In the Supreme Court of Nevada

Case No. 86323

SYLVIA FRED & ELVIN FRED,

Petitioners,

v.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CARSON CITY AND THE HONORABLE JUDGE JAMES RUSSELL

Respondent,

and

STATE OF NEVADA *EX REL*. INVESTIGATION DIVISION OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF NEVADA (TRI-NET NARCOTICS TASK FORCE)

Real Party in Interest,

In re 3587 Desatoya Drive, Case No. 150C00741B

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Despite Tri-Net's contentions otherwise, Sylvia and Elvin do not seek sympathy from the courts of Nevada. They seek justice and vindication of their constitutional rights. Tri-Net's dilatory conduct in the district court is well-documented. The Agency's reckless decision to not serve either Sylvia or Elvin with *any* document after the criminal proceedings completed is the proximate cause of the destruction of their Home. Despite Sylvia and Elvin providing overwhelming evidence demonstrating the irreparable harm they face, the district court incorrectly interpreted Nevada law and assisted Tri-Net in carrying out its strategy of delay by staying these proceedings pending resolution of Elvin's Petition (Case No. 85590). Indeed, without either party asking for a stay, the district court recently entered *another* stay to the proceedings. (*See* 9PA1467-69). This superfluous stay order provides preponderant proof that guidance is needed to explain when a district court should exercise its discretion and stay proceedings under NRAP 8(c).

NRAP 8(c) is a very narrow stay provision. But as a threshold matter, that provision does not provide a Real Party in Interest (Tri-Net)

authority to obtain a stay based on a Petitioner's (Elvin) Petition for relief. The district court's order concluding otherwise is clearly erroneous. Tri-Net's Answer does nothing to assist this Court in affirming the district court's decision, therefore mandamus relief is proper.

Indeed, Tri-Net forgot to provide this Court with *any* legal support for the quintessential question—how the plain language of NRAP 8(c) provides Tri-Net authority to obtain a stay based on Elvin's Petition. Tri-Net likewise failed to address Sylvia and Elvin's challenge to the district court's conclusion that neutrality under the likelihood of success factor is sufficient to award a stay. These two concessions are dispositive, and Sylvia and Elvin should be provided mandamus relief today.

Unlike the self-evident harms Sylvia and Elvin suffer every day they cannot enjoy their Home, Tri-Net provided no legal or factual support for its alleged harms that demanded stay relief. This is because Tri-Net's irreparable harm is superficial as it believes it is special because it is the Government and therefore it is "entitled" to carry out its strategy of delay. At best, Tri-Net claims the burdens of engaging in litigation constitute irreparable harm. But this Court long ago

determined for private litigants that litigation costs (however substantial) do not constitute irreparable harm. The Government should be treated no differently than any other litigant—especially considering the unlimited budget of taxpayer money at its disposal—when the Government is defending itself in civil rights and torts suits.

Demonstrating its lack of irreparable harm, Tri-Net takes an illogical position to claim that because Sylvia and Elvin have pro bono representation, money is of no object to them as compared to the bottomless Government accounts that fund Tri-Net's litigation machine. Tri-Net likewise litters its Answer with unwelcome and unfounded attacks. *See Polk v. State*, 126 Nev. 180, 184 (2010) ("We intend to impress upon the members of the bar our resolve to end lackadaisical appellate practices." (cleaned up)); *see also* Antonin Scalia & Bryan Garner, *Making Your Case: The Art of Persuading Judges*, 35 (2008) ("An attack on opposing counsel undercuts the persuasive force of any legal argument. The practice is uncalled for, unpleasant, and ineffective."). Because the district court clearly erred based on an incorrect interpretation of NRAP 8(c), this Court should provide mandamus relief, and instruct the district court to lift the stay.

II. MANDAMUS RELIEF IS PROPER UNDER THESE FACTS.

Tri-Net tried to shift Sylvia and Elvin's arguments into somehow challenging the district court's authority to enter a stay. (*See* Answer at 13-14; *see also* 2PA214 (the State making the same procedural move in *Lara*)). Tri-Net claims that Sylvia and Elvin "ignore the established legal principle that a district court has discretion to control its own docket." (Answer at 13). Hardly.

Neither Sylvia nor Elvin quarrels with a district court's power to stay a proceeding. (*See* Pet. at 22 ("'A stay is not a matter of right, it is instead an exercise of judicial discretion that is dependent upon the circumstances of the particular case.'" (quoting *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)). Instead, Sylvia and Elvin ask this Court for guidance on *when* a district court may exercise this power as the district court clearly erred here.

A. *This Petition Satisfies Traditional Mandamus Factors.*

Tri-Net does not understand the requirements of mandamus relief. (*See* Answer at 11 ("The fact that not every trial court is appealable does not create grounds for writ relief.")). Tri-Net further misstates when a Petitioner may seek extraordinary relief from this Court. (*See id*. at 13

("[T]he Court has established precedent regarding when mandamus relief is available and Petitioners have failed to meet their burden for extraordinary relief." (citing *Mineral Cnty v. State*, 117 Nev. 235 (2001)). Tri-Net's arguments are misplaced.

