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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LAS VEGAS REVIEW-JOURNAL; and THE ASSOCIATED PRESS;

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and

THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE;

Respondent,

VERONICA HARTFIELD, A NEVADA RESIDENT AND THE ESTATE OF CHARLESTON HARTFIELD and OFFICE OF THE CLARK COUNTY CORONER/MEDICAL EXAMINER;

Real Parties in Interest.

SUPREME COURT NO.: 75073

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT FOR CLARK COUNTY, NEVADA,

CASE NO.: A-18-768781-C

Hon. Richard F. Scotti

[PROPOSED] BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE NEVADA PRESS ASSOCIATION

(In Support of Petitioners for Vacating District Court Order)

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

2. The Nevada Press Association is a non-profit organization.

3. No law firm or lawyer has appeared for the *amici* below; the only law firm and lawyer appearing for *amici* in this case is:

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Dated: February 14, 2018

/s/ Marc J. Randazza
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INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today it provides *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Nevada Press Association is the formal trade organization for the newspaper industry in Nevada. It is a voluntary nonprofit association that represents 6 daily and 37 non-daily newspapers in Nevada, as well as 4 online news services.

As organizations that advocate on behalf of journalists and news organizations, *amici* are deeply alarmed about the prior restraint imposed on the Las Vegas Review-Journal (the "Review-Journal") and the Associated Press (the "AP") (collectively, the "Media Parties") in this case. *Amici* write to stress the importance of public access to autopsy reports, the unjustified nature of the prior restraint imposed by the district court, and the potential impact of the district court's decision on public records requesters. As required by Nevada Rule of Appellate Procedure 29(a), *amici* have filed a motion for leave of court to file this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

This case concerns whether a district court may bar the Media Parties from reporting on a public record they obtained through a Nevada Public Records Act (the "NPRA" or the "Act") request and order the Media Parties to destroy the record. A Nevada district court held that redacted, anonymized autopsy reports of the 58 victims of the October 1, 2017, shooting in Las Vegas must be disclosed under the NPRA to the Media Parties. After the autopsy reports were disclosed to and reported on by numerous news organizations, Mrs. Hartfield and the Estate of Charleston Hartfield (collectively, the "Hartfield Parties") filed a lawsuit seeking a declaration that Mr. Hartfield's autopsy is not a public record and an injunction seeking the return of the autopsy and a gag order barring the Media Parties from reporting on it. The Eighth Judicial District Court (the "district court") granted the Hartfield Parties' request for injunctive relief and prohibited the Media Parties from "disclosing, disseminating, publishing, or sharing" Mr. Hartfield's redacted, anonymized autopsy report and requiring the Media Parties to destroy it.[1] Order on Counter-Mot. to Dissolve TRO and Opp'n to Ex Parte Appl. for TRO/Mot. for

[1] Alternatively, since the Media Parties do not know which anonymized autopsy report belongs to Mr. Hartfield, the Media Parties are required to either collect and return all 58 autopsy reports to the coroner's office (and request that the coroner re-send a new set of reports without Mr. Hartfield's report) or allow a representative from the coroner's office to review the records at Petitioners' offices and destroy the applicable report. District Court Order at 6–7.

Prelim. Inj., *Hartfield v. Office of the Clark Cty. Coroner*, Case No. A-18-768781-C at 7 (Eighth Judicial District Court, Feb. 13, 2018) (the "District Court Order").

Amici have tremendous sympathy for the Hartfield Parties and the immense tragedy Mrs. Hartfield, her children, and the city of Las Vegas, have suffered. It is understandable that Mrs. Hartfield seeks to shield herself and her family from any further pain that might be caused by reading about her husband's death in the media. However, in seeking to protect Mrs. Hartfield from this pain, the district court has ignored decades of established precedent under the First Amendment, protecting the flow of information to the public, and issued a gag order that is plainly unconstitutional. This order should be vacated.

