D.400, and 486C.110.)

In *Zuniga*, the Colorado Supreme Court, identified several indicia of criminality that, in combination with the odor of marijuana, established probable cause to search the vehicle there. The court noted that the occupants of the car exhibited extreme nervousness and remained overly nervous; the trooper noted that the driver "had beads of sweat on his face, stuttered in response to requests, and had shaky hands[;]" the driver would not look in the trooper's eyes; the passenger—Zuniga—was, in addition to nervous, 'overly nice.' *Id.* at 1054–55. The court noted that "the two men's extreme nervousness . . . leads to a reasonable inference that illegal activity was ongoing during the traffic stop." *Id.* at 1060. Further, the men "gave remarkably disparate accounts of their visit to Colorado." *Id.* at 1055. The court reasoned "[t]he vast inconsistencies between the two men's stories lead to a reasonable inference that the two men were attempting to conceal illegal conduct from the Trooper." *Id.* at 1059. The court in *Zuniga* additionally considered that the trooper smelled the "heavy odor" of "raw (i.e., unburnt) marijuana[,]" to suggest that "marijuana was in the vehicle, potentially in an illegal amount." *Id.* at 1054, 1060. These combined indicia of criminality led the trooper in *Zuniga* to call for a K-9. *Id.* at 1055.

Similarly, in its later *Cox* decision, the Colorado Supreme Court found probable cause to search when the trooper observed, in addition to the smell of marijuana: the defendant had two cell phones on the car seat; exhibited unusual nervousness; and gave inconsistent explanations regarding his travels in conjunction with a later dog alert. 401 P.3d at 510.

Likewise, in *K.C.-S.* the Washington Court of Appeals found there was probable cause to search the car in that case based on numerous indicators of criminality in combination with the smell of marijuana. 2016 WL 264960, at *4. The court focused on that there was a suspected drug deal along with "K.C.-S.'s furtive movements, the *strong odor of fresh marijuana* despite the car's open windows and the removal of its occupants, K.C.-S.'s outstanding [violation of the uniform controlled substances act] warrant, and [a] K9 sniff" (emphasis added). *Id.*

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There is great dissimilarity between the facts of *Zuniga*, *Cox*, and *K.C.-S* and this case. First, the government's opposition fails to address any indicators to suggest that either Defendant was in possession of marijuana. (ECF No. 45 at 14–16.) To the contrary, the Troopers' Body Cam footage captured the Troopers' conclusion that Defendants exhibited no indicia of criminality—particularly nervousness. (Zehr Body Cam at 05:05:00–05:05:12; Garcia Body Cam (Exh. A-1) at 05:04:45–05:04:53.) Testimony was also provided at the Hearing that Defendants were cooperative, which also tends to suggest a lack of criminality or at a minimum is not indicia of criminality. Nonetheless, when Zehr arrived at the scene of the CMV stop and Garcia advised him a second time of the smell and admission to use of marijuana, Zehr stated: "well, get them out and we can pat them down and then we can search, or you want me to search or what." (Garcia Body Cam (Exh. A-1) at 04:37:54–04:38:01; Zehr Body Cam at 04:38:16–04:38:28.) The Court considers this marker to be the ending delineation of its inquiry as to whether probable cause existed for the search because the Troopers had clearly decided they had probable cause to search at this moment.

This limitation of the Court's probable cause inquiry is of utmost importance here. At this point, it appears the Troopers have no more than the same basis on which Garcia's reasonable suspicion is grounded plus the established improper belief that probable cause to search was authorized by noted federal regulations and a lack of identified indicators of criminality.[18] Markedly, the inconsistency in the timeframe—between having smoked six or seven hours ago to three or four hours—was yet to occur. Next, unlike in *Zuniga* where the trooper smelled a heavy odor of marijuana and thus "potentially in an illegal amount,"

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[18]As indicated, the government's fallback argument that odor alone satisfies probable cause is factually unsupported based on the Troopers' reasons for undertaking the search. The Court therefore declines to address the government's contention that in this circuit odor alone is enough despite the legalization of possessing an ounce or less of marijuana for recreational use in Nevada. *But see United States v. White*, 732 F. App'x 597, 598 (Mem.) (9th Cir. 2018) (concluding odor was enough to establish probable cause in medical marijuana case where the defendant had not explained he had a medical marijuana card and "possession of nonmedical marijuana was *then still a state crime*") (emphasis added).

here Body Cam footage documents that Garcia described the smell as a "little marijuana"—thus consistent with Malik's admission to smoking a single marijuana cigarette. (Garcia Body Cam (Exh. A-1) at 04:16:12–04:16:30; *see also id.* at 04:39:00–04:39:28 (Zehr stating it is "probably a user amount" and suggesting it could be anywhere in the CMV). This Court considers Garcia's representation as to the amount of marijuana—as evidence of odor—at the time of the stop to be controlling, albeit his suggestion of a stronger odor during his testimony at the Hearing. Notably, Zehr confirmed at the Hearing that at the time of the stop of the CMV Garcia told him he smelled a little marijuana in the cab of the CMV.

Moreover, there was nothing to suggest that the CMV contained marijuana at all—much less in excess of a one-ounce user amount—in light of Malik's repeated explanation that he had thrown the unwanted remains of the marijuana cigarette out. As such, under the totality of the circumstances the Troopers articulate no objectively reasonable basis for concluding there was a fair probability that Malik and Majid were engaging in unlawful activity. The Court therefore finds that the Troopers lacked probable cause to search the CMV for contraband or evidence of a crime in violation of Nevada law. Additionally, even if the Troopers initially had probable cause to search, there is no basis for Garcia to have extended the search beyond the CMV's cab—however, the government does not address the issue and the Court need not discuss it in depth here.[19]

In sum, the Court finds that Defendants are entitled to suppression on the basis that the Troopers lacked probable cause under Nevada law to search the various areas of the CMV. Accordingly, the Court grants the Defendants' Motions (ECF Nos. 40, 41, 42).

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[19]Defendants argue in briefing and at the Hearing that *even assuming* that the Troopers had probable cause to search the CMV, the search exceeded the permissible scope of a warrantless search because Garcia went beyond the object of the search and the particular place wherein he may have objectively had probable cause to believe the user amount (or remnants) of marijuana they were looking for may be found. (*See, e.g.*, ECF No. 41 at 24.)

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that Defendants' motions to suppress (ECF Nos. 40, 41, 42) are granted.

DATED THIS 10th day of May 2019.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND REQUEST FOR DECLARATORY JUDGMENT

COMES NOW, Plaintiffs, (Business) and Ms. Janet Joe, ("Ms. Doe") (collectively "Plaintiffs"), by and through their counsel of record, JOSEPH S. GILBERT, ESQ., of JOEY GILBERT LAW, and moves this Honorable Court pursuant to NRCP 65(a) for a preliminary and permanent injunction prohibiting any type of enforcement of Nevada Governor Steve Sisolak's ("Gov. Sisolak") Declaration of Emergency Directives Governor's Emergency Directives. Plaintiffs further request this Court to issue an injunction enjoining and restraining any department, division, agency, office, organization, officer, agent, employee or assignee of the State of Nevada or United States from enforcing unlawful, nullified emergency orders, regulations and, or directives issued by Governor Sisolak on or after March 12, 2020, whether attempted to do so criminally, civilly, judicially or administratively. Nevada's Supreme Court has recognized that "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury." Finkel v. Cashman Prof'l, Inc., 270 P.3d 1259, 1263 (Nev. 2012) (quoting Sobol v. Capital Management, 726 P.2d 335, 337 (Nev., 1986)). Accordingly, the allegations and arguments in the Points and Authorities below will support the issuance of an injunction. Guion v. Terra Mktg. of Nevada, Inc., 523 P.2d 847, 848 (Nev., 1974).

Plaintiffs further seek a determination that Gov. Sisolak's interpretation of "emergency" in his Declaration of Emergency ("D.E.") issued on March 12, 2020, under the provisions of Nevada's Emergency Management statutes, NRS 414.020 to NRS 414.340, inclusive, is unreasonable as it cannot encompass an infectious disease outbreak; and a corresponding determination that Gov. Sisolak's E.D. was unconstitutional in violation of the Separation of Powers doctrine codified at Art. 3, § 1, of Nevada's Constitution, because it exceed the

authorization delegated to the Governor given that the COVID-19 pandemic did not constitute an "emergency" within the context of NRS 414.060 and 414.070 following a determination by the Chief Medical Officer of the Division of Public and Behavioral Health that it amounted to a "public health emergency."

This application is made in good faith and not for the reasons and on the grounds that Gov. Sisolak must be enjoined from protecting the public health and welfare of Nevada's citizens as a means of disagreement with political discourse. As such, the application is based upon Nevada's Separation of Powers principles, concepts of federalism and seeks to enjoin an unlawful exercise of power by Nevada's Governor that usurps legislative functions and amounts to tyrannical action that should be prohibited. This application is therefore based upon numerous Nevada statutory chapters, the Nevada Constitution, the U.S. Constitution, all papers and pleadings on file with this Court, the Memorandum of Points and Authorities below, and any evidence and testimony that may be presented at an oral hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In Nevada, like in other states, the Governor is currently overseeing and directing the state's response to the COVID-19 pandemic through the exercise of emergency powers bestowing substantially greater authority than is inherent to his elected position as the Chief Magistrate and chief executive officer of the State. These emergency powers arose on March 12, 2020, when Governor Sisolak ("Gov. Sisolak") issued a Declaration of Emergency ("D.E.) in response to a determination that the COVID-19 pandemic presented a substantial risk to the public health and safety of the citizens of Nevada. *See* Declaration of Emergency attached hereto as **Exhibit 1**. Gov. Sisolak has exercised his emergency powers by issuing 33 D.E.

Directives between March 12th and October 8th of 2020. Some of these Directives have restricted the size of gatherings and required that people maintain specified social distancing, while others have closed schools, closed businesses, suspended residential evictions by landlords and thus interfered with contracts and have restricted travel, entertainment and means of earning a livelihood. These restrictions have substantial consequences for individuals and economies. There have been and will continue to be debates concerning the best way to address the threat posed by this disease and arguments arise concerning what balance the government should strike between the protection of the public safety and welfare and the deprivation of individual liberties. To that extent those debates involve policy choices and are best left to legislative debate and action. As discussed at great length below, police power of the State relating to public safety in the midst of a pandemic has always belonged exclusively to the legislature which retained that power when it was not expressly delegated to the federal government in Articles I-III of the U.S. Constitution at the time of its enactment. As the United States Supreme Court recognized more than a century ago in a case that has once again became highly relevant, "It is no part of the function of a court *** to determine which of two modes is likely to be the most effective for the protection of the public against disease." Jacobson v. Massachusetts, 197 US 11, 30 (1905). Chief Justice Roberts reiterated that point recently when he stated that "'the safety and health of the people'" is principally entrusted to the states' political leaders. South Bay United Pentecostal Church v. Newsom, 2020 WL 2813056 at *1 (May 29, 2020) (Roberts, C.J., concurring) (quoting Jacobson, 197 US at 38). This point is not absolute, however, in our system of government, with its three separate branches structured to check and balance the powers of each other, the courts do have a role to play. That role involves determining, in certain cases, whether the executive branch an its officers have exceeded the limits on their coequal powers. As

the Supreme Court also stated in Jacobson, courts have the authority to intervene when political leaders charged with protecting the public when facing an epidemic act in an arbitrary, unreasonable manner" or in a way that exceeds their limitations on authority. 197 US at 28.

115 years ago the U.S. Supreme Court addressed the issue, it is now presented to this Court in the instant action seeking permanent and preliminary injunctions as well as a declaration that the D.E. of Gov. Sisolak issued on March 12, 2020 was unlawful and a nullity for reason that its issuance exceed his scope of authority and involved the usurpation of the legislature's plenary power to legislate and address outbreaks of infectious disease. This issue presents itself throughout the language of all 33 of the Governor's D.E. Directives, however, each of these directives is based upon his initial D.E. which was unlawful for the same reasons. (If it is declared unconstitutional all of the directives based thereon will be void as well.) As such, the language of the D.E. and the statutes relating thereto will be the primary focus of the allegations, issues and arguments presented to this Court.

