IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE:

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

Case No:

Volume IX

RECORD OF DISCIPLINARY PROCEEDINGS,
PLEADINGS
AND TRANSCRIPT OF HEARINGS

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Had physicians not already been prescribing these drugs to treat COVID-19 patients it would have been unnecessary for the BOP to adopt this regulation. The regulation permits physicians to prescribe these drugs for course pursuant to any existing course of treatment for a diagnosis made after the effective date of the regulation unless that diagnosis is COVID-19 or a "new diagnosis." The regulation is ambiguous concerning whether the new diagnosis means a new diagnosis of a particular patient after the regulation was enacted, or whether it refers to the diagnosis of a new disease. However, because the second exception applies to any existing course of treatment for a diagnosis of a patient after the effective date of the regulation, it must refer to a new disease for which the FDA has not approved the use of the drugs at issue. This regulation effectively distinguishes COVID-19 from all other known diseases in that it prohibits physicians from prescribing the drugs to treat newly diagnosed COVID-19 patients but allows the drugs to be prescribed by physicians for any other off-label use. Before the regulation was adopted physicians were prescribing these drugs within the course of treatment of a patient diagnosed with COVID-19 and there was nothing unlawful under Nevada law that could have prevented physicians from doing so. If there was, it would have been unnecessary for the BOP to adopt this emergency regulation because pharmacists could have prohibited patients from filling them given the prescription would have been unlawful as an act by a physician outside the scope of his medical practice. Underlying this argument concerning preemption is the following question: *Why was it lawful before the enactment of this emergency regulation for physicians to prescribe these drugs to COVID-19 patients if the FDA had never specifically approved the medications for this purpose?*

To answer this question Plaintiffs briefly revisit authorities provided in their previous motion/petition. The Food and Drug Administration ("FDA") is responsible for protecting the

public health "by assuring the safety, effectiveness, and security of human and veterinary drugs, vaccines and other biological products for human use, and medical devices."[3] *See* 21 U.S.C. *et all*. The FDA will provide approval of a drug, thus authorizing its prescription by a practitioner, and its use by a patient, once its effects have been reviewed by the FDA's Center for Drug Evaluation and Research, and it has been determined that its benefits outweigh its known and potential risks. Important here, the FDA has also found that once it approves a drug for use, healthcare providers may then generally prescribe that drug for an off-label use when they determine that is appropriate for their patient. This practice has been recognized by the United States Supreme Court. *See* Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 351 n. 5 (2001); *see also* U.S. v. Kaplan, 836 F.3d 1199, 1210-11 (9th Cir. 2006) (acknowledging the existence of an off-label use "privilege" under FDCA for prescriptions of drugs and devices);, 536 F.3d 1049, 1051 n.2 (9th Cir. 2008) (physicians are free under FDCA to prescribe drugs off-label).

When a physician prescribes a drug approved by the FDA for off-label purposes believed to be effective in treating a particular patient's disease or symptoms in light of their biology, personal information and body chemistry this act constitutes a valid medical purpose. The emergency regulation in this case is premised upon the declaration by the BOP that prescribing the drugs at issue for off-label purposes in not a legitimate medical purpose, and that the emergency regulation is necessary to ensure that an adequate supply of the drugs is available within the State for legitimate medical purposes, which for all diagnosis other than COVID-19 includes off-label prescribing. However, the BOP had no authority to determine and declare that such prescribing of the drugs at issue was not for a legitimate medical purpose, and this was

[3] https://www.hhs.gov/about/news/2020/03/29/hhs-accepts-donations-of-medicine-to-strategic-national-stockpile-as-possible-treatments-for-covid-19-patients.html

simply untrue given that if it were true there would have been no need to enact the regulation in the first place.

Citing to Zogenix, Inc. v. Patrick (D. Mass. 2014), Plaintiffs argued that the Supremacy Clause gives Congress the power to preempt state law. U.S. Const. art. VI cl. 2. There are different types of preemption. Id. *5. At issue here is "obstacle preemption," which occurs when, "under the circumstances of [the] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the challenged regulation as a whole and identifying its purpose and intended effects." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000). The Supreme Court put it this way more than one hundred years ago: "If the purpose of the [federal] act cannot otherwise be accomplished-if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect-the state law must yield to the regulation of Congress within the sphere of its delegated power." Savage v. Jones, 225 U.S. 501, 533 (1912).

The Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-399f, sets forth the pertinent federal purposes and objectives. The FDCA created the FDA and required it to "protect the public health" by ensuring that "drugs are safe and effective." 21 U.S.C. § 393(b)(2)(B). The FDA must approve new drugs before they are introduced to the market. Id. § 355(a). To do so it employs "a structured risk-benefit assessment framework." Id. § 355(d)(7). It will not approve a new drug if it concludes the drug is unsafe, or if there is insufficient information from which to determine whether the drug is safe. 21 C.F.R. § 314.125(b)(3)-(4). But if a new drug passes the

benefit-risk assessment, the FDA "promote[s] the public health" by making it available to the public. 21 U.S.C. § 393(b)(1).

The court held that the emergency regulation at issue prohibiting physicians from prescribing a pain medication called Zohydro due to its potential for abuse (resulting from ability to ingest by inhalation or injection and experience the full effect which is meant to be experienced over 12 hours if taken orally) *prevented the accomplishment of the FDCA's objective that safe and effective drugs be available to the public, and the regulation undermined the FDA's authority to approve drugs for specific uses and purposes*. Thus, the court held that the emergency regulation was preempted by the federal regulations and was unconstitutional and void.

The Defendants argue that this case is not relevant here because Massachusetts had totally banned prescribing the drug for its indicated use as approved by the FDA and the regulation here does not ban the drugs which can still be dispensed in any hospital, and in this case the Plaintiffs seek to prescribe the drugs for off-label use, not indicated, approved use. Plaintiffs do not agree that this case, cited for persuasive purposes, lacks relevance for the reasons Defendants assert. First, the Massachusetts emergency regulation also prohibited physicians from prescribing a specific medication for any purpose (approved use or off-label use) due to a potential risk to the public health. The regulation in this case prohibits physicians from prescribing the drugs at issue. The State argues that the drugs can still be prescribed or dispensed in a hospital and are not prohibited being prescribed to the extent as in Zogenix. This argument overlooks the fact that inpatient administration to patients in hospitals does not satisfy the definitions of either *prescription* or *dispense* under Chapter 639 of NRS, and as such the regulation in this case does completely prohibit physicians from prescribing the drugs. Neither the FDA nor the DEA can regulate or prohibit the prescribing by practitioners of approved drugs

for off-label purposes because it would infringe upon the "practice of medicine" which is outside its scope of authority and would be unlawful. The practice of medicine is statutorily defined in NRS 630.020 which states in pertinent part: "(1) To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality …"

The analysis in Zogenix should apply here as it involves an identical challenge to an emergency regulation adopted by the Governor restricting physicians from prescribing a specific prescription drug that had been approved by the FDA for commercial distribution. This Court should find that the emergency regulation at issue is preempted under the Supremacy Clause of the U.S. Constitution for the same reason why the court in Zogenix found it was preempted, unconstitutional and void.

It is interesting that the Defendants distinguished the facts in Zogenix from the facts at hand by asserting that "Plaintiffs' seek to prescribe the drugs for off-label use, not indicated, approved use. The Defendants believe that the BOP may regulate and prohibit a physician from prescribing drugs for off-label uses, which is consistent with its misguided belief that the BOP may determine what constitutes a "legitimate medical purpose" and that such determination is consistent with the practice of pharmacy as defined above (in Chapter 639 of NRS). Both Congress and federal agencies such as the FDA had determined that it would be unlawful and improper to regulate and prohibit physicians from prescribing approved medications for off-label uses as most cancer patients and children are treated with off-label uses. Efficient, medically beneficial uses of medicines are typically not learned until years after initial clinical trials and approval. For decades, physicians prescribed aspirin to reduce the risk of heart attacks, yet, the

