

1 **ORDR**

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3
4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6
7 DALE ZUSI, an individual; VICKI
8 DELATORRE, an individual; and SYDNEY
9 GORDON, an individual,

10 Petitioners/Plaintiffs,

11 v.

12 BRIAN SANDOVAL, in his capacity of Governor
13 of the State of Nevada ; ADAM LAXALT, in his
14 capacity as Attorney General of the State of
15 Nevada,

16 Respondent/Defendants.

CASE NO: A-17-762975-W
DEPT NO: XV

**ORDER DENYING PETITION FOR
WRIT OF MANDAMUS AND
DENYING ALTERNATIVE REQUEST
FOR DECLARATORY RELIEF**

17 **I. INTRODUCTION**

18 Petitioners seek mandamus relief against Governor Sandoval and Attorney General Adam
19 Laxalt. Petitioners further seek a declaration that The Background Check Act is valid and
20 enforceable. Because neither the Governor nor the Attorney General has disregarded a clear and
21 specific duty required by law, mandamus relief is not merited. Additionally, although The
22 Background Check Act on its face is a valid law passed by the voters of the State of Nevada, unless
23 and until the federal government agrees to enforce it, this Court lacks the jurisdiction and ability to
24 declare it enforceable. This Court further concludes, as a matter of law, that given the undisputed
25 efforts to implement The Background Check Act, it is unenforceable as written.

26 **II. PROCEDURAL BACKGROUND**

27 Petitioners Dale Zusi, Vicki Delatorre, and Sydney Gordon (collectively "Petitioners")
28 Petition for Writ of Mandamus and Complaint for Declaratory Relief ("Petition") was filed on
October 12, 2017. The Petition pleads two separate and distinct causes of action. First, the Petition

☒ Summary Judgment
☐ Stipulated Judgment
☐ Default Judgment
☐ Judgment of Arbitration
☐ Voluntary Dismissal
☐ Involuntary Dismissal
☐ Stipulated Dismissal
☐ Motion to Dismiss by Def(s)

1 seeks mandamus relief compelling Governor Sandoval to “faithful[ly] execute The Background
2 Check Act.” Second, the Petition seeks relief in the form of a declaratory judgment that the Nevada
3 Background Check Act (the “Act”) is valid and enforceable as written.

4 Petitioners’ Brief in Support of the Petition for Writ of Mandamus was filed on November 2,
5 2017. Various briefs were thereafter filed in opposition and in support, including an amicus brief by
6 Clark County. The Court reviewed and considered the Petition and the subsequent briefs. A hearing
7 was held on February 23, 2018. Mark Ferrario argued on behalf of Petitioners and Lawrence
8 VanDyke argued on behalf of Defendants. After hearing oral arguments this Court took the matter
9 under advisement.

10 On April 26, 2018, this Court ordered further supplemental briefing and an additional
11 hearing on the matter. Petitioners and Defendants filed supplemental briefs and a supplemental
12 hearing was held on June 5, 2018.¹ Again, Mark Ferrario argued on behalf of Petitioners and
13 Lawrence VanDyke argued on behalf of Defendants. Following the June hearing, the Court again
14 took the matter under advisement and now issues this order.

15 **III. FINDINGS OF FACT²**

16 **A. The Brady Act and SB 221**

17 Under the Brady Act of 1993, federal law requires the Federal Bureau of Investigation
18 (“FBI”) to verify records of prospective firearm purchasers who buy from licensed firearms dealers.
19 The FBI does so by using the Federal National Instant Criminal Background Check System
20 (“NICS”). 18 U.S.C. Chpt. 44. A licensed dealer is a firearms dealer who holds a Federal Firearm
21 License (“FFL”). *Id.* Federal law does not require background checks for firearms transfers between
22 private parties or unlicensed sellers. *See id.* This lack of a federally-required background check is
23 often colloquially referred to as the “gun show loophole.” App. at 6-7.

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26 ¹ The last brief was filed by Petitioners on June 1, 2018. In that brief, Petitioners provided notice of
27 additional documents they obtained from the FBI pursuant to a FOIA request. Petitioners also stated
28 that the FBI was to make an additional document production on June 20, 2018. To date, however, no
additional documents have been provided to the Court.

² To the extent any item designated as a finding of fact is actually a conclusion of law, it is adopted
as such and vice versa.

1 In the mid-1990s, the FBI began to outsource the background check function to states that
2 agreed to become a Point of Contact (“POC”) and run the background checks themselves. 28 C.F.R.
3 §§ 25.2, 25.6; AGO-2016-12 at 2. The State of Nevada, through then-Governor Bob Miller, is one of
4 several states that agreed to the POC designation and has held that designation since 1998.
5 Petitioners’ Opening Brief at 7.³ Prior to passage of Question 1, all background checks by licensed
6 FFLs in Nevada were required to be conducted through the Nevada Department of Public Safety
7 (“DPS”) Central Repository. *See* NRS 179A.075; Opening Brief at 5-7. In the State of Nevada and
8 under federal law, however, there were no requirements for background checks on guns sold by
9 unlicensed sellers. Opening Brief at 5-7. Rather, background checks for unlicensed firearm sellers or
10 private individuals were optional and were conducted using the state DPS Central Repository, the
11 same system used in Nevada for the federally mandated checks required for transfers by licensed
12 FFLs. *Id.*

13 In Nevada’s 2013 legislative session, various changes were proposed to Nevada’s
14 background check scheme through Senate Bill 221 (“SB 221”). These proposed changes were
15 somewhat similar to the changes contained in Question 1. *Compare* SB 221 with Question 1. In
16 particular, both SB 221 and Question 1 would generally require that sales between private persons,
17 *i.e.*, unlicensed sellers, be submitted to licensed FFL dealers who would then obtain a background
18 check through NICS, rather than DPS.⁴ *Id.* In May 2013, DPS staff contacted the FBI regarding the
19 FBI’s potential participation in private-party background checks under SB 221. Declaration of Julie
20 Butler (“Butler Decl.”), filed on January 29, 2018, at ¶ 5. SB 221 was later vetoed by Governor
21 Sandoval, who pointed out that while it had “a number of worthy components,” he was unable to
22 support its passage. Letter from Governor Brian Sandoval to Nevada Secretary of State Ross Miller
23 (June 13, 2013), *available at*
24 https://www.leg.state.nv.us/Session/77th2013/Reports/vetoedbills_messages.cfm.