ARGUMENT

I. The public has a strong interest in access to anonymous autopsy reports related to national tragedies like mass shootings.

There is significant news value in reporting on anonymous autopsy results, particularly those related to stories affecting a community as deeply as the October 1 mass shooting did in Las Vegas. When autopsy reports are released and reported on by the news media, the public can scrutinize the performance of government officials and learn how to improve public policies and prevent future deaths.

Most immediately, this transparency boosts the public's confidence in the work of county medical examiners. The public often depends on the office of the

coroner and the medical examiner to provide answers when someone dies of unnatural causes, especially in high-profile circumstances like a mass shooting. *See People v. Dungo*, 55 Cal. 4th 608, 621, 286 P.3d 442, 450 (2012), *as modified on denial of reh'g* (Dec. 12, 2012) (noting that "an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media"). Access to the autopsy reports themselves, rather than just a coroner-provided list of causes of death, helps the public inspect and understand those findings. Further, the coroner's office is a tax-payer funded entity, *see* Clark County Code §§ 2.12.020, .250 (establishing the coroner's office and setting responsibilities of the medical examiner), and the public has a strong interest in ensuring it is functioning properly. *See Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388, 401 (Fla. Dist. Ct. App. 2002) ("[T]he public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion.").

The information from autopsy reports also allows the public to ensure the medical examiner's findings match the account told by public officials, including the police. In some cases, these reports have shown that the official account provided to the public was not accurate. *See Autopsy Photos Are Often Used to Refute Official Conclusions*, News Media & The Law, Spring 2001, https://perma.cc/ZP99-LZXC (listing a dozen examples in which autopsy reports

exposed inaccuracies in official accounts of deaths, from prisoners to an airline passenger). For example, when a Chicago police officer shot and killed 17-year-old Laquan McDonald in 2014, police told the public that McDonald died of a gunshot wound to the chest after he lunged at the officer with a knife. Jamie Kalven, *Sixteen Shots: Chicago Police Have Told Their Version of How 17-year-old Black Teen Laquan McDonald Died. The Autopsy Tells a Different Story*, Slate, Feb. 10, 2015, https://perma.cc/Y5CA-388S. The autopsy report, obtained later by a journalist through a public records request, showed that McDonald was shot by police sixteen times, in different areas of the body and from different angles. *Id.* This information sparked a public debate about the case, and was partly responsible for a federal investigation of the Chicago police department. James Warren, *How the Media Blew Reporting the Chicago Cop's Shooting of a Teen*, Poynter, Nov. 25, 2015, https://perma.cc/47VL-9P2A.

Autopsy reports in the aggregate can also help experts and officials spot trends, which could improve responses to future tragedies. *See Dungo*, 55 Cal.4th at 625, 286 P.3d at 453 (Werdegar, J., concurring) (noting that autopsies "protect[] the public interest and provide[] the information necessary to address legal, public health, and public safety issues in each case") (citation omitted). These reports may inform the way government officials and the public respond to future incidents of mass shootings or other catastrophes. If a significant number of victims of a mass

shooting, for example, died from injuries sustained from a panicked crowd, event organizers and fire marshals across the country could use that information to change venue designs and emergency procedures. Such information is more likely to be recognized and effectively put to use to save lives if it is shared broadly. Alternatively, if autopsy reports show that victims died because they did not receive adequate or timely medical care, for example, that would also be of great interest to the public. It could assist emergency personnel in other cities as they prepare for catastrophic events. Such detailed information and trends about how victims died is more likely to be gleaned from autopsy reports, rather than a simple list of the victims' primary cause of death. *See* I PA033[2] (describing the contents of an autopsy report).

II. The First Amendment's guarantee of a free press and heavy presumption against prior restraints outweigh any purported privacy concerns here.

