

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE ZUSI, an individual; VICKI DE LA
TORRE, an individual; and SYDNEY
GORDON, an individual,
Appellants,

vs.

STEVE SISOLAK, in his capacity of
Governor of the State of Nevada; and
AARON FORD, in his capacity as
Attorney General of the State of
Nevada,
Respondents.

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District Court of Clark County, Nevada

APPELLANTS' OPENING BRIEF

MARK FERRARIO (NV Bar No. 1625)
TAMI COWDEN (NV Bar No. 8994)
GREENBERG TRAUERIG, LLP
10845 Griffith Peak Dr., Suite 600
Las Vegas, NV 89135
(702) 972-3773

DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

Counsel for Appellants

CORPORATE DISCLOSURE

Because the appellants are individuals, no corporate disclosure is required under NRAP 26.1.

The appellants were represented by the following law firm in the proceedings below: Greenberg Traurig, LLP.

Respectfully submitted,

/s/ Tami Cowden

MARK FERRARIO (NV Bar No. 1625)
TAMI COWDEN (NV Bar No. 8994)
GREENBERG TRAURIG, LLP
10845 Griffith Peak Dr., Suite 600
Las Vegas, NV 89135
(702) 972-3773

/s/ Deepak Gupta

DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

Counsel for Appellants

Dated: March 26, 2019

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INTRODUCTION

In 2016, the voters of Nevada approved the Background Check Act via ballot initiative. The purpose: to close a loophole in federal law that lets people who are not licensed firearms dealers sell or transfer guns without a criminal background check on the gun's prospective purchaser.

With the passage of the Background Check Act, Nevadans expected that people trying to buy a gun from a gun show or over the Internet would now have to pass the same criminal background check that a buyer must pass before obtaining a gun from a licensed firearms dealer. And, to ensure that the Act's provisions would not be held up by legal challenges, it included a severability provision declaring that if any portion of the Act was held invalid or unconstitutional, "such invalidity or unconstitutionality shall not affect the validity or constitutionality of . . . any provision or application of this act which can be given effect without the invalid or unconstitutional provision," and the invalid provisions "are declared to be severable." JA76.

But, contrary to the expectations of Nevada's electorate, the Background Check Act has *never* been enforced in the two years it has been in effect, and unlicensed firearms sales in Nevada have continued with no requirement that the buyer's criminal record be investigated. This result was blessed by former Governor Sandoval and former Attorney General Laxalt who, rather than implement the law,

declared the Background Check Act void and unenforceable. As justification for thwarting the will of the voters, these executive officials relied on a section of the Background Check Act that specifies that the background checks required by the Act will be carried out through the FBI rather than through Nevada's Department of Public Safety. According to then-Governor Sandoval and then-Attorney General Laxalt, the FBI refuses to conduct the necessary background checks and the State cannot force the FBI's hand. The lower court agreed, holding that the law is unenforceable as written because the FBI will not change course.

If that conclusion is true, then the solution is obvious: the Background Check Act's FBI-enforcement provision is unenforceable, and thus invalid, and must be severed. Nevadans clearly expressed their intent to have any invalid portion of the law severed. The remaining law would be easily enforced by the Nevada agency already responsible for conducting all other background checks related to gun sales in the state. And severing *who* conducts the background checks preserves the "central component" of the law, which is the background-check requirement itself. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 517 (2009). As a result, severing the portion of the Act that requires FBI involvement would be consistent with the clear intent of voters to ensure that guns do not get into the wrong hands regardless of who is selling those guns.

JURISDICTIONAL STATEMENT

The district court issued its order denying petitioners' petition for writ of mandamus and granting defendants' motion to dismiss on August 20, 2018. JA530–51. The order is a final judgment appealable to this Court pursuant to Nevada Rule of Appellate Procedure 3A(b)(1). The appellants timely filed a notice of appeal on September 19, 2019. JA553–54.

ROUTING STATEMENT

This Court presumptively retains this appeal because the questions presented are matters of statewide public importance. NRAP 17(a)(12). The case concerns the enforcement of a ballot initiative approved by Nevada's voters, and whether a portion of that statute should be severed to allow the rest of the statute to go into effect. Additionally, the case concerns whether, and under what circumstances, the Governor of Nevada may decline to enforce an initiative passed by the state's citizens. These are issues that should be resolved by the highest court of the state.

ISSUES PRESENTED FOR REVIEW

1. The former Governor and former Attorney General claimed, and the district court found below, that the Governor cannot implement a state law passed by ballot initiative because a federal agency refuses to assist in its enforcement. Can the provision of the law requiring federal action be severed, thereby allowing the

same action to be conducted by a Nevada state agency responsible for all similar actions in the state?

2. In the alternative, if the state law as presently written *can* be enforced by the Governor, should this Court issue a writ of mandamus ordering the Governor to take action necessary to implement the validly enacted Nevada law?

STATEMENT OF THE CASE

Following Nevada's adoption of the Background Check Act via ballot initiative in 2016, employees of the Nevada Department of Public Safety had conversations with the FBI about implementation of the new law. Under the Act, unlicensed sellers of firearms in Nevada are required to go to licensed firearms dealers to request background checks through the FBI before a transfer of a firearm can occur. The FBI opined that it was not legally required to conduct such background checks and therefore would not conduct them. Governor Sandoval and his administration, acting on an opinion issued by Attorney General Laxalt, concluded that the Background Check Act was unenforceable solely because of the FBI's refusal to conduct the required background checks and failed to take the necessary steps to implement the Act.

The appellants, Nevada taxpayers who worked to get Question 1 passed and voted in favor of the law, filed this lawsuit in the district court, seeking a writ of mandamus compelling the former Governor to implement the Act or, in the

alternative, a declaratory judgment that the statute as written is impossible to enforce and is therefore invalid insofar as it requires the FBI to perform the background checks mandated by the statute. The district court denied the petition for mandamus and granted the defendants' motion to dismiss the claim for declaratory judgment.

STATEMENT OF FACTS

I. The national background-check framework

For decades, federal law has required that federally licensed firearms dealers conduct a criminal background check before selling or transferring a gun to an individual. These criminal background checks help ensure that firearms do not end up in the hands of people who have committed certain crimes, and who are therefore prohibited by state or federal law from possessing a gun.