25
26 ³ Petitioners’ Opening Brief filed on November 2, 2017 was not filed on pleading paper and
therefore the Court cannot cite to line numbers from that brief.

27 ⁴ The Court recognizes that Petitioners argue the two are dissimilar because Question 1 requires that
28 the FFL take actual possession of the firearm, whereas SB 221 lacked that physical possession
requirement. Petitioners’ characterization of this difference, however, ignores the numerous
similarities.

1 Article 19 of the Nevada Constitution reserves the right of the people to enact or amend
2 statutes by initiative petition. Nev. Const. art. 19 § 2(1). The same constitutional article also provides
3 that the legislature may “provide by law for procedures to facilitate the operation thereof.” Nev.
4 Const. art. 19 § 5. Following Governor Sandoval’s veto of SB 221, the voting public of Nevada was
5 asked, through an initiative petition, to enact The Background Check Act which, as noted, is
6 substantially similar to SB 221. App. at 2-15. Thus, The Background Check Act was placed on the
7 Ballot as State Question No. 1 (“Question 1”). App. at 4.

8 **B. Pre-Passage of The Background Check Act**

9 Although federal law does not require a background check on private transfers, Nevada law
10 has expressly allowed private parties to voluntarily request a background check from the Central
11 Repository since 1997. NRS 202.254 (2015); NRS 480.140(8); NRS 179A.075(5)(a)-(b). Question 1
12 sought to require a background check for private transfers thereby adding requirements to the Brady
13 Act. *See* NRS 202.254. Along with adding background checks on private transfer firearm sales,
14 Question 1 sought to require the FBI through NICS to perform the background checks. *See* NRS
15 202.254; App. at 5, 7. Julie Butler, the General Services Division Administrator for the Nevada
16 DPS, noted on August 22, 2014, that the “LCB [Legislative Counsel Bureau] will indicate [the]
17 fiscal impact [of The Background Check Act] cannot be determined” because DPS didn’t “know
18 how the FBI w[ould] respond” to requirements set forth in The Background Check Act, if passed.
19 App. at 149.

20 Prior to passage of the Act its proponents knew, and voters were informed, that “passage of
21 Question 1 would require a renegotiation of POC status or the development of an alternative
22 agreement with the FBI in order to accommodate the provisions of the question.” App. at 11-12. In
23 other words, prior to voting on The Background Check Act proponents and voters knew, or should
24 have known, that post-passage implementation would be contingent upon the FBI’s approval. There
25 is no language in the Act itself mandating that the Governor undertake any action to implement or
26 enforce the Act. NRS 202.2531-202.2543.

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1 **C. The Act Itself**

2 One of Petitioners' central arguments is that the "Governor has failed to take any concrete
3 action to confirm Nevada's change to partial POC status, and/or renegotiate Nevada's POC status
4 with the FBI." Pet'r's Br. in Support at 12. They further expand this argument by stating, "Nor has
5 Governor Sandoval taken any other action to cause the N.R.S. 202.254. . . to be enforced as
6 mandated by Nevada voters." *Id.* at 12-13.

7 The full text of The Background Check Act is found in Chapter 202 of the Nevada Revised
8 Statutes. NRS 202.2531-202.2543. Notably absent from the text of The Background Check Act is
9 language mandating that the Governor undertake any action to implement or enforce the Act. *Id.*; *Cf.*
10 Nev. Const. art. 15 § 16(a) ("The Governor of the State agency designated by the Governor *shall*
11 publish a bulletin...") (emphasis added). There are various Nevada statutes that include language
12 clearly outlining steps the Governor must take to implement the law. *See generally* NRS 223.700(3)
13 ("The Governor *shall* appoint a Director...") (emphasis added); NRS 353.230(4) ("The Governor
14 *shall*, not later than 14 calendar days before the commencement of the regular legislative session,
15 submit the proposed budget") (emphasis added); NRS 459.3864(4) ("The Governor *shall* appoint the
16 chair and *may* appoint a co-chair") (emphasis added); NRS 490.067(8) ("The Governor *shall* ensure
17 that, insofar as practicable, the members appointed to the Commission...") (emphasis added.)
18 Drafters of The Background Check Act could have included language that mandated specific
19 implementation requirements but did not.

20 **D. Post-Passage of The Background Check Act**

21 The Background Check Act, through Question 1, was adopted by Nevada voters on
22 November 8, 2016, becoming effective January 1, 2017. NRS 202.2531-202.2543. Upon its passage,
23 the Act revised the state requirements for unlicensed firearm sales. The Act generally requires that
24 unlicensed or private firearm sellers turn over physical possession of their firearm to a dealer
25 holding an FFL to conduct a background check through NICS. NRS 202.254. Using the FBI's NICS
26 for the Act's newly mandated background checks was a central feature of the initiative, touted by its
27 proponents as ensuring, "No Nevada tax dollars will be used to conduct Question 1 background
28 checks because the checks will be r[a]n by the FBI." App. at 7.

1 Question 1 creates a unique partial-POC arrangement. It is undisputed that the FBI has never
2 accepted a partial-POC arrangement wherein the state performs all of the federally required
3 background checks while the FBI performs only the state-law required background checks. *Cf.*, Iowa
4 Code Ann. §§ 724.16-724.21; Md. Code Ann., Pub. Safety §§5-108, 5-117; Mich. Comp. Laws Ann.
5 § 28.422; N.H. Rev. Stat. Ann. § 159-D:1; N.C. Gen. Stat. Ann. § 14-404; Wash. Rev. Code Ann. §
6 9.41.090; Neb. Rev. St. § 69-2410; Fla. Stat. § 790.065; Wis. Stat § 175.35. Petitioners rightfully
7 acknowledge the FBI's stance that this re-arrangement of responsibilities would be both a brand new
8 situation and a huge undertaking by the FBI. Petitioners' Reply Brief. at 8:8-9.