The first paragraph of the D.E alleged:

> WHEREAS, Nevada Revised Statutes, Chapter 414, *authorizes the Governor to issue a proclamation declaring a state of emergency* when a natural emergency or disaster of major proportions has occurred within this state, and the assistance of state agencies is needed to supplement the efforts and capabilities of political subdivisions to save lives, protect property, and protect the health and safety of persons in this state, particularly through a coordinated response; and …

The D.E. then alleged that the CDC was responding to an outbreak of a respiratory illness called COVIS-19 that had been confirmed in numerous countries, including the United States (π 2-3); The World Health Organization had declared the COVID-19 outbreak a pandemic (π 4); "The State of Nevada [had been] coordinating with the federal government, as well as local health authorities, health care facilities, and providers of health care to prepare for, and identify possible cases of COVID-19 in the State of Nevada" (π 5); The nearby states of California,

Washington, Oregon, Arizona and Utah had already declared a state of emergency (π 6); the Nevada Department of Health and Human Services is working with local health authorities to identify any other potential cases of COVID-19 in the State (π 9); "*The Chief Medical Officer [had] reported that a public health emergency exists in the State* (π 10); "The Governor determined that the State of Nevada is experiencing events that require a coordinated response for the health and safety of the public" (π11); and, "Article 5, Section 1 of the Nevada Constitution provides: "The Supreme executive power of this State, shall be vested in a chief Magistrate who shall be the Governor of the State of Nevada" (π 12). Id. The *Emergency Declaration* then asserted:

> NOW, THEREFORE, I, Steve Sisolak, Governor of the State of Nevada, *pursuant to the authority vested in me by the Constitution and laws of the State of Nevada*, **hereby declare an emergency** and direct all state agencies to supplement the efforts of all impacted and threatened counties to save lives, protect property, and protect the health and safety of persons in this state. Under my authority, I will perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

Section 7 (subsequent sections 1-7) then claimed the *Emergency Declaration* would remain in effect until the Chief Medical Officer notified the Governor that the health event had been abated and the Governor issues an order terminating the emergency. Id.

In his D.E. Gov. Sisolak asserted that the Chief Medical Officer had reported that a *public health emergency* existed within this State, and that a *natural emergency* had occurred within this State, necessitating the assistance of state agencies to supplement efforts and capabilities of political subdivisions in order to protect property and save lives. The Governor was authorized under Chapter 414 of NRS to declare a state of emergency. The subtle difference between the terms "public health emergency" and "natural emergency" has more than likely gone unnoticed until now. This difference, however, is extremely important and will cause all 33 of the D.E.

Directives issued by Gov. Sisolak to be vacated or enjoined for violating the Separation of Powers Doctrine codified at Art. 3, § 1, of Nevada's Constitution.

As will be discussed in the subsections that follow, Chapter 414 of NRS, which Gov. Sisolak claims authorized him to declare a state of emergency, relates solely to emergency management and the Governors powers and duties under Nevada's Emergency Management laws are narrowly tailored to the limited functions of emergency management as they are set forth in detail within the provisions of this Chapter. And of greater importance, disasters and emergencies are precisely defined to include three categories, and the only category capable of a tenuous determination that it encompasses pandemics or outbreaks of infectious diseases is the "natural emergency" subset. In paragraph (1) of the D.E., Gov. Sisolak specifically alleges that his emergency declaration and source of power thereof was the fact that a natural emergency of major proportions had occurred within this State. However, as explained below, the definition of natural emergency relates to hurricanes, wildfires, hurricanes, tornados and other naturally occurring acts of God likely to result in incalculable damages and absolute destruction of property and high numbers of human casualties. Public health emergencies, on the other hand, are defined in an entirely separate chapter of NRS entitled 'Administration of Public Health' codified in NRS 439.005 to 439.994, inclusive. These statutes expressly prescribe the powers and duties of *health authorities* which include mitigation and control of "public health emergencies" and the definition of "public health emergency" may encompass an outbreak of infectious disease. Thus, Nevada's legislature specifically delegated the authority to address and regulate outbreaks of disease which threaten the public health to the Board of Public Health and divisions within that Department; as opposed to the Department of Public Safety and Division of Emergency Management("DEM") which respectively administer the Public Health Emergency

laws. While the Governor is authorized to declare emergencies under both statutory frameworks (emergency v. public health emergency) his powers are far more limited under the public health emergency provisions.

The meaning of emergency under the Emergency Management laws can be ascertained by reviewing various statutes relating to the three types of emergencies prescribed within the provisions of Chapter 414 of NRS, including the provision codifying the legislative policy and purpose of the Chapter, NRS 414.020(1), which provides in relevant part:

> Because of the existing and increasing possibility of the occurrence of emergencies or disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other **hostile action**, from a fire, flood, earthquake, storm or other **natural causes**, or from technological or **man-made catastrophes**, and in order to ensure that the preparations of this state will be adequate to deal with such emergencies or disasters, and generally to provide for the common defense and to protect the public welfare, and to preserve the lives and property of the people of the State, it is hereby found and declared to be necessary:…

A disease is neither a hostile action, a man-made catastrophe nor a natural cause such as a storm, fire or flood, and is not even regulated by the Division of Emergency Management ("DEM") under the emergency management statutes. In contrast, laws relating to the Administration of Public Health under Chapter 439 of NRS are administered by the Division of Public and Behavioral Health, and NRS 439.170 states that:

> The Division shall take such measures as may be necessary to prevent the spread of sickness and disease, and shall possess all powers necessary to fulfill the duties and exercise the authority prescribed by law and to bring actions in the courts for the enforcement of all health laws and lawful rules and regulations.

Gov. Sisolak injudiciously brought the COVID-19 pandemic within his scope of powers under the emergency management laws by interpreting "natural disaster" to include sickness and disease. This interpretation was unreasonable and unwarranted, and as a result of this ultra vires act the Governor's D.E. exceeded the scope of his authority under NRS 414.060 and 414.070 and

was null and void from the moment ink hit paper. One of the allegations Gov. Sisolak made in his D.E. in support of his declaration of emergency, was that the neighboring states of California, Washington, Oregon, Arizona and Utah had already made emergency declarations in response to COVID-19 and declared States of Emergency. This implied that because nearby states had already done the same thing his actions must have been lawful. Comparing how "emergency" is defined under Chapter 414 with its definition in the emergency management statutes of these other states is initially useful to assist with understanding the issues presented and recognizing from the beginning that there are serious shortcomings with the means used by Gov. Sisolak to expand this scope of power during the national response to the pandemic.

The Supreme Court of Oregon recently addressed a factually similar scenario in Elkhorn Baptist Church v. Brown, 366 Or 506 (Or. 2020) where Oregon's Governor had declared a state of emergency relating to COVID-19, and a district court enjoined the emergency declaration and subsequent directives based thereon, because the statute that was more specific in relation to the control of public health emergencies in the context of an outbreak of diseases provided that the emergency declaration expired no longer than 14 days after its issuance. Specifically, ORS 401.165(1) stated that the Governor may declare a state of emergency by proclamation *** after determining that an emergency has occurred or is imminent." Id. at 523. For the purposes of chapter 401, emergency was defined by ORS 401.025(1) as "a human created or natural event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering or financial loss, including but not limited to *** disease[.] Id. Thus, the court recognized that "the legislature expressly authorized the Governor to declare a state of emergency in response to a disease." Id. at 524.

ORS chapter 433 concerns public health, and ORS 433.441 gives the Governor the authority to declare "a public health emergency." Id. at 528. To do so, the Governor issues a proclamation, which must specify, among other things, the nature of the public health emergency and the political subdivision or geographic area subject to the proclamation. Id. Under another provision of ORS 433 (433.433(4)) the statute specified that a public health emergency could be declared to determine the causes of an illness related to the public health emergency, identify the patterns of transmission and take steps to control the disease. The court then recognized that the Governor was able to declare an emergency under ORS chapter 401, or alternatively declare a public health emergency under ORS chapter 433 as an additional option that was more limited in scope. Id, at 535.

Like the Oregon statutes, California's Government Code § 8558(b) defines a "state of emergency" to mean "the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or **disease**,"

Utah has a similar statute as well which only uses the word "disaster" rather than emergency, and defines disaster to include a "natural phenomenon" and defines "natural phenomenon" to mean "any earthquake, tornado, storm, flood, landslide, avalanche, forest or range fire, drought, **epidemic**, or other catastrophic event." *See* Utah Code § 63-5b-2(4)(9).

As explained below, in 2002 the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities for the Centers for Disease Control and Prevention (CDC) developed and enacted the Model Emergency Health Powers Act. In 2002 Nevada's Legislature began drafting similar legislation and introducing it as an amendment which would amend the

definitions of emergency within Chapter 414 of NRS to include a "public health emergency" which included diseases, but Nevada appears to be the only state that did not amend its emergency management statutes so that outbreaks of disease could be defined as emergencies in the same manner as floods, fires, earthquakes and other natural disasters. Ultimately, this minor detail is what distinguishes Nevada from all other states as far as emergency management is concerned. This difference is also the reason that while Oregon's Governor could declare a public health emergency but then regulate COVID-19 under its emergency management provisions. In Nevada the emergency management statutes that define emergency to include floods, earthquakes, acts of terrorism and other hostile acts and man-made emergencies does not allow for disease outbreaks to be defined under these same provisions. This difference is what allows other states to regulate diseases in the same manner as earthquakes but prohibits this in Nevada.

II. LEGAL ARGUMENT

a. Legal Standard

Plaintiffs seek a preliminary and permanent injunction pursuant to *NRCP 65*. A preliminary injunction is normally available when the moving party can demonstrate that it has a reasonable probability of success on the merits and that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate. *See* U. Sys. V. Nevadans for Sound Govt., 100 P.3d 179, 187 (Nev., 2004); Dangberg Holdings v. Douglas County, 978 P.2d 311, 319 (Nev., 1999).

Where one branch of the government is infringing o the constitutional authority of another, that is all that is required to show irreparable harm. *See* Overstreet v. Lexington-Fayette Urban Cty. Gov ., 305 F.3d 566, 578 (6th Cir. 2002) ("plaintiff can demonstrate that a denial of

an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing o irreparably injury is necessary"); O'Conner v. Mowbray, 504 F.Supp. 139, 143 (D. Nev. 1980) ("plaintiffs will be irreparably harmed if the preliminary injunction does not issue, only because unconstitutional activity or the deprivation of a constitutional right constitutes in and of itself irreparable harm.") (citing 11 Wright & Miller, Fed. Practice & Proc., § 2948 at p. 440)).

In this case, for the reasons below, the Governor's D.E. and all subsequent Directives exceeded statutory authority and were unlawful under the Separation of Powers doctrine of Nevada's Constitution. Accordingly, irreparable injury is established.

b. The Emergency Declaration Issued by Governor Sisolak on March 12, 2020 was Unconstitutional Under the Separation of Powers Doctrine Codified at Art. 3, § 1 of Nevada's Constitution Because the Governor Lacked Statutory Authorization Under Chapter 414 of NRS and Usurped Plenary Legislative Police Powers to Regulate an Outbreak of Infectious Disease

i. Introduction

On March 12, 2020, Nevada's Governor, Steve Sisolak ("Gov. Sisolak"), declared a state of emergency in response to the Covid-19 outbreak. The D.E. asserted in its opening paragraph (π1):

> WHEREAS, Nevada Revised Statutes, **Chapter 414**, *authorizes the Governor to issue a proclamation declaring a state of emergency* when a ***natural emergency*** or disaster of major proportions has occurred within this state, and the assistance of state agencies is needed to supplement the efforts and capabilities of political subdivisions to save lives, protect property, and protect the health and safety of persons in this state, particularly through a coordinated response; and …

Subsequent paragraphs of the D.E. alleged as follows:

> WHEREAS, the *Chief Medical Officer* has reported that a **public health emergency** exists in the State; and… (D.E. at π10).

> WHEREAS, Article 5, Section 1 of the Nevada Constitution provides: "The supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada." (D.E. at π12).
>
> NOW, THEREFORE, I, Steve Sisolak, Governor of the State of Nevada, pursuant to the authority vested in me by the Constitution and laws of the State of Nevada, *hereby* ***declare an emergency*** *and direct all state agencies to supplement the efforts of all impacted and threatened counties to save lives, protect property, and protect the health and safety of persons in this state*. Under my authority, I will perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population. (D.E. at π13).