FDA did not approve such usage until 1998.[4] Physicians' ability to prescribe drugs for off-labels uses is consistent with the practice of medicine and cannot be regulated by federal agencies or State agencies not delegated with the responsibility to regulate the practice of medicine, including the BOP. Physicians must contend with Anti-Kickback Laws (42 U.S.C. § 1320a-7b), Stark Laws (42 U.S.C. § 1395nn), Medicare regulations, Medicaid regulations, state licensing requirements, and malpractice lawsuits and are accordingly highly regulated. Yet, by way of the FDCA, the federal government makes no attempt to regulate the daily practice of medicine – the dozens of decisions a doctor must make when evaluating, diagnosing, treating, and caring for a patient. It is absurd to even suggest that the BOP has this power which is at the heart of all of its arguments in this case.

4. The Emergency Regulation Violates Both Constitutional and Statutory Provisions

Defendants assert that Plaintiffs scattershot claims of violations of numerous violations of statutory and constitutional provisions fails. As addressed in the sections above (unaddressed in initial motion/petition) the Defendants argue that the BOP lawfully interpreted its statutory authority and requested adoption of the emergency regulation pursuant to that authority. The BOP has no authority to determine whether a physicians' specific course of treatment, including the prescription of medication is or is not a legitimate medical purpose. This unquestionably involves the practice of medicine which is not delegated to the enforcement of the BOP. The emergency regulation at issue lacks statutory authority unless the BOP has this specific power under Chapter 639 of NRS, and its statutory interpretation of NRS 639.070 and determination that the legislature delegated to it this authority amounted to the usurpation of legislative

[4] Jim Oliphant, *FDA's New Drug War Industry Fights For Alternative Uses of Approved Products* , LEGAL TIMES, January 10, 2000 at 1.

functions in violation of the Nevada Constitution. Thus, the true failure underlying this matter is that of the BOP for exercising powers in excess of its palpable scope of authority.

a. Physicians Have a Due Process Right to Prescribe Medications for Off-Label Uses Consistent With Their Right to Practice Medicine

As an initial matter, Defendants argue that Plaintiffs lack standing to press their patient' constitutional rights. Courts ordinarily do not allow third parties to litigate the rights of others. Since at least *Singleton v. Wulff*, however, it has been held repeatedly that physicians may acquire jus tertii standing to assert their patients' due process rights within the context of facial challenges to abortion laws. Recognizing the confidential nature of the physician-patient relationship and the difficulty for patients of directly vindicating their rights without compromising their privacy, the United States Supreme Court has entertained both broad facial challenges and pre-enforcement as-applied challenges to abortion laws brought by physicians on behalf of their patients. Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013). "It has been held repeatedly that physicians may acquire jus tertii standing to assert their patients' due process rights in facial challenges to abortion laws" – similar conditions exist here, because "the rights were likely to be diluted or adversely affected if they could not be asserted by the physician." *See* Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir. 2004). Further, the plain and intended result of the Emergency Regulation is to prevent physicians from fully doing their jobs and the Emergency Regulation is not objectively reasonable. In enacting the Emergency Regulation, the BOP violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Contra Conn v. Gabbert, 526 U.S. 286, 287, 119 S. Ct. 1292, 1294 (1999).

The Defendants argue that Plaintiffs have no substantive rights grounded in existing law. Plaintiff physicians argue that they have a right to practice medicine pursuant to their licenses to

do so, and under Nevada law. Arguing that no such right exists, Defendants argue that under Plaintiffs' proposed rights the FDA's approval process and the CSA would be unconstitutional because it restricts the right of physicians to prescribe methamphetamine to a patient. Defendants assert "that cannot be the case." Plaintiffs agree that prescribing methamphetamine would likely be unlawful, and would probably not be an effective means of treating any diseases, disorders or symptoms and would not constitute the practice of medicine. Because these regulations do not restrict physicians' from practicing medicine or interfere with the rights of patients to receive a medically recommended and beneficial treatment for an infectious disease no liberty or property rights would be unlawfully interfered with. While this abysmal analogy is not persuasive, but it is humorous that Defendants equate the deprivations of liberty/property flowing from the injudicious emergency regulation in this case with the hypothetical right to prescribe methamphetamine, insinuating that because no constitutional rights would be deprived by the ladder regulation there can be no rights deprived by the former.