9 The arrangement created by passage of Question 1 is clearly unique, the enforcement of
10 which requires a new agreement between the FBI and the State of Nevada. To facilitate
11 implementation, Julie Butler has had at least four conversations with the FBI. Butler Decl. at ¶ 4.
12 Ms. Butler made two phone calls on the morning of November 9, 2016. App. at 148; Butler Decl. at
13 ¶ 5. The first of the two morning phone calls was between Ms. Butler, and Eric of NICS. During this
14 communication Eric indicated that the FBI's position prior to passage of The Background Check Act
15 was that it "doesn't matter how the law [was] written – it would not have to go through the FBI."
16 App. at 148.

17 In a subsequent conversation with Jill Montgomery, an FBI NICS contact, the call notes
18 reflect that the FBI's "stance has not changed" and "just because state law passed doesn't compel the
19 FBI to comply." *Id.* In addition to taking the position that it was not required to comply with the
20 proposed Act, the FBI indicated to Ms. Butler that "this new law would be a brand new situation"
21 and require a "huge undertaking," and shared its concerns about the enforcement of such a law. *Id.*
22 The handwritten notes from the morning of November 9, 2106, indicate that the FBI was planning to
23 "send a letter on the implications – by the end of next week." *Id.* This is consistent with Ms. Butler's
24 Declaration stating that she "asked the FBI to put in writing its position definitively to refuse to
25 assist in implementing [The Background Check Act]." Butler Decl. at ¶ 6.

26 Following these conversations, the General Services Division of the Records Bureau created
27 a PowerPoint dated November 10, 2016, and titled "Impact of Initiative Petition Question #1." App.
28 at 139. The PowerPoint includes a slide titled "FBI's stance" which states, "The FBI is not bound by

1 State of Nevada law.” App. at 142. It further concludes that given the FBI’s stance, “[t]he NICS
2 Office will not accept phone calls/inquiries directly from Nevada’s licensed firearms dealers” and
3 “will refer any such calls to the State Point of Contact.” *Id.* The record before the Court is clear that
4 the Executive Branch of Nevada had contacted the FBI prior to passage of The Background Check
5 Act and immediately thereafter to determine the FBI’s position regarding enforcement of the Act.

6 Communications between state and federal officials continued after the Act was passed. Ten
7 days after passage, on November 18, 2016, Ms. Julie Butler sent an email to James Wright, the
8 Director of Nevada DPS. Defs. Resp. Br. Exhibit B. The email states that Mindy McKay, Nevada
9 DPS Records Bureau Chief, spoke to Jill Montgomery, the NICS contact for the FBI, that morning.
10 *Id.* Ms. Butler indicated that the letter she requested was “drafted and is making its way up the chain
11 within the CJIS Division.” *Id.* Additionally, Ms. Montgomery suggested a conference call between
12 DPS, the FBI NICS Office, and ATF. *Id.* Notes from a phone call on November 23, 2016, between
13 several NICS and ATF representatives indicate the FBI letter is still in the routing process but that it
14 will “reinforce our stance on POC status.” *Id.* These notes also indicate that DPS takes the position
15 that it has no authority to run the background checks because the Act provides that private sellers
16 cannot contact DPS. *Id.*

17 Communications continued on December 12, 2016, when Ms. McKay sent an email to Clint
18 Thompson, the ATF contact for the Brady Act, to notify him of changes made to The Background
19 Check Act. *Id.* Mr. Thompson responded a day later on December 13, 2016, and stated that he “did
20 not see anything that would change ATF’s position.” *Id.*

21 Then again on December 14, 2016, Kimberly J. Del Greco, Section Chief of the NICS, sent a
22 letter to Ms. Butler regarding the FBI’s current position on The Background Check Act. App. at 61.
23 Ms. Del Greco states, “State and local authorities serving as POCs are likely to have readier access
24 to more detailed information for processing background checks than the FBI.” *Id.* In addition, the
25 letter states that “the state of Nevada will be best suited to conduct NICS checks for private sales as
26 provided for in the recent legislation that was passed, The Background Check Act, as opposed to the
27 FBI conducting these checks.” *Id.* The letter further provides that “the recent passage of the Nevada
28 legislation regarding background checks for private sales cannot dictate how federal resources are

1 applied” and thus the “position of the NICS Section is that these background checks are the
2 responsibility of the state of Nevada to be conducted as any other background check for firearms,
3 through the Nevada DPS as the POC.” *Id.*

4 Ms. McKay forwarded a previous email exchange between Ms. McKay and Mr. Thompson
5 to Ms. Butler on December 15, 2016, following a phone conversation between Ms. McKay and Mr.
6 Thompson. *Id.* Ms. McKay reported that ATF counsel looked at the new Nevada law and that
7 Nevada “cannot direct the FFL to not comply with federal law.” *Id.* Further, Ms. McKay indicated
8 that ATF counsel had concerns relating to the Supremacy Clause and that the “hiccup will be the
9 language in the state law that expressly states that the FFL will not go through [DPS].” *Id.* Finally,
10 Ms. McKay indicated that Mr. Thompson and ATF’s legal counsel had read the FBI’s letter and
11 agreed with their stance. *Id.*

12 Also after Question 1 passed, to seek further clarification on the feasibility of implementation
13 in light of the FBI’s letter, DPS Director Wright, requested a formal opinion from the Office of the
14 Attorney General. Att’y General Op., AGO-2016-12 at 1. Pursuant to NRS 228.150, on December
15 26, 2018, the Office of the Attorney General issued Opinion No. 2016-12 informing the DPS that
16 The Background Check Act “specifically and unambiguously directs the licensed dealers who act as
17 intermediaries for such checks to contact [NICS] administered by the FBI and not the Central
18 Repository administered by the Nevada Department of Public Safety.” *Id.* at 2.

19 AGO 2016-12 notes that due to the FBI’s then current position, Question 1 cannot be
20 complied with and is thereby unenforceable. *Id.* at 4. The opinion further clarifies that because the
21 FBI had responded via a December 14, 2016, letter stating that intermediaries would not be allowed
22 to run background checks directly through the FBI as required by the Act, “expressly requires what
23 the FBI, at least at present, does not allow.” *Id.* at 1-2. Despite the Act’s intent to regulate transfers
24 and sales of firearms in Nevada, the Attorney General Opinion states, “[T]he FBI’s refusal to carry
25 out the central function required by the Act effectuates an unconditional ban, at present, on all
26 firearm sales or transfers in Nevada.” *Id.* at 3.⁵

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28 ⁵ It bears pointing out that the foregoing communications and interactions between the State of
Nevada and federal officials all occurred prior to The Background Check Act’s effective date.

