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8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 * * *

11 NevadansCAN, a Nevada non-profit
corporation; MARY ROONEY, as its co-
12 founder and as an individual; JULIE
HEREFORD, as its co-founder and as an
13 individual; JANE DOE, as an individual gun
owner who sues anonymously; and JOHN DOE,
14 as an individual gun owner who sues
anonymously,

15 Plaintiffs,

16 vs.

17 STATE OF NEVADA *ex rel.* STEVE
18 SISOLAK, in his capacity as GOVERNOR OF
NEVADA,

19 Defendant.

CASE NO. 1900002131B
DEPT NO. I

**COMPLAINT FOR DECLARATORY
RELIEF** [Seeking Findings: (1) That a
9/12/2019 Supreme Court of Nevada
Decision Mandates a Judgment Declaring
AB 291's Red Flag Component
Unconstitutional, and Thus, Cannot Be
Implemented on its January 1, 2020,
Effective Date; and (2) That AB 291's
Red Flag Component Is an Invalid
Exercise of the State's Police Powers,
Unduly Burdening the Keep and Bear
Arms Guarantees of the Nevada and
United States Constitutions] **AND
INJUNCTIVE RELIEF** [Barring
Enforcement of the Red Flag Component
of AB 291]

[Exempt from Arbitration Pursuant to
NAR 3(A) - Action for Declaratory
Relief]

24 COMES NOW, Plaintiffs, NevadansCAN, MARY ROONEY, JULIE HEREFORD, JANE
25 DOE, and JOHN DOE (collectively, "Plaintiffs"), by and through their attorneys Alan J. Lefebvre,
26 Esq. and William D. Schuller, Esq. of the law firm of Kolesar & Leatham, and hereby complain
27 and allege as follows:

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1 1. Plaintiff NevadansCAN is a lawfully formed domestic non-profit corporation,
2 operating and existing under the corporate laws of the State of Nevada. Its goal is to defend and
3 protect the Constitution of the United States (“U.S. Constitution”), the Constitution of the State of
4 Nevada (“Nevada Constitution”), and American values by promoting grassroots activism in the
5 political process. In this instance, NevadansCAN first seeks judicial relief to construe a September
6 12, 2019 “precedential” decision of the Supreme Court of Nevada affecting the controversy herein
7 regarding the Keep and Bear Arms rights of all Nevadans.

8 2. Secondly, NevadansCAN seeks a judicial determination that the Red Flag Law
9 component of Assembly Bill 291 (“AB 291”) is unconstitutional.

10 3. NevadansCAN’s membership includes gun-owning citizens interested in
11 promoting and protecting the ownership and safe use of firearms for self-defense, security,
12 competition, recreation, and hunting. As a grassroots, citizen-action network, NevadansCAN
13 monitors the Nevada Legislature and other governmental bodies to ensure that Nevadans’ civil
14 rights are protected generally and in this instance, that firearms laws enacted are in accordance
15 with our Constitutions and due process protections.

16 4. Plaintiff MARY ROONEY (“Rooney”) is a citizen and resident of the State of
17 Nevada and a co-founder of NevadansCAN.

18 5. Plaintiff JULIE HEREFORD (“Hereford”) is a citizen and resident of the State of
19 Nevada and a co-founder of NevadansCAN.

20 6. Plaintiff JANE DOE is a citizen and resident of the State of Nevada, who sues using
21 a fictitious designation because she is apprehensive that a new law to go into effect on January 1,
22 2020, which this suit concerns, will be used to deprive her use of arms, in violation of her civil
23 liberties.

24 7. Plaintiff JOHN DOE is a citizen and resident of the State of Nevada, who sues using
25 a fictitious designation because he is apprehensive that a new law to go into effect on January 1,
26 2020, which this suit concerns, will be used to deprive his use of arms, in violation of his civil
27 liberties.

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1 8. Defendant STEVE SISOLAK (“Governor Sisolak”) is the Governor of the State of
2 Nevada and made a party hereto, in his official capacity.

3 9. Article 5, Sec. 7 of the Nevada Constitution, in regards to the GOVERNOR
4 provides: “Responsibility for execution of laws. He shall see that the laws are faithfully executed.”
5 Article 5, Sec. 1 states in regards to the Governor: “Supreme executive power vested in governor.
6 The supreme executive power of this State, shall be vested in a Chief Magistrate who shall be
7 Governor of the State of Nevada.” The enforcement of the laws enacted by the legislative branch
8 are entrusted to his sound execution of them, if constitutional.