1. *Mineral County* is inapposite to this matter.

Mineral County involved dueling litigation pending in both Nevada state and federal court. 117 Nev. at 244. That decision, like the forfeiture proceeding here, concerned property rights, but unlike this proceeding, all of the necessary parties were not before the *Mineral County* court. *Id.* at 246 ("The absence of several interested parties, including the Tribe and the United States, makes the adjudication of water rights among those parties problematic because this court lacks jurisdiction over all the necessary parties."). Importantly for this Court's purposes, *Mineral County* simply detailed the standard for a writ of mandamus and prohibition. *See id.*

2. *Walker* presents the correct mandamus standard.

The *Walker* factors are the correct framework for this Court to consider Sylvia and Elvin's request for mandamus relief. *See*, *e.g.*, *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680 (2020). Indeed, this

Court explained that for a Petition "to warrant" traditional mandamus relief, the Petitioner must show (1) "a legal right to have the act done which is sought by the writ;" (2) "that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse;" and (3) "that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy." *Id.* (cleaned up).

3. ***Aspen* provides the exact opposite procedural posture to this Petition and proves mandamus relief is available.**

"The right to an appeal is generally an adequate legal remedy and where, as here, 'an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief.'" *Willick v. Eighth Jud. Dist. Ct.*, 506 P.3d 1059, 1061 (Nev. 2022) (quoting *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 225 (2004)).

A writ of mandamus is the appropriate vehicle for challenging a stay because the order is not directly appealable and following final judgment, the issue of the propriety of a stay will be moot. *Aspen Fin.*

Servs., Inc. v. Eighth Jud. Dist. Ct., 128 Nev. 635, 640 (2012)); *see also Univ. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720 (2004) (explaining that this Court has a duty "to decide actual controversies by a judgment which can be carried into effect").

Aspen involved an inquiry into whether the district court erred in *not staying* discovery because a criminal proceeding had begun parallel to the civil proceeding. 128 Nev. at 640 (explaining that "if discovery is not stayed" the criminal defendant and civil litigant "can either waive his Fifth Amendment privilege and risk revealing incriminating information to criminal investigators, or he can assert his privilege and . . . thereby effectively forfeit the civil suit" (cleaned up)). This Court enunciated several factors for why the district court's decision to *not stay* the matter was correct. *Id*. at 651 ("For the foregoing reasons, we conclude that the district court did not abuse its discretion in determining that, on balance, the interests of the Aspen defendants in a stay do not outweigh the countervailing interests involved.").

That said, Sylvia and Elvin's Petition provides the flip side of the coin—whether the district court erred by *granting a stay* based on the Government's superficial irreparable harm claims. Sylvia and Elvin,

therefore, meet the traditional mandamus relief requirements. *See Walker*, 136 Nev. at 680.

B. *Advisory Mandamus is Proper Because Guidance is Clearly Needed on When a Stay Should Occur.*

Besides Sylvia and Elvin satisfying the traditional mandamus relief factors, this Court "has alternatively granted mandamus relief where a petitioner presented legal issues of statewide importance requiring clarification" because a decision would "promote judicial economy and administration by assisting other jurists, parties, and lawyers." *Walker*, 136 Nev. at 683 (cleaned up).

Tri-Net questions this Court's jurisprudence. (*See* Answer at 11 ("Petitioners cannot turn to this Court every time they disagree with the decision of the district court by arguing that this is a civil rights case and therefore it has statewide importance.")). Regardless of Tri-Net's abhorrence of Nevada's precedent, Sylvia and Elvin demonstrated that relief is available on advisory mandamus grounds as well. (*See* Pet. at 15-22). For the additional reasons detailed below, advisory mandamus is available to provide guidance to lower courts.

1. <u>The *sua sponte* stay order is improper.</u>

Based on this Petition, the district court imposed another stay order

in the proceedings. (9PA1467-69.) Neither Party sought a stay and there is no analysis or support for why *another* stay order was necessary given the district court's prior decision to stay the proceedings based on Case No. 85590. (8PA1353-61). This second stay is clearly erroneous and provides sufficient support for Sylvia and Elvin's request for guidance from this Court.

2. Guidance on when stays are appropriate in civil rights matters is needed in light of *Mack*.

This Court should provide guidance to Nevada district courts as this matter involves the vindication of Elvin and Sylvia's constitutional rights—a subject this Court recently opined on. *See*, *e.g.*, *Mack v. Williams*, 522 P.3d 434, 448 (Nev. 2022) ("And even if the Legislature has authorized injunctive and declaratory relief for such [constitutional] claims (an argument we questioned above), equitable relief, if ever, suffices to remedy a past wrong, as Mack has assertedly suffered here."); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 409-10 (1971) (Harlan J., concurring) ("For people in [appellant's] shoes, it is damages-or nothing.").