All background checks must search the FBI's National Instant Criminal Background Check System (NICS). JA531; 28 C.F.R. § 25.1; *see also About NICS*, Fed. Bureau of Investigations, <https://bit.ly/2TqF1el>. But states get to choose who conducts the federally-mandated background checks for that state: the checks can either be performed directly by the FBI, or, alternatively, states can choose to designate one of their own state-level agencies as the point of contact (POC). JA532; 28 C.F.R. §§ 25.2, 25.6. A state POC can check both the federal NICS database and state databases to determine if prospective gun buyers have committed a disqualifying crime, have been committed to a mental health

facility, or are otherwise unable to legally purchase a gun. States can also choose to become a “partial POC” state, in which case some background checks are conducted by a state POC and others are conducted by the FBI directly.¹ *Permanent Brady State Lists*, Bureau of Alcohol, Tobacco, Firearms & Explosives, <https://bit.ly/2FB44Tx>. According to present figures, thirty-three states and territories have all federally-required background checks go through the FBI, twelve states rely exclusively on a state POC to conduct the checks, and nine have adopted some form of partial POC status. *Id.*

While federal law requires a criminal background check before any licensed firearms dealer sells or transfers a gun, it does *not* require a background check before unlicensed sellers sell or transfer a weapon. JA67; JA531. As a result, individuals with a criminal record can simply buy a firearm at a gun show or from someone they meet over the Internet without ever having a background check conducted on them.

Although federal law does not require background checks for unlicensed transfers of firearms, the federal government has long encouraged and

¹ The majority of partial POC states divide the responsibility for background checks based on type of firearm, with the state POC conducting background checks for handgun sales and the FBI’s NICS Section handling background checks for long guns. *See Permanent Brady State Lists*. Other partial POC states divide responsibility for background checks based on the type of store in which the sale takes place or the type of handgun license the buyer possesses. *Id.*

authorized background checks on such unlicensed sales, whether done on a voluntary basis or required by state law. JA170–83. The Bureau of Alcohol, Tobacco, Firearms, and Explosives, for example, advises a licensed firearms dealer to conduct background checks on gun purchasers who are part of an unlicensed transfer if the parties appear at the dealer’s location. JA177–78. The dealers are told to contact either the FBI or the state POC and follow the same procedures as if the dealer were the original seller of the firearm. *Id.*

Yet despite such federal encouragement, the unlicensed-sales loophole persists, and many unlicensed transfers of firearms are conducted without a background check. To eliminate this unlicensed-sales loophole, many states have enacted state laws to require background checks on gun sales by unlicensed sellers. *See, e.g.*, Cal. Penal Code §§ 27545, 27850–28070; Colo. Rev. Stat. § 18-12-112; Conn. Gen. Stat. §§ 29-33(c), 29-36l(f), 29-37a(e)-(j); Del. Code tit. 11, § 1448B, tit. 24, § 904A; N.Y. Gen. Bus. Law § 898; Or. Rev. Stat. § 166.435; R.I. Gen. Laws §§ 11-47-35 to 11-47-35.2; Rev. Code Wash. § 9.41.113; D.C. Code Ann. § 7-2505.02. Several of these states rely on the FBI’s NICS section to conduct all criminal background checks related to the transfer of a firearm—both those required by federal law and those required only by state law. *See* Del. Code tit. 11, § 1448B(a); N.Y. Penal Law § 400.00(4); N.Y. Gen. Bus. Law § 898(1). And Washington State, which is a partial POC state, conducts a portion

of background checks through the FBI before a firearms transfer between unlicensed, private parties. *See* Wash. Rev. Code § 9.41.113. The FBI has conducted these background checks that are required only by state law. *Permanent Brady State Lists*.

II. Nevada’s point-of-contact status and passage of the Background Check Act

In 1998, Nevada opted to become a POC state and designated the Nevada Department of Public Safety Central Repository (DPS) as its authorized POC. JA10. In addition to authorizing the Department of Public Safety to conduct all federally-required background checks, Nevada also authorized the Department to conduct a background check on any unlicensed firearms sale in the state if the unlicensed seller and buyer involved in the transfer requested such a check.

In 2013, the Nevada legislature sought to close the unlicensed-sales loophole and require background checks be conducted for any transfer of a firearm in the state. JA7; *see also* S.B. 221, 77th Leg. (Nev. 2013). The legislation passed the Nevada legislature but was vetoed by then-Governor Sandoval. JA7. In response, supporters of expanded background checks availed themselves of the state’s initiative process, qualifying the background check initiative for the 2016 ballot, as Ballot Question 1, the “Background Check Act.” *Id.* Section 2 of the Act listed several findings and declarations by the People of Nevada,

including:

To promote public safety and protect our communities, and to create a fair, level playing field for all gun sellers, the people of Nevada find it necessary to more effectively enforce current law prohibiting dangerous persons from purchasing and possessing firearms by requiring background checks on all firearms sales and transfers, with reasonable exceptions, including for immediate family members, hunting, and self-defense.

JA74.

The materials explaining the Background Check Act emphasized that the purpose of the legislation was to close the dangerous loophole that allowed unlicensed firearms transfers without a criminal background check. The packet accompanying the ballot initiative explained that the Act would “prohibit, except in certain circumstances, any person who is not a licensed dealer, importer, or manufacturer of firearms from selling or transferring a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee.” JA65. And the question on which Nevadans actually voted asked: “Shall Chapter 202 of the *Nevada Revised Statutes* be amended to prohibit, except in certain circumstances, a person from selling or transferring a firearm to another person unless a federally-licensed dealer first conducts a federal background check on the potential buyer or transferee?” *Id.*

The ballot initiative materials also explained a number of other details about the Act. This included the fact that the newly-required background checks would be conducted by dealers contacting the FBI directly rather than contacting

the state POC. *Id.* Voters were also informed that the licensed dealer could charge a reasonable fee for facilitating the transfer between unlicensed seller and buyer. *Id.* And they were told that the fiscal impact of Background Check Act could not be determined, because “[t]he Department of Public Safety has indicated that passage of Question 1 would require a renegotiation of POC status or the development of an alternative agreement with the FBI in order to accommodate the provisions of the question.” JA72–73.