Defendants argue that courts have recognized only two narrow substantive due process rights in the medical context, being abortion and contraception. They contend that outside of those two rights, courts have refused to apply substantive due process doctrine to medical regulations. Offered as a brief example disproving Defendants' assertion, in 1958 the Fifth Circuit pronounced that under the Fourteenth Amendment the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills. England v. La. State Bd. of Med. Exam'rs, 259 F.2d 626, 627 (5th Cir. 1958). The court in this case held that the State of Louisiana's prohibition on the practice of chiropractic medicine was a violation of due process.

In Conn v. Gabbert, 526 U.S. 286, the U.S. Supreme Court recognized a general due process right to engage in one's profession. The court expressed its view that prosecutors were not entitled to qualified immunity on the Fourteenth Amendment claim, as (1) the attorney's right to practice his profession without undue and unreasonable government interference was clearly established at the time of the search, (2) the plain and intended result of the prosecutor's actions was to prevent the attorney form consulting with his client during the client's grand jury appearance, and (3) these actions were not objectively reasonable. Patients suffering from infectious diseases in Nevada have right to obtain any approved medical treatment at the direction of a physician of his or her choosing. Physicians have a right to practice medicine without undue and unreasonable government interference, the plain and intended result of the regulations challenged prevent physicians from prescribing specific medications to patients who may greatly benefit from them. There is at least a meritorious argument that the physician plaintiffs have been denied due process.

Additional Sections need to be addressed.

EXHIBIT O

EXHIBIT O

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..

EXHIBIT P

EXHIBIT P

Swafford, William
06/23/1981
1085
12/14/2015

The patient is in for follow-up on the management of his metabolism where we have done immersion, bone density, growth hormone stimulation and a PM mapping. These have confirmed that he does have spinal osteoporosis in a male at a relatively young age. This may be related to his documented inability to stimulate growth hormone possibly related to prior head trauma and the hypogonadotropic hypogonadism also possibly related. With that, we are going to initiate HCG and growth hormone treatment as he does desire fertility and I think is a candidate for post head dramatic growth hormone deficiency as a diagnosis; both of these could be impacting the bone density finding which will have to be followed over the longer term. His tendency to anxiety and hypertension also being factors that could be related. Whether or not he will then have a return to appreciation of his profession as a lawyer or continue feeling that this is not appropriate I think we will evaluate once these are available to him and may have had an adequate clinical trial.

ROS & VS to be found on the intake form. Follow-up here will be scheduled for 3 weeks.

ROBERT S. FREDERICKS, M.D.
RSF/bpa
22065104

Swafford, William

12/05/2017

William is in for followup on the management of his history of head injury where he has benefitted from Jardiance and the combination of growth hormone and is now functioning much better. He has find that he had immediate improvement upon initiating the Jardiance and we will try going from 10 to 25 particularly as he has a tendency to hypertension. He is using Zoloft for treatment of anxiety with some benefit. Blood pressure today is a shade higher than we would like and we will see if is improved with the increasing in the Jardiance dose. Followup here will be scheduled for 2 months to assess his response including IGF-1 levels on current growth hormone replacement. He is also getting testosterone as part of the treatment protocol.

ROS & VS to be found on the intake form.

ROBERT S. FREDERICKS, M.D.
RSF/bpa
22619154

Swafford, William

01/05/2016

The patient is in for follow-up. He has not yet received his growth hormone although it has been approved and we will see if that has a favorable influence on the posttraumatic injury diathesis. He is also pending HCG which is being used to treat hypogonadotropic hypogonadism. He was told if it is being used to treat fertility they could not approve it. He is being used to treat hypogonadotropic hypogonadism while preserving fertility rather than using testosterone which I think is hopefully going to be clear to the peer-to-peer review as opposed to the minions that made the decision that he should not get it.

ROS & VS to be found on the intake form. Follow-up here to be scheduled for 1 month.