This Court already recognized that vindication of constitutional rights is very difficult, and many constitutional rights violations will *per*

se present irreparable harm. *See City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 357 (2013). But the specific constitutional violations Sylvia and Elvin seek to vindicate are one of our Nation's most cherished rights—property ownership. *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 361 (2015) (explaining that even with a Taking in which just compensation is due, "people still do not expect their property, real or personal, to be actually occupied or taken away").

Sylvia and Elvin likewise seek to vindicate their due process rights. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." (cleaned up)).

Thus, and because of the nature of the relief sought in Sylvia and Elvin's counterclaims Sylvia and Elvin ask this Court to provide guidance. Specifically, Sylvia and Elvin ask that this Court conclude that stays to civil rights litigation are highly disfavored because of the

inherent irreparable harm present when a Court is asked to vindicate constitutional rights.

3. The *Lara* stay and the district court's stay here demonstrate that guidance is needed.

Sensing its opposition to this Court's advisory mandamus standard is wrong, Tri-Net shifts and posits that Sylvia and Elvin "without evidence or citation" claim that other courts in Nevada provided unwarranted stays when confronted with allegations of constitutional rights violations. (Answer at 11). This is demonstrably false as Sylvia and Elvin provided the *Lara* matter in their appendix. (*See* Pet. at 18 n.5 (citing 1PA155-213; 2PA239-349; 374-80)). Tri-Net further claims Sylvia and Elvin "fail[ed] to establish how an order in *Lara* has any bearing on this Court's decision on whether to grant writ relief." (Answer at 13). Sylvia and Elvin provide the *Lara* matter as an example as that matter is substantively and procedurally similar and provides further proof that guidance is needed.

For example, Lara challenges the State's participation in the federal equitable sharing program of forfeitures of property and he challenges the incentives placed on law enforcement by tying certain funding initiatives to the number of forfeitures the State obtains. (*See*

1PA155-88; 2PA244-80). Lara sought declaratory, injunctive, and monetary relief. (*See id.*) Sylvia and Elvin challenge Nevada's forfeiture scheme as applied to Tri-Net's egregious and unconstitutional misconduct. (3PA538-60; 4PA647-73). Sylvia and Elvin likewise seek declaratory and monetary relief. (*Id.*).

Right after being served with the Complaint, the State moved to stay *Lara*'s proceedings because of this Court's review in *Mack*. (*See* 1PA189-201). The *Lara* district court, lacking guidance on stay requests, stayed *Lara*'s proceedings for over a year while this Court decided *Mack*. (2PA239-43). Mere days after Elvin petitioned this Court to protect his double jeopardy and property rights, Tri-Net requested Sylvia and Elvin to stipulate to stay the proceedings. (7PA1094). Similar to *Lara*, and because it lacked guidance, following Tri-Net's improper motion, the district court stayed these proceedings. (8PA1353-61).

Each matter had the "just, speedy, and inexpensive" resolution of their matters delayed because a district court lacked guidance on when to exercise discretion and issued a stay. NRCP 1. The analogy and citation to the *Lara* matter is apt that guidance is needed on when district courts should enter stays in civil rights matters.

4. Absent guidance from this Court, Sylvia and Elvin predict further delays.

If all of the above was not enough, Sylvia and Elvin predict further delays to these proceedings absent guidance from this Court. For example, Sylvia argued in her motion for partial summary judgment that her due process rights are violated by Nevada law. (*See* 4PA717-42; 5PA743-857). Sylvia contends that Nevada's statutory scheme violates her right to a speedy trial and her presumption of innocence because she cannot challenge the forfeiture until trial. (*See id.*)

The United States Supreme Court granted certiorari on one of the several questions presented in Sylvia's Motion—must a state provide a probable cause hearing before a statutory judicial forfeiture trial and if so, what standard applies? *See Culley v. Marshall*, ___ S.Ct. ___, 2023 WL 2959364 (Apr. 17, 2023) (granting cert to resolve a circuit split over whether the *Barker v. Wingo* speedy trial test applies or if *Mathews v. Eldridge* applies). Because the Agency's playbook of delay is fairly easy to predict at this point, without providing guidance to the district court for when a stay should be granted, Tri-Net will in all likelihood point to *Culley* as another reason to further delay discovery and resolution of these proceedings.

5. Providing guidance will assist other litigants, attorneys, and the courts of Nevada.

By providing crucial guidance on stay relief, this Court will speed the administration of justice for Elvin and Sylvia as well as for all Nevadans as more district courts confront constitutional damages questions. *See*, *e.g.*, *Mack*, 522 P.3d at 448; *Aspen*, 128 Nev. at 649 ("[A] policy of freely granting stays . . . would threaten to become a constant source of delay and an interference with judicial administration." (cleaned up)). Elvin and Sylvia, therefore, ask this Court to review the Petition, provide guidance to district courts on this important issue of statewide concern, issue a writ of mandamus, and instruct the district court to lift the stay today.

III. THE DISTRICT COURT CLEARLY ERRED BY RELYING ON NRAP 8(c) TO STAY THESE PROCEEDINGS.

"The fact that the issuance of a stay is left to the court's discretion does not mean that no legal standard governs that discretion. A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (cleaned up). "The party requesting a stay bears the burden of showing that the circumstances

justify an exercise of that discretion. *Id*. at 434.