Given the uncertainty over how the law would be implemented, the fiscal note identified three possible ways the Act could be enforced and assessed the economic impact of each. First, the State and the FBI could agree that the DPS would perform all of the background checks, even though the statutory text required the FBI to perform the checks. JA73. The note stated that this outcome “would result in no financial impact upon state government” because licensed dealers could charge a \$25 fee that would entirely defray the additional costs. *Id.* Second, the State and FBI could agree that the FBI would conduct unlicensed-transfer background checks while DPS conducted licensed-transfer background checks. *Id.* This arrangement would likewise have “no financial impact upon state government.” *Id.* Third, Nevada could become a full NICS state, under which the FBI would conduct *all* background checks. Doing this would cost the state approximately \$2.7 million in lost revenue per year. *Id.*

On November 8, 2016, Ballot Question 1 passed with the support of 558,631 Nevadans and became the binding law of this state. JA7, 12. As passed, it requires any unlicensed seller and buyer wishing to transfer a firearm to appear at a licensed firearms dealer. The firearms dealer then must “take possession of the firearm and comply with all requirements of federal and state law as though the licensed dealer were selling or transferring the firearm from his or her own inventory,” including conducting a criminal background check of the buyer. NRS 202.254(3). But instead of contacting the state POC, the dealer “must contact the National Instant Criminal Background Check System, as described in 18 U.S.C. § 922(t).” *Id.* 202.254(3)(a).²

The Act also includes a severability provision stating:

If any provision of this act, or the application thereof to any person, thing, or circumstance is held invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of this act as a whole or any provision or application of this act which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are declared to be severable.

JA76.³

² The provisions referencing the FBI and NICS are found at NRS 202.254(3)(a) and (4). These sections are referred to as “section 3(a) and section 4” throughout this brief. The provisions are located at section 7(3)(a) and (4) of the Background Check Act. JA76.

³ The full text of NRS 202.254 can be found in an Addendum to this brief. The Background Check Act is located at pages 74–76 of the Joint Appendix.

III. Governor Sandoval’s failure to implement the law

Following the passage of the Background Check Act, members of the DPS had several communications with the FBI regarding the Act’s implementation. Throughout these communications, the FBI made clear that it did not intend to conduct background checks related to unlicensed gun sales. In its estimation, because Nevada remained a “full POC” state, it would need 60 days’ notice if Nevada changed its status before it could begin honoring background check requests. JA209. Still, the FBI explained that, because it would require a “huge undertaking,” even if Nevada’s status changed, the FBI would not conduct NICS background checks. *Id.* The FBI saw the Background Check Act as creating a “new situation”—no other state required all federally-required background checks to proceed through the state POC while having all state-required checks proceed through the FBI. *Id.* The FBI told Nevada officials that the state POC could “provide a more comprehensive NICS check” than the FBI, and that it was therefore preferable for Nevada to conduct *all* firearms background checks through the DPS. JA123. In a PowerPoint created by Nevada’s General Services Division, state officials explained the “FBI’s stance” as:

- The FBI is not bound by State of Nevada law.
- As such . . .
 - The NICS Office will not accept phone calls/inquiries directly from Nevada’s licensed firearms dealers.
 - The NICS Office will refer any such calls to the State Point of Contact.

JA203.

The DPS requested an opinion from the Nevada Attorney General on how to proceed. On December 28, 2016, then-Attorney General Adam Laxalt issued a legal opinion declaring the Background Check Act unenforceable. JA13. The opinion relied on the FBI's stated rationales and agreed that the state could not dictate whether a federal agency would conduct background checks pursuant to state law. The Attorney General stated that, by requiring checks to go through the FBI, the Act "expressly requires what the FBI, at least at present, does not allow." JA114. According to the Attorney General's Opinion, the FBI's refusal to conduct background checks for Nevadans constituted an obstacle "wholly beyond the[] control . . . of the State itself," and thus the Act as written could not be enforced. JA117.

In response to the Attorney General's opinion letter, counsel for supporters of the Act prepared a legal memorandum outlining why the FBI's position regarding Nevada's POC status was erroneous. JA127-41. The legal memorandum also emphasized that the FBI was waiting on official action from the Governor explaining that Nevada had changed its status and become a partial POC state before recognizing that Nevada's POC status had changed. *Id.* This position was further supported by a letter the FBI sent to the DPS in early 2017, which stated that Nevada had elected in 1998 to become a full POC state and that the Background Check Act was "in conflict" with this status, thereby "preclud[ing] the FBI from conducting the

subject checks under the applicable federal regulation.” JA319.

For almost a year, then-Governor Sandoval took no further action to implement the Background Check Act. Then, in October 2017, following additional letters from counsel for the Act’s supporters and the tragic mass shooting that occurred in Las Vegas on October 1, 2017, the Governor wrote a letter to the Attorney General seeking “clarification” on whether Nevada could change its status to a partial POC state and inform the FBI of this development.

The Attorney General said yes. In a letter sent to Governor Sandoval, Attorney General Laxalt acknowledged that the Governor could request that the FBI run the background checks required by the Background Check Act. But, according to the Attorney General, the FBI was unlikely to care about this change: the FBI “has already repeatedly stated that it will not perform the checks required by Nevada law, because such checks are an inferior check to that performed by Nevada’s Central Repository and because state law cannot dictate how federal resources are used.” JA246.

Attorney General Laxalt neglected to comment on the legality of the FBI’s position. The Attorney General did not inform the Governor that the Act was written to eliminate any basis for the FBI to refuse the checks by requiring precisely what federal law already requires. Under the Act, because an unlicensed seller is required to give possession of the gun to a licensed dealer, that triggers the federal requirement

under the Brady Act that a background check be conducted before the licensed dealer can transfer the weapon to the buyer. *See* 18 U.S.C. § 922(t). Nevertheless, the Attorney General’s letter suggested the Governor could rely on the FBI’s representations without further action, stating: “how many times the State of Nevada should ask the FBI to change its position is undoubtedly a policy choice for the Governor to make.” JA246.

Then-Governor Sandoval sent one final communication to the federal government. JA442–43 (letter March 27, 2018 letter to the Director of the White House Office of Intergovernmental Affairs). The letter acknowledged that “the FBI does not recognize a ‘partial’ point of contact system on the basis of private party sales” and expressed the Governor’s “hope that the FBI would reconsider its position.” JA443. The letter concluded “If the position of the FBI should change, or there are any further actions Governor Sandoval could take to secure the cooperation of the FBI in enforcing the Background Check Act, please do not hesitate to contact me.” *Id.* No further communications between the Governor and any relevant federal agency have been documented in the record.