9 10. During the 2019, 80th Session of the Nevada Legislature, it irregularly enrolled a
10 law designated as AB 291, which provides for gun control in an omnibus fashion; among its
11 features is the creation of what is commonly known as a “red flag law,” which can be used to
12 unconstitutionally confiscate guns lawfully owned and possessed by Nevada citizens by use of
13 Extreme Risk Protection Orders (“ERPO”).

14 11. On June 14, 2019, Governor Sisolak signed the legislation to become effective
15 January 1, 2020.

16 12. Governor Sisolak is a joined as a party, as he is charged with implementation of
17 this unconstitutional law, and he should recognize that he *should not* have done so.

18 13. The Judicial Power of the State of Nevada is vested in a court system, led by the
19 Supreme Court of Nevada, having jurisdiction to decide issues of law arising under the “law” of
20 the state, such “law” including statutes such as AB 291, enacted by the Legislature and signed by
21 the Governor.

22 14. In *Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 135 Nev. Adv.
23 Op. 42, 448 P.3d 1120 (2019), the highest court in Nevada recognized that the right to keep and
24 bear arms is a fundamental right, as enshrined in the Second Amendment of the United States
25 Constitution and Article 1, Sec. 11 of the Nevada Constitution, providing: “Right to keep and bear
26 arms; civil power supreme: Every citizen has the right to keep and bear arms for security and
27 defense, for lawful hunting and recreational use and for other lawful purposes.”

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1 15. The “red flag law” component of the 80th Session’s AB 291, as configured and
2 structured by the Legislature, is unconstitutional according to *Andersen’s* holding, and cannot take
3 effect on January 1, 2020 because of infirmities in the law.

4 16. Red flagging, according to *Andersen’s* holding, cannot be used to deprive gun
5 owners of their right to keep and bear arms, unless a jury is empaneled to be the fact decider,
6 ousting the judicial officer’s role in “red flag” processes.

7 17. The seating of jury to be the decider of facts defeats the *sine qua non* of the red
8 flagging ambush, and invalidates the process to obtain an ERPO in Nevada, created by the 80th
9 Session of the Legislature.

10 18. Plaintiffs, and in the case of NevadansCAN, its members, will suffer by the
11 enforcement of this unconstitutional statute enacted contrary to the Nevada Constitution and the
12 U.S. Constitution, which is void and of no effect. Plaintiffs, and in the case of NevadansCAN, its
13 members, will suffer an injury-in-fact, because to enforce AB 291, there will be unlawful
14 government expenditures made to enforce this law.

15 **JURISDICTIONAL ALLEGATIONS**

16 19. Actions against public officials are permitted by the State of Nevada’s waiver of
17 sovereign immunity (Article 4, Sec. 22 of the Nevada Constitution).

18 20. Venue is proper in the First Judicial District Court, in and for Carson City, as it is
19 the seat of the government of the State of Nevada.

20 21. A declaratory judgment may be sought by persons interested in the validity of a
21 statute and are harmed by it, and are entitled to and have a determination of its validity determined
22 in a court of law. NRS 30.040(1); NRS 30.070.

23 22. Additionally, Plaintiffs’ rights, status, and/or legal relations are affected by AB 291
24 as Plaintiffs are: (a) subjected to less safe communities as a result of the enactment/enforcement
25 of AB 291; and (b) their fundamental enumerated constitutional rights to keep and bear arms will
26 be unduly burdened and infringed by AB 291 (when less drastic means were available to the
27 Legislature, and could have been selected to achieve the goals of AB 291).

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23. A justiciable controversy exists as Plaintiffs seek to have AB 291's enforcement blocked by a judicial declaration of its invalidity, by reason of the Nevada Supreme Court's decision in *Andersen*, and on other grounds.

PRELIMINARY ALLEGATIONS

The National Gun Control Effort Arrived in Nevada.

24. AB 291 is omnibus gun control legislation processed by the 80th (2019) Nevada Legislature, becoming effective January 1, 2020.

25. The sum of AB 291's parts reflects the personal preferences of proponents of out-of-state moneyed interests for "gun control" – "something" to address the symptoms of a society degraded by drugs, and the disintegration of the family unit, plagued by "fatherless homes." As the result of social and moral decline, and the mass media's control of the "news," there has been elite panic to produce a solution – "anything."

26. Thus, there arose national efforts to emasculate "keep and bear" arms provisions found in the U.S. Constitution and Nevada Constitution. Gun control in the form of gun seizure laws are touted as the cure-all, regardless of effectiveness of this remedy to the perceived cause of gun violence, which those in this panic believe is escalating.