A. *Tri-Net's Perfunctory Analysis Does Not Stand up to the Actual Facts and Weight of Nevada Precedent.*

Tri-Net's carelessness in answering Sylvia and Elvin's Petition simplifies this Court's analysis. Sylvia and Elvin have been explicit since they moved to strike Tri-Net's motion to stay—NRAP 8(c)'s plain language does not provide a real party in interest authority to obtain a stay to counterclaims that will be unaffected by a writ petition. (*See* Pet. at 14-15; *see also* 7PA1046). Sylvia and Elvin have been unable to locate a single decision in either federal court or Nevada that mirrors this procedural posture. Tri-Net failed to provide this Court with any precedent in its Answer that supports its claimed need for a stay.

Instead, Tri-Net brushes off this critique of the district court's ground-breaking decision in one sentence. (*See* Answer at 11 ("Even assuming that the district court incorrectly applied NRAP 8, that alone is not grounds for writ relief.")). This conclusory, one-sentence rebuttal conceded the merits to Sylvia and Elvin's request for mandamus relief. *See Ozawa v. Vision Airlines*, 125 Nev. 556, 563 (2009) (treating the failure to respond to an argument as a confession of error). This is because the threshold issue (whether NRAP 8(c) even applies) is

dispositive on whether the district court manifestly abused its discretion and clearly erred by staying these proceedings. *See Polk*, 126 Nev. at 184 ("We have also concluded that a confession of error occurs when a respondent has inexcusably disregarded applicable appellate procedure.").

Tri-Net's Answer likewise conceded the merits to Sylvia and Elvin's challenge of the district court's NRAP 8(c)(4) analysis. *Compare* Answer (never discussing the "neutrality factor" problems contained in the district court's order); *with* Pet. at 33-35 (challenging neutrality as the correct analysis on the likelihood of success prong). Couple these concessions with the irreparable harm that is inflicted on Sylvia and Elvin every day these proceedings are delayed; mandamus relief should be provided today. *See Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 820 (2017) (explaining that mandamus relief requires a showing of "clear error" that will inflict "irreparable harm.").

Tri-Net's analysis under NRAP 8(c)(1)-(3) is underwhelming as the Agency provided minimal citations to substantial evidence in the record and even fewer citations to legal authority for support. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38 (2006). Thus, even if this

Court wanted to provide greater weight to one of the other NRAP 8(c) factors to conclude a stay was warranted, Tri-Net's Answer does not provide *any grounds* for this Court to grant the Agency such relief. *See Levia-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (detailing the sliding-scale approach for stays survives *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008)). *But see Nken*, 556 U.S. at 435 (requiring a movant to show that irreparable harm is likely, rather than just possible).

B. *The Object of Elvin's Petition Will Not Affect Sylvia and Elvin's Counterclaims.*

Tri-Net claims Elvin's "Petition will have a significant impact on the underlying litigation." (Answer at 13-14). This is true. But it is true in only one direction (and against Tri-Net): if Elvin prevails on his Petition, the forfeiture proceedings are over. In contrast, Elvin's Petition will have *zero effect* on Sylvia and Elvin's counterclaims or Tri-Net's defenses to those counterclaims.

For instance, in the unlikely event that Tri-Net can somehow muster sufficient facts to overcome the other affirmative defenses Sylvia and Elvin possess and the Home is forfeited, Sylvia and Elvin's counterclaims *remain viable*. Indeed, Tri-Net's Answer displays its true purpose of the stay—delay—while incorrectly claiming that bifurcation

of the forfeiture and counterclaim proceeding is necessary. This is nonsensical. Tri-Net's analysis under NRAP 8(c)(1) lacks merit.

1. Tri-Net utterly failed to meet the bare minimum requirements of Due Process.

Tri-Net admits in its Answer that it knew Sylvia and Elvin created a quitclaim deed on March 31, signed the deed on April 1, and recorded it on April 6, 2015 "after the [forfeiture] complaint was filed." (Answer at 6); *see also Allen v. Webb*, 87 Nev. 261, 273 (1973) (Batjer, J. concurring in part and dissenting in part) ("When an instrument involving real property is properly recorded it becomes notice to all the world of its contents." (cleaned up)).

This admission explains why Tri-Net mailed Sylvia notice of the stay on April 29, 2015. (*See* 1PA17-23; *see also* Oral Arguments ("Why was Sylvia served with anything under your position that she was not a claimant and did not have any standing to be involved in this?")). This admission in Tri-Net's Answer also means that when Tri-Net moved to lift the stay, obtained the default judgment, and evicted the family (1PA79-100)—the Agency violated Nevada law. *See* NRS 179.1171(5).