IV. The decision below

Less than three weeks after the tragic mass shooting in Las Vegas, Nevada, and after multiple requests to take action had been sent to then-Governor Sandoval with no responsive action, residents and taxpayers who worked to pass the

Background Check Act filed a petition for a writ of mandamus or declaratory judgment to see the Act finally implemented.

The district court denied the petition for mandamus and granted the respondents' motion to dismiss. JA530. It first concluded mandamus was inappropriate because the executive branch's communications with the FBI demonstrated that it had made "a real and substantial effort to implement the law." JA544. And, the court concluded, because the FBI had refused to comply with the Act's mandates, the Governor was absolved from taking further action; state officers "cannot commandeer the federal government, forcing it to run background checks required only by *state law*." *Id.*

Despite concluding that this aspect of the law was void and unenforceable, the district court nevertheless refused to sever the sections relating to the FBI's role. Citing *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894 (2006), and *Flamingo Paradise Gaming*, the district court stated that severability "require[d] an application of several factors including: (1) whether the primary purpose of the petition would be preserved, (2) the existence of a severability provision, and (3) whether severance would preserve the people's right to enact law through the initiative process." JA547. Although the court acknowledged that the Background Check Act includes an express severability provision, JA548, it nevertheless ruled that severance was inappropriate. In its view, because explanatory material

accompanying the Question 1 ballot initiative had included two references to the FBI, the “primary subject” of the Background Check Act was to “prohibit the private sale of firearms without first conducting a *federal* background check.” *Id.* For the court, severing the requirement that the FBI conduct background checks rather than the Nevada POC would therefore effectively gut the Background Check Act’s “central purpose of implementing federal NICS background checks at no cost to Nevada taxpayers.” JA550.

SUMMARY OF ARGUMENT

The former Governor, former Attorney General, and district court below all concluded that the Background Check Act as written is unenforceable because the FBI is unwilling to conduct state-mandated background checks, and state officials lack authority to compel federal action. If this conclusion is correct, then the portion of the Act requiring FBI action is unenforceable and invalid, and it should therefore be severed pursuant to the statute’s severability clause. On the other hand, if the conclusion of the executive officials and district court is incorrect, and the statute as written *is* enforceable, then the initiative’s proponents are entitled to a writ of mandamus compelling the Governor to enforce a valid law of the state of Nevada. Either way, the status quo—in which the Governor has effectively nullified the Act in its entirety solely because of the FBI’s forbearance with respect to one section—cannot persist.

1. If the Act’s requirement that the FBI conduct background checks for unlicensed transfers is unenforceable, then the portion requiring FBI action—section 3(a) and section 4’s reference to NICS—is invalid. Under the Act’s severability provision, any invalid portion of the law is to be “declared to be severable” and does not affect the validity of the other provisions of the Act. JA76. The rest of the Act remains legally enforceable. *Id.* Background checks preceding unlicensed firearms transfers would be conducted by the DPS, Nevada’s POC agency, in the same manner that background checks are conducted before licensed firearms dealers sell or transfer a weapon. That system, in fact, has already been approved by federal and state agencies, and under a recently-enacted law, will become the law of the State of Nevada in 2020 regardless of this suit.

Implementing the Background Check Act without the provision requiring the FBI to conduct the background checks is consistent with the intent of the voters who voted in favor of the Act. The primary purpose of the Act is to ensure that gun transfers occur only after a criminal background check, whether the transfer is between unlicensed, private parties or involves a licensed firearms dealer. This purpose is met no matter who conducts the checks. Indeed, both the text of the Act and the explanatory materials given to voters reflect this core objective and make almost no mention of who would conduct unlicensed-transfer background checks. The explanatory material even highlighted that the Nevada DPS alone might

ultimately conduct the background checks mandated by the Act. Voters thus approved the Act knowing that the FBI would not necessarily conduct any background checks for Nevadans. Nevada’s voters also made their intent clear by voting for an act that includes the above-mentioned severability provision, which this Court has recognized “expresse[s] a desire” by voters “to allow the initiative to proceed even without some sections.” *Heller*, 122 Nev. at 910.

Severing the invalid portion of the Background Check Act would further the public policy of “preserv[ing] the people’s constitutional right” to enact legislation through the initiative process, *id.* at 912, by implementing the majority of the initiative as approved by Nevada’s voters. And the Legislature and Governor have signaled that having DPS conduct the background checks is a desirable outcome by passing and signing a law that will require licensed dealers to conduct a background check through DPS prior to any unlicensed firearm sale in Nevada beginning in 2020. But Nevadans should not have to wait nearly a year for that outcome when the invalid provisions of the Background Check Act can be severed now, saving the rest of the law.

2. On the other hand, if the Act’s requirement that the FBI conduct background checks preceding unlicensed transfers *is* enforceable, then the Governor has a constitutional duty to see that the Act is enforced. In that case, the district court abused its discretion in concluding otherwise.

The Governor is obligated by the Constitution to see that the law of the State is faithfully executed. *State of Nev. Employees Ass'n v. Daines*, 108 Nev. 15, 21 (1992). Despite his constitutional duty to see that the Background Check Act is enforced, former Governor Sandoval refused to take a critical step—formally notifying the FBI that Nevada has become a partial POC state—that the FBI has expressly stated is needed before it would even consider conducting the background checks under the Act. The Governor refused to take this step even though Nevada has, by virtue of enacting the Background Check Act, already become a partial POC state. The Governor's decision not to take this expressly required step qualifies as constitutionally impermissible inaction. It does not matter that other steps might *also* be required—the Governor's discretion in how to enforce a law does not allow him to decide to simply not enforce it at all.

The Governor's reasons for not communicating the change in Nevada's POC status to the FBI were arbitrary and capricious and thus subject to mandamus action. The former Governor relied on the FBI's understanding of federal law that it need not conduct the checks. But the Governor cannot refuse to enforce Nevada state law based on another sovereign's legal interpretation. *State v. Dickerson*, 113 P. 105, 108 (Nev. 1910). Nor can the Governor reasonably rely on the FBI's plainly wrong interpretation of the law, which ignores the actual text of the Act requiring background checks to be conducted by a licensed dealer *after the dealer has taken*

possession of the firearm being transferred. In other words, because the background checks at issue *are* required by federal law, the Governor cannot rely on a a contrary view of law to refuse to act.