27. The out-of-state proponents of these efforts in Nevada can be identified by their sizeable political donations and their shared anxiety of even seeing a firearm except on a movie screen or as a still picture. See, e.g., <https://www.nvsos.gov/SOSCandidateServices/AnonymousAccess/ViewCCEReport.aspx?syn=dk5OIG2EH8xeiRZ4PgI1hw%253d%253d> (last accessed November 22, 2019).

28. The Giffords Law Center to Prevent Gun Violence (<https://lawcenter.giffords.org/>) and Everytown for Gun Safety (<https://everytown.org/>) were the greatest advocates for furthering the legislative advancement of AB 291.

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29. These advocates for gun confiscation laws are the same elitists who have opposed any right to gun ownership. For example, in *District of Columbia v. Heller* an amicus brief filed by the alter ego of Everytown, the Hon. Michael Bloomberg and the Legal Coalition Against Violence (now part of the Giffords Law Center to Prevent Gun Violence) contended that the Founders had not “intended the Amendment to protect the right to possess guns for self-defense.” The same groups which advocate confiscation laws have historically opposed any right to individual gun ownership in the first instance. The view of Everytown’s Bloomberg is: “I don’t know why people carry guns. Guns kill people.” See <http://www.nydailynews.com/news/politics/10-americans-michael-bloomberg-article-1.2508480> (last accessed November 22, 2019).

30. As AB 291 finally emerged from the 80th Session, its function was to:

a. Criminalize Certain Firearm Modifications: With the amendments, it extends broader than federal regulations, and criminalizes certain modifications to semi-automatic firearms. Violations of this section would be criminal felonies. The section is subject to a constitutional challenge by reason of the supremacy clause of the U.S. Constitution, as federal regulations operate as “field preemption” by the Federal Government, ousting the State of Nevada of its jurisdiction within a “field occupied” by Federal regulation;

b. Impose Mandatory Storage Requirements that expand Nevada’s laws regulating firearm storage by interposing a one-size-fits-all government standard requiring firearms to be made inaccessible for defense and security. As enrolled, it unduly burdens Nevadans right to deploy firearms for defense, security, and self-protection and is void on account of vagueness, and as an overreach of the State’s police powers; and

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1 c. Create Red Flag/Pre-Crime Protective Orders – gun grabbing, which
2 facilitates violations of persons’ constitutional rights not because a person has been convicted of a
3 crime or adjudicated mentally ill, but solely on account of third-party, *ex parte* allegations. This
4 legislation lacks sufficient due process protections and utilizes low evidentiary standards falling
5 well below the norm for impairment/curtailment of fundamental civil constitutional rights; AB 291
6 does not survive any “tier of scrutiny” imposed by judicial review, ignores existing laws to combat
7 the gun use and ownership by those not entitled, and chooses the most drastic means to accomplish
8 its ends, by trampling too heavily upon the right the “keep and bear arms for security and
9 protection.”

10 **AB 291’s Circuitous Routing Through the 2019 Legislature.**

11 31. AB 291 was introduced in the Nevada State Assembly on March 18, 2019, in a
12 radically different form than what emerged from swift and stealth legislative processes, all
13 occurring at the end of the 80th Session.

14 32. AB 291 was first represented as: “AN ACT relating to public safety; prohibiting
15 certain acts relating to the modification of a semiautomatic firearm; reducing the concentration of
16 alcohol that may be present in the blood or breath of a person while in possession of a firearm;
17 repealing state preemption of the authority of counties, cities and towns to regulate the transfer,
18 sale, purchase, possession, carrying, ownership, transportation, storage, registration and licensing
19 of firearms, fire arms accessories and ammunition; providing penalties; and providing other
20 matters properly relating thereto.”

21 33. Emerging after midnight on May 29, 2019, AB 291 was suddenly transformed to:

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1 AN ACT relating to public safety; **establishing provisions**
2 **governing certain orders for protection against high-risk**
3 **behavior; defining certain terms relating to the issuance of such**
4 **orders; prescribing certain conduct and acts that constitute**
5 **high-risk behavior; authorizing certain persons to apply for ex**
6 **parte and extended orders for protection against high-risk**
7 **behavior under certain circumstances; providing for the**
8 **issuance and enforcement of such orders; prohibiting a person**
9 **against whom such an order is issued from possessing or having**
10 **under his or her custody or control, or purchasing or otherwise**
11 **acquiring, any firearm during the period in which the order is**
12 **in effect; establishing certain other procedures relating to such**
13 **orders; prohibiting the filing of an application for such orders**
14 **under certain circumstances; making it a crime to violate such**
15 **orders; prohibiting certain acts relating to the modification of a**
16 **semiautomatic firearm; reducing the concentration of alcohol that**
17 **may be present in the blood or breath of a person while in possession**
18 **of a firearm; making it a crime to negligently store or leave a firearm**
19 **under certain circumstances; providing penalties; and providing**
20 **other matters properly relating thereto.**

21 (emphasis added).