Indeed, this Court already acknowledged the due process violation. *See In re 3587 Desatoya Dr.*, Case No. 80194, 2021 WL 4847506, at *2

(Order of Reversal and Remand, Oct. 15, 2021) ("[T]he State did not serve Sylvia with a copy of the complaint or a summons, such that she had notice and the opportunity to file an answer."); *Maiola v. State*, 120 Nev. 671, 675 (2004) ("The Due Process Clause requires notice and an opportunity to be heard before the government deprives a person of his or her property."); (*see also* 8PA1336-45 (detailing that even if NRS 179.1169 is found constitutional, it does not extinguish Sylvia's ownership interest)).

Tri-Net likewise violated Elvin's due process rights because it incorrectly provided service of its papers to Elvin's former counsel rather than asking whether that counsel still represented Elvin. (*See* 1PA79-100); *Maiola*, 120 Nev. at 675 ("If the state was proceeding with a criminal prosecution against appellant contemporaneously with a quasi-criminal forfeiture proceeding that arose from the same alleged criminal behavior, the state's attorney arguably had a professional obligation to inquire of appellant's attorney in the criminal proceeding to determine whether appellant's attorney also intended to represent appellant in the forfeiture proceeding." (cleaned up)).

But even though Tri-Net stubbornly disagrees with this Court's

precedent, Tri-Net still violated Elvin's due process rights because its affidavits moving to default the Home do not satisfy the Rules. (*See* 1PA86-95); *Landreth v. Malik*, 127 Nev. 175, 188-89 (2011) ("Where a party against whom default judgment is sought has appeared in the action, NRCP 55(b)(2) requires the applying party to satisfy heightened notice standards."). Thus, Tri-Net's reckless decision to violate due process, obtain a void default judgment, and evict the Fred family—all of which led to the destruction of Sylvia and Elvin's Home—opened the Agency up to Sylvia and Elvin's counterclaims and the damages they are owed.

2. Even if the State somehow forfeits the Home, that decision will not extinguish Sylvia and Elvin's counterclaims.

To be sure, Tri-Net will not forfeit the Home for several reasons. (*See* 3PA541-42; 4PA650-51). But even setting aside those reasons, and assuming *arguendo* that Tri-Net could forfeit the Home, Sylvia and Elvin's counterclaims will not be extinguished. (*Cf.* Answer at 14-16).

To make such a claim, Tri-Net posits a draconian interpretation of Nevada law that favors absolute government power. (*See id.*). Based on Tri-Net's view, if it forfeits the Home, because NRS 179.1169 vests all

right, title, and interest in the Home to Tri-Net at the time of Elvin's crimes, the Agency was free to violate as many constitutional rights and commit as many torts as they wish because the Agency would *eventually* own the property. (*See id.*)

A truly scary proposition for liberty in Nevada. Worse still for the taxpayers of Nevada, Tri-Net is wrong and does not understand its litigation risk. Recall, that Sylvia and Elvin counterclaimed against Tri-Net under three general damages theories: (1) *Good*; (2) NRS 41.031; and (3) Takings.[1] (*See* 3PA538-60; 4PA647-73). As shown below, each of these claims remains viable in the proceeding *regardless* of the outcome of Elvin's Petition.

a. Sylvia and Elvin's Good remedy remains viable.

Sylvia and Elvin possess a *Good* remedy. *See Good*, 510 U.S. at 62; *see also United States v. Bowman*, 341 F.3d 1228, 1234 (11th Cir. 2005) (detailing that under *Good* "the remedy for an illegal seizure where the

[1] Sylvia and Elvin's declaratory relief claims remains viable under NRS 30.080 three-prong requirements because (1) a judicial controversy exists, (2) Sylvia and Elvin have a legally protected interest, and (3) the issues presented are ripe for review. *See Cnty. of Clark, ex rel. v. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752 (1998).

government fails to provide pre-deprivation notice and hearing" is for the government to provide "return of rents or lost profits during the illegal seizure"). The federal courts long ago dismissed Tri-Net's claim that a meritorious forfeiture extinguishes the *Good* remedy. *See United States v. Real Prop.*, 958 F.Supp. 482, 489 (D. Nev. 1997) ("The government is just plain wrong. Whether or not [a claimant's] property is ultimately declared forfeit[ed], he is entitled to due process at every stage of the proceedings, and 'fair proceedings are not confined to the innocent. The question is the legality of the seizure, not the strength of the Government's [forfeiture] case.'" (quoting *Good*, 510 U.S. at 62)).

Tri-Net makes the remarkable claim (for the first time) that the "[t]axes that were assessed on the property while in the custody of Tri-Net were inadvertently assessed because property owned by a governmental entity is exempt from taxation." (Answer at 4-5). Tri-Net cites no law (federal or state) for support. This is likely because it is incorrect considering the federal government's policies. (*See* 9PA1458 (detailing Justice Department administrative procedures for payment of property taxes in forfeiture proceedings); 9PA1460-64 (providing Treasury Department administrative procedures)); *Whitehead v. Nevada*

Comm'n on Jud. Discipline, 110 Nev. 380, 419 (1994) (permitting "judicial notice of facts capable of accurate and ready determination").