1 The Background Check Act became effective on January 1, 2017. NRS 202.254. Five days
2 later, on January 6, 2017, Julie Butler of DPS, Jill Montgomery of NICS, and Clint Thompson of
3 ATF, held a teleconference call to discuss the Act. Defs. Resp. Br. Exhibit B. A follow-up letter
4 from Section Chief Del Greco issued on January 10, 2017, to supplement the prior December 14,
5 2016, letter. *Id.*

6 In the January 10, 2017 letter, the FBI clarified its position regarding implementation of The
7 Background Check Act by stating that “a full POC state agrees to conduct all NICS background
8 check requests form FFLs within the state and respond to FFLs with the results of a NICS
9 background check.” *Id.* The letter takes the position that as a result of Nevada’s 1998 election to
10 “serve as a NICS POC state and process all firearm purchaser background checks,” The Background
11 Check Act is “in conflict with Nevada’s status as a full POC state, which precludes the FBI from
12 conducting the subject checks under the applicable federal regulation.” *Id.*

13 On September 25, 2017, counsel for Petitioners wrote a letter to Governor Sandoval
14 acknowledging the two letters sent from the FBI to Nevada DPS in response to DPS’s inquiry
15 regarding implementation of The Background Check Act. App. at 63. The letter gave Governor
16 Sandoval a deadline to “initiate action by October 9, 2017 to implement this law by engaging with
17 the FBI and NICS.” *Id.* In response to Petitioners’ letter, on October 4, 2017, Kathryn Reynolds,
18 General Counsel to Governor Sandoval, wrote a letter to Attorney General Adam Laxalt seeking
19 clarification of the December 26, 2016 Attorney General Opinion. App. at 181.

20 The October 4, 2017, letter from Governor Sandoval’s office seeks to determine whether
21 Nevada could change its POC status to “partial” thereby allowing the FBI to conduct the private
22 background checks. *Id.* One week later, the Attorney General of Nevada, Adam Laxalt, issued a
23 formal opinion. AGO-2017-10; App. at 183. The opinion states that post-passage of The
24 Background Check Act, the FBI has taken the position that it will not conduct the private party
25 background checks. AGO-2017-10 at 2. Although the opinion concludes that the Governor may
26 continue to ask the FBI to perform the background checks, how many times the Governor is required
27 to do so is “undoubtedly a policy choice for the Governor to make.” *Id.* at 3.

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1 Attorney General Laxalt opines that “the type of ‘partial’ POC status that Nevada would be
2 asking for would be, as far as [he] could tell, unique and unprecedented.” *Id.* The opinion further
3 identifies and explains several errors in Petitioners’ position. *Id.* at 5-6. One such error is the
4 proposition that Petitioners seek to “impose on the FBI a new obligation to perform a check required
5 by *state* law alone.” *Id.* at 5. The opinion states that there can be no analogy to other partial-POC
6 states because under the Act “the only role for the FBI would be conducting background checks that
7 are not required by federal law.” *Id.*

8 Although the FBI itself and Attorney General Laxalt have responded to state officials
9 indicating that The Background Check Act cannot be implemented as proposed and enacted,
10 Petitioners argue that Governor Sandoval has not adhered to his duty to implement this law by
11 effectively communicating with the FBI. As previously noted, however, there have been multiple
12 instances of communication between Nevada’s executive branch and federal officials regarding
13 responsibilities resulting from The Background Check Act. *See* App. at 61, 63, 107, 139-142, 148-
14 49; Defs.’ Supp. Br. Exhibits A, B.

15 The most recent communication is the March 27, 2018 letter sent by General Counsel
16 Reynolds to Justin Clark, Director of the White House Office of Intergovernmental Affairs. Defs.’
17 Supp. Br. Exhibit A. In the March 27, 2018 letter, Ms. Reynolds indicates that a phone conference
18 between “representatives of the White House and the Department of Justice” was held wherein the
19 parties “discuss[ed] Governor Sandoval’s request that the Federal Bureau of Investigation (FBI)
20 reconsider its decision regarding Nevada’s Background Check Act.” *Id.* The letter refers to
21 communications between DPS staff and the FBI detailed above, and plainly acknowledges the
22 position of the FBI. *Id.* The letter states that “it was disappointing to hear that the FBI is unable to
23 accommodate Governor Sandoval’s request.” *Id.* The letter concludes by inviting the White House
24 Office of Intergovernmental Affairs to contact Governor Sandoval “[if] the position of the FBI
25 should change, or there are any further actions Governor Sandoval could take to secure the
26 cooperation of the FBI in enforcing The Background Check Act.” *Id.*

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1 **IV. CONCLUSIONS OF LAW**

2 **A. The Court Rules as a Matter of Law**

3 Petitioners and Defendants agree that the issues presented before this Court are solely issues
4 of law. Reply at 15:25-27. Neither party has requested that the Court “order the question to be tried
5 before a jury.” NRS 34.220. This Court has included a comprehensive factual foundation forming
6 the basis of its determination. Petitioners have indicated without specifics that they may dispute
7 some of the factual findings of this Court. To the extent there are questions as to matters of fact
8 however, the Court finds such are not “essential to the determination” of the issues and do not
9 “affect[] the substantial rights of the parties.” *Id.* To the extent that the disputed facts should not be
10 considered, the Court finds that the undisputed facts alone support the denial. As such, the Court
11 decides the issues raised as a matter of law and this decision shall be a final judgment.

12 **B. Constitutional Separation of Powers and the Mandamus Standard**

13 Nevada’s system of government, like its federal counterpart, is based on three co-equal, but
14 separate branches of government—executive, judicial, and legislative. Article 3, Section 1(1) of the
15 Constitution of the State of Nevada provides:

16 The powers of the Government of the State of Nevada shall be divided
17 into three separate departments, -- the Legislative, -- the Executive and
18 the Judicial; and no persons charged with the exercise of powers
19 properly belonging to one of these departments shall exercise any
functions, appertaining to either of the others, except in the cases
expressly directed or permitted in this constitution.