ROBERT S. FREDERICKS, M.D.
RSF/bpa
22083080

Swafford, William

06/21/2017

Bill is in for follow-up on the management of metabolism, where his use of testosterone, ADH, and growth hormone are all part of a treatment of posthead trauma hypopituitarism and we are wondering if he does have a component of hemochromatosis carrier state that might be accounting for his tendency to elevated hemoglobin on testosterone. The other consideration might be the fact that he appears to have component of FH, where the use of a PCSK9 inhibitor could be beneficial on his current complaint, which is fatigue and it will be of interest to look into that in the future, but I think we will first evaluate whether he would get a benefit from B12 as this would be a less costly intervention; and we are wondering if there is a component of B12 activity that might be regulating PCSK9 directly.

ROS & VS to be found on the intake form. Follow-up here to be scheduled for 1 month with an immersion test on current medications.

ROBERT S. FREDERICKS, M.D.
RSF/lli
22525818

FILED

SEP 20 2021

STATE BAR OF NEVADA

BY _____

OFFICE OF BAR COUNSEL

Case Number: SBN21-99129

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant, vs. WILLIAM A. SWAFFORD, ESQ. NV BAR No. 11469 Respondent.	**ORDER APPOINTING HEARING PANEL CHAIR**

IT IS HEREBY ORDERED that the following member of the Northern Nevada Disciplinary Board has been designated and as the Hearing Panel Chair.

1. Rich Williamson, Esq., Chair

DATED this 20 day of September, 2021.

STATE BAR OF NEVADA

By: _____
Eric Stovall, Esq., Chair
Northern Nevada Disciplinary Board

North Hearing Chair Ord_Swafford

Final Audit Report 2021-09-20

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By:	Cathi Britz (cathib@nvbar.org)
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"North Hearing Chair Ord_Swafford" History

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2021-09-20 - 9:02:24 PM GMT

CERTIFICATE OF SERVICE BY E-MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **Order Appointing Hearing Panel Chair** was served electronically upon:

1. William Swafford, Esq. – swaffordw@gmail.com
2. Kait Flocchini, Esq. – kaitf@nvbar.org
3. Rich Williamson, Esq. - rich@nvlawyers.com

Dated this 20th day of September 2021.

Laura Peters

By: _____
Laura Peters, an employee of
the State Bar of Nevada

FILED

OCT 01 2021

STATE BAR OF NEVADA

BY _____

OFFICE OF BAR COUNSEL

Case Nos.: SBN21-99129

STATE BAR OF NEVADA
NORTHERN NEVADA DISCIPLINARY BOARD

IN RE: PETITION FOR REINSTATEMENT)
)
WILLIAM SWAFFORD,)
Nevada Bar No. 11469)
Petitioner)

ORDER APPOINTING FORMAL HEARING PANEL

IT IS HEREBY ORDERED that the following members of the Northern Nevada Disciplinary Board have been designated as members of the formal hearing panel in the above-entitled action. The hearing will be convened on the 1st day of December, 2021 starting at 9:00 a.m. via Zoom Video Conferencing.

1. Rich Williamson, Esq., Chair;
2. William Hanagami, Esq.
3. Tim Meade, Laymember

DATED this 1st day of October, 2021

STATE BAR OF NEVADA

By: _____
Eric Stovall, Esq., Chair
Northern Nevada Disciplinary Board

North Reinstatement Ord__Swafford

Final Audit Report 2021-10-01

Created:	2021-10-01
By:	Cathi Britz (cathib@nvbar.org)
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Document e-signed by Eric A. Stovall (eric@ericstovalllaw.com)
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Agreement completed.
2021-10-01 - 7:49:51 PM GMT

CERTIFICATE OF SERVICE BY E-MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **Order Appointing Formal Hearing Panel** was served electronically upon:

1. William Swafford, Esq. - swaffordw@gmail.com
2. Kait Flocchini, Esq. – kaitf@nvbar.org
3. Rich Williamson, Esq. - rich@nvlawyers.com
4. William Hanagami, Esq. – Bill@Hanagami.com
5. Tim Meade - timmeade1@yahoo.com

Dated this 1st day of October 2021.