Between March 15, 2020 and October 8, 2020 Gov. Sisolak issued 34 Emergency Declaration Directives he claimed were authorized by the express provisions of Chapter 414 of NRS outlining the powers and duties delegated to the Governor during the declared existence of a State of Emergency. However, a close examination of Nevada's "Emergency Management" statutes codified at NRS 414.020 to 414.340, inclusive, reveals that a significant outbreak of an infectious disease such as COVID-19 is neither a "natural emergency" nor a "disaster" of major proportions within the context of Chapter 414 as is asserted by the Governor in paragraph one of the D.E.. In the D.E., Gov. Sisolak alleges that the outbreak of COVID-19 is a "natural emergency" or "disaster" in the first paragraph, but subsequently asserts that the outbreak was reported to be a "Public Health Emergency" by Nevada's Chief Medical Officer. *See* D.E. π10. An outbreak of a contagious disease may constitute a "Public Health Emergency" in the State of Nevada within the provisions of NRS Chapters 439 and 441A, but it can never amount to a "natural emergency" under Chapter 414 as asserted in the D.E.. Gov. Sisolak wrongfully conflated "Public Health Emergencies" with "Natural Emergencies" and passed over critical differences between the separate departments of the State (and their respective duties and powers) charged with responding to the two different types of emergencies. Gov Sisolak erroneously interpreted the meaning of "Natural Emergency" under Chapter 414 of NRS to

encompass an outbreak of an infectious disease and resultantly proclaimed an ongoing emergency, allegedly triggering his emergency management powers and duties as Governor under NRS 414.060, NRS 414.070 and NRS 414.075. The Governor's injudicious D.E. then became the source of authority for each of his subsequently issued Emergency Declaration Directives.

Gov. Sisolak's interpretation of "natural emergency" under Chapter 414 of NRS was plainly and palpably inconsistent with Nevada law governing State response to outbreaks of infectious disease, was unreasonable in light of other assertions in the D.E., was unlawful in excess of statutory authority delegated to the Governor under Chapter 414 of NRS and violated Nevada's Separation of Powers doctrine codified at . 3, § 1, of Nevada's Constitution by usurping plenary legislative powers and functions.

Sisolak initially asserts that under Chapter 414 he is authorized to declare a state of emergency when a "*natural emergency" (*or disaster) of major proportions has occurred within this state. Id. A nearly imperceptible modification to the language of π1 changes the type of emergency Sisolak proclaimed in his D.E. from a *natural emergency* identified by him, to a *public health emergency* reported to him by the Chief Medical Officer. Id. at π10. In cognizance of this slight textual modification there exists a corresponding catalogue of questions that expose the loose threads in the cloak of authority draped over the 33 emergency declaration directives issued between March 15th and October 8th of 2020. Pulling at these loose ends (understanding the material differences between the two types of emergencies mentioned) results in a complete unraveling of the Governor's proclaimed basis of authority under Chapter 414 of NRS. What previously appeared to be a finely woven cloak of authority stitched together from the threads of NRS Chapter 414, soon becomes nothing but unraveled string and yarn lying on the floor next to

the unauthorized, naked body of emergency directives issued by Sisolak; directives that have undoubtedly been unlawful and void ab initio from the outset on the day the D.E. was issued, March 12, 2020. *See* **Ex. 1**.

The Governor's designation of the COVID-19 outbreak as a "Natural Emergency" and emergency proclamation pursuant to Chapter 414 of NRS was misguided and predicated upon a momentous misunderstanding of the meaning of "emergency" under the provisions of Chapter 414. This misunderstanding and erroneous interpretation of "emergency" resulted in an usurpation of the legislature's plenary powers and functions to legislate and delegate its police powers relating to the regulation of public health and control of disease violation of the Separation of Powers Doctrine codified at Art. 3, § 1, of Nevada's Constitution.

ii. The Manner in Which "Natural Emergency" is Defined Under Chapter 414 of NRS is Inconsistent and Irreconcilable with the Governor's Interpretation

NRS 414.060(1) provides that the "Governor is responsible for carrying out the provisions of this chapter, and in the event of an *emergency or disaster* beyond *local control*, may assume direct operational control over any part of the functions of *emergency management* within this State." NRS 414.070 additionally clarifies the fact that these provisions relate solely to "emergency management" when an emergency has been rightfully declared by the Governor.

This statute states in relevant part that:

> During the period when a state of emergency or declaration of disaster exists or continues, the Governor may exercise the following additional powers:
>
> 1. To enforce all laws and regulations *relating to emergency management* and to assume direct operational control of any or all forces, including, without limitation, volunteers and auxiliary staff *for emergency management* in the State.
>
> 2. To sell, lend, lease, give, transfer or deliver materials or perform services *for the purpose of emergency management* ...

"Emergency Management" means preparation for, and carrying out all emergency functions, other than functions for which military forces are primarily responsible, to minimize injury and repair damage resulting from emergencies or disasters caused by *hostile action* such as enemy attack or sabotage, *natural causes* such as fire, flood, earth quake or storms, or by *technological or manmade catastrophes*.

The "policy and purpose" of Chapter 414 of NRS is expressed in relevant part as:

> 1. Because of the existing and increasing possibility of the occurrence of emergencies or disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, from a fire, flood, earthquake, storm or other natural causes, or from technological or man-made catastrophes, and in order to ensure that the preparations of this state will be adequate to deal with such emergencies or disasters, and generally to provide for the common defense and to protect the public welfare, and to preserve the lives and property of the people of the State, it is hereby found and declared to be necessary:
>
> (a) To create a state agency for emergency management and to authorize the creation of local organizations for emergency management in the political subdivisions of the State.
>
> (b) To confer upon the Governor and upon the executive heads or governing bodies of the political subdivisions of the State the emergency powers provided in this chapter.
>
> (c) To assist with the rendering of mutual aid among the political subdivisions of the State and with other states and to cooperate with the Federal Government with respect to carrying out the functions of emergency management. …
>
> NRS 414.020.

Three types of emergencies or disasters are governed by Chapter 414 of NRS. These emergencies or disasters are (i) hostile action such as enemy attack; (ii) natural causes including fire, flood, earthquake, storm or similar natural disasters, and (iii) or man-made catastrophes. Chapter 414 of NRS authorizes the Governor to proclaim an emergency and exercise statutorily delegated powers relating to emergency management and the coordination of responses to the emergencies among local and state agencies charged with emergency management functions.

The emergency management powers allow the State to effectively and efficiently protect the public welfare, preserve life and protect property.

Nevada's Supreme Court interpreted the legislative purpose of Chapter 414 in Nylund v. Carson City, 34 P.3d 578 (Nev. 2001), where it opined:

> But we can infer the legislative intent from the other sections of the same statutory chapter. The express purpose of NRS Chapter 414 is to empower the State and local governments to prepare for and swiftly respond to emergencies and disasters that **imperil life and property**, *such as fire, flood, earthquake, and enemy attack*. To this end, the legislature granted immunity for "death of or injury to persons*, or for damage to property*" that result from negligence in *managing an emergency*. The sound public-policy reasons behind this language are apparent. An emergency is a sudden and unforeseen crisis, and the damage it causes can spread quickly.

The Governor's attempt to cram the square peg of a COVID-19 outbreak into the round hole of a "natural emergency" as defined in Chapter 414 is misguided and disingenuous. The meaning of "Natural Emergency" within the context of emergency management under Chapter 414 is clarified further in light of the following considerations.

First, "emergency management" is carried out by the Division of Emergency Management ("DEM") which is a division created within the Department of Public Safety. The Chief of the DEM is appointed by, and serves at the pleasure of the Director of the Department of Public Safety. NRS 414.040(1). The Chief must coordinate the activities of all organizations for emergency management within the State and must be a liaison with and cooperate with agencies and organizations of the federal government and other states for emergency management. The Chief must develop written plans for the *mitigation* of, *preparation* for, *response* to and *recovery* from emergencies and disasters. The Chief must also conduct activities designed to prepare the state and local government agencies by fostering the adoption of plans

for emergency operations, conducting exercises to test those plans, training necessary personnel and acquiring necessary resources. NRS 414.040(4)(b)(2).

These four plans and training requirements to ensure that all state and local agencies and organizations responsible for emergency management are revised, implemented and trained on annually. This requirement was implemented by the legislature via amendments to NRS 414 in 2019. In connection with the enactment of Assembly Bill ("AB") 206 in 2019 (responsible for those amendments) testimony by Assemblyman William McCurdy before the Assembly Committee on Government Affairs on March 15, 2019, explained to the Committee that 2017 was a remarkable year for emergencies and disasters in the State of Nevada. *See* Minutes of Assembly Committee on Govt. Affr's., 80th Session, p. 6 (Mar. 15, 2019), attached hereto as **Exhibit 1**. Northern Nevada experienced two flooding events in January and February following record snowfall in the Sierras, and a near record fire season followed in the spring and summer. Las Vegas was shocked with the largest mass shooting event in the history of the U.S., a tragedy that took 58 lives. Id. After these events, the Commission on Homeland Security for the State of Nevada directed the Division of Emergency Management to develop and implement a strategy to improve efficiency of systems and increase resilience. Nine bills were put forward during the 2019 legislative session as part of the effort to implement this strategy. Id. AB 206 (2019) focused on ensuring that Nevada is prepared for potential emergencies and disasters. *AB 206 did this by requiring essential emergency management preparedness plans for State agencies are written and updated annually*. Id. at 7. These are plans for disaster mitigation, preparedness, response, and recovery, as well as plans for disaster behavioral health. Id. The Chief of DEM, Caleb S. Cage, then informed the Committee that the changes to Chapter 414 of NRS would require the four types of emergency management plans to be annually reviewed and updated by

him, the Chief of the DEM, and then provided to county and tribal governments so that they can change their plans for emergency management if necessary to conform to the State plans and coordinate their responses with the DEM. Id. There is also annual mock exercises and training where the local governments and organizations practice their responses to different emergency scenarios with the DEM. Id. at 9.

Prior to these amendments in 2019 the written plans did not have to be coordinated with the written plans of political subdivisions and other organizations at local levels. Following this amendment there was a much more serous and heightened level of coordination as the plans of all lower organizations must be consistent with the plans developed at the highest levels of the State, whose plans must be coordinated with the federal plans.

Emergency Management under NRS Chapter 414 is managed by the DEM within the Department of Public Safety, and refers to the implementation and execution of written plans that are revised and implemented annually, and then given to county and tribal emergency management agencies and organizations so that they can implement similar, coordinated plans and participate in training and mock drills such as active shooter scenarios, fire management and response tactics and flooding planning, response and mitigation, technological and infrastructure attacks, school shootings, biological weapons and numerous other possibilities.

Second, *emergencies* and *disasters* are defined nearly identically, but with one meaningful difference relating to whether State command/support will supplement efforts at state or local levels. For example, NRS 414.0335 provides that a "Disaster" as used in Chapter 414 means:

> An occurrence or threatened occurrence for which, in the determination of the Governor, the assistance of the Federal Government is needed to supplement the efforts and capabilities **of state agencies** to save lives, protect property and

> protect the health and safety of persons in this state, or to avert the threat of damage to property or injury to or the death of persons in this state.

"Emergency is defined exactly the same way, except that the term "state agencies" is replaced with **political subdivisions**. NRS 414.0345.