20 Nev. Const. art. 3 § 1(1).

21 Thus, the party seeking mandamus relief whereby the judicial branch would order or
22 arguably interfere with the function of another branch must meet a relatively high burden. Through
23 mandamus, a court may require an officer or agent of the state to either (1) to carry out specific acts
24 of ministerial functions or (2) to compel the officer or agent to take some action where functions are
25 discretionary and no action has been taken. *See, e.g., State v. Dickerson*, 33 Nev. 540, 113 P. 105
26 (1910) (holding that mandamus was the appropriate remedy for a governor who failed to discharge a
27 ministerial duty).

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1 When an executive officer has a right to exercise his or her judgment, deliberation, and
2 discretion, that officer can be compelled by mandamus only to take act where no action has been
3 taken, but cannot be directed on how specifically to act. *See, e.g., Douglas County Bd. of County*
4 *Com'rs v. Pederson*, 78 Nev. 106, 109, 369 P.2d 669, 671 (1962) (holding that discretionary
5 decisions may not be altered by mandamus). Where no discretion is given to an officer, however,
6 mandamus may lie to compel enforcement of clear and specific ministerial functions required by that
7 officer. *Id.*

8 It is a well-settled principle that courts cannot issue writs of mandamus on other branches of
9 government to perform discretionary duties. *See Guinn v. Legis. of State of Nev.*, 119 Nev. 277, 71
10 P.3d 1269 (2003) (Maupin, J., *dissenting* noting the strong preference against compelling action of
11 co-equal branches of government), *overruled by Nevadans for Nevada v. Beers*, 122 Nev. 930, 142
12 P.3d 339 (2006). Separation of powers is a bedrock constitutional principle requiring the judicial,
13 legislative, and executive branches to forego commandeering one another. *See, e.g., Nev. Const. art.*
14 *3 § 1(1)*. Mandamus may also be used by the judiciary in the event that executive officers arbitrarily
15 and capriciously misuse discretion by failing at all to exercise the discretion contemplated by the
16 applicable law. *See Guinn*, 119 Nev. 277.

17 **1. Governor Sandoval Has Discretion to Determine How to Implement The**
18 **Act**

19 Petitioners rely on *American Federation of State, County and Municipal Employees v.*
20 *Martinez* for the overly broad notion that the “Governor is required to apply his or her full energy
21 and resources to ensure that the intended goals of duly enacted legislation are effectuated.” *Am.*
22 *Fed’n of State, Cty. & Mun. Employees v. Martinez*, 150 N.M. 132, 132, 257 P.3d 952, 955 (2011). A
23 more apt statement is found in the original source stating, “[T]he Governor is bound to apply his full
24 energy and resources, *in the exercise of his best judgment and ability*, to ensure that the intended
25 goals of legislation are effectuated.” *Op. of the Justices to the Senate*, 376 N.E.2d 1217, 1221 (1978)
26 (emphasis added).

27 Petitioners also rely on *Cooper v. Gwinn* for the proposition that the executive branch of
28 Nevada must make a “real and substantial effort” to implement the law. *See Pet’r’s Reply Br.* at 13.

1 However, Petitioners fail to include the court's conclusion that the actions taken in *Cooper* to
2 implement the law were "so limited in scope that it cannot honestly be said that they bear a rational
3 relationship" to the purpose of the legislation. *See Cooper v. Gwinn*, 177 W.Va. 245, 255, 298
4 S.E.2d 781, 791 (1981). Here, Governor Sandoval and the executive branch have clearly taken steps
5 to communicate with both the FBI and the federal government regarding the implementation and
6 enforcement of the Act by Nevada and the FBI. *See* Defs.' Supp. Br. Exhibit A & B; Pet. App. at
7 105-108, 181, 185. The Court finds that these communications demonstrate a real and substantial
8 effort to implement the law and that these actions bear a rational relationship to the purpose of the
9 legislation, *i.e.*, to encourage the federal government to perform background checks for private party
10 transfers.

11 Petitioners cite *Perry v. Barker* to bolster their argument that the Governor has a non-
12 discretionary duty to execute The Background Check Act. *See* Pet'r's Reply Br. at 13. While the
13 executive official in *Perry* had a non-discretionary duty to implement the law, the particular method
14 of implementation was left to the official's discretion so long as "the method chosen fulfilled the
15 mandate imposed by the statute to 'promptly and effectively enforce the law.'" *See Perry*, 169 W.Va
16 at 546. A limitation on discretionary implementation is not present in the instant action. The Act
17 does not have any limiting language as to the method of implementation that the executive branch
18 may take in its efforts to execute the law. Because the Act does not contain any language related to
19 the standard for execution and implementation, the general duty to "apply his full energy and
20 resources, *in the exercise of his best judgment and ability*, to ensure that the intended goals of
21 legislation are effectuated" applies. *See Op. of the Justices to the Senate*, , 376 N.E.2d at 1221
22 (emphasis added).

23 Given the high, clear and specific mandamus standard, the Act falls significantly short of
24 permitting, let alone requiring, this Court to compel Governor Sandoval and Attorney General
25 Laxalt to complete any nondiscretionary, ministerial acts. *See Round Hill Gen. Imp. Dist. v.*
26 *Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981); *Douglas County Bd. of County Com'rs v.*
27 *Pederson*, 78 Nev. 106, 109, 369 P.2d 669, 671 (1962); *State v. Dickerson*, 33 Nev. 540, 113 P. 105
28 (1910). On the contrary, the executive branch's implementation of the Act requires judgment,

1 deliberation, and discretion—functions for which this Court lacks authority to override or substitute
2 its judgment. *Id.*

3 Because Governor Sandoval has discretion in implementing and enforcing The Background
4 Check Act, this Court has authority to issue mandamus only if the executive branch has failed to
5 take any action. Petitioners originally attempted to assert non-action; however, Petitioners’
6 arguments have shifted throughout this case. Initially, Petitioners vaguely contended that Governor
7 Sandoval needed to comply with his constitutional obligation to the faithful execution of The
8 Background Check Act, arguing that the Governor had “failed to take any concrete action to confirm
9 Nevada’s change to partial POC Status” which requires the FBI to conduct the background checks
10 on unlicensed sales. *See* Pet’r’s Br. in Supp. at 12. At the initial hearing on February 23, 2018,
11 Petitioners argued that “after passage of Question 1 there [was] nothing but one phone call to the
12 FBI.” Hr’g Tr. 56:4-7.