22 34. AB 219's character was drastically altered by removal of the "section" concerning
23 "preemption" and replacement with sections creating the "red flag law" (gun confiscation law via
24 ERPOs). As two Senators noted, the bill was not "amended" by the switch-out; it was
25 transmogrified, in violation of Senate Standing Rule No. 117. Different Subject Not Admitted as
26 Amendment ("No subject different from that under consideration shall be admitted as an
27 amendment; and *no bill or resolution shall be amended by* incorporating any irrelevant subject
28 matter or by association or *annexing any other bill or resolution* pending in the Senate, but a
substitute may be offered at any time so long as the original is open to amendment" (emphases
added).

35. The subject of "preemption" was a replaced *in toto* with the substance of separate
Senate Bill 120 ("SB 120"), which was proposed to create a "red flag law" at the beginning of the
80th Session, but was abandoned as of April 13, 2019.

36. However, SB 120 was legislatively "dead" as of April 13, 2019, pursuant to both
Joint Standing Rule No. 14.3.1 providing no further action allowed; but further action took place
upon it, by trick and chicanery – i.e., a violation of Senate Standing Rule No. 117.

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37. Joint Standing Rule No. 14.3.1 and Senate Standing Rule No. 117 were both violated and standalone SB 120 embracing a single subject was resurrected by transplantation into AB 291, demonstrating that Article IV, Sec. 17 of the Nevada Constitution was defied *en route*: “Each law enacted by the Legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised or section as amended, *shall be re-enacted and published at length*” (emphasis added).

38. The transformation of the law resulted from a 34-page Amendment 1027, which superciliously dwarfed the original text of the bill it “amended,” presented to the Senate Judiciary Committee for “consideration” in its early morning session of May 29, 2019.

39. The next day, May 30, 2019, transmogrified AB 291 was “read” in the Senate for the second time and approved after a division of the house. There was no “third reading” reported in the Senate’s Journal of its proceedings, as Article 4, Sec. 18 of the Nevada Constitution requires.

40. On June 1, 2019, the Assembly summarily concurred in Senate Amendment 1027. That process, as reflected in the Assembly’s Journal, including a “reading” of AB 291 in its entirety, for the first and only time.

41. During the entire 80th Legislative Session, the Assembly Judiciary Committee failed to conduct a single hearing to consider this firearm seizure language, before bringing amended AB 291 to the Assembly floor for the concurrence vote; the Assembly was the legislative house of AB 291’s origination.

42. What was presented to the Senate Judiciary Committee on May 29, 2019 at 8:00 AM as “new” AB 291 was unashamedly styled as a “MOCK-UP” and so rushed that it was described as merely “CONCEPTUAL:”

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1 MOCK-UP
2 *PROPOSED AMENDMENT TO AB291*
3 PROPOSED AMENDMENT 6000 TO
4 ASSEMBLY BILL NO. 291

5 FIRST REPRINT
6 *PREPARED FOR SENATE COMMITTEE ON JUDICIARY*
7 *MAY 29, 2019*

8 PREPARED BY THE LEGAL DIVISION

9 **NOTE: THIS DOCUMENT SHOWS PROPOSED**
10 **AMENDMENTS IN CONCEPTUAL FORM. THE**
11 **LANGUAGE AND ITS PLACEMENT IN THE OFFICIAL**
12 **AMENDMENT MAY DIFFER.**

13 (emphases in original). See AB 291 Revised Mock Up, available at
14 <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6530/Exhibits> (last accessed
15 November 22, 2019).

16 43. The legislative architects of the “switch-out” were not concerned about
17 constitutional irregularities in the bill’s processing through the legislature and appeared to embrace
18 the process short-cut. See Minutes of the Senate Committee on Judiciary, Eightieth Session, May
19 29, 2019, available at <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6530/Meetings>
20 (last accessed November 22, 2019).

21 **United States and Nevada Constitutional Shortcomings of the Red Flag Law**
22 **Considered at the Eleventh Hour in the 80th Session.**

23 44. The AB 291 red flag law template enacted as Nevada law is commonly known as
24 the “Giffords/Bloomberg model.” See United States Senate Judiciary Committee, Full Committee
25 Hearing, “Red Flag Laws: Examining Guidelines for State Action” - Written Testimony of David
26 B. Kopel, available at [https://www.judiciary.senate.gov/download/03/25/2019/kopel-](https://www.judiciary.senate.gov/download/03/25/2019/kopel-testimony&download=1)
27 [testimony&download=1](https://www.judiciary.senate.gov/download/03/25/2019/kopel-testimony&download=1) (last accessed November 22, 2019) (“Kopel Testimony”).