The district court's order barring the Media Parties from "disclosing, disseminating, publishing, or sharing" a redacted, anonymized autopsy report that has already been lawfully released by the coroner's office (and widely reported on by the news media) and requiring them to destroy it is an unconstitutional prior

[2] Citations to Petitioners' Appendix ("PA") refer to both the volume and page numbers. For example, "I PA033" refers to volume I of the Petitioners' Appendix at page 033.

restraint. To allow this prior restraint to stand would defy decades of well-established U.S. Supreme Court case law, send a chilling message to the press and the public by calling into question the news media's ability to report on public records, and provide virtually no protection for the asserted privacy interests at stake, since the media has already reported on the anonymized autopsy report at issue (along with the 57 other such reports).

The Supreme Court has long recognized that this type of government ban on speech is a prior restraint that is only permissible in the rarest of circumstances. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (a prior restraint is "the most serious and the least tolerable infringement on First Amendment rights"); *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (emphasizing the heavy burden that the government carries in justifying prior restraints on speech); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (a prior restraint on speech bears a "heavy presumption against its constitutional validity"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). Prior restraints are particularly oppressive because they prevent the restricted information from being heard or published at all and are therefore the most direct attack on the marketplace of ideas. *See Neb. Press Ass'n*, 427 U.S. at 559.

The damage is "particularly great," where, as here, "the prior restraint falls upon the communication of news and commentary on current events." *See id.*

Reporting on the anonymized autopsy records of people killed during the nation's deadliest mass shooting provides important information to the public, enabling it to understand how people died, helping it assess the response of government officials, and informing future plans to prevent loss of life during catastrophic events. *See supra* Section I. Thus, the district court's gag order impairs the public's right to receive information as well. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (freedom of speech "necessarily protects the right to receive" information and ideas).

By contrast, the privacy interests asserted here are minimal. As an initial matter, the Clark County District Attorney's office reviewed the autopsy reports and anonymized them, redacting any information that could potentially be used to identify the victims: not just their names, but the coroner's case numbers, age, race, and toe tag numbers. I PA001. Thus, the reports only included such information as "location of wounds, the time and date of death, and the time and date the autopsies were performed." Anita Hassan & Rachel Crosby, *Coroner Releases Autopsy Reports of 58 Victims from Las Vegas Shooting*, Las Vegas Review-Journal, Jan. 31, 2018 (I PA003). Since no information from these reports is connected to any individual victim, it is unclear how *any* privacy interests are at

stake. Notably, neither the district court nor the Hartfield Parties have asserted that any of the information reported from the autopsy records has been matched back to any specific victim.

Even more fatal to the district court's gag order, the Media Parties lawfully obtained the anonymized autopsy reports from the coroner's office pursuant to a court order (*see* II PA247 ¶ 60), and the press has already reported on them. *See* Emergency Pet. for Writ of Prohibition or in the Alternative Mandamus Pursuant to NRAP 21 and 27(e) at 14, n.2 (the "Petition"); Hassan & Crosby, *supra*, at I PA002. It is well-established that the First Amendment does not permit recovery of damages against the press for disclosing facts that are a matter of public record, as they are here. *Cox Broad. Co. v. Cohn*, 420 U.S. 469 (1975) (vacating a civil damages award against a TV station for broadcasting the name of a rape-murder victim that the station had obtained from courthouse records). Certainly, then, the First Amendment precludes the more extreme remedy of a prior restraint barring such disclosure altogether. Tellingly, the district court's gag order did not cite a single case to support the proposition that privacy interests could warrant the imposition of a prior restraint on speech regarding lawfully obtained public records.

Aside from First Amendment concerns, the gag order's reliance on vague privacy interests is also flawed. Nevada law recognizes a "public records defense" to invasion of privacy claims where a defendant can show that the disclosed

information is contained in a court's official records, and thus the plaintiff lacked an objective expectation of privacy in the information. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 734 (Nev. 2017) (plaintiff could not recover for invasion of privacy based on disclosure of his name, address, and social security number, since the information was already publicly available) (citing *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983)). This principle should apply with even greater force here, where the information came from public records disclosed pursuant to a court order, these records have already been reported on in the media, and they do not contain any personally identifiable information.