The delinquent taxes due are encompassed within Sylvia and Elvin's *Good* remedy (because the Home is still seized to this day because they cannot enjoy the Home) and demonstrates why all these proceedings should be consolidated—not bifurcated. (*Compare* 5PA878-936 (moving to consolidate) *with* Answer at 19 (claiming bifurcation is proper)). The Petition is not dispositive of *any* of Sylvia and Elvin's counterclaims such that bifurcation is improper. *Cf. Tracey v. Am. Fam. Mut. Ins. Co.*, No. 2:09-cv-01257-GMN-PAL, 2010 WL 3613875, at *4 (D. Nev. Sept. 8, 2010) ("Bifurcation is particularly appropriate when the resolution of a single claim or issue could be dispositive of the entire case.").

b. Sylvia and Elvin's tort claims remain viable.

The plain language of NRS 179.1169 does not displace any tort remedy in the event the Government unlawfully seizes and forfeits property with a void default judgment. *See Bedi v. McMullan*, 160 Cal.App.3d 272, 275 (Cal.Ct.App. 1984) ("A default judgment that has been set aside will not support a writ of execution, and it is well settled a party is liable in tort if he executes a void judgment against the property

of another."); *see also Echeverria v. State*, 137 Nev. 486, 491-92 (2021) ("[T]his state's public policy, reflected in NRS 41.031, [is] that the State should generally take responsibility when it commits wrongs.").[2]

Tri-Net claims the Agency's opportunity to raise discretionary immunity has not been waived. Answer at 19. This is false, but even so, Tri-Net failed to explain how a reckless decision to violate Sylvia and Elvin's due process rights, evict the Fred family during a global pandemic, claim in Case No. 80194 that Sylvia is not a proper party when it knew otherwise—all of which led to the destruction of the Home—will somehow satisfy NRS 41.032(2) based on "the considerations of social, economic, or political policy." *Paulos v. FCH1, LLC*, 136 Nev. 18, 26 (2022). Thus, waived or not, the Petition will *never* affect the denial of discretionary immunity because Tri-Net cannot meet those requirements as a matter of law. *See* Case No. 85590.

[2] Indeed, Sylvia challenges the constitutionality of NRS 179.1169. (*See* 4PA724-41). If NRS 179.1169 is void, the torts Tri-Net committed based on that void statute likewise open the agency up to damages under NRS 41.031. *See Bedi*, 160 Cal.App.3d at 275 ("In addition, state officials were held liable for forcible entry and detainer when they evicted a tenant under color of a void statute.").

c. Sylvia and Elvin's Takings claim remains viable.

Tri-Net's unlawful exercise of its police powers does not absolve the Agency of the Takings clause. *See Baker v. City of McKinney*, 601 F.Supp.3d 124, 133 (E.D. Tex. 2022) ("If the government was exempt from paying just compensation every time it exercised the police power, there would never be just compensation; the exception would swallow the rule." (cleaned up)). Indeed, the destruction of the Home is a foreseeable result because of the Agency's failure to maintain the property. *See id.* ("[I]f the destruction of the House was a direct result of the government's conduct, and that result was intentional or foreseeable, then the Department's conduct amounts to a taking."). Tri-Net, therefore, committed a per se physical taking and owes just compensation. *See Tahoe-Sierra Pres. Council, Inv. v. TRPA*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

Tri-Net's frightening view of absolute government power that the Takings clause can be displaced by legislative enactment is incorrect. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 489 (2014) ("If the Legislature could change the Constitution by ordinary enactment, no

longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and like other acts alterable when the legislature shall please to alter it." (cleaned up)).

Indeed, the United States Supreme Court *just a few weeks ago* debunked such a theory. *See Tyler v. Hennepin Cnty*, 598 U.S. ___ (2023) (slip. op., at 5) ("State law is one important source [for the definition of property rights b]ut state law cannot be the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." (cleaned up)); *see id*. (slip op., at 12) ("The State now makes an exception only for itself . . . [b]ut 'property rights cannot be so easily manipulated.'" (quoting *Cedar Point Nursery v. Hassid*, 596 U.S. __, ___ (2021) (slip op., at 13)).

3. <u>This Court's precedent belies the district court's findings regarding NRAP 8(c)(1).</u>

The district court found and Tri-Net parrots back that "[g]enerally, a stay is appropriate when there is a pending matter in another court which could impact the proceedings which are requested to be stayed." (8PA1359 (citing *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248 (2004));

Answer at 14; *see also* 1PA143 (State making an identical claim in *Lara*)). This is clearly erroneous and based on an incorrect interpretation of Nevada law.

Mikohn dealt with an arbitration provision in a contract and this Court recognized that "[t]he benefits of arbitration would likely be lost or eroded if it were necessary for an appellant to simultaneously or sequentially proceed in both judicial and arbitral forums." 120 Nev. at 252. Additionally, in *State v. Robles-Nieves*, as this Court evaluated the Government's right to an interlocutory appeal to an order suppressing evidence based on a statute, this Court reasoned "[i]f the stay is denied, that object will be defeated as the trial will proceed without the suppressed evidence." 129 Nev. 537, 542 (2013). Neither situation exists here as nothing about Elvin's Petition affects the viability of the counterclaims or Tri-Net's defenses.