As discussed above, in the first paragraph of the D.E. Gov. Sisolak alleged that under Chapter 414 the Governor may issue a proclamation declaring a state of emergency when a ***natural emergency*** *of major proportions has occurred within this state …* *See* **Ex. 1**. Obviously the COVID-19 outbreak was not a technological or man-made emergency, it was not an emergency resulting from a hostile action such as terrorism or a public shooting, and it was not a disaster; hence NRS 414.070 would only be applicable to these facts if this infectious disease outbreak (COVID-19) consisted of a *natural emergency* as the term is used within Chapter 414, which appears to be the reason Gov. Sisolak asserted that his proclamation was based on a finding that the COVID-19 pandemic was a "natural emergency." Additionally, the D.E. claimed that "the State of Nevada has been coordinating with the federal government, as well as local health authorities, health care facilities, and providers of health care to prepare for, and identify possible cases of COVID-19 in the State of Nevada;…" D.E. at π5. It was also asserted that "the Nevada Department of Health and Human Services is working with local health authorities to identify any other potential cases of COVID-19 in the State;…" D.E. at π9. These assertions suggest that the State was coordinating emergency management responses with local districts and political subdivisions as opposed to merely state agencies, implying that the emergency management response was in relation to an "emergency" as opposed to a "disaster." However, because the pandemic caused by the COVID-19 outbreak did not constitute a "natural emergency" such as a fire, flood, earthquake or storm that imperiled both life and property, it

was not the type of emergency prescribed by the emergency management provisions of NRS Chapter 414 as regulated by the DEM and Department of Public Safety.

Third, with respect to natural emergencies such as earthquakes, fires, storms and floods, this chapter immunizes officials at State and local levels who while responding to a natural emergency like a flood or fire may need to damage private property in order to minimize the potential aggregate damages caused to other property. For example a fire department may have a policy of burning an area of private land or even buildings thereon to prevent a forest fire from jumping across a highway or entering into a ravine where it cannot be controlled and may spread to an entire town. A flood response team may sandbag an area to divert water toward a river and in doing so may cause the flood waters to damage a specific property owner's commercial buildings in order to minimize possible damage to an entire subdivision of homes. Subsections 2 and 3 of NRS 414.070 authorize the Governor to acquire private property including private and real property by immediate summary condemnation with provisions detailing the manner in which compensation must be subsequently paid to those whose property is taken by the State for emergency management purposes. NRS 414.070(2)(3). NRS 414.110 immunizes "government entities for negligent emergency management and for pre-emergency negligence that contributed to the damage caused by the emergency management activities. Vermef v. City of Boulder City, 119 Nev. Adv. Op. No. 60 (Nev. 2003). In Nyland, supra, the court recognized that pre-emergency management activities included negligent pre-flood design, operation, or maintenance activities that are causally related to damage caused by the emergency management activities. 34 P.3d at 581. The types of pre-emergency management activities for which government entities are immune from monetary damages include activities that affect property and can result in damage thereto in preparing for natural emergencies such as floods, wildfires

and earthquakes. It makes no sense whatsoever to suggest that these provisions of Chapter 414 that apply to emergency responses to floods, fires, storms, earthquakes and other types of similar natural emergencies, and allow for seizures and takings of property and immunize response agencies at state and local levels for damaging property during emergency management should also apply to the response to outbreaks of disease. Why would it be necessary for the legislature to immunize emergency response personnel from monetary liability resulting from property damages during relief and mitigation efforts relating to the outbreak of disease?

Fourth, within the DEM the legislature created the Board of Search and Rescue ("Board") and the provisions of NRS 414.170 to 414.260 enumerate provisions relating to the creation and duties of the Board. The Board is necessary for emergency management functions relating to technological, man-made and natural emergencies and disasters, as makes sense following an earthquake, flood, wildland fire, mass shooting situation, a 9/11 type terrorist attack and other types of events that are envisioned by the legislature under Chapter 414 of NRS. However, it takes no mental gymnastics to understand why the Board would not have been created or ever believed necessary for responding to outbreaks of diseases as individuals who are infected with respiratory illness would under no set of imaginable circumstances require the response of teams trained in locating possibly injured persons and rescuing them with carefully planned travel routes, arrival of EMTs and other emergency medical personnel and immediately mass transportation to medical facilities with ample capacity to treat mass injuries at once.

iii. Nevada's Legislature Delegated its Authority to Control Outbreaks of Infectious Diseases to the Department of Public Health

a. Background of Public Health Administration in Nevada

There are no provisions in the Constitution of the State of Nevada explicitly providing for the health of Nevada's citizens. Nor were there explicit provisions for public health in the

Organic Law of the Territory of Nevada. However, the Constitution provides that the legislative authority of the State is vested in the Legislature of the State of Nevada; and the Organic Law of the Territory provided that "the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act...." Pub. Health Admin. In Nev., Bulletin No. 23, at p. 19/140 (Dec. 1954), accessible at https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1955/Bulletin023.pdf , last retrieved on Oct. 27, 2020. Among the residual powers retained by the individual States, at the same time certain other powers were delegated to the federal government, is the State Police Power. Id. It is an inherent and residual power never given up by the States nor delegated to the federal union. The State Police Power is the power of the States to restrict and regulate personal liberty and private property in order to protect the health, safety, morals, good order, convenience, and general welfare of all of the citizens of the State. Id. The State Health Police Power is, therefore, the authority of the sovereign state to regulate and provide for the health of the citizens. It is by virtue of the inherent police power of the State that the Legislature is empowered to exercise the power to provide health laws for the protection and improvement of public health, even to the extent of establishing quarantines and care, treatment, and confinement of unhealthy persons. Id.

The Constitution of the State of Nevada makes the general provisions that "the legislature shall establish a system of county and township government, which shall be uniform throughout the state." Id. at p. 20/149. "In some of the early acts to incorporate towns and cities, the Legislature neglected to provide specifically for local public health administration, but most of the early charter acts provided some such authority to enable local officials to make "such ordinances as may be necessary for the health of the inhabitants of the town" or to "*establish a*

Board of Health to prevent the introduction and spread of disease."" Id. The State Board of Health came into existence in the State of Nevada when the Legislature passed "An Act to prevent the spreading of contagious diseases and to establish a State Board of Health" in 1893. Id. at p. 21/149. The 1939 statutes declared the State Board of Health and the State Health Officer together to be the State Department of Health, and declared the Board to be supreme in all health matters, with "general supervision over all matters relating to the preservation of the health and life of citizens of the state and over the work of the state health officer and all local (district, county, and city) health departments, boards of health. and health officers." This act also designated the State Department of Health to be the agency to cooperate with the federal authorities in the federal grant-in-aid programs for the general promotion of health. Id. at p. 23/149.

b. "Public Health Emergencies" are Regulated by the State Board of Health

NRS 439.150 provides in pertinent part:

> 1. The State Board of Health is hereby declared to be supreme in all nonadministrative health matters. It has general supervision over all matters, except for administrative matters and as otherwise provided in NRS 439.950 to 439.983, inclusive, relating to the preservation of the health and lives of citizens of this State and over the work of the Chief Medical Officer and all district, county and city health departments, boards of health and health officers.

NRS 439.970 states:

> 1. Except as otherwise provided in chapter 414 of NRS, if a health authority[1] identifies within its jurisdiction a **public health emergency** or other health event that is an immediate threat to the health and safety of the public in a health care facility or the office of a provider of health care, the health authority shall immediately transmit to the Governor a report of the immediate threat.
>
> 2. Upon receiving a report pursuant to subsection 1, the Governor shall determine whether a **public health emergency** or other health event exists that requires a

[1] "Health authority" means the officers and agents of the Division of Public and Behavioral Health of the Department of Health and Human Services, or the officers and agents of the local boards of health. NRS 439.005(5).

coordinated response for the health and safety of the public. If the Governor determines that a *public health emergency or other health event exists that requires such a coordinated response*, the Governor shall issue an executive order:

(a) Stating the nature of the public health emergency or other health event;

(b) Stating the conditions that have brought about the public health emergency or other health event, including, without limitation, an identification of each health care facility or provider of health care, if any, related to the public health emergency or other health event;

(c) Stating the estimated duration of the immediate threat to the health and safety of the public; and

(d) Designating an emergency team comprised of:

(1) The Chief Medical Officer or a person appointed pursuant to subsection 5, as applicable; and

(2) Representatives of state agencies, divisions, boards and other entities, including, without limitation, professional licensing boards, with authority by statute to govern or regulate the health care facilities and providers of health care identified as being related to the public health emergency or other health event pursuant to paragraph (b).

3. If additional state agencies, divisions, boards or other entities are identified during the course of the response to the public health emergency or other health event as having authority regarding a health care facility or provider of health care that is related to the public health emergency or other health event, the Governor shall direct that agency, division, board or entity to appoint a representative to the emergency team.

4. The Chief Medical Officer[2] or a person appointed pursuant to subsection 5, as applicable, is the chair of the emergency team.

5. If the Chief Medical Officer has a conflict of interest relating to a public health emergency or other health event or is otherwise unable to carry out the duties

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[2] The Chief Medical Officer is appointed by the Director of the Department of Health and Human Services. NRS 439.085. The Chief Medical Officer must (a) Enforce all laws and regulations pertaining to the public health, (b) Investigate causes of disease, epidemics, source of mortality, nuisances affecting the public health, and all other matters related to the health and life of the people, … (c) Perform the duties prescribed in NRS 439.950 to 439.983, inclusive (relating to Public Health Emergencies). NRS 439.130.

prescribed pursuant to NRS 439.950 to 439.983, inclusive, the Director shall temporarily appoint a person to carry out the duties of the Chief Medical Officer prescribed in NRS 439.950 to 439.983, inclusive, until such time as the public health emergency or other health event has been resolved or the Chief Medical Officer is able to resume those duties. The person appointed by the Director must meet the requirements prescribed by NRS 439.095.

6. The Governor shall immediately transmit the executive order to:

(a) The Legislature or, if the Legislature is not in session, to the Legislative Commission and the Legislative Committee on Health Care; and

(b) Any person or entity deemed necessary or advisable by the Governor.

7. The Governor shall declare a public health emergency or other health event terminated before the estimated duration stated in the executive order upon a finding that the public health emergency or other health event no longer poses an immediate threat to the health and safety of the public. Upon such a finding, the Governor shall notify each person and entity described in subsection 6.

8. If a public health emergency or other health event lasts longer than the estimated duration stated in the executive order, the Governor is not required to reissue an executive order, but shall notify each person and entity identified in subsection 6.

9. The Attorney General shall provide legal counsel to the emergency team.

Pursuant to NRS 439.975, the emergency team designated in the Governor's executive order shall:

(a) Convene as soon as practicable after the executive order is issued pursuant to NRS 439.970; and

(b) Upon the advice of the Attorney General, investigate the response of each state agency, division, board and other entity that is represented on the emergency team to the public health emergency or other health event and work cooperatively to ensure the sharing of any material information and coordinate a response to the public health emergency or other health event with all the state agencies, divisions, boards and other entities represented on the emergency team.

2. The scope of powers and duties of the emergency team extends only to the respective jurisdiction of each state agency, division, board or other entity represented on the team and does not supersede the authority of a health authority to investigate the public health emergency or other health event within its jurisdiction.

As discussed above, the D.E. issued by Gov. Sisolak on March 12, 2020 alleged at paragraph ten (1) that The Chief Medical Officer has reported that a **public health emergency** exists in the State." The next paragraph of the D.E. alleges that "the Governor has determined that the state of Nevada is experiencing *events* that require a coordinated response for the health and safety of the public." (D.E. at π 11). These two allegations by Gov. Sisolak in his D.E. satisfy the first two subsections of NRS 439.970, as the Chief Medical Officer identified a disease that was an immediate threat to the health and safety of the public, reported it to the Governor, and the Governor determined that an emergency existed requiring a coordinated response for the health and safety of the public. *See* NRS 439.970(1)-(2). After being informed of the "public health emergency" or other health event that is an immediate threat to the health and safety of the public (in a health care facility or the officer of a provider of health care) Gov. Sisolak determined that a "public health emergency" existed, albeit a "natural emergency" and he issued his D.E. on March 12, 2020. Pursuant to subsection (3) of NRS 439.970 the Governor was then required to specific in his executive order (which was the D.E.): (i) The nature of the public health emergency and the conditions that brought it about (Gov. Sisolak complied with these requirements) (NRS 439.970(3)(a)-(b)); (ii) The estimated duration of the immediate threat to the public health and safety ((c)); (iii) A designation of the emergency team comprised of the Chief Medical Officer, representatives of state agencies, divisions, boards and other entities having statutory authority to regulate health care facilities or providers related to the public health emergency, and (iv) Immediately transmit the executive order to the Legislative Commission and the Legislative Committee on Health Care.