Laura Peters

By: _____
Laura Peters, an employee of
the State Bar of Nevada

FILED

NOV 01 2021

STATE BAR OF NEVADA

BY _____

OFFICE OF BAR COUNSEL

Case Number: SBN21-99129

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

In Re REINSTATEMENT OF

WILLIAM SWAFFORD, ESQ.

Bar No. 11469

Petitioner.

NOTICE OF REINSTATEMENT HEARING

TO: William Swafford, Esq.
21385 Saddleback Rd.
Reno, NV 89521

PLEASE TAKE NOTICE that the formal hearing in the above-entitled action has been scheduled for ***Wednesday, December 1, 2021, beginning at the hour of 9:00 a.m.*** The hearing will be conducted via Zoom (meeting #89095820392). You are entitled to be represented by counsel, to cross-examine witnesses, and to present evidence.

DATED this 1 day of November 2021.

STATE BAR OF NEVADA
Daniel M. Hooge, Bar Counsel

By: _____

R. Kait Flocchini, Assistant Bar Counsel
9456 Double R. Blvd., Ste. B
Reno, Nevada 89521
(775) 329-4100
Attorney for State Bar of Nevada

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that true and correct copies of the foregoing **Notice of Reinstatement Hearing** was placed in a sealed envelope in Reno, Nevada, postage fully prepaid thereon for first class and certified mail addressed to the following:

William Swafford, Esq.
21385 Saddleback Rd.
Reno, NV 89521

The foregoing documents were also e-mailed to: swaffordw@gmail.com, kaitf@nvbar.org

DATED this 15th day of November 2021.

Laura Peters, an employee of
the State Bar of Nevada.

Notice of Hearing

Final Audit Report 2021-11-01

Created:	2021-11-01
By:	Laura Peters (laurap@nvbar.org)
Status:	Signed
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"Notice of Hearing" History

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NOV 17 2021

STATE BAR OF NEVADA
BY _____
OFFICE OF BAR COUNSEL

Case No: SBN21-99129

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

In Re REINSTATEMENT OF WILLIAM SWAFFORD, ESQ. Bar No. 11469 Petitioner	**AMENDED NOTICE OF HEARING**

PLEASE TAKE NOTICE that the Reinstatement Hearing in the above-entitled action has been rescheduled for ***Thursday, January 20, 2022, beginning at the hour of 9:00 a.m.*** The hearing will be conducted via Zoom (new meeting number to be distributed at later date). You are entitled to be represented by counsel, to cross-examine witnesses, and to present evidence.

DATED this 17th day of November 2021.

STATE BAR OF NEVADA
DANIEL M. HOOGE, BAR COUNSEL

By: _____
R. Kait Flocchini, Assistant Bar Counsel
Nevada Bar No. 9861
9456 Double R Blvd., Ste. B
Reno, NV 89521
(775) 329-4100

CERTIFICATE OF SERVICE BY E-MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **Amended Notice of Hearing** was served by electronic mail upon:

William Swafford, Esq. - swaffordw@gmail.com
Rich Williamson, Esq. - rich@nvlawyers.com
Bill Hanagami, Esq. - bill@hanagami.com
Tim Meade - timmeade1@yahoo.com
R. Kait Flocchini, Esq. – kaitf@nvbar.org

Dated this 17th day of November 2021.

Laura Peters

Laura Peters, an employee of
the State Bar of Nevada

2021.11.17.Amended Notice of Hearing

Final Audit Report 2021-11-17

Created:	2021-11-17
By:	Laura Peters (laurap@nvbar.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAATNbiL9UTLonqPjXo8nEHkNfJRYLKdCp-

"2021.11.17.Amended Notice of Hearing" History

Document created by Laura Peters (laurap@nvbar.org)
2021-11-17 - 6:29:39 PM GMT- IP address: 71.94.199.108

Document emailed to Kait Flocchini (kaitf@nvbar.org) for signature
2021-11-17 - 6:30:42 PM GMT

Email viewed by Kait Flocchini (kaitf@nvbar.org)
2021-11-17 - 6:56:45 PM GMT- IP address: 13.52.61.199