28 45. This law makes mincemeat of due process of law, will endanger law enforcement
and the public, and is a tool for stalkers and abusers to disarm innocent victims. Empirical data is
available to establish that nearly a third of such orders are improperly issued against innocent
people, in states with experience of the operation of such a law. *Id.* at p. 5.

1 46. Courts have identified seven hallmark elements indicative of legal processes which
2 safeguard procedural due process: “(1) notice of the basis of the governmental action; (2) a neutral
3 arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an
4 opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be
5 represented by counsel; and (7) a decision based on the record with a statement of reasons for the
6 result.” *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980) *citing* J. Nowak, R. Rotunda
7 & J. Young, *Constitutional Law* 488-503 (1978) and cases collected therein.

8 47. This AB 291 *ex parte* system deprives individuals of five of the seven elements of
9 due process: notice; opportunity to make an oral presentation; means to present evidence; cross-
10 examination and response to evidence; and the right to counsel at critical junctures.

11 48. The confiscation operation occurs in two phases of court proceedings: Stage I and
12 Stage II (the second phase occurring within seven days of the initial ambush of the victim.

13 49. Stage I transpires *ex parte* and in stealth, and the culmination of the process is an
14 order to seize the victim’s guns.

15 50. The Giffords/Bloomberg model features no-notice and surprise confiscation in its
16 Stage I, which is a violation of due process of law.

17 51. In the Giffords/Bloomberg model, the victim of the red flag treatment receives
18 notice of the legal proceeding against him or her when the police show up to confiscate his or her
19 firearms, creating an inherently volatile and dangerous situation for law enforcement and the
20 public at large.

21 52. Even at the Stage II “hearing” contemplated by this scheme, the
22 Giffords/Bloomberg system perpetuates the loss of individual due process because the victim is
23 not allowed to cross-examine adverse witnesses. Indeed, the adverse witnesses, including the
24 accuser, *never needs to appear in court*; instead, affidavits are submitted and relied upon in lieu of
25 the fundamental right to confront and cross examine adverse witnesses.

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1 53. *Ex parte* orders are disfavored in the law. Normally, when a petitioner seeks a
2 temporary restraining order on an *ex parte* basis, that party must explain why the object of the
3 order was not notified of the hearing and must prove that there will be “immediate” injury if the
4 order is not granted. If the court grants the order in the ordinary case, then the court must explain
5 why it was necessary to issue the order *ex parte*. AB 291 turns the table: the Giffords/Bloomberg
6 system presumes that confiscation orders will be issued *ex parte* as a matter of course.

7 54. Under the Nevada gun confiscation law, the one seeking the order of seizure need
8 not show up in court if law enforcement petitions. Instead, the petitioner can testify by telephone.
9 Thus, a judge is robbed of the ability to observe the petitioner’s demeanor, which is essential for a
10 court to make credibility judgments, as in any other judicial proceeding.

11 55. The Stage I *ex parte* hearing to obtain the confiscation order only requires proof by
12 a preponderance of the evidence, an evidentiary standard far too low. The petitioner at an *ex parte*
13 hearing enjoys the advantage of being able to present “prepared” one-sided evidence to the court,
14 with no opportunity for the court to consider contrary evidence.

15 56. The *ex parte* seizure standard in Stage I of merely “proof to a preponderance” is
16 both a due process abomination and an affront to the right to confront witnesses, guaranteed by
17 the Sixth Amendment.

18 57. The absence of a feature to provide counsel at the state’s expense is yet another
19 badge of unconstitutionality. The right to counsel is a fundamental precept of due process when a
20 protected fundamental right, such as “to keep and bear arms,” is to be stripped.

21 58. Without a right to appointed counsel in Stage I, victims can be forced to submit to
22 a mental health evaluation, be the subject of fairly widespread “danger” notifications even before
23 a court order has been issued against them, face contempt proceedings and prison for failing to
24 abide by any part of an ERPO, and unwittingly place themselves in jeopardy of criminal charges
25 in the absence of the advice of counsel.

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1 59. Another disconcerting aspect of the court’s powers under the bill is that in addition
2 to confiscating any firearms, the judge can order a mental health or substance abuse evaluation,
3 presumably against the victim’s will and upon contempt of court if he or she fails to comply. An
4 ERPO petition can thus function as an end-run around the State’s mental health statutes, which
5 have very detailed standards before compelling a person’s participation in the mental health
6 system.