With respect to the estimated duration of the immediate threat to public health and safety, or the COVID-19 pandemic, Gov Sisolak did not satisfy this requirement, instead alleging that

the "declaration would remain in effect until the Chief Medical Officer notified him that the "health event" had been abated and he issued an order terminating the emergency. *See D.E., § 7.* Rather than designating a specific emergency team comprised of representatives of state agencies, divisions, boards and other entities having authority to regulate health care facilities or providers he simply alleged that "An Emergency Team be established to coordinate the response to COVID-19" and the "Emergency Team will coordinate with the Nevada Tribal Emergency Coordinating Counsel to ensure a coordinated response to COVID-19." *See D.E., § 2-3*. It is unknown whether the D.E. was transmitted to the Legislative Commission and the Legislative Committee on Health Care given the Legislature was not in session at this time.

NRS 439.975 outlines the powers and duties of the "Emergency Team" that the Governor is required to designate in his executive order. The express text of this statute provides:

> 1. The emergency team shall:
>
> (a) Convene as soon as practicable after the executive order is issued pursuant to NRS 439.970; and
>
> (b) Upon the advice of the Attorney General, investigate the response of each state agency, division, board and other entity that is represented on the emergency team to the public health emergency or other health event and work cooperatively to ensure the sharing of any material information and coordinate a response to the public health emergency or other health event with all the state agencies, divisions, boards and other entities represented on the emergency team.
>
> 2. The scope of powers and duties of the emergency team *extends only to the respective jurisdiction of each state agency, division, board or other entity represented on the team and does not supersede the authority of a health authority to investigate the public health emergency or other health event within its jurisdiction*.
>
> NRS 439.975.

In his D.E., Governor Sisolak did not designate any specific individuals or their official capacities, and because no specifics were provided in the executive order concerning the

agencies, divisions, boards or other entities represented on the Emergency Team[3] it was impossible to determine the authority and jurisdiction of the Emergency Team briefly mentioned, or whether it would be authorized to respond to the public health emergency (COVID-19 pandemic) specified in the order at all. The individuals who may be included on an Emergency Team are officers, agents or assignees of the Division of Public and Behavioral Health ("DPBH") of the Department of Health and Human Services ("DHHS"). When the Chief Medical Officer of the DPBH determines that a "public health emergency" exists and reports such to the Governor, an executive order may be issued designating the Emergency Team that will respond to the specific health event, and each of the team members will be enter into a cooperative agreement with the Governor himself or his designatee. In contrast, emergency management under Chapter 414 involves a coordinated response to emergencies and disasters through the DEM within the Department of Public Safety. Emergency management organizations are created in accordance with the provisions of Chapter 414 "by state or local authority to be dispatched by the Governor *to supplement local organization for emergency management in a* ***stricken area***" are designated as "Incident Management Assistance Teams." NRS 414.0359. These localized emergency response teams are parties to cooperative agreements with the Governor or his designatee such as the Chair of the DEM, and are subject to the powers and prescriptions delegated by the Legislature to the Department of Public Safety and its Emergency Management Division to address emergencies or disasters in specific areas of the State. The Governor is authorized to provide and compel for evacuations of all or part of the population from any **stricken or threatened area or areas** within the State and to take such steps as necessary for the receipt and care of those persons. NRS 414.070(4). Hence, with

[3] ""Emergency Team" means an emergency team designated in an executive order of the Governor pursuant to NRS 439.970 to respond to a public health emergency or other health event." NRS 439.955.

"natural emergencies" caused by instances such as floods, wildfires, tornados, earthquakes, tsunamis or other types of storms or similar acts of God capable of mass property destruction and significant loss of life, emergency management under Chapter 414 of NRS applies to specific areas stricken or threatened to be stricken by the catastrophic event.[4] Here, the D.E. not only failed to designate the officials who were members of the Emergency Team (the language of *D.E. § 2* suggested that the Emergency Team would be designated at a later time) but it failed to specify any specific areas of the State that had been stricken or threatened to be stricken by a natural emergency. Understandably, an infectious disease does not create an emergency in one specific area of the State or damages property, rather, it applies to people and spreads through populations that are fluid in their movements without relation to any geographic proximity. Yet, a close review of the language of NRS 439.070, provided above, states that if a health authority identifies within its jurisdiction a public health emergency … that is an immediate threat to the heath and safety of the public *in a health care facility or the office of a provider of health care,* the health authority shall immediately transmit to the Governor a report of the immediate threat. This means that the authority of the Governor and health officials under this Chapter can respond to and address public health emergencies like outbreaks of infectious diseases at specific locations defined as health care facilities or offices of health care providers. The D.E. did not specify where the Chief Medical Officer identified cases of COVID-19 infections or if the public health emergency determined to exist within this State was present in any specific heath care locations governed by the language of NRS 439.070.

[4] Under Chapter 414 such an event is designated as a "hazard" which is "an event or physical condition that has the potential to cause an emergency or disaster.

With respect to the assertion in Gov. Sisolak's D.E. that the Chief Medical Officer determined that a public health emergency was present in this State, the following question must be asked:

> *If there was a natural emergency such as a flood, earthquake, wildfire, storm or similar acts of God that placed lives and property in imminent imperil necessitating a coordinated response of the State Division of Emergency Management (DPS) with emergency management officers at county, city and other local levels, then why was it necessary for Gov. Sisolak to assert that the Chief Medical Officer reported his determination that a public health emergency existed in the State of Nevada?*

The emergency management chapter of NRS (414) is administered the DEM under the Department of Public Safety, and the Chief Medical Officer is the Chair of the Division of PBHD which is within the DHHS. If the Governor was authorized under NRS 414.070(1) to proclaim the existence of an emergency and trigger his emergency management powers and duties the determination of the Chief Medical Officer was entirely nonconsequential. The Governor clearly was advised to include this allegation, among others that were equally irrelevant to create the appearance of compliance with all relevant statutory requirements.

As previously discussed, the authority to provide for health, safety and welfare of the public is inherent in the police power of the State without any express statutory or constitutional provision. Ex Parte Boyce, 27 Nev. 299, 75 P. 1 (1904). Although the police power cannot justify the enactment of unreasonable, unjust or oppressive laws, it may legitimately be exercised for the purpose of preserving, conserving and improving public health, safety, morals and general welfare, and Nevada's legislature has expressly delegated the supreme authority to identify, manage, control and regulate infectious diseases and outbreaks thereof in this State to the State Department of Public Health and its divisions. Ormsby County v. Kearney, 37 Nev. 314, 142 P. 803 (1914); NRS 439.150. "The state may exercise its police power in many ways, including through "[i]nspection laws, quarantine laws, [and] health laws of every description[.]"

State ex rel. v. Farmers Union Creamery, 84 P2d 471 (1938) (*quoting* Nebbia v. New York, 291 US 502, 510 (1934) (internal quotation marks and citation omitted)). As the United States Supreme Court held 115 years ago (in a case that has once again become relevant) in Jacobson v. Massachusetts, 197 US 11, 30 (1905) when it upheld a city regulation requiring residents to be vaccinated against smallpox, "a state's police power includes the power to enact reasonable regulations for the protection of "the public health and the public safety."" "Through the police power, a community can "protect itself against an epidemic of disease which threatens the safety of its members."" Id. at 27.

As mentioned in the Introduction to the Legal Argument, above, Gov. Sisolak alleged in his D.E. that his declaration of emergency and powers under Chapter 414 of NRS were supported in part because under Article 5, Section 1 of the Nevada Constitution, "[t]he supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada." *D.E. at π12.* This suggests that the Governor's authority to declare the emergency and issue 33 emergency declaration directives was based in part on his supreme executive power vested in him in his capacity as Governor. This implication is misguided as State police power, which includes the authority to legislate for the protection of the public health and the public safety, including the power to protect the public from an epidemic of disease is retained by the people, and the Legislature on their behalf exclusively. For the reasons discussed both above and below, the Legislature in this State has delegated this power and the responsibility to identify, respond to and eradicate infectious diseases to the State Department of Health and Human Services pursuant to the enactments of NRS 439.010 to 439.265, inclusive (Division of Public and Behavioral Health of the Department of Health and Human Services), NRS 439.950 to 439.983. inclusive (Public Health Emergencies and Other Health Events),

and NRS 441A.010 to 441A.930, inclusive (Infectious Diseases, Toxic Agents).

Gov. Sisolak's interpretation of "emergency" and specifically "natural emergency" under Chapter 414 of NRS is unconsidered, unreasonable and arbitrary as it is not rationally related to the legislative intent and policy embedded within the provisions of Chapter 414 or any of the provisions just mentioned which specifically apply to the regulation of infectious disease outbreaks within the State of Nevada as determined by the Legislature.

iv. Interpretation of "Emergency" Within Context of Chapter 414 of NRS

Gov. Sisolak interpreted "emergency" as used in Chapter 414, and specifically a "natural emergency" to encompass "public health emergencies" as he asserted in his D.E. that the COVID-19 outbreak was a *natural emergency*. For the reasons addressed in the foregoing sections, the meaning of *natural emergency* within the statute is not ambiguous and refers to events such as a storm, flood, earthquake, wildfire, tsunami, hurricane or a similar act-of-God that imperils life and property at a particular location of the State. The term "natural emergency" would describe the recent and ongoing fires that destroyed and continue to threaten millions of acres of forest in California, but would not apply to an outbreak of an infectious disease in this State. Purely for sake of arguendo, if the State were able to persuade this Court that the meaning of "natural emergency" is ambiguous and thus susceptible to two or more reasonable interpretations, one of which being that it encompasses infectious disease outbreaks, this Court should consider reason and public policy to determine the intent of the legislature. Cable v. State ex rel. Emp'rs Ins. Co. of Nev., 122 Nev. 120, 124–25, 127 P.3d 528, 531 (2006).

When interpreting the language of a statute courts in this State rely on the following well-settled cannons of statutory construction.

> When a statute is facially clear, courts will give effect to the statute's plain meaning. D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 168 P.3d 731, 737

> (Nev., 2007). In contrast, where a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, this court will consider reason and public policy to determine legislative intent. Cable v. State ex rel. Emp'rs Ins. Co. of Nev., 127 P.3d 528, 531 (Nev., 2006). In addition, this court assumes that when enacting a statute, the Legislature is aware of related, statutes. Id.
>
> In Welfare Div. v. Washoe Co. Welfare Dep't., 503 P.2d 457 (Nev., 1972) the Court held: "The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense." State ex rel O'Meara v. Ross, 14 P. 827, 828 (Nev., 1887); State ex rel Huckley v. District Court, 1 P.2d 105, 106 (Nev., 1931); Western Pacific R.R. v. State, 241 P.2d 846 (Nev., 1952). "The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it." Ryan v. Manhatten Mining Co., 145 P. 907 (Nev., 1914).
>
> When the Legislature adopts a statute substantially similar to a federal statute, "`a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts.'" International Game Tech. v. Dist. Court, 127 P.3d 1088 (Nev. 2006). Courts presume that the Legislature enacts a statute "`with full knowledge of existing statutes relating to the same subject.'" The presumption that the Legislature, in enacting a state statute similar to a federal statute, intended to adopt the federal courts' construction of that statute, is rebutted when the state statute clearly reflects a contrary legislative intent. Id.