Document e-signed by Kait Flocchini (kaitf@nvbar.org)
Signature Date: 2021-11-17 - 6:57:03 PM GMT - Time Source: server- IP address: 71.83.120.174

Agreement completed.
2021-11-17 - 6:57:03 PM GMT

FILED

NOV 29 2021

STATE BAR OF NEVADA

BY

OFFICE OF BAR COUNSEL

Case No.: SBN21-99129

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

In Re REINSTATEMENT OF WILLIAM SWAFFORD, ESQ. Bar No. 11469 Petitioner	**STIPULATION AND ORDER CONTINUING FORMAL HEARING AND RESETTING PREHEARING CONFERENCE DEADLINES**

Petitioner William Swafford, Esq., and the State Bar of Nevada, by and through Assistant Bar Counsel, R. Kait Flocchini, Esq., hereby stipulate and agree to continue the Formal hearing in this reinstatement matter to January 20, 2022 starting at 9:00 a.m. and conducted via simultaneous audio/visual transmission using the Zoom platform.

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The parties further stipulate and agree to reset the deadline for exchange of marked hearing exhibits and identification of hearing witnesses to January 10, 2022 at 12:00 pm and the date for the Prehearing Conference in this matter to January 11, 2022 at 1:30 pm.

IT IS HEREBY STIPULATED.

Dated this Nov. 24, 2021 day of November, 2021.

STATE BAR OF NEVADA
Daniel M. Hooge, Bar Counsel

By: _____
R. KAIT FLOCCHINI, Esq.
Assistant Bar Counsel
Nevada Bar No. 9861
9456 Double R. Blvd, Suite B
Reno, Nevada 89521
Attorney for State Bar of Nevada

Dated this 24th day of November, 2021.

By: _____
William Swafford, Esq.
Nevada Bar No. 11469
Petitioner

ORDER

On agreement of the parties, and good cause appearing,

IT IS SO ORDERED.

Richard D. Williamson (Nov 29, 2021 10:10 PST)

RICHARD WILLIAMSON, ESQ.
Hearing Chair, Northern Nevada Disciplinary Board

William Swafford_stipulation order (002)

Final Audit Report 2021-11-29

Created:	2021-11-24
By:	Laura Peters (laurap@nvbar.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAiJbIIh7MvdMMbo6EsDpjV9wAHszaDmF_

"William Swafford_stipulation order (002)" History

Document created by Laura Peters (laurap@nvbar.org)
2021-11-24 - 11:02:04 PM GMT- IP address: 71.94.199.108

Document emailed to Kait Flocchini (kaitf@nvbar.org) for signature
2021-11-24 - 11:03:41 PM GMT

Email viewed by Kait Flocchini (kaitf@nvbar.org)
2021-11-24 - 11:21:44 PM GMT- IP address: 54.183.176.12

Document e-signed by Kait Flocchini (kaitf@nvbar.org)
Signature Date: 2021-11-24 - 11:22:03 PM GMT - Time Source: server- IP address: 172.58.36.229

Document emailed to Richard D. Williamson (rich@nvlawyers.com) for signature
2021-11-24 - 11:22:05 PM GMT

Email viewed by Richard D. Williamson (rich@nvlawyers.com)
2021-11-24 - 11:22:25 PM GMT- IP address: 68.190.180.187

Document e-signed by Richard D. Williamson (rich@nvlawyers.com)
Signature Date: 2021-11-29 - 6:10:26 PM GMT - Time Source: server- IP address: 68.190.180.187

Agreement completed.
2021-11-29 - 6:10:26 PM GMT

CERTIFICATE OF SERVICE BY E-MAIL

The undersigned hereby certifies that a true and correct copy of the foregoing **Stipulation and Order Continuing Formal Hearing and Resetting Prehearing Conference Deadlines** was served electronically upon:

1. William Swafford, Esq. - swaffordw@gmail.com
2. Kait Flocchini, Esq. – kaitf@nvbar.org
3. Rich Williamson, Esq. - rich@nvlawyers.com
4. William Hanagami, Esq. – Bill@Hanagami.com
5. Tim Meade - timmeade1@yahoo.com

Dated this 29th day of October 2021.