STANDARDS OF REVIEW

The district court’s decision to dismiss the action “is subject to a rigorous standard of review on appeal,” and its legal conclusions are reviewed de novo. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227–28 (2008) (citation omitted). The Court reviews questions of statutory construction de novo. *Johnson v. Wells Fargo Bank Nat’l Ass’n*, 382 P.3d 914, 916 (Nev. 2016). This Court reviews a district court’s decision denying a writ petition for abuse of discretion. *Kay v. Nunez*, 122 Nev. 1100, 1104 (2006). An abuse of discretion occurs “if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Jackson v. State*, 117 Nev. 116, 120 (2001).

ARGUMENT

I. The provisions of the Background Check Act requiring that criminal background checks be conducted by the FBI are severable.

The district court concluded below that the executive officials had provided “unequivocal evidence that the FBI both understood the requirements of The Background Check Act” and knowingly refused to provide those checks because it is a “blackletter legal realit[y]” that “the federal government cannot be compelled to

action by state law.” JA544. If this Court agrees, then the Background Check Act’s requirement that the FBI conduct background checks for unlicensed sales is plainly unenforceable, and thus invalid, and the Act’s severability provision is triggered. Language can be severed from a statute as long as two conditions are satisfied: first, “the remainder of the statute, standing alone, can be given legal effect,” and second, the remaining portion of the statute accords with the voters’ intent in enacting the statute. *Sierra Pac. Power v. State Dep’t of Tax.*, 130 Nev. 940, 945 (2014). Because severance would restore the statute’s validity and align the law with the voters’ intent, both criteria are met.

A. The remaining portions of the Background Check Act can be given legal effect.

It is undisputed that if section 3(a) and the reference to NICS in section 4 of the Act were severed, the remaining portions of the statute could be given legal effect. If those sections were severed from the statute, the remaining Act would simply require licensed dealers to conduct background checks on behalf of unlicensed, private parties through the Nevada DPS as they do when the background check precedes the sale of a firearm from the dealer’s own inventory. This is the exact system that the FBI has encouraged Nevada to adopt as the most effective means of providing background checks in its letters to the DPS. JA122–23. And the Nevada Legislative Counsel Bureau recognized in its fiscal assessment of Question 1—contained in the explanatory material provided to voters—that using DPS to

conduct background checks for unlicensed, private parties would be one method of implementing Question 1 if it was passed by the people of Nevada. JA73. The Nevada Legislature and current Governor likewise agree that using DPS to conduct background checks for unlicensed transfers would be legal—by recently passing and signing legislation mandating that just such a background check requirement be implemented, and that law will become effective in 2020. See Governor Signs Bill for Background Check, KOLO (Feb. 15, 2019), <https://bit.ly/2HIMq2d>; Nev. S.B. 143, 80th Leg. (Nev. 2019).

B. The remaining portions of the Background Check Act accord with the voters’ intent in passing the Act.

When determining whether portions of a statute or initiative can be severed, this Court has focused on whether enforcing the remaining portions of the statute would serve its “primary purpose” and would not remove a “central component” of the statute. *Flamingo Paradise Gaming*, 125 Nev. at 517. A law’s primary purpose need not be all-inclusive or defined at a high level of specificity: in *Nevadans for the Protection of Property Rights, Inc. v. Heller*, this Court determined that the “primary purpose of the petition” at issue in the case was the broad topic of “eminent domain” and held that portions of the petition not related to that general topic could be severed. *Flamingo Paradise Gaming*, 125 Nev. at 517 (summarizing holding of *Heller*). And in *Flamingo Paradise Gaming*, this Court concluded that the portion of the Nevada Clean Indoor Air Act that created criminal penalties for violations of the statute could be severed

from the statute's civil-enforcement mechanisms because the criminal penalties were not "central" to the legislative scheme. 125 Nev. at 517.

For ballot initiatives, this Court has recognized that it is more difficult to determine the voters' intent than it is to determine legislative intent for enactments of a statute. *See Sierra Pac. Power*, 130 Nev. at 944. As a result, to ascertain the voters' intent, courts must consider a number of factors. The first is the "primary subject" of the initiative itself. *Heller*, 122 Nev. at 907. An initiative's primary subject can be deduced from both the statute that will be enacted and from the explanatory text that accompanies the initiative. *See id.* (determining that the initiative's primary subject was eminent domain because "the vast majority of its [statutory] provisions address one subject" and "the description of the initiative's effect specifically state[d]" that it was intended to supersede certain "eminent domain actions").

Next, if the law "contains a severability clause," this is very strong evidence that severance of any invalid provisions is proper because the voters "have expressed a desire to allow the initiative to proceed even without some sections, and, in severing, this court need not speculate whether the [voters] would have [voted for] the petition in its severed form." *Id.* at 910. In addition, "strong public policy favors upholding the initiative power whenever possible," and as a result, courts "must make every effort to sustain and preserve the people's constitutional right to amend their constitution through the initiative process." *Id.* at 898, 912.

Here, all of the available evidence reflects that the voters intended for the Background Check Act to be enforced even if the required background checks for sales by unlicensed, private sellers were conducted by the DPS instead of the FBI.

1. The primary subject of the Background Check Act is ensuring that criminal background checks are conducted by someone before unlicensed firearms sales occur.

A canvas of both the Background Check Act’s statutory text and the explanatory materials that accompanied Question 1 demonstrate that the purpose of the Act was to ensure that anyone purchasing a firearm in Nevada would have to pass a background check before receiving said firearm. The choice of what specific agency would be responsible for conducting unlicensed-sale background checks was not central to the Act’s passage.

For starters, as in *Heller*, the “vast majority” of the Act’s provisions concern the enactment of background checks generally without regard to who will conduct the check. 122 Nev. at 907. The Background Check Act contained nine sections and amended NRS 202.254 with 5 new sections. JA74–76. The Act contains numerous definitions, exceptions to the background-check requirement for certain unlicensed, private transfers of firearms, and step-by-step guidance for how private parties must bring a firearm to a licensed dealer and what protocols the licensed dealer must follow. *Id.* In the three pages of text, only a single provision (section 3(a)) and a fleeting reference to NICS in section 4 concern which agency the licensed dealer must

contact to conduct a criminal background check.⁴ In light of the number of provisions focused on ensuring that the statute reasonably defines which unlicensed transfers require a background check and ensuring both private parties and licensed dealers know what duties they have under the Act, it cannot reasonably be said that the use of the FBI as contained in sections 3(a) and 4 of the Act is a “central component” of the statute.