To begin, it should initially be noted that in Gov. Sisolak's first E.D. Directive (001) issued on March 15, 2020, he alleged at paragraph two (2):

> WHEREAS, on March 13, 2020, Donald J. Trump, President of the United States declared a nationwide emergency *pursuant to Sec. 501(6) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act")*; and …

Within the provisions of the Stafford Act are provisions relating to emergency management preparation similar to what is codified in Chapter 414 of NRS. 42 U.S.C. Sec. 5195a defines "hazard" as an emergency or disaster resulting from (i) a natural disaster, or (ii) an accidental or man-caused event. *See* Subsection (a)(1). Subsection (a)(2) then defines a "*natural disaster*" as any "hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, *or other*

catastrophe in any part of the United States which causes, or which may cause, substantial damage or injury to civilian property or persons."[5]

Federal statutes pertaining to FEMA define "catastrophic incident" as any natural disaster, act of terrorism, or other man-made disaster resulting in extraordinary levels or casualties or damage or disruption severely affecting the population (including mass evacuations, infrastructure, economy, environment, national morale or government functions in an area. 6 U.S.C. Sec. 311(3). The federal FEMA statutes are substantially similar to the provisions of Chapter 414 in that Administrator "shall":

> (A) lead the Nation's efforts to prepare for, protect against, respond to, recover from, and mitigate against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents;
>
> (B) partner with State, local, and tribal governments and emergency response providers, with other Federal agencies, with the private sector, and with nongovernmental organizations to build a national system of emergency management that can effectively and efficiently utilize the full measure of the Nation's resources to respond to natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents;
>
> (C) develop a Federal response capability that, when necessary and appropriate, can act effectively and rapidly to deliver assistance essential to saving lives or protecting or preserving property or public health and safety in a natural disaster, act of terrorism, or other man-made disaster;
>
> (D) integrate the Agency's emergency preparedness, protection, response, recovery, and mitigation responsibilities to confront effectively the challenges of a natural disaster, act of terrorism, or other man-made disaster;
> …
>
> 6 U.S.C. Sec. 313(a)(2).

[5] Federal law defines natural emergencies or natural disasters the same way as under NRS Chapter 414 in that it relates to an act-of-God, usually a storm such as a tornado or a hurricane that may result in catastrophic damages to property and result in high numbers of human casualties in the area of land threatened or actually stricken.

Public health emergencies are defined in the provisions of the Pandemic and All Hazards Preparedness Act. Subsection (a) of 42 U.S.C. Sec. 247d states:

> If the Secretary determines, after consultation with such public health officials as may be necessary, that—
>
> (1) a disease or disorder presents a public health emergency; or
>
> (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists,the Secretary may take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering intocontracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder as described in paragraphs (1) and (2). Any such determination of a public health emergency terminates upon the Secretary declaring that the emergency no longer exists, or upon the expiration of the 90-day period beginning on the date on which the determination is made by the Secretary, whichever occurs first. …

These federal statues reveal that Nevada's emergency management statutes, NRS 414.020 to 414.340, inclusive, are modeled after their federal counterparts. As the legislative history relating to emergency management plans addressed in AB 206 (2019) addressed above demonstrated, the emergency management plans of each local emergency management organization must be coordinated with State and Federal preparedness plans and updated and submitted for review annually. The federal emergency management plans consist of the same disaster mitigation, preparedness, response, and recovery, as well as plans for disaster behavioral health plans as at the state and local levels because they are coordinated from the federal government at the top, down the State DEM and then to the local organizations at the County, municipal and private organization levels. The definitions of *natural emergencies* and the three categories of emergencies that the emergency management plans and response teams at every level address are defined the same way.

The legislative history of Nevada's emergency management provisions further dictates that Gov. Sisolak's interpretation of "natural emergency" is unreasonable and should be rejected by this Court. On April 26, 2019, during a hearing on the floor of the Senate Committee on Government Affairs in connection with Assembly Bill 71, Caleb Cage, the Chief of the Division of Emergency Management presented testimony and information concerning the disaster accounts managed and administered by the DEM on behalf of the State. *See* Minutes of Assembly Committee on Govt. Affr's., 80th Session, p. 5 (Apr. 26, 2019), attached hereto as **Exhibit 3**. Mr. Cage explained that the first is the Emergency Assistance Account (EAA) which the DEM oversees and administers. The second is the Disaster Relief Account (DRA) in which the DEM provides technical assistance to State and local government agencies to facilitate their applications through the process. Id. During the same meeting the focus switched from AB 71 to AB 206 which also dealt with emergency management. Mr. Cage was asked how the DEM interfaces with the Department of Health and Human Services as far as the written plan development goes. Mr. Cage responded that there were three main touchpoints between the two Departments and Divisions, the first was that the Department of Health and Human Services, Division of Public and Behaviorial Health has a section called Public Health Preparedness ("PHP") which would be the State version of CDC in the same way that the DEM is the State version of FEMA. Id. at p. 11. Cage stated that "the PHP completes preparedness activities for a flu pandemic and other such things similar to the preparedness activities for fires, floods, earthquakes, cyberattacks and terrorist attacks completed by the DEM." Id. Mr. Cage further explained that the DEM and the Department of Health and Human Services will work together much in the same way the DEM assists any political subdivision, tribal government, public utility or otherwise in developing a plan. The DEM puts together a committee, looks at best

practices and principles of emergency management, and assists through the process, whether in a leadership or a support role based on the Department of Health and Human Services' request." Id.

Like the legislative history addressed earlier in this Motion, this history relates to the same amendments to Nevada's emergency management plans in 2019. However, this specific legislative history additionally demonstrates that the Department of Health and Human Services is solely responsible for responding to outbreaks of disease such as COVID-19, Hepatitis C and Influenza, and it is separate and distinct regarding the statutes proscribing their powers as well as matters they regulate and enforce withing this State. The DEM is a division within the Department of Public Safety and the emergencies it manages are not public health emergencies but rater catastrophic events that threaten or actually result in substantial damage to property while simultaneously resulting in serious injuries and death to persons in the same areas where the disasters occurred. Imagine a series of tornados touching down in the middle of a trailer park, damaging camper trailers, RVs and mobile homes used as primary residences, destroying entire communities and injuries dozens and killing just as many. This is the type of situation the DEM is charged with preparing for and responding to so that damages to property, injuries and deaths to individuals is minimized, and this is what the Legislature meant when it codified the term "natural emergency."

In early 2012 legislators proposed adopting the Model Emergency Health Powers Act, and Act based on the "Model State Emergency Health Powers Act, Draft as of December 21, 2001 developed by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities for the Centers for Disease Control and Prevention (CDC). Discussions concerning this Act is found in Legislative History of A.J.R. 13, 2003 and 2005, accessible at:

athttps://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2003/AJR13,2003_2005.pdf. The initial draft that was rejected and never enacted into law is an Act relating to emergencies, establishing various duties concerning public health emergencies and authorizing the governor to take certain actions concerning public health emergencies; attached hereto as **Exhibit 3**. As can be seen in the first two sections of this proposed Bill form 2002, the Legislature considered amending the definitions of "emergency" under NRS 414 to include "Public Health Emergencies" defined in this proposed Act as "an occurrence or imminent threat of an illness or health condition that is believed to be caused by … a novel or previously controlled or eradicated infectious agent or biological toxin." Sec. (2) (1)(b). Other believed causes of public health emergencies under this proposed act were bioterrorism, chemical attacks and nuclear attacks. See Sec. (2)(1)(a)-(e). The proposed "State Emergency Health Powers Act" attached at **Ex. 3** shows that the Legislature specifically considered permitting the Governor of Nevada to issue an Emergency Declaration pursuant to the provisions of Chapter 414 of NRS based on a determination that a public health emergency existed due to the outbreak of a contagious disease within the State, and this proposal was rejected. The legislative history of A.J.R. 13, 2003 and 2005 shows that the Legislature considered amendments and variations of this proposed Act for three more years until it was finally rejected for good in 2005. If the Governor's interpretation of "natural emergency" under the provisions of Chapter 414 of NRS is reasonable, why did the Legislature attempt to amend Chapter 414 so that the definition of "emergency" would include "public health emergency" as the Governor can only address under the provisions of Chapter 439 of NRS? If the Governor is correct in his interpretation and assertion of authority under Chapter 414 to issue his 33 E.D. Directives it would have been

unnecessary for the Legislature to propose the Bill attached at **Ex. 3**, as the Governor could simply assert that infectious disease is a "natural emergency."

In his second E.D. Directive 002 issued on March 18, 2020, Gov. Sisolak alleged:

> WHEREAS, NRS 414 outlines powers and duties delegated to the Governor during the existence of a state of emergency, including without limitation, directing and controlling the conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster, public meetings or gatherings; and

E.D. Directive 002, attached hereto as **Exhibit 4**.

The Governor's misinterpretation and misguided proclamation of authority to declare an emergency under Chapter 414 if NRS and to issue subsequent E.D. Directives upon this "delegated to self" power, usurping functions retained exclusively by the legislature, resulted in several more imprudent interpretations of the language employed throughout provisions of Chapter 414. As addressed immediately below, the Governor's belief that he had the authority to control the conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises of an emergency, meetings or gatherings reveals a misunderstanding of how those functions relate to the execution of a preexisting emergency management plan that was approved and found to be consistent with federal plans enacted under federal law. As addressed above, Chapter 414 of NRS is modeled after federal FEMA legislation. 6 U.S.C. Sec. 321a entitled "Evacuation Plans and Exercises states in relevant part:

> Notwithstanding any other provision of law, and subject to subsection (d), grants made to States or local or tribal governments by the Department through the State Homeland Security Grant Program or the Urban Area Security Initiative may be used to—
>
> (1) establish programs for the development and maintenance of *mass evacuation plans under subsection (b) in the event of a natural disaster*, act of terrorism, or other man-made disaster;

(2) prepare for the execution of such plans, including the development of evacuation routes and the purchase and stockpiling of necessary supplies and shelters; and

(3) conduct exercises of such plans.

(b) Plan development - In developing the mass evacuation plans authorized under subsection (a), each State, local, or tribal government shall, to the maximum extent practicable—

(1) establish incident command and decision making processes;

(2) ensure that State, local, and tribal government plans, *including evacuation routes*, are coordinated and integrated;

(3) identify *primary and alternative evacuation routes and methods to increase evacuation capabilities along such routes such as conversion of two-way traffic to one-way evacuation routes*;

(4) identify *evacuation transportation modes and capabilities, including the use of mass and public transit capabilities, and coordinating and integrating evacuation plans for all populations* including for those individuals located in hospitals, nursing homes, and other institutional living facilities;

(5) develop procedures for informing the public of evacuation plans before and during an evacuation, including individuals …

***

(1) In general

The Administrator may establish any guidelines, standards, or requirements determined appropriate to administer this section and to *ensure effective mass evacuation planning for State, local, and tribal areas*.
(2) Requested assistance

The Administrator shall make assistance available upon request of a State, local, or tribal government to assist hospitals, nursing homes, and other institutions that house individuals with special needs to establish, maintain, and exercise mass evacuation plans that are coordinated and integrated into the plans developed by that State, local, or tribal government under this section.

(d) Multipurpose funds

> Nothing in this section may be construed to preclude a State, local, or tribal government from using grant funds in a manner that enhances preparedness for a natural or man-made disaster unrelated to an act of terrorism, if such use assists such government in building capabilities for terrorism preparedness.

Likewise, NRS 414.060(3)(G) states that, "in performing his duties under this chapter, and to effect its policy and purpose, the Governor may:

> (g) Cooperate with the President of the United States and the heads of the Armed
> Forces, the agency of the United States for emergency management and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to emergency management in the State and nation, including the direction or control of:
>
> (5) The conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster.
>
> (6) Public meetings or gatherings.
>
> (7) The evacuation and reception of the general public during an attack or an emergency or disaster.

The requirement to cooperate with the President of the United States and the agency of the United States for emergency management is additional proof that the provisions of NRS 414.060 and 414.070 are modeled after federal laws relating to the same subject matter, which is the emergency management of emergencies including natural emergencies and disasters which the Governor claims existed in this case. When there is a natural emergency such as a wildfire, there is no question as to whether or not an emergency exists within this State that requires the coordination and response of emergency management operations at federal, state and local levels. When a residential community is immediately threatened with burning down in a rapidly moving wildfire there must be mass evacuation plans which include creating efficient, open evacuation routes and the ability to convert two-way traffic routes into one-way traffic routes to ensure that mass transportation may move smoothy and unimpeded while escaping danger.

In Section (2) of the E.D. Directive 002, it states that "gaming licensees who offer hotel accommodations may remain open if needed to avoid guest displacement or for essential emergency purposes. The only rational nexus between the provisions of Chapter 414 and Section (2) of Directive 002 is that the rooms could be necessary for displaced persons, or perhaps needed to isolate infected individuals. Regardless of why Section (2) was asserted in Directive 002 it is outside the scope of NRS 414.060. Where there is a natural emergency the provisions of emergency management only apply to the specific area affected or threatened with catastrophic property damage and in this case there is no place in the State that satisfies this requirement. With respect to the assertion that Chapter 414 empowers the Governor to limit, direct and control the conduct of the general public, the movement and cessation of pedestrians and vehicular traffic and public meetings and gatherings, absent a natural emergency such as a hurricane, a specific area of the State threatened and the need to establish routes of mass evacuation, this assertion is nothing more than further evidence of **unreasonable interpretation**.