7 60. The Sixth Amendment’s guarantee to confront accusers is a fundamental right:
8 cross-examination is beyond a doubt the greatest legal engine ever invented for discovering the
9 truth.

10 61. The Nevada confiscation statute shreds the right of cross-examination. The accuser
11 and witnesses supporting the accuser can avoid court and are not subject to cross-examination;
12 instead, an affidavit is the only evidence.

13 62. The Nevada gun confiscation statute does not give a judge the option to order a
14 continuance after an *ex parte* hearing commences in Stage I to adjourn and to later hear evidence
15 lending more badges of due process, and after a recess thoughtfully consider whether the case for
16 gun seizure was made out.

17 63. Unhappily, this Giffords/Bloomberg model permits petitions to be filed by a wide
18 variety of people, including ex-girlfriends or ex-boyfriends, and has no requirement for
19 corroboration of any evidence presented by this assortment of potential petitioners.

20 64. When considering to extend the arms deprivation order in Stage II, AB 291 neither
21 attempts to define what constitutes a “significant danger,” nor does it impose any sort of temporal
22 limitation on the anticipated danger expected to become manifest, in contrast to a separate
23 provision in the bill authorizing *ex parte* orders when the danger is “imminent.”

24 65. The purported danger need not be to more than one person, nor does the potential
25 harm even need to be a threat of *serious* personal injury – any type of possible injury will suffice
26 to trigger the possible issuance of an ERPO in Stage I. One does not even have to claim that the
27 feared injury is likely to be caused by a firearm; only that the victim’s possession of one creates a
28 significant danger of inflicting some type of injury.

1 66. Filing and being granted, a Stage I petition has the additional bonus of serving as a
2 general search warrant that would allow police to stumble across evidence of unrelated activity,
3 because the bill allows police officers granted an ERPO to “conduct any search permitted by law”
4 at a respondent’s residence in order to search for firearms.

5 67. An ERPO petition has a wide-scale impact on presumptively innocent individuals
6 even before a judge considers the request. If the petition is being initiated by law enforcement,
7 then the police agency must first make a good faith effort to notify family and household members
8 and “any known third party who may be at risk of violence.” This is required even if the danger
9 is not considered imminent and takes place before a judge has even reviewed the petition.

10 68. When dealing with an alleged prospective mass shooter, whom do the police notify?
11 *To be on the safe side, is it not likely that every known family member will be apprised? Will every*
12 *school within reasonable driving distance be subject to notification? What about the respondent’s*
13 *employer? Over-notification is inevitable, especially when tied to the broad standard for*
14 *petitioning described above. The consequences for the individual, even if an ERPO is never issued,*
15 *could be enormous.*

16 69. ERPOs will be entered into police databases and the bill makes provision for
17 removing that information once an ERPO is terminated. However, ERPOs are also entered into a
18 public judicial database, but there does not appear to be a comparable requirement for removing
19 terminated ERPOs from that system. A publicly accessible record showing that a person was a
20 party to a petition to have their gun rights taken away based on being an “extreme risk” could erect
21 barriers for decades when victims undergo a background check for employment or housing, and
22 could end up being just as harmful as if they had actually been convicted of a violent felony.

23 70. “Few states have sufficient experience with these seizure laws: California (2016),
24 Connecticut (1999), Indiana (2005), and Washington (2016). Social science research on the topic
25 is therefore sparse. No research has found any statistically significant reduction in crime, including
26 mass shooting fatalities, from confiscation laws.” *See Kopel Testimony at pp. 7-8.*

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1 71. “Studies about suicide reduction show mixed results. One study looked at suicide
2 in Connecticut and Indiana. ‘Whereas Indiana demonstrated an aggregate decrease in suicides,
3 Connecticut’s estimated reduction in firearm suicides was offset by increased non-firearm
4 suicides.’” *Id.* at p. 8 (citation omitted).

5 72. One theory of confiscation laws is that if potentially suicidal persons are deprived
6 of firearms, they will be much less likely to complete suicide because firearms are so much more
7 lethal than other means. That theory has no factual underpinnings. *Id.* at p. 8.

8 73. Given the dangers imposed by the Giffords/Bloomberg model, many sheriffs will
9 rightfully refuse to put their deputies and the public in harm’s way to enforce a confiscation order
10 that has a high possibility (about one in three) of being wrong. *Id.* at p. 10.

11 74. Another danger of the Giffords/Bloomberg system is the disarmament of innocent
12 victims. About a third percent of *ex parte* confiscation orders were issued wrongfully, in
13 jurisdictions with sufficient experience such that social science can monitor and report experience.
14 *Id.* at p. 10.