What’s more, section 2 of the initiative itself described the Act’s purpose with no reference to the agency conducting the mandated background checks. It described the Act’s purpose this way:

To promote public safety and protect our communities, and to create a fair, level playing field for all gun sellers, the people of Nevada find it necessary to more effectively enforce current law prohibiting dangerous persons from purchasing and possessing firearms by requiring background checks on all firearms sales and transfers, with reasonable exceptions, including for immediate family members, hunting, and self-defense.

JA74. None of these purposes—promoting public safety, protecting Nevada’s communities, creating a level playing field for all gun sellers, or prohibiting dangerous persons from purchasing and possessing firearms—turns on *who* conducts the background check. Indeed, the former Attorney General and FBI both argued that because DPS background checks search both the federal NICS

⁴ The ballot question, as presented to voters, read: “Shall Chapter 202 of the Nevada Revised Statutes be amended to prohibit, except in certain circumstances, a person from selling or transferring a firearm to another person unless a federally-licensed dealer first conducts a federal background check on the potential buyer or transferee?” JA65.

database *and* state databases, conducting checks through DPS would *better* serve the initiative’s public safety goal. And conducting background checks through DPS would create a more “level playing field for all gun sellers” by requiring the same searches of the same federal and state databases through the same state agency whether the transferor was a licensed dealer or a private party.

The explanatory materials that voters received when considering Question 1 make clear that the Act’s central purpose was to guarantee that background checks occur without regard to *who* conducted them. The argument in favor of the ballot initiative described the purpose of Question 1 as “clos[ing] the loophole” that allows people to buy guns from an unlicensed seller without a criminal background check. JA67. It also made clear that the Act sought to “create a level playing field where everyone would have to follow the same rules, whether they buy and sell at a gun store, at a gun show, or using the Internet.” *Id.* As explained above, these purposes are served regardless of who conducts the background checks.

In contrast to these stated purposes, neither proponents nor opponents of the ballot initiative made an argument to the voters that it is important to have the FBI conduct the criminal background checks implemented by Question 1 rather than the DPS. Instead, the only mention of the FBI to be found in either the argument for or against Question 1 was the statement that “[n]o Nevada tax dollars will be used to conduct Question 1 background checks because the checks will be run by

the FBI.” JA68. Yet, this passage suggests that what mattered for some voters was whether the Act would *cost tax money*—not who conducted the background checks. Even so, this reference does not suggest that the cost of the bill’s implementation was a *primary* consideration for voters, and thus it does not alter the severability analysis.

Even if passing a bill with no cost were part of the voters’ primary purpose, the fiscal note attached to the ballot initiative informed voters that the DPS could conduct the unlicensed-transfer background checks instead of the FBI without costing the state government money, because “the \$25 fee imposed on the private-party background checks would be sufficient to defray these expenditures.” JA73. Voters who were concerned about costs would therefore not have been swayed one way or the other by the consideration of who was designated to conduct the background checks.

Finally, the fiscal note of the explanatory material, prepared by the state’s Legislative Counsel Bureau, informed voters that there were “three potential scenarios that could occur due to the implementation of Question 1.” *Id.* The very first scenario offered to voters involved the state and the FBI negotiating an agreement under which “the [DPS] [shall] perform all background checks.” *Id.* The uncertainty over who would conduct the background checks, the Legislative Counsel Bureau said, was due to the fact that Question 1’s passage would “require

a renegotiation of POC status or the development of an alternative agreement with the FBI.” JA72. In other words, voters were informed that, although the text of the statute stated that the FBI would conduct unlicensed-transfer background checks, in reality, it was possible that the state POC would ultimately have to conduct those checks. It thus blinks reality to conclude that it was the intent of voters to implement unlicensed-transfer background checks *only* if they were conducted by the FBI.

The district court largely ignored the overwhelming number of textual signals that Question 1’s primary purpose does not concern who conducts the required background checks. In its view, the primary purpose of the initiative was “to prohibit the private sale of firearms without first conducting a *federal* background check.” JA548. In reaching this conclusion, the court relied on two pieces of information from the ballot initiative: (1) the explanation provided to voters that the background check “would be conducted using the National Instant Criminal Background Check System and administered by the Federal Bureau of Investigations,” and (2) the ballot initiative’s statement that no Nevada tax dollars would be spent on new background checks “because the checks will be run by the FBI.” *Id.* (quoting JA66, 68).

Neither statement justifies the court’s conclusion that the FBI’s participation in the background check scheme could not be severed from the rest of the Act. Not only would it ignore the vast array of contradictory evidence from the Act and

explanatory materials—including a note that the DPS might conduct unlicensed-sale background checks and a stated purpose that makes no reference to the FBI—it also contravenes this Court’s precedents in *Heller* and *Flamingo Paradise Gaming*, which require only that the most “central component[s]” of an enacted initiative remain intact before severing an invalid portion of the statute. *Flamingo Paradise Gaming*, 125 Nev. at 517.

2. The severability provision contained in the Background Check Act reflects the voters’ intent to enact the statute even absent invalid provisions.

In any case, were there any doubt that section 3(a) and the reference to NICS in section 4 of the Background Check Act are severable, the Court need look no further than the Background Check Act’s severability clause. That provision allows *any* portion of the Act to remain in effect as long as it “can be given effect without the invalid or unconstitutional provision or application.” JA76. As a result, the Court “need not speculate whether the signatories would have signed the petition in its severed form” in this case. *Heller*, 122 Nev. at 910. The voters approved the Background Check Act with the express intent that any valid portion of it would be enacted. As the district court correctly acknowledged, the Background Check Act “contains a severability clause,” and this is a factor that “weighs in favor of severance.” JA548.

The severability provision undoubtedly applies in the present case if the Court

concludes that the Act’s requirement that the FBI conduct background checks for unlicensed transfers is unenforceable. By its terms, the clause applies if any portion of the law is deemed “invalid.” And the plain meaning of “invalid” includes if the portion is deemed unenforceable. Commonly understood, “invalid” means “without . . . force in fact, truth, or law.” *Invalid*, Merriam-Webster, <https://bit.ly/2jMMlgc>; *see also Invalid*, Black’s Law Dictionary, <https://bit.ly/2MjQ42g> (“not of binding force or legal efficacy”).