On March 20, 2020 Gov. Sisolak issued E.D. Directive 003 where he made the following two assertions (*See* E.D. Directive 003, attached hereto as **Exhibit 6**):

> WHEREAS, NRS 414.070 outlines additional powers delegated to the Governor during the existence of a state of emergency, including without limitation, *enforcing all laws and regulations relating to emergency management* and assuming direct operational control of any or all forces, including, without limitation, volunteers and auxiliary staff for emergency management in the State; **providing for and compelling the evacuation** of all or part of the population *from any stricken or threatened area or areas within the State* and to take such steps as are necessary for the receipt and care of those persons; and performing and *exercising such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population*; and
>
> WHEREAS, NRS 414.090 limits the powers of political subdivisions in the event of an emergency, and provides that counties shall, and cities may, in pertinent part establish local organizations for emergency management *in accordance with the state emergency management plan and program for emergency management*; enter into contracts and incur obligations necessary to combat such an emergency

> or disaster, protect the health and safety of persons and property and provide emergency assistance to the victims of such an emergency or disaster; and exercise the powers vested under NRS 414.090 in the light of the exigencies of the extreme emergency or disaster without regard to time-consuming procedures and formalities prescribed by law, except constitutional requirements, pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, the levying of taxes, and the appropriation and expenditure of public funds; and
>
> E.D. Directive 003 at π8-10.

The primary flaw with the Governor's first assertion relating to NRS 414.070 was just addressed in discussing the purpose of evacuation under the statute. If the Governor was correct, and there was a natural emergency such as a wildfire or a hurricane the "stricken area" would be the geographic location where the emergency of major proportions was likely to result in substantial property damage and loss of life. This specific area could then be evacuated and steps would then be taken to as necessary for the receipt and care of those displaced persons. With respect to the second assertion relating to NRS 414.090, this statute does not limit the powers of political subdivisions in the event of an emergency. Instead political subdivisions and other local governments and emergency management organizations must execute their preexisting, approved written emergency management plans pursuant to their cooperative agreements with other local agencies at Municipal, County, State and Federal levels, and perform their functions as they previously practiced or discussed with State DEM officers and personnel.

The Governor's false contention that 414.090 limits the powers of political subdivisions in the event of an emergency declared by the Governor pursuant to Chapter 414 is haphazardly supported with a subsequent allegation that "the Nevada Attorney General opined in Opinion Number 9-5-03 that, in the context of the Governor's exercise of powers under NRS Chapter 414, municipalities exceed their statutory authority in adopting emergency powers that:

(a) Establish a curfew allowing only authorized persons in public places;
(b) Forbid or limit the number of persons who may gather or congregate in public places;
(c) Prohibit or restrict traffic on public streets and roads;
(d) Prohibit the sale or distribution of gasoline (or other flammable/combustible), except in vehicle gas tanks or other proper container;
(e) Close businesses which sell gasoline (or other flammable/combustible);
(f) Prohibit the sale or distribution of alcohol;
(g) Close businesses which sell alcohol;
(h) Prohibit the sale or distribution of guns, ammunition or explosives;
(i)Close businesses which sell guns, ammunition or explosives.

In this specific AG opinion it is stated:

> The expansive powers sought (e.g., highway closure, business closure, prohibitions against public assembly and the sale of otherwise legal goods) are simply too broad and sweeping in light of the limited emergency powers explicitly granted to political subdivisions under NRS 414.090(2) (i.e., powers relating only to contracts and debt), and the broad emergency authority granted to the Governor under that chapter.

Local jurisdictions such as Mineral County (the County at issue in the opinion) may enact ordinances relating to emergencies that are equal to or more narrow than the powers afforded to the Governor relating to emergency management under NRS 414.060 and 414.070. As discussed throughout this Motion, the issue before this Court is whether the Governor failed to understand the meaning of natural emergency, and his limited powers relating exclusively to the execution of emergency management functions under Chapter 414. The constitutional shortcoming with the specific ordinances of Mineral County relating to emergency management is that they were overbroad and exceeded the limited powers delegated by the legislature to the Governor and his delegates and contractual assignees at local levels of Nevada's government. For example the ordinance that permitted local officers to prohibit or restrict traffic on public roads was overbroad because it was not limited to areas stricken by natural emergency such a wildfire and did not specifically relate to evacuation or another function permissible in the furtherance of the emergency management provisions. This AG opinion is from 1995 and does not account for the

fact that in 2019 NRS Chapter 414 was amended so that local emergency organizations must annually update their emergency management plans and have them approved by the DEM to ensure that all emergency management responses at all levels of State and local government will be consistent and efficient in promoting the purposes of the DEM's emergency management objectives, which in turn must be consistent and approved at the federal level so that emergency management is efficient and effective.

The Governor's reliance on this AG opinion involves extremely selective reading and interpretation in the same manner his interpretation of emergency and "natural emergency" under NRS 414.070. Relevant to the instant Motion, the AG also articulated in his opinion as follows:

> As discussed earlier, neither political subdivisions nor the Governor can waive constitutional requirements in the event of an emergency. While it is acknowledged that certain state legislatures have given emergency powers to their governors that are similar to those sought by Mineral County, the emergency powers sought may impact on rights recognized by the state and federal constitutions. For example, the curfew power sought by Mineral County, along with the power to restrict public gatherings and public travel, raises first amendment concerns—namely, the unlawful restriction on the freedoms of speech, public assembly and association, and on the right of interstate travel. In that the proposed ordinance allows the closure of legitimate businesses in the event of an emergency, fifth amendment concerns regarding governmental "takings" are raised.

The emergency powers conferred upon the Governor under Chapter 414 of NRS is limited to emergency management functions limited by the definitions, duties and requirements set forth in the chapter. These powers do not allow for restrictions of speech, assembly, association, interstate travel or the closures of businesses where they are not specifically limited to evacuation or other emergency management functions within the specific areas stricken or immediately threatened by the natural or other emergency.

The Governor also overlooks an issue with the AG Opinion that tears its position apart. The opinion states that political subdivision like Mineral County may not enact ordinances that

conflict with the emergency management functions of the Governor unless those specific emergency powers are explicitly granted to the counties by the legislature via statutory authorization. A footnote then states that no specific emergency powers are included within the relevant section of the Nevada's County Government law. NRS 439.350 states, "The County board of health shall … adopt such regulations that may be necessary for the prevention, suppression and control of any contagious or infectious disease dangerous to the public health, which regulations take effect immediately upon approval by the State Board of Health." This means County Boards of Health may regulate to prevent, suppress and control any contagious or infectious diseases within their Counties regardless of what the Governor does. This further demonstrates that the Governor cannot interpret the word emergency to include outbreaks of diseases because the Public Safety Department has never been delegated the powers to regulate and control disease.

The Governor makes the assertions relating to the powers of local governments and limitations thereon to suggest that all contrary laws at local levels are preempted and they local authorities must enforce his specific directives. While these directives will be addressed in subsequent subsections of this Motion, they are discussed in this subsection for the purpose of demonstrating that the Governor's interpretation of emergency, natural emergency and the powers delegated to the Governor during the existence of an emergency under Chapter 414 are misguided and unreasonable, and should be rejected by this Court.

v. Nevada's Constitutional Separation of Powers Doctrine

The United States Constitution does not expressly articulate a separation of powers doctrine, this principle is established through the creation of three separate branches of government in Articles I (legislative), II (executive), and III (judicial). Buckley v. Valeo, 424

U.S. 1, 124 (1976). States are not required to structure their governments to incorporate the separation of powers doctrine, Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957), but Nevada has embraced this doctrine and incorporated it into its state constitution at Art. 3, § 1. Commission On Ethics v. Hardy, 212 P.3d 1098 (Nev. 2009). The purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. Clinton v. Jones, 520 U.S. 681, 699 (1997). The Nevada Constitution mirrors this structure in Articles 4, 5, and 6. The Nevada Constitution vests the state's legislative power in a Legislature comprised of two bodies, the Senate and Assembly. Nev. Const. art. 4, § 1. Specifically, Article 4, Section 1, provides that "[t]he Legislative authority of this State shall be vested in a Senate and Assembly which shall be designated `The Legislature of the State of Nevada.'" Article 5 outlines the powers of the executive branch and provides that the supreme executive power is granted to the Governor. Nev. Const. art. 5, § 1. The powers of the judicial branch are set forth in Article 6 of the Nevada Constitution. Art. 3, § 1 states that the separation of powers doctrine works by preventing the accumulation of power in any one branch of government.

Specifically, Art. 3, § 1, of Nevada's Constitution provides:

> [t]he powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,— the Executive,—and Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

With respect to the relationship between legislative and executive powers, the legislative power, which is vested in the state Legislature, refers to the broad authority to enact, amend, and repeal laws; the executive power, vested in the Governor, encompasses the responsibility to carry out and enforce those laws (i.e., to administrate). Halverson v. Hardcastle, 163 P.3d 428, 439

(Nev. 2007). Under the separation of powers doctrine, the Legislature cannot delegate legislative power to administrative agencies. Sheriff, Clark Cty. v. Luqman, , 697 P.2d 107, 110 (1985). The Legislature "may delegate [to administrative agencies or the executive branch] the power to determine the facts or state of things upon which the law makes its own operations depend." Id. at 110. Hence, under the Separation of Powers Doctrine, the Legislature may delegate fact-finding authority, i.e., the "application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency." Id; Smith v. State at p. 3 (Nev. 2020). Administrative regulations have the force of law when "properly adopted." *See* State ex rel. Nev. Tax Comm'n v. Saveway Super Serv. Stations, Inc668 P.2d 291, 294 (Nev., 1983).

Statutes and constitutional amendments are proposed by the Legislature, a non-administrative body. Nevadans for Prop. Rights v. Sec'Y of State, 141 P.3d 1235, 1248 (Nev. 2006). In Nevada, administrative regulations and orders which govern administrative issues is created not by the Legislature but by entities with rule-making authority delegated to them by the Legislature which fill in administrative details pertaining to the policy articulated in legislation. Id. Legislation "originates or enacts a permanent law or lays down a rule of conduct or course of policy for the guidance of the citizens or their officers," *whereas impermissible administrative matters* simply "put into execution previously-declared policies or previously-enacted laws or direct[] a decision that has been delegated to *[a governmental body with that authority*]." Id.

A party may seek a declaratory judgment regarding the validity or applicability of any regulation, and a court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions *or exceeds the statutory authority of the agency*." If the legislature enacts a statute which delegates the power to enforce that statute to the executive branch, and delegates

the power to enact regulations for the purpose of enforcing the statute, any regulations so enacted must conform to the specific grant of authority delegated. If an agency action exceeds its scope of authority delegated under a statute, that action is unconstitutional and is void. Generally, courts will differ to an agency's interpretation of a statute that the agency is charged with enforcing when it addresses challenges to an administrative act, however, *no deference is to be given if the regulation conflicts with existing statutory provisions or exceeds the statutory authority of the agency*. Spittler v. Routsis, * 5 (Nev., 2013).

The fundamental problem with excessive judicial deference to agency regulation is that it tramples upon the concept of separation-of-powers enshrined in both the U.S. Constitution and Nevada Constitution. See Seila Law LLC v. Consumer Fin. Prot. Bureau, ___ U.S. ___, 140 S. Ct. 2183, 2186 (2020). This division is "essential to the preservation of liberty" in order to prevent "a gradual concentration of the several powers in the same department." The Federalist No. 51, 321 (James Madison), quoted in Morrison v. Olson, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty . . . ."; "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."). "[T]he Framers considered structural protections of freedom the most important ones . . . . The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." Nat'l. Fed. of Indep. Businesses v. Sebelius, 567 U.S. 519, 707 (2012); Vasquez v. State (Nev. App. 2020).

As previously stated, the executive power extends to the carrying out and enforcing the laws enacted by the Legislature. Except where there is a constitutional mandate or limitation, the Legislature may state which actions the executive shall or shall not perform. Galloway v.