13 **2. Governor Sandoval has Taken Steps to Implement The Background**
14 **Check Act**

15 Petitioners now part from the original argument and instead contend that the actions the
16 executive branch has taken are somehow unsatisfactory. Petitioners assert that although the
17 executive branch made a “phone call,” “we do not know what was discussed,” and that the Governor
18 failed to communicate in writing since there had been “no written communications with the FBI.”
19 *See* Decl. of Julie Butler (January 29, 2018); Hr’g Tr. 6:1-2, 19-20; Hr’g Tr. 7:21-22. Next, when
20 Defendants produced the March 27, 2018 letter written by Governor Sandoval’s general counsel to
21 the White House Office of Intergovernmental Affairs, Petitioners remain unsatisfied, now arguing
22 that although there was a conference call with a follow-up written communication from the
23 Governor’s counsel, the letter was inadequate because it (1) should have been sent to the FBI instead
24 of the White House, and (2) the letter in some way “failed to ask the right question.” *See* Defs. Resp.
25 Br. Exhibit A; Hr’g Tr. 8:5-7.

26 During the June 5, 2018 hearing, Petitioners’ counsel attempted to discomfit the Court by
27 stressing that the March 27, 2018 letter was addressed to the White House Office of
28 Intergovernmental Affairs and not to the FBI. *See* Hr’g Tr. 4:3-25, 5:1-6. Counsel’s inimical

1 exchange with the Court demonstrates Petitioners' failure to recognize that the letter was the
2 ultimate result of numerous previous written and verbal communications with the FBI regarding
3 their position. In fact, the letter memorializes Governor Sandoval's plea for reconsideration to the
4 Department of Justice, the FBI's superiors. Defs.' Supp. Br. Exhibit A.

5 The March 27, 2018 letter demonstrates that Governor Sandoval has indeed taken action to
6 enforce the Act by requesting a reconsideration of the FBI's decision regarding Question 1. *See*
7 Defs.' Supp. Br. Exhibit A. This letter is particularly important because the Governor's office clearly
8 outlines Nevada's position that "for private party sales, an FFL must directly contact the FBI, 'not
9 the [DPS] Central Repository.'" *Id.* Additionally, the letter documents the FBI's position that the
10 "FBI does not recognize a 'partial' point of contact system on the basis of private party sales." *Id.*

11 Petitioners also argue that the contents of the letters written by the FBI are somehow
12 unsatisfactory. *See* Pet'r's Supp. Br. at 7. Petitioners assert that Governor Sandoval has failed to
13 engage in an "informed dialog" with the FBI while simultaneously arguing that the FBI has provided
14 no legal basis to support its decision not to perform the newly mandated background checks. *Id.* In
15 supplemental briefing Petitioners point out that Defendants failed to explain why the "hearsay
16 position of the FBI... should be deemed reliable or admissible evidence that the Governor has done
17 what he can to fulfill his constitutional duty." *Id.* Despite these arguments, Petitioners, however,
18 chose to proceed in litigation without naming the FBI as a party in this action.

19 The December 14, 2016 letter between Section Chief Del Greco, of NICS, and Julie Butler,
20 of DPS, substantiates Defendants' claims that the executive branch of Nevada attempted to
21 renegotiate the POC arrangement with the FBI. The letter also serves as unequivocal evidence that
22 the FBI both understood the requirements of The Background Check Act and took the position that
23 the federal government cannot be compelled to action by state law. State governments cannot
24 commandeer the federal government, forcing it to run background checks required only by *state* law.
25 Petitioners continue to dispute blackletter legal realities by insisting that "Nevada can require that
26 the FBI do [the] required background check." Pet'r's. Consol. Rep. at 6. In light of the various
27 communications between the executive branch and federal officials, the Court concludes that
28 Governor Sandoval has undertaken a real and substantial effort to implement the law.

1 **3. Mandamus is Not an Appropriate Remedy Given the Instant Facts**

2 In the supplemental hearing, Petitioners argued that this Court should compel the Governor
3 to sign a proposed letter drafted by Petitioners themselves. Pet'r's Supp. Br. at 8-9. Petitioners
4 request this Court to review and approve the draft letter, force Governor Sandoval to sign the letter,
5 and finally send the letter to a specific federal authority. *Id.* Despite this request, Petitioners have
6 failed to provide this Court any authority even remotely supporting such a specific and unique
7 request. The Governor has a duty to faithfully execute the laws, but this does not create a related
8 right, in either the citizens or the courts, to micromanage that duty to the level of wordsmithing
9 executive branch communications.

10 While this Court may exercise mandamus authority to compel Defendants to act in
11 furtherance of duties involving discretionary functions where the executive officer has failed to act
12 at all, this is not the case here. Defs.' Supp. Br. Exhibits 1-2. Petitioners state that they "ask only that
13 this Court insist that the Governor take the most basic steps, the bare minimum, required to
14 implement this law." Petitioners, however, ignore the facts and request much more. Petitioners
15 themselves acknowledge Governor Sandoval's multiple communications with the FBI and Attorney
16 General to obtain direction in enforcing the Act. Pet'r's Supp. Br. This Court concludes as a matter
17 of law that Governor Sandoval's actions were not arbitrary and capricious. This Court cannot
18 overstep its function and direct the Governor on how to act or alter the Governor's decisions. *See*
19 *Douglas County Bd. of County Com'rs v. Pederson*, 78 Nev. 106, 109, 369 P.2d 669, 671 (1962). As
20 such, any additional discovery on the matter would be futile, and Petitioners' belated request for
21 such must be denied.