The district court's gag order also fails as a matter of law by improperly placing the burden on the Media Parties to prove the need for "dissemination and/or publication." District Court Order at 5. It is well-established that the party seeking to enjoin another's speech carries this heavy burden. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (Blackmun, Circuit Justice 1994) (granting emergency stay of preliminary injunction where party seeking to prohibit TV network from airing video footage failed to satisfy its rigorous burden justifying this prior restraint). In addition, the district court's reliance on *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476 (D.D.C. 1994), a federal Freedom of Information Act ("FOIA") case, is improper. *Katz* was appealed to the D.C. Court of Appeals, where the court held that autopsy photographs and x-rays of former President John F. Kennedy after

he was assassinated were not "agency records" subject to disclosure under FOIA, but rather were personal presidential papers subject to restrictions on disclosure. *Katz v. Nat'l Archives & Records Admin.*, 68 F.3d 1438, 1441 (D.C. Cir. 1995). The analysis there has little bearing on this case, which concerns whether certain members of the press may be enjoined from reporting on the county coroner's anonymized autopsy reports that have been lawfully released to the press and already reported on.

The fact that the Media Parties are in the news business and seek to generate revenue from their reporting does not somehow render the district court's gag order permissible, as the Hartfield Parties suggest. *See* I PA019. As the U.S. Supreme Court has recognized, "If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels." *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 667 (1989); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (rejecting the argument "that the constitutional guarantees of freedom of speech and of the press are inapplicable" where the allegedly libelous statements were part of a paid ad).

Our Founders recognized the critical role the news media plays in our democracy: As Thomas Jefferson wrote, "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost." *Neb Press Ass'n*, 427 U.S.

at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954)). Gag orders such as this significantly limit the ability of the press to report on topics of public concern and thus threaten the liberty of the American people.

III. The district court's order undermines the right of access to public records under the Nevada Public Records Act.

Not only is the district court's order an impermissible prior restraint, but if upheld it will also create a procedural loophole that undermines the NPRA. The purpose of the NPRA "is to foster principles of democracy by allowing the public access to information about government activities." *Reno Newspapers v. Sheriff*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010) (citing Nev. Rev. Stat. § 239.001(1); *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000)). The Act "ensure[s] the accountability of the government to the public by facilitating public access to vital information about governmental activities." *DR Partners*, 116 Nev. at 621, 6 P.3d at 468.

To that end, the NPRA provides that, when a request for public records is denied, a requester may bring an action in district court to compel the disclosure of the record. *See* Nev. Rev. Stat. § 239.011(1). This is precisely what the Media Parties did: they submitted an application and petition under the NPRA asking the Eighth Judicial District Court to issue a writ of mandamus directing the coroner's office to produce the autopsy reports that they had requested and been denied. I

PA207. District Judge Timothy Williams considered the Media Parties' application and petition and the coroner's opposition—including concerns about the privacy of the victims—and determined that the records must be released. I PA186–PA192, I PA205–PA217. To address concerns about the victims' privacy, Judge Williams ordered that their names and other identifying information be redacted from the records. I PA191, I PA213, I PA216. In short, the Media Parties and Judge Williams followed the Act's provisions precisely.

After the release of the requested records pursuant to Judge Williams' oral order, the Hartfield Parties filed a Complaint for Declaratory and Injunctive Relief seeking a declaration that one of the requested records should not be disseminated under the NPRA and an injunction prohibiting the Media Parties from disseminating information from that record. *See* I PA008–PA012. Because the NPRA provides no mechanism for a lawsuit brought by a third party to prevent a governmental entity from releasing public records, the Hartfield Parties' Complaint is not permitted under the Act and should have been dismissed.