Truesdell, 422 P.2d 237 (Nev. 1967). Nevada's Separation of Powers doctrine exists to "prevent on branch of government from encroaching on the powers of another branch." Comm'n on Ethics v. Hardy, 212 P.3d 1098 (Nev., 2009). Nevada's Supreme Court has held that "this separation is fundamentally necessary because '[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: were it joined to the executive power the judge might behave with all the violence of an oppressor.'" Berkson v. LePome, 245 P.3d 560, 565 (Nev., 2010).

The authority to provide for health, safety and welfare of the citizen is inherent in the police power of the State without any express statutory or constitutional provision. Ex Parte Boyce, 27 Nev. 299, 75 P. 1 (1904). Although the police power cannot justify the enactment of unreasonable, unjust or oppressive laws, it may legitimately be exercised for the purpose of **preserving, conserving and improving public health**, safety, morals and general welfare. Ormsby County v. Kearney, 37 Nev. 314, 142 P. 803 (1914). A party may seek a declaratory judgment regarding the validity or applicability of any regulation, and a court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions *or exceeds the statutory authority of the agency*." If the legislature enacts a statute which delegates the power to enforce that statute to the executive branch, and delegates the power to enact regulations for the purpose of enforcing the statute, any regulations so enacted must conform to the specific grant of authority delegated. **If an agency action exceeds its scope of authority delegated under a statute, that action is unconstitutional and is void**. Generally, courts will differ to an agency's interpretation of a statute that the agency is charged with enforcing when it addresses challenges to an administrative act, however, *no deference is to be given if the regulation conflicts with*

existing statutory provisions or exceeds the statutory authority of the agency. Spittler v. Routsis, * 5 (Nev., 2013).

As discussed in numerous sections above, the police power to preserve, conserve and improve the public health, which since the territorial laws of Nevada preceding the enactment of the State Constitution have involved the regulation, control and eradication of infectious diseases. The Governor has no inherent powers or functions relating to the regulation of public health and any powers he may exercise pertaining to the regulation of disease must be delegated to him by the Legislature. Under Nevada law, where a public health authority has identified the outbreak of a disease which threatens the safety of the public within health care facilities and the offices of health care providers, the public health officer may present a report to the Governor and the Governor may declare a public health emergency which triggers certain powers he may exercise concerning the coordination of a lawful, efficient response among state and local health districts and authorities. The Governor in this case declared an emergency pursuant to NRS 414.060 and 414.070 and in doing so exceeded the scope of his statutorily delegated powers. Additionally, the Governor created a hybrid procedure combining the duties and requirements under Chapters 414 and 439 of NRS, and in doing so he usurped and exercised powers that were plenary functions of the legislature, and by exercising legislative powers he violated the Separation of Powers doctrine codified at Art. 3, § 1 of the Nevada Constitution.

vi. The Emergency Regulation Enacted by the Division of Emergency Management on March 20, 2020 was Unlawful and Void as it Violated the Administrative Procedures Act and was in Excess of Statutory Authority Causing it to Violate the State Separation of Powers Doctrine

Initially, at the outset of this Subsection (B) it should be noted that the emergency regulation discussed expired on April 16, 2020, and an argument directly challenging this

emergency regulation would be moot. However, this brief argument is presented for demonstrative purposes only to further support the argument that the actions of the Governor and the DEM pursuant to the Governor's initial D.E. on March 20, 2020 was unlawful and void for the reasons argued above.

On March 20, 2020, Justin Luna, Chief of the Division of Emergency Management sent a letter to Gov. Sisolak which set forth the reasons it determined that an emergency existed because it's ability to prevent further transmission of COVID-19 was limited by the continued operation of non-essential businesses, and because its ability to prevent the spread of the disease was limited lives were at stake. *See* Emergency Regulation and Supporting Documents attached hereto as **Exhibit 7**. The DEM determined that there was an immediate need for an emergency regulation defining essential and nonessential businesses, as well as the parameters for nonessential businesses to conduct business within the State under the E.D. of March 12, 2020 and related directives. The Governor endorsed this request and the emergency regulation was enacted on March 20, 2020. March 20, 2020 also happened to be the same day that the E.D. Directive 003 was issued which prohibited nonessential businesses from operating until April 16, 2020, and defined these businesses to include recreation centers, clubhouses, nightclubs, movie theaters, massage parlors, adult entertainment establishments, brothels, and live entertainment venues, fitness establishments such as gyms and studios; aesthetic services such as beauty shops, barber shops, nail salons, tanning salons, and wax salons. *See* **Ex. 6**. Neither the Governor nor the DEM had the power under Chapter 414 of NRS to regulate which types of businesses were essential or nonessential, and had no authority to restrict the operations of businesses and interfere with their lawful operations as dictated by their business or professional licenses. The authority of the Governor under Chapter 414 of NRS is limited to the coordination of emergency

response organizations and the enforcement of emergency management planning and enforcement within the parameters of NRS 414.060 and 414.070.

With respect to the powers of the Chief under subject to the direction and control of the Director, shall carry out the program for emergency management in this state. The Chief shall coordinate the activities of all organizations for emergency management within the State, maintain liaison with and cooperate with agencies and organizations of other states and of the Federal Government for emergency management and carry out such additional duties as may be prescribed by the Director.

4. The Chief shall assist in the development of comprehensive, coordinated plans for emergency management by adopting an integrated process, using the partnership of governmental entities, business and industry, volunteer organizations and other interested persons, for the mitigation of, preparation for, response to and recovery from emergencies or disasters. In adopting this process, the Chief shall:

> (a) Except as otherwise provided in NRS 232.3532, develop written plans for the mitigation of, preparation for, response to and recovery from emergencies and disasters. The plans developed by the Chief pursuant to this paragraph must include the information prescribed in NRS 414.041 to 414.044, inclusive.
>
> (b) Conduct activities designed to:
>
> (1) Eliminate or reduce the probability that an emergency will occur or to reduce the effects of unavoidable disasters;
>
> (2) Prepare state and local governmental agencies, private organizations and other persons to be capable of responding appropriately if an emergency or disaster occurs by fostering the adoption of plans for emergency operations, conducting exercises to test those plans, training necessary personnel and acquiring necessary resources;
>
> (3) Test periodically plans for emergency operations to ensure that the activities of state and local governmental agencies, private organizations and other persons are coordinated;

(4) Provide assistance to victims, prevent further injury or damage to persons or property and increase the effectiveness of recovery operations; and

(5) Restore the operation of vital community life-support systems and return persons and property affected by an emergency or disaster to a condition that is comparable to or better than what existed before the emergency or disaster occurred.

5. In addition to any other requirement concerning the program of emergency management in this State, the Chief shall:

(a) Maintain an inventory of any state or local services, equipment, supplies, personnel and other resources related to participation in the Nevada Intrastate Mutual Aid System established pursuant to NRS 414A.100.

Where there is a natural emergency and the Governor declares an emergency, the Governor and the Chief of the DEM may develop written plans for the mitigation of, preparation for, response to and recovery from emergencies and disasters, assist victims, prevent further injury or damage to persons or property and increase the effectiveness of recovery operations. The emergency regulation and directives of the Governor designating business operations as essential or nonessential, and was unquestionably in excess of their legislatively prescribed powers under Chapter 414 of NRS and were unlawful actions based on an erroneous interpretation of emergency under the chapter.

All 33 of the directives issued by the Governor were based on the initial E.D. issued on March 20, 2020 and because the E.D. was unlawful for the reasons addressed in this Motion each of the directives was void *ab initio* and should be vacated by this Court.

c. <u>This Court Should Declare that Gov. Sisolak's D.E. Violated the Separation of Powers Doctrine of the State Constitution</u>

Under NRS 30.030, courts have the power to declare rights, status, and other legal relations whether or not further relief is or could not be claimed. Here, Plaintiffs seek the Court's determination that the meaning of emergency, and "natural emergencies" do not include the outbreak of disease, and that because Gov. Sisolak's D.E. was based entirely upon this misguided interpretation his D.E. and all

Directives based thereon were null and void and of no lawful consequence from the outset. Further, Plaintiffs move this Court to declare that in proclaiming a State of Emergency pursuant to Chapter 414 of NRS upon an interpretation that a pandemic was a natural emergency, the D.E. and subsequent Directives based thereon amounted to legislation by the Governor in violation of the Separation of Powers doctrine. As stated above, the ability to regulate disease to protect the public health and welfare of the citizenry is a function exclusively retained by the Legislature pursuant to its police powers. Thus, where the Governor unilaterally broadens the scope of his own powers via an unreasonable interpretation of the statue upon his powers are derived, this cannot be anything other than a legislative act in violation of the State Constitution, and arguably the rights of millions of people negatively affected.

Based on the foregoing, Plaintiffs submit that declaratory relief is the appropriate means of obtaining judicial review and relief from the Governor's interpretation of emergency as used in the provisions of NRS 414.060 and 414.070. These provisions are the statutory basis of the Governor's purported power to issue the D.E. and related directives, and this Court should interpret the Governor's actions and powers and render a declaration concerning the scope of the Governor's powers and whether or not his interpretation was unreasonable so that it resulted in what could be an unraveling of rights, duties, obligations and legal relations on an unimaginable scale.

d. <u>The Preliminary and Permanent Injunctions Should Issue</u>

Returning to the legal standard for injunctions, there is a strong likelihood that Plaintiffs will prevail on the merits because there is simply basis in the realm of World logic for the interpretation of emergency by Gov, Sisolak that would have permitted a determination of disease outbreak by the Chief Medical Officer to constitute a natural emergency under Chapter 414 of NRS. The Governor failed to designate an Emergency Team in his D.E. and there were already written plans in place for the coordination and control of infectious disease under the Department of Public Health and its divisions responsible for the control of infectious disease. Further, there is a very strong likelihood that Plaintiffs will prevail on the merits of their declaratory relief action.

Resolution of this case depends on the interpretation of NRS 414.060 and 414.070 relating to the powers of the Governor to first declare an emergency, and then to take further action based upon the proclamation of a state of emergency. Even if the Governor for some reason did have the authority to interpret emergencies to include disease outbreak under Chapter 414 of NRS, his additional actions in issuing all of nearly all of the 33 directives prohibiting or limiting the rights of business and individuals did not comport with the powers of Governors under the statutes. The emergency powers of Governors under the emergency management statutes are limited to the coordination and enforcement of the written plans previously created and updated annually. Gov. Sisolak's actions had nothing to do with the emergency management duties and powers under the statutes but rather involved actions like limiting gatherings at church services, defining essential and nonessential business and other actions that had nothing to do with responding to emergency situations within specific areas of the State threatened with imminent damage to property of a catastrophic nature.

Plaintiffs, like every other person in Nevada must guess concerning whether the Governor's emergency directives are enforceable by law enforcement officers or professional licensing boards. NRS 414.160 states that the emergency orders and directives of the Governor are enforceable by every emergency management organization established under Chapter 414, as well as the officers of those organizations. County Sheriffs and city police departments, which were not mentioned in the initial D.E. are likely excluded from this definition. The Governor never disclosed the Emergency Team as required and it is unknown to the public who may lawfully enforce the directives. This Court should end the confusion shared by the citizens if this State in general and require that the manner in which the COVID-19 pandemic is regulated and controlled in this State is lawful in accordance with the intents of the legislature.

III. CONCLUSON

For the foregoing reasons, Plaintiffs motion for preliminary and permanent injunction should be granted.

An Order should be issued and entered by this Court as follows:

1. Construing the meaning of emergency as used in NRS 414.060 to 414.070 to exclude threats to public health and safety caused by disease, epidemics and pandemics.
2. Declaring that Gov. Sisolak violated the Separation of Powers doctrine of the Nevada Constitution by the manner in which he interpreted emergency and natural emergency to encompass the outbreak of disease; and also by the manner in which he failed to comply with the requirements, duties and obligations of Chapter 414 and rather utilized dual procedures that combined parts of both Chapters 414 and 638 to support the legality of his D.E. and subsequent directives.
3. Granting the request for a preliminary injunction and prohibiting enforcement of any of the emergency directives still in force if they are based on the D.E..