22 Further, Petitioners' emotional appeals are both improperly placed in front of the judiciary
23 and without supporting evidence. Petitioners include several charged statements indicating that the
24 Governor has failed to keep Nevada safe. *See* Pet'r's Reply Br. Some of these arguments include
25 statements such as: "[t]he Attorney General's and Governor's unwillingness to even *try* to work on
26 behalf of the people for the implementation of Question 1," and "the Governor's and Attorney
27 General's absolute refusal to take any meaningful steps to work with the FBI."

28 ///

1 Petitioners allege that Governor Sandoval has made “half-bak[ed]” attempts to enforce the
2 law. *See* Hrg. Tr. On Supp. Br. at 6. These contentions are not properly placed before this Court. Not
3 the least of which is the fact that they are unfounded. Defendants have provided evidence of the
4 executive branch’s multiple communications with federal authorities to address NRS 202.245. *See*
5 Defs. Supp. Br. Exhibit A & B. Petitioners themselves include evidence of executive action related
6 to the initiative in their appendix including the December 14, 2016 letter, written by NICS Section
7 Chief Del Greco. Pet’r’s App. at 62.

8 Petitioners argue that they do not wish for the Governor to do anything “Herculean,” yet
9 nothing the Governor, or the executive branch, has done towards implementing the Act is
10 satisfactory to Petitioners. Hrg. Tr. On Supp. Br. at 8. Similarly, Petitioners contend that the
11 Governor “will not take the very simple step of telling the FBI this law has been passed.” *Id.* at 7.
12 The December 14, 2016 letter written by Section Chief Del Greco clearly demonstrates to the
13 contrary by stating that “the recent passage of the Nevada legislation regarding background checks
14 for private sales cannot dictate how federal resources are applied.” Pet’r’s App. at 104. Emotional
15 arguments may be more appropriate for the legislature, or in advocating policy decisions made by
16 the executive branch, but they are unpersuasive to this Court.

17 In conclusion, Petitioners argue that Governor Sandoval has not taken the required action and
18 that mandamus is not appropriate because the Governor has failed to take the required action. Pet’r’s
19 Br. in Supp. at 12. This argument is fundamentally flawed, however, because nowhere in The
20 Background Check Act is there any command or explicit directive to Governor Sandoval, or any
21 other executive branch official, to do anything. NRS 202.2531-202.2543. Unlike other statutory
22 schemes that clearly direct the Governor to implement the law in a particular manner, The
23 Background Check Act includes no such direction. *Compare* NRS 202.2531-202.2543, *with* Nev.
24 Const. art. 15 § 16(a) (“The Governor of the State agency designated by the Governor *shall* publish
25 a bulletin...”)(emphasis added), *and* NRS 353.230(4) (“The Governor *shall*, not later than 14
26 calendar days before the commencement of the regular legislative session, submit the proposed
27 budget”)(emphasis added).

28 ///

1 The Court cannot issue a writ of mandamus because there is no non-discretionary function
2 contained in the Act unlike so many other Nevada statutes. *See* NRS 223.700(3) (“The Governor
3 *shall* appoint a Director...” (emphasis added); NRS 353.230(4) (“The Governor *shall*, not later than
4 14 calendar days before the commencement of the regular legislative session, submit the proposed
5 budget”) (emphasis added); NRS 459.3864(4) (“The Governor *shall* appoint the chair and *may*
6 appoint a co-chair”) (emphasis added); NRS 490.067(8) (“The Governor *shall* ensure that, insofar as
7 practicable, the members appointed to the Commission...” (emphasis added.) Drafters of Question 1
8 certainly could have included such a directive but failed to do so. Based on the foregoing, mandamus
9 is not appropriate.

10 C. Severability

11 As alternative relief, Petitioners request severance of certain portions of the Act. Specifically,
12 Petitioners seek removal of the language “from the National Instant Criminal Background Check
13 System” in NRS 202.254(4), as well as subsection (3)(a) from NRS 202.254. Pet. for Writ at 14.
14 Drafters of the Question 1 ballot initiative purposefully framed the initiative so that Legislative
15 Counsel Bureau could report that “no Nevada tax dollars [would] be used to conduct Question 1
16 background checks,” thereby complying with the fiscal note requirements of NRS 293.250. This
17 framing and representation no doubt facilitated passage by the voting public. *See* Defs.’ Resp. Br. at
18 4.

19 1. Petitioners’ Legal Authority for Severance is Distinguished From the 20 Facts Here

21 To argue in favor of severability, Petitioners primarily rely on two cases which are notably
22 distinguishable from the facts at issue here. Both cases apply the same basic three part test for
23 severability. *See Nevadans for the Protection of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 908, 141
24 P.3d 1235, 1244 (2006); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 517, 217
25 P.3d 546, 556 (2009). The general test for whether a provision is severable requires an application of
26 several factors including: (1) whether the primary purpose of the petition would be preserved, (2) the
27 existence of a severability provision, and (3) whether severance would preserve the people’s right to
28 enact law through the initiative process. *Flamingo Paradise Gaming*, 125 Nev. at 517.

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1 The Court has reviewed the application of this test in the *Heller* and *Flamingo Paradise*
2 *Gaming* decisions. In *Heller*, certain portions of the ballot initiative were severed because they were
3 not “functionally related” or “germane” to the single-subject of the initiative. *Heller*, 122 Nev. at
4 908. The Supreme Court clarified that a ballot initiative “must propose policy—[and] may not
5 dictate administrative details.” *Id.* at 913. Petitioners argue that the *Heller* factors apply in the instant
6 petition and support severability. This Court disagrees.

7 The first factor addressed by the Nevada Supreme Court in *Heller* is that the “primary
8 subject of the initiative [was] readily discernable.” *Heller*, 122 Nev. At 910. This Court disagrees
9 with Petitioners’ broad characterization of Question 1’s purpose. Petitioners argue that the central
10 purpose is “closing the unlicensed private sale loophole.” Pet’r’s App. at 11. The explanation as
11 provided to voters clearly stated that the “background check would be conducted using the National
12 Instant Criminal Background Check System administered by the Federal Bureau of Investigations.”
13 *Id.* at 3 & 5. The “Argument for Passage” section of the ballot initiative goes so far as to state that
14 “[n]o Nevada tax dollars will be used to conduct Question 1 background checks because the checks
15 will be run by the FBI.” Pet’r’s App. at 5. The Court therefore concludes that the primary subject of
16 the initiative is to prohibit the private sale of firearms without first conducting a *federal* background
17 check. Therefore, Petitioners’ proposed severance would be fail to “preserve the primary purpose of
18 the petition.” *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 517, 217 P.3d 546, 556
19 (2009).