Indeed, the district court's order and Tri-Net's Answer provides a cursory reference to *Mikohn* and conflates the careful application of NRAP 8(c) this Court made in that decision. Couple the substance of the counterclaims which present a civil rights matter—speed and vindication of rights is the object so that Judiciary can deter future constitutional

violations by the Executive. The logical conclusion of the district court's order is that any time another appeal (or petition) on a similar matter (i.e., constitutional questions) is being heard by this Court a stay should be entered. If this were the law in Nevada, it would *frustrate* the entire judicial system and the vindication of civil rights as this Court is *constantly* evaluating constitutional questions.

4. The district court clearly erred and manifestly abused its discretion under NRAP 8(c)(1).

All of the above rebuts the totality of the district court's decision under its object of the Petition analysis. (*See* 8PA1359:13-17 ("[T]he object of the Petition is to frame and potentially circumscribe the issues which are to be addressed in the proceedings before this Court, denying a stay would frustrate the object of the proceedings in the Nevada Supreme Court.")). Tri-Net's Answer fails to demonstrate that the object of the Petition will affect the counterclaims or any defenses Tri-Net may have. The district court clearly erred on its NRAP 8(c)(1) analysis.

C. *Sylvia and Elvin are Irreparably Harmed Everyday They Cannot Enjoy Their Home.*

Tri-Net claims that Sylvia and Elvin do not "explain how a stay in this matter either causes or exacerbates" the damage Tri-Net inflicted on

Sylvia and Elvin's property rights. Answer at 17. Tri-Net simply does not understand property law. Furthermore, Tri-Net foists an undisclosed report purportedly written by one of its agents to claim that Sylvia and Elvin's family lived in filth and are in fact the real perpetrators of the Homes destruction. This is offensive and belied by the documents disclosed by Sylvia and Elvin in discovery—unlike this biased report. By its own arguments related to this undisclosed report, Tri-Net demonstrates why Sylvia and Elvin are rightfully concerned about Tri-Net's discovery practices and concerned that a stay will obfuscate additional relevant evidence Sylvia and Elvin are entitled to receive.

1. <u>Tri-Net does not understand property law.</u>

"Because real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm, the district court erred in holding otherwise." *Dixon v. Thatcher*, 103 Nev. 414, 416 (1987). "[A] *lis pendens* impedes the property's marketability and thus may cause substantial hardship to the property owner." *Tahican, LLC v. Eighth Jud. Dist. Ct.*, 523 P.3d 550, 553 (Nev. 2023) (cleaned up). Indeed, "the seizure of real property affects the fundamental interest of our citizenry in maintaining control over their

residence and remaining free from governmental interference." *Levingston v. Washoe Cnty.*, 112 Nev. 479, 484 (1996). All of these substantial harms to Sylvia and Elvin's property rights are simultaneously present here.

It is therefore axiomatic that because of the destruction of the Home, Sylvia and Elvin's indigent status, and the lack of marketability of the Home because of the *lis pendens*, they cannot fix their Home. (*Cf.* Answer at 11 ("The lis pendens does nothing more than provide notice in the chain of title that there is litigation regarding the property.")). Because they cannot fix their Home, they likewise cannot enjoy their Home, and they are irreparably harmed every day the stay blocks the enjoyment of their property.

2. <u>Tri-Net destroyed Sylvia and Elvin's Home.</u>

Tri-Net makes an *extremely* offensive claim that Sylvia and Elvin's family lived in filth. *See* Answer at 5 ("A report written the day of the lockout notes that the home was filthy with broken and cracked windows, urine and feces on the floor and rodent infestation throughout the residence."). Tri-Net failed to attach this biased report in response to the several motions Sylvia and Elvin filed where the two exhaustively

detailed Tri-Net's liability and destruction of the Home. *See Cuzze v. Univ. Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603 (2007) (detailing that when a party "fails to include necessary documentation in the record, we necessarily presume that the missing portion" goes against any argument presented by the party in an appeal).

Worse, Tri-Net has *never* disclosed what should have been provided in its initial NRCP 16.1 disclosures. (*See* 7PA1129-33); *see Sanders v. Sears-Page*, 131 Nev. 500, 517 (Nev. Ct. App. 2015) (explaining that NRCP 16.1 disclosures "serves to place all parties on an even playing field and to prevent trial by ambush or unfair surprise"); NRCP 16.1(a)(1)(A)(ii).

Therefore, this purported report's authenticity and veracity are *extremely suspect* and will be investigated closely upon inspection. But this phantom report written by Tri-Net's agent put in charge of taking care of the Home (which he clearly did not do) is unlikely to rebut the photos and videos of the Home Sylvia and Elvin already disclosed to Tri-Net. (*See* 7PA1219-26; 7PA1210-17; *see also* 9PA1398-99(2019 photos of bathroom and ceiling fan); 9PA1466 (authentication of the 2019 photos); 3PA419-20 (2022 photos of bathroom and ceiling fan)).