Laura Peters

By: _____
Laura Peters, an employee of
the State Bar of Nevada

Case No.: SBN21-99129

FILED

JAN 11 2022

STATE BAR OF NEVADA

BY _____

OFFICE OF BAR COUNSEL

STATE BAR OF NEVADA

NORTHERN NEVADA DISCIPLINARY BOARD

In Re REINSTATEMENT OF WILLIAM SWAFFORD, ESQ. Bar No. 11469 Petitioner	**STIPULATION AND ORDER CONTINUING FORMAL HEARING AND RESETTING PREHEARING CONFERENCE DEADLINES**

Petitioner William Swafford, Esq., and the State Bar of Nevada, by and through Assistant Bar Counsel, R. Kait Flocchini, Esq., hereby stipulate and agree to continue the Formal hearing in this reinstatement matter to April 20, 2022 starting at 9:00 a.m. and conducted via simultaneous audio/visual transmission using the Zoom platform.

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The parties further stipulate and agree to reset the deadline for exchange of marked hearing exhibits and identification of hearing witnesses to April 8, 2022 at 12:00 pm and the date for the Prehearing Conference in this matter to April 11, 2022 at 1:30 pm.

IT IS HEREBY STIPULATED.

Dated this 11th day of January, 2022.

STATE BAR OF NEVADA
Daniel M. Hooge, Bar Counsel

By: _____
R. KAIT FLOCCHINI, Esq.
Assistant Bar Counsel
Nevada Bar No. 9861
9456 Double R. Blvd, Suite B
Reno, Nevada 89521
Attorney for State Bar of Nevada

Dated this 11th day of January, 2022.

William Swafford
By: William Swafford (Jan 11, 2022 16:45 PST)
William Swafford, Esq.
Nevada Bar No. 11469
Petitioner

ORDER

On agreement of the parties, and good cause appearing,

IT IS SO ORDERED.

Richard Williamson (Jan 11, 2022 17:09 PST)
RICHARD WILLIAMSON, ESQ.
Hearing Chair, Northern Nevada Disciplinary Board

Swafford Reinstatement Petition: Second Stipulation and Order

Final Audit Report 2022-01-12

Created:	2022-01-11
By:	Kait Flocchini (Kaitf@nvbar.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAgWata_BhYpAvW8h0dJ4t7Qsk6yNrfwok

"Swafford Reinstatement Petition: Second Stipulation and Order" History

Document created by Kait Flocchini (Kaitf@nvbar.org)
2022-01-11 - 5:41:07 PM GMT- IP address: 71.83.120.174

Document emailed to William Swafford (swaffordw@gmail.com) for signature
2022-01-11 - 5:41:50 PM GMT

Document e-signed by William Swafford (swaffordw@gmail.com)
Signature Date: 2022-01-12 - 0:45:24 AM GMT - Time Source: server- IP address: 209.58.130.54

Document emailed to Richard Williamson (rich@nvlawyers.com) for signature
2022-01-12 - 0:45:26 AM GMT

Email viewed by Richard Williamson (rich@nvlawyers.com)
2022-01-12 - 1:08:31 AM GMT- IP address: 68.190.180.187

Document e-signed by Richard Williamson (rich@nvlawyers.com)
Signature Date: 2022-01-12 - 1:09:00 AM GMT - Time Source: server- IP address: 68.190.180.187

Agreement completed.
2022-01-12 - 1:09:00 AM GMT

CERTIFICATE OF SERVICE

I, Laura Peters, certify that I am a citizen of the United States, over 18 years of age, a resident of Washoe County, and not a party to the within action. I am an employee of the State Bar of Nevada and my business address is 9456 Double R Blvd., Suite B, Reno, Nevada 89521.

I hereby certify that I electronically served a copy of the RECORD ON APPEAL, Volumes I - IX, upon William A. Swafford, Esq. at swaffordw@gmail.com.

DATED the 16th day of June 2022

Laura Peters

Laura Peters, Paralegal
Office of Bar Counsel
State Bar of Nevada