20 The second factor discussed by the Supreme Court in *Heller* is the existence of a severability
21 clause. Like in *Heller*, The Background Check Act contains a severability clause. The Supreme
22 Courts notes that a severance clause demonstrates a “desire to allow the initiative to proceed even
23 without some sections.” *Heller*, 122 Nev. at 910. The Court finds that the second factor weighs in
24 favor of severance.

25 *Heller*’s third factor, however, weighs in against severance. The third factor relates to the
26 preference to preserve “the people’s constitutional right to amend their constitution through the
27 initiative process.” *Heller*, 122 Nev. at 912. The Supreme Court refers to the constitutional
28 reservation of the initiative power as “one of the basic powers enumerated in this state’s

1 constitution.” *Id.* at 912. The issue in *Heller* was notably different from the facts presented here. In
2 *Heller*, the challenge was that the initiative’s provisions violated the single-subject statutory
3 requirement. *Id.* at 913. In *Heller*, the single-subject statute, which was the primary focus of the
4 analysis, was a legislative enactment meant to “facilitate the operation of the initiative process.” *Id.*
5 at 912.

6 Before arriving at its holding, the *Heller* court precisely distinguished the facts of that case
7 from prior cases. *Id.* In so doing, the Supreme Court noted that “severance may be appropriate with
8 respect to Nevada Revised Statutes” but was not appropriate when it severed a ballot initiative’s
9 “central component.” *Rogers v. Heller*, 117 Nev. 169, 187, 18 P.3d 1034, 1039 (2001). In *Rogers*,
10 the Supreme Court declined to sever a ballot initiative’s central component as it relates to the will of
11 the voting public. *Id.* at 913. There the *Heller* court noted that, unlike in *Rogers*, there was not a
12 “challenge to a constitutional requirement.” *Id.* at 913. Notably, the facts at issue in the present
13 action involve a ballot initiative. Thus, the mere existence of a severable provision is not enough,
14 because severance of a ballot initiative must not “[gut] the initiative’s central component.” *Flamingo*
15 *Paradise Gaming*, 125 Nev. at 517. The decision to route the private-party checks through the FBI,
16 not DPS – the part of the law that Petitioners seek to sever – was not inadvertent drafting on a
17 peripheral point. It was a conscious choice relating to a central provision of The Background Check
18 Act.

19 In *Heller*, the Supreme Court distinguished the legislative enactment from a constitutional
20 challenge. *Heller*, 122 Nev. at 913. While the issues in the instant case are not necessarily
21 constitutional challenges, this Court has concerns about separation of powers issues raised by the
22 facts. From the evidence, it is clear that the FBI’s position is that the FBI as a federal agency does
23 not have to comply with Nevada state law as passed. The December 14, 2016 letter states, “[T]he
24 recent passage of the Nevada legislation regarding background checks for private sales cannot
25 dictate how federal resources are applied.” See Pet’r’s App. at 62. In addition, notes from the
26 November 9, 2016, phone call with Jill Montgomery from NICS indicate the FBI’s position is that
27 “just because [the] state law passed doesn’t compel the FBI to comply.” See Pet’r’s App. at 148. The
28 Background Check Act in this case is more closely aligned with the initiative in *Rogers* than in

1 *Heller* because there are federal issues implicated in the instant initiative and severance would
2 eliminate a “central component” of the initiative. *Rogers*, 117 Nev. at 177.

3 **2. Severance of the Proposed Portions of The Background Check Act is**
4 **Inappropriate**

5 Petitioners urge this Court to sever portions of The Background Check Act that are counter
6 to the clear intent of voters, namely by removing the initiative’s central purpose of implementing
7 federal NICS background checks at no cost to Nevada taxpayers. Pet’r’s Reply Br. at 16. While this
8 Court may sever portions of an unenforceable initiative, it generally may only sever “provisions that
9 concern secondary subjects” or portions of the initiative that will not hinder the “central
10 components” so as to avoid obstructing the people’s voice. *Heller*, 122 Nev. at 911-12; *Rogers*, 117
11 Nev. at 177.

12 Because Petitioners seek to sever portions of the Act which require the background checks to
13 be conducted through NICS, and the primary purpose of The Background Check Act is to implement
14 federal background checks, severance of the proposed portions would effectively destroy a central
15 component of the initiative. Therefore, the Court finds that application of the third severance factor
16 weighs against severance.

17 The Nevada Supreme Court in *Heller* held that severance of the secondary subjects would:
18 (1) allow the primary purposes of the initiative to be accomplished, (2) result in an enforceable law
19 that aligned with the will of the voters, and (3) protect the initiative power of the people. This Court
20 remains unconvinced that severance of the proposed portions of the Act here would accomplish the
21 three purposes contemplated in *Heller*.

22 Finally, severance is inappropriate because it would effectively be a judicial end run around
23 the voters’ own choice. Severance would likely (1) destroy a central component of the initiative, (2)
24 result in a still unenforceable law that is contrary to the law voted upon, and (3) undermine the
25 initiative power of the people by fundamentally altering the law as passed. Therefore, this Court
26 concludes that severance of the language “from the National Instant Criminal Background Check
27 System” in NRS 202.254(4), as well as subsection (3)(a) from NRS 202.254 is inappropriate. In
28 sum, application of the *Heller* factors favor non-severance of any portions of the Act.

The Court's therefore DENIES Petitioners' Petition for Writ of Mandamus. The Court further DENIES Petitioners' request for additional discovery. Additionally or alternatively, the Court GRANTS Defendants' Motion to Dismiss for all the reasons set forth herein.

DATED this 20th day of August, 2018.


JOE HARDY
DISTRICT JUDGE
DEPARTMENT XV

I hereby certify that on or about the date filed, a copy of the foregoing was electronically served, mailed or placed in the attorney's folder on the first floor of the Regional Justice Center as follows:

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