Moreover, this Court has recognized that when laws are “unenforceable,” they are “invalid” for purposes of analyzing the law’s severability. *See Home v. Mesquite*, 120 Nev. 700, 707 (2004) (per curiam) (affirming the lower court’s judgment that two ordinances were “invalid” because they contravened state statutes and were thus “unenforceable”). Other states have similarly interpreted “invalid” as “unenforceable.” *See, e.g., Hood v. Perry*, 75 Ga. 310, 311–12 (1885); *State ex rel. Mackenzie v. Casteel*, 11 N.E. 219, 223 (Ind. 1887). Many have concluded that a law is invalid if it cannot be executed, basing this conclusion on the longstanding maxim that “the law never requires impossibilities.” *See, e.g., Fisk Tire Co. v. Lanstrum*, 30 P.2d 84, 85 (Mont. 1934); *Howard v. Am. Boiler Co.*, 68 Ill. App. 566, 568 (1896); *Nixon v. State*, 68 Ala. 535, 536–37 (1881); *see also Davis v. Burton*, 278 P.2d 213, 218 (Mont. 1954) (declaring contract invalid based on impossibility of performance); *Bower v. Repsher*, 2 Walk. 387, 391 (Penn. 1883) (same). If the Governor cannot

implement the Background Check Act's requirement that the FBI conduct background checks for unlicensed firearms transfers, then that requirement is invalid. The voters of Nevada have deemed it proper to sever that provision if the Court deems it unenforceable.

3. Public policy favors enforcing the valid portions of the Background Check Act.

Additionally, "the people's constitutional right to amend their constitution through the initiative process" would be best served by severing the invalid portions of the Background Check Act and enforcing the remaining provisions. *Heller*, 122 Nev. at 912. The people of Nevada have already voted in favor of enacting the Background Check Act. The Court should give effect to that vote to the greatest degree possible and enforce all portions of the statute that are valid. As a result, should the Court conclude that the Governor cannot enforce the Background Check Act as currently written because of the FBI's refusal to comply, the Court should sever the requirement that the FBI conduct background checks on behalf of Nevada and uphold the validity of the rest of the Act.

It would run counter to the voters' will to deem the entirety of the Background Check Act unenforceable based on a federal agency's actions when the Act can be carried out by a state agency. Both the Nevada Legislature and the current Governor have recognized this fact and have passed and signed SB 143, which enacts all of the Background Check Act, except that it requires background checks

related to unlicensed transfers be conducted by DPS rather than by the FBI. This law is set to go into effect on January 2, 2020. But there is no reason Nevadans should have to wait nearly a year for their choice to enact unlicensed-transfer criminal background checks to be given effect. That result is proper now by enforcing all valid portions of the Background Check Act.

4. Severing the invalid portion of the Background Check Act avoids constitutional concerns.

Severing section 3(a) and a portion of section 4 would also allow this Court to avoid wading into the question of mandamus and its attendant danger of upsetting the separation of powers within the state. In *Rogers v. Heller*, a Justice of this Court acknowledged that it may be appropriate to sever portions of a statute that raise questions about the separation of powers. 117 Nev. 169, 181 n.6 (2001) (Rose, J., dissenting) (favorably citing *Citizens Clean Elections Commission v. Myers*, 196 Ariz. 516 (2000)). And as the district court acknowledged, the mandamus petition in this case potentially raises just such a concern. JA540. As a result, the Court should sever the invalid portions of the Background Check Act to avoid having to rule on a petition that may raise constitutional concerns.

The upshot: all of the relevant circumstances demonstrate that this Court can sever the requirement that the FBI conduct the background checks mandated by the Background Check Act while upholding the will of Nevada's voters.

II. In the alternative, if the FBI background-check provision is enforceable, then the district court abused its discretion in denying mandamus.

If this Court rejects the conclusion that the Background Check Act as written is unenforceable and thus invalid, then it should instead reverse the district court’s denial of the mandamus petition. In other words, if the Background Check Act is—contrary to the repeated claims of Nevada’s executive officials and the district court’s conclusion—fully enforceable, then the former Governor impermissibly abdicated his constitutional duty to enforce that law and an order should issue from this Court directing the current Governor to do so.

Mandamus is “available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 197 (2008); *see also* NRS 34.160. In order to justify the issuance of a writ of mandamus, a petitioner must demonstrate one of two scenarios. First, the petitioner may show that the respondent had a legal duty by virtue of his office but failed to perform in accordance with that duty. *State v. Gracey*, 11 Nev. 223, 233 (1876). Second, mandamus is proper if the petitioner demonstrates that the respondent had discretion to act but exercised that discretion in a manner that was arbitrary and capricious. *Int’l Game Tech.*, 124 Nev. at 197. “An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on

reason and capricious if it is contrary to the evidence or established rules of law.” *Nev. Dep’t of Pub. Safety v. Coley*, 368 P.3d 758, 760 (Nev. 2016) (citation omitted). Here, on the assumption that the FBI background-check provision is fully enforceable, both standards for mandamus are met.

First, the former Governor failed to fulfill his constitutional duty to faithfully execute the laws of Nevada. Under the Nevada Constitution, the Governor has a duty to “see that the laws are faithfully executed.” Nev. Const. art. 5, § 7; *accord Daines*, 108 Nev. at 21 (recognizing the Governor’s “constitutional duty to see that the laws enacted by the legislature are faithfully executed”). Accordingly, once a law is passed, the Governor must enforce that law. *Daines*, 108 Nev. at 21 (recognizing that “the supreme executive power of the State of Nevada” does not include “the power to disregard acts of the legislature”).