By its plain terms, the NPRA does not provide for a "reverse-NPRA lawsuit," *i.e.*, an action filed by a third party to prevent a governmental entity from disclosing the record under the Act. Several NPRA provisions make clear that the Act's intent is to allow requesters to bring suit for access to public records that government entities must defend. The NPRA provides a process only for *requesters* to bring

suit in district court to compel disclosure of public records. *See* Nev. Rev. Stat. § 239.011. In addition, the NPRA contemplates that a governmental entity—not a third party—will, if appropriate, advocate for the confidentiality of a record under the Act. *See* Nev. Rev. Stat. § 239.0113 (placing the burden on the governmental entity to prove that a public record is confidential in whole or in part); Nev. Rev. Stat. § 239.012 (providing that a public officer or employee who acts in good faith in disclosing information is immune from liability for damages to the person whom the information concerns).

In contrast to other states that have specifically allowed for reverse public record act lawsuits, *see, e.g.*, Wash. Rev. Code § 42.56.540 (permitting "a person who is named in [a public] record or to whom the record specifically pertains" to petition the superior court to enjoin public examination of a record); Tex. Gov't Code Ann. § 552.325 (enabling "[a] governmental body, officer for public information, or other person or entity" to file suit "seeking to withhold information from a requestor"), the Nevada Legislature has taken no steps to allow or approve reverse-NPRA actions. Nor has the Nevada Legislature set forth any procedures to be used in reverse-NPRA lawsuits or protections for requesters whose requests spur a reverse public records act suit. *Cf.* Wash. Rev. Code § 42.56.540 (establishing procedures for notification of third parties to whom a requested record pertains and the standard for review for actions for injunctions brought by third parties); Tex.

Gov't Code Ann. § 552.325 (prohibiting reverse public records act lawsuits from being brought against requesters and requiring that requesters be notified and permitted to intervene in such lawsuits).

The action brought by the Hartfield Parties is, essentially, a reverse-NPRA lawsuit. It seeks a declaration that one of the records disclosed to the Media Parties is not available under the NPRA and an injunction prohibiting its dissemination. Because the plain language of the NPRA does not provide for reverse-NPRA lawsuits, the Hartfield Parties' action should not have been permitted. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) (stating that "when a statute is clear and unambiguous" the court "give[s] effect to the plain and ordinary meaning of the words . . .").

Allowing a reverse-NPRA action, especially in the absence of statutory authority setting forth clear procedures for such a lawsuit, will have a chilling effect on requesters that is detrimental to the public's right of access to government records. Reverse-NPRA actions would expose any member of the public to the risk of a lawsuit simply for filing a public records request. Requesters who cannot afford to defend a reverse-NPRA lawsuit, even if they may recoup their fees if they prevail, will be deterred from requesting records in the first instance. In addition, even if a requester makes a request, if she cannot oppose the reverse-NPRA lawsuit for whatever reason, the public's right of access will be left undefended in court.

Here, the Media Parties followed the NPRA's procedures and obtained a court ruling entitling them to access to the autopsy reports. Although the precise argument later raised by the Hartfield Parties may not have been before Judge Williams, he did consider and account for the privacy interests of the victims in ordering the redaction of the autopsy reports. The district court should not have allowed what amounts to a reverse-NPRA action to challenge, for a second time, after it had been properly decided, the Act's application to the autopsy records.

CONCLUSION

For all of these reasons, this Court should grant Petitioner's emergency petition and vacate the district court's unconstitutional gag order.

Dated February 14, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Amicus Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Amicus Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I further certify that this Amicus Brief complies with formatting requirements of NRAP 32(a)(4) and with the type-face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Amicus Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Finally, I certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) as it contains 3,810 words.

Dated: February 14, 2018

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. Proc. 25(b) and NEFR 9(f), I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Nevada Supreme Court by using the NEVADA ELECTRONIC FILING RULES ("Eflex"). Participants in this case who are registered with Eflex as users will be served by the Eflex system as follows:

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