August 12, 2019, Ceiling Fan

March 14, 2022, Ceiling Fan

August 12, 2019, Bathroom

March 14, 2022, Bathroom

The Agency violated due process which led to the destruction of the Home. No matter how many excuses Tri-Net attempts to manufacture—both the law and facts are squarely on Sylvia and Elvin's side such that they are irreparably harmed every day the stay remains. Quite simply,

Sylvia and Elvin are entitled to damages. But before that, they are entitled to discovery.

3. Sylvia and Elvin are rightfully concerned about Tri-Net's discovery practices.

The public is harmed every day these proceedings languish. (*See* Pet. at 30 ("'There is a presumption that the public has an interest in prompt resolution of civil cases.'" (quoting *Aspen*, 128 Nev. at 650)). Through Tri-Net's reliance on a previously undisclosed report, Tri-Net in fact proves Sylvia and Elvin's concerns about Tri-Net's lackluster discovery processes and the issuance of a stay. This is because Sylvia and Elvin are entitled to the discovery they seek. *See Aspen*, 128 Nev. at 646. Here though, Tri-Net's litigation conduct is the definition of dilatory—Sylvia already had to move to compel discovery responses. (*See* 7PA1037-1149). Tri-Net's reference to this undisclosed report is simply more of the same misconduct that has plagued these proceedings for *years*. This litigation needs to be resolved and that can only happen if the Parties complete discovery.

4. The district court clearly erred and manifestly abused its discretion under NRAP8(c)(2).

In sum, Sylvia and Elvin face irreparable harm on multiple fronts.

Tri-Net destroyed their Home, they cannot fix it as a *lis pendens* and forfeiture proceeding clouds title, which makes any home-equity loan funds unavailable. Sylvia and Elvin therefore cannot enjoy their Home. Tri-Net demonstrates that its discovery practices are unsound and the stay will likely lead to Sylvia and Elvin not obtaining pertinent, relevant evidence. Finally, the public is harmed every day these proceedings do not reach finality. The district court clearly erred under NRAP 8(c)(2).

D. *Tri-Net Faces no harm.*

Tri-Net claims that it is "entitled to know the procedural posture of the proceedings pending with this Court because the information is critical to strategic and logistical decisions in regard to its prosecution of the forfeiture action and the defense of the asserted counterclaims." (Answer at 19; *see also* 1PA189-205 (State making similar claims in *Lara*)). As exhaustively detailed above, nothing about Elvin's Petition will affect the counterclaims or Tri-Net's defenses. Tri-Net's irreparable harm arguments are in fact belied by precedent. *See Nken*, 556 U.S. at 427 ("A stay is an intrusion into the ordinary process of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant."). Indeed,

irreparable injury cannot be a "possibility" because "the 'possibility' standard is too lenient," a movant must show that irreparable harm is likely. *Id*. (quoting *Winter*, 555 U.S. at 22). Tri-Net failed to demonstrate that any harm is likely—let alone irreparable harm necessitating a stay.

1. Litigation costs do not constitute irreparable harm.

This Court detailed in *Mikohn* that litigation costs for private litigants does not constitute irreparable harm. *Mikohn*, 120 Nev. at 253. The same *must* be true of the Government because it should not be treated differently than any other litigant when the Government is being called to account for its misconduct. *See*, *e.g.*, *Mack*, 522 P.3d at 448; *Echeverria*, 137 Nev. at 491-92. Especially in civil rights litigation, the Government should not be afforded some special irreparable harm factor in which it can delay vindication of constitutional rights.[3] The district court clearly erred in concluding otherwise.

[3] Tri-Net's claims regarding Sylvia and Elvin's retention of pro bono counsel is a red herring for this Court's consideration of Tri-Net's irreparable harm. (Answer at 15). When confronted with the unlimited budget of the State—*any* alleged irreparable harm the Government faces because of costs and fees is illusory compared to the pro bono services Sylvia and Elvin receive.

2. The district court clearly erred and manifestly abused its discretion under NRAP8(c)(3).

The district court concluded "the procedural posture of the forfeiture action is important" for Tri-Net "to know in order to fairly protect its interests in these proceedings." (8PA1359:21-23.) There is no citation provided by either the district court or Tri-Net to support this revolutionary position on irreparable harm. (*See id.*; Answer at 19). Thus, the district court clearly erred under NRAP 8(c)(3).

IV. CONCLUSION

NRAP 8(c)'s does not provide a Real Party in Interest authority to obtain a stay to discovery on civil rights counterclaims unaffected by a Petition. Sylvia and Elvin ask for mandamus relief today.

Dated this 15th day of June 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that this Petition complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared with a proportionally spaced typeface in 14-point, double-spaced, Times New Roman font

2. I certify that this Petition complies with type-volume limitations of NRAP 21(d) because it contains 6,970 words which is less than the 7,000 word limit.

3. I certify that I have read this Petition, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedures, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 15th day of June 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of MCDONALD CARANO LLP, and that on this 15th day of June 2023, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing properly addressed to the following:

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