Governor Sandoval failed to faithfully execute the Background Check Act by refusing to officially inform the FBI that Nevada has become a partial POC state and take other reasonable steps to convince the FBI to enforce the law. The FBI repeatedly suggested that it had not recognized a change in Nevada’s status from full POC state to partial POC state and thus would not conduct the state-mandated background checks for unlicensed transfers. JA164–65, 209. The FBI also explicitly told the DPS that DPS could inform the FBI if Nevada changed to partial POC status. JA209. And, by virtue of the passage of the Background Check Act, Nevada’s

status *had already* been altered to become a partial POC state. *See* 28 C.F.R. § 25.2 (recognizing that a state’s status can change by statute as well as regulation or executive order). Accordingly, the former Governor needed to attempt to implement the Background Check Act by formally informing the FBI of Nevada’s changed status, which the FBI repeatedly demonstrated it had not yet recognized. The former Governor’s refusal to attempt to enforce the law by informing the FBI of the status change allowed for the failure of implementation of the Background Check Act, and thus amounted to a constitutionally impermissible failure to ensure that the law is faithfully executed.⁵

Alternatively, mandamus is proper here because the reasons why the former Governor chose not to officially inform the FBI of Nevada’s partial POC status were arbitrary and capricious. The Governor refused to take further action to implement the Background Check Act based on the FBI’s letters stating its legal position that the FBI was not required to perform background checks arising from an unlicensed

⁵ The former Governor and former Attorney General suggested that the FBI would not have changed its position even if it was formally informed of this change because it refused to honor state-mandated background checks as long as it was not required to perform any federally-mandated background checks. JA262–76. This does not change this Court’s analysis. At most, this amounts to an argument that informing the FBI of a change in Nevada’s status was a necessary but not sufficient step to implementing the Background Check Act. This does not alter the fact that the Governor was obligated to continue taking reasonable steps to enforce a valid law of the state, which is precisely what the second part of the mandamus petition requests. JA18.

transfer of firearms in Nevada because those background checks were required only by state law and not federal law. JA113–19, 122–23. But the Governor was not entitled to rely on the FBI’s legal interpretation of its duties under federal or state law. *See Dickerson*, 113 P. at 108 (issuing writ of mandamus ordering the Governor to accept bonds that had been declared void by the state of North Carolina because the legality of the bonds was “not properly for the executive to determine” and such “grave judicial questions” as the bonds’ validity needed to be “determined in an action between the state of Nevada and the state of North Carolina, in which the latter would be entitled to appear and defend”). The Governor’s reliance was particularly unjustified because, as he had been informed multiple times in legal memoranda prepared by the Act’s supporters, the Act was written to make checks for unlicensed sales mandatory under federal law by requiring that unlicensed sellers transfer possession of the gun to a licensed dealer before consummating a sale, thereby triggering the federal requirement that the licensed dealer conduct a background check on the prospective purchaser. *See* 18 U.S.C. § 922(t); *see also* JA76.

The district court abused its discretion in concluding that a writ of mandamus should not issue. The district court reasoned that because the Governor had discretion in how to implement the Background Check Act, the court “ha[d] authority to issue mandamus only if the executive branch has failed to take *any* action.” JA543 (emphasis added). This conclusion rests on the faulty assumption that

the Governor's constitutional obligation is merely to act. It is not. The Governor is obligated to see that the law is actually "executed." Nev. Const. art. 5, § 7. As a result, the Governor does not have discretion to cease acting before the law is actually implemented. At a minimum, where, as here, there was a clear step that would have facilitated the law being implemented, and where the ostensible obstacle to implementation was based on a flawed reading of the interplay of state and federal law, the Governor lacked discretion to decline to take that step and any other reasonable steps to further ensure implementation. In the alternative, the Governor's decision not to take the necessary step (and other reasonable steps required thereafter) was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the district court's order denying declaratory relief and a writ of mandamus should be reversed.

Respectfully submitted,

/s/ Tami Cowden

MARK FERRARIO (NV Bar No. 1625)
TAMI COWDEN (NV Bar No. 8994)
GREENBERG TRAUIG, LLP
10845 Griffith Peak Dr., Suite 600
Las Vegas, NV 89135
(702) 972-3773

/s/ Deepak Gupta

DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

Counsel for Appellants

Dated: March 26, 2019

CERTIFICATE OF SERVICE

This is to certify that on March 26, 2019, a true and correct copy of the foregoing **Appellant's Opening Brief** was served by via this Court's e-filing system, on counsel of record for all parties to the action below in this matter.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Baskerville 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 9,268 words.

Finally, I hereby certify that I have read this appellate 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 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 understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26 day of March 2019.

/s/ Tami Cowden

MARK FERRARIO (NV Bar No. 1625)
TAMI COWDEN (NV Bar No. 8994)
GREENBERG TRAURIG, LLP
10845 Griffith Peak Dr., Suite 600
Las Vegas, NV 89135
(702) 972-3773

/s/ Deepak Gupta

DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

ADDENDUM

NRS 202.254 Background check required for certain sales or transfers of firearms between unlicensed persons; procedure. [The amendment to this section was proposed by an initiative petition and approved by the voters at the 2016 General Election and therefore is not subject to legislative amendment or repeal until after November 22, 2019.]

1. Except as otherwise provided in [NRS 202.2541](#), an unlicensed person shall not sell or transfer a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee in compliance with this section.

2. The seller or transferor and buyer or transferee shall appear jointly with the firearm and request that a licensed dealer conduct a background check on the buyer or transferee.

3. A licensed dealer who agrees to conduct a background check pursuant to this section shall take possession of the firearm and comply with all requirements of federal and state law as though the licensed dealer were selling or transferring the firearm from his or her own inventory to the buyer or transferee, including, but not limited to, all recordkeeping requirements, except that:

(a) The licensed dealer must contact the National Instant Criminal Background Check System, as described in 18 U.S.C. § 922(t), and not the Central Repository, to determine whether the buyer or transferee is eligible to purchase and possess firearms under state and federal law; and

(b) The seller or transferor may remove the firearm from the business premises while the background check is being conducted, provided that before the seller or transferor sells or transfers the firearm to the buyer or transferee, the seller or transferor and the buyer or transferee shall return to the licensed dealer who shall again take possession of the firearm prior to the completion of the sale or transfer.

4. A licensed dealer who agrees to conduct a background check pursuant to this section shall inform the seller or transferor and the buyer or transferee of the response from the National Instant Criminal Background Check System. If the response indicates that the buyer or transferee is ineligible to purchase or possess the firearm, the licensed dealer shall return the firearm to the seller or transferor and the seller or transferor shall not sell or transfer the firearm to the buyer or transferee.

5. A licensed dealer may charge a reasonable fee for conducting a background check and facilitating a firearm transfer between unlicensed persons pursuant to this section.

(Added to NRS by [1997, 825](#); A [2015, 1805](#); 2016 initiative petition, Ballot Question No. 1)