15 75. The penalty for false testimony supporting a wrongful order must be sufficiently
16 high to discourage false swearing. The threat of a misdemeanor, as AB 291 provides, is hardly
17 enough deterrence to a disturbed person seeking vengeance against the gun owner. There is no
18 reason to believe people who pervert the law by making false reports will somehow be more
19 scrupulous regarding the confiscation tool because of a charge of a mere misdemeanor.

20 76. Victims of abusive claims should be entitled to attorney’s fees and be afforded a
21 cause of action for civil damages. Without a strong civil remedy, there is little practical deterrent
22 to malicious reports and wrongfully issued seizure orders.

23 77. Constitutional requirements of procedural due process are put at highest risk when
24 an individual is deprived of a “fundamental” enumerated, constitutional right. The “right to keep
25 and bear arms” is such a “fundamental right.” This should be a civil rights issue in which a board
26 spectrum of voices agree. *See* [http://riaclu.org/news/post/aclu-of-rhode-island-raises-red-flags-
27 over-red-flag-gun-legislation/](http://riaclu.org/news/post/aclu-of-rhode-island-raises-red-flags-over-red-flag-gun-legislation/) (last accessed November 22, 2019).

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1 78. In its quest to *de jure* repeal of the Second Amendment, the law functions to maim
2 the Fourth, Fifth, Sixth, and Fourteenth Amendments along its way.

3 **Allegations Concerning Plaintiffs' Standing to Bring and Maintain this Action.**

4 79. Plaintiffs repeat and re-allege the allegations of all preceding paragraphs as though
5 set forth fully herein.

6 80. Once the web of the red flag law entangles a gun owner by the secret filing of the
7 petition for an ERPO order, the gun owner has no opportunity to object until the keep and bear
8 right has been fully infringed.

9 81. This feature of the seizure law is its most egregious constitutional assault; its
10 processes unfold against the lawful gun owner *in absentia* and while he or she is *incommunicado*.

11 82. The gun owner is advised *post hoc* of the entry of an ERPO after it all occurs.

12 83. By that time, the *ERPOed* gun owner has been conferred unassailable standing to
13 challenge the law, but has been deprived of the opportunity to use that "standing" to challenge the
14 law in the first instance, after he or she has been fully victimized by it.

15 84. Awaiting an actual first enforcement proceeding confiscating someone's gun
16 under AB 291, in an effort to demonstrate "standing" in a court, means sanctioning the process
17 after it has befallen a citizen, forcing the unconstitutional injury to be suffered and the infringement
18 completed.

19 85. That is so, as the first victim will not be notified of the filing of a petition to seize
20 the subject's guns, nor will he or she be notified of the first hearing in which a petitioner will obtain
21 the seizure order.

22 86. Neither will the lawful possessor of guns be allowed to testify in his or her own
23 case, nor have a lawyer present to cross-examine, put on a defense, or confront the witnesses
24 against them in the *ex parte* proceeding.

25 87. The commencement of the proceeding itself is the *fait accompli* destruction of the
26 keep and bear right and the penultimate infringement.

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1 88. More than half of the seizure “processes” AB 291 allows, will have occurred
2 before the law’s first victim is notified that he or she has been successfully *ERPOed* and has
3 “standing.”

4 89. When the gun owner first learns he or she is the subject of the proceeding, a search
5 warrant will have been issued and a search of his or her premises transpired. Deprivation of that
6 citizen’s property will have been authorized, and if he or she, they will be subjected to arrest for
7 obstruction of law enforcement officers.

8 90. The law’s proponents will likely choose the first test case of the ERPO process,
9 and ensure that he or she is unsophisticated and without resources to mount a defense by reason of
10 lack of money for a lawyer or a support system to fight back against the cavalcade of
11 unconstitutional violations unleashed by the filing of the ERPO petition with them as the object.

12 91. Thus, “additional factual development that would result from awaiting an actual”
13 proceeding enforcing this law (whose hallmark is the *ex parte* nature of most of its processes), “is
14 not likely to shed more light upon the...question of law presented by what is essentially, a facial
15 challenge” to the law.

16 92. So if factual development must mature into actual practice of the law upon an
17 unwitting subject, the loss of constitutional protection will have been accomplished and the
18 constitutional wrong fully consummated.

19 93. A core and remedial purpose of the Nevada Uniform Declaratory Judgments Act
20 (NRS Chapter 30) is to afford lawful Nevada gun owners “relief and insecurity with respect to
21 constitutional rights,” guaranteed in the Nevada and U.S. Constitutions to which harm will occur,
22 unless plaintiffs are deemed worthy persons to litigate this case and seek what their suit prays as
23 relief.

24 94. The best source available places gun ownership in Nevada at 37.50% out of a
25 population of 3 million, placing gun owners clearly in a minority of the general population. See
26 <http://worldpopulationreview.com/states/gun-ownership-by-state/> (last accessed November 22,
27 2019).

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1 95. Hostility to gun possession was non-existent a decade ago in Nevada, but now
2 thinly veiled hostility to guns and their owners is widespread on social media and in the press.

3 96. That 37.50% minority share a higher anxiety of suspicion about those seeking to
4 curtail the free exercise of the keep and bear right.

5 97. The grounds for imposition of an ERPO under AB 291 is the exhibition of “high
6 risk” behavior.

7 98. Among those fearing illegitimate use of the red flag law against them are the
8 Plaintiffs in this lawsuit. They are becoming more cautious about being outspoken about Second
9 Amendment issues. And anti-gun owner sentiment chills the exercise of free speech under the
10 First Amendment as the red flag law cites “words uttered” as a “behavior” that marks the need for
11 *red flagging*.

12 99. The law mentions drug and alcohol use as a “high risk” indicator but it is hearsay
13 “communications” of hostile speech uttered by the “adverse party,” which will be the easiest
14 indicator used as grounds for issuance of the ERPO.

15 100. Rooney is the co-founder of NevadansCAN, formed out of devotion, respect, and
16 heartfelt love of country and our sacred and divinely inspired Bill of Rights.

17 101. NevadansCAN is a domestic nonprofit cooperative corporation formed on
18 December 20, 2017 by Rooney and Hereford and it is in good standing with the Nevada Secretary
19 of State.

20 102. Since NevadansCAN and Rooney first identified AB 291 as a civil liberties threat
21 during the 80th Legislative Session, Rooney has devoted in excess of 200 hours in preparation to
22 mount this legal challenge, rallying grass root support for this legal effort and molding its direction.

23 103. Rooney owns her gun for the purpose of self-defense; she is fearful of the broad
24 “standing” AB 291 affords persons having only a causal relationship to her, who might be
25 motivated to seek an ERPO against her for ulterior motives and no other reason than to chill her
26 exercise of First Amendment rights (to express non-favored political views), or in retaliation.

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1 104. As gun control bills were steam-rolled through the 80th Nevada Legislature,
2 Rooney attended each hearing in person to express her views that enactment of the gun bills was
3 an infringement of Nevadans' constitutional rights.

4 105. Rooney has a long history of political activism, including running for Nevada
5 Assembly (District 41) in 2016.

6 106. Rooney's history of activity in the political sphere demonstrates that she is a
7 person worthy to be conferred standing to maintain this suit and she will do so with vigor.

8 107. Hereford is the other co-founder of NevadansCAN, a Citizens Action Network
9 formed in 2017, and is its president.

10 108. As its website demonstrates, the organization advocates for a broad array of
11 conservative policies. <https://nevadanscan.com/> (last accessed November 22, 2019). At its core,
12 the organization is specially attuned to protecting the Bill of Rights, which AB 291 violates in
13 multiple facets.

14 109. Hereford immigrated lawfully to the United States in 1970, residing in the
15 Northeast, building and nurturing successful companies, fully enjoying the freedoms allowed in a
16 capitalist country.

17 110. From 1993 to 1998, Hereford was the owner and stockholder of PECOR Steel
18 Engineering Company, based in Pennsylvania.

19 111. Hereford served as President of an International Trading Company from 1982 to
20 1998, was recognized as the recipient of SBA Exporter of the Year in 1993 for Atlantic Region,
21 Entrepreneur of the Year in 1996 in Pittsburgh, and as one of the Best 50 Business Women in
22 Pennsylvania in 1995.

23 112. Hereford is married to Bane Hereford and raised two children and is a grandmother
24 of two.

25 113. Since 1998, Hereford has been a citizen and resident of Las Vegas, Nevada.

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1 114. Hereford has been recognized for her activism in civil affairs as President – Asian
2 American Leadership Counsel of Nevada (2006-2010) and as a member of the planning committee
3 - Nevada Policy Research Institute (2008) and has been recognized with the Minority Life Time
4 Achievement Award by the Nevada Women Chamber of Commerce.

5 115. Like Rooney, Hereford attended each hearing on gun control bills considered
6 during the 2019 80th Session; she advocated against each bill. Though frustrated by legislative
7 shenanigans, she strived to exercise her right to instruct her representatives as they made law.

8 116. In July of 2018, Hereford was one of three speakers at the monthly meeting of the
9 Nevada Republican Club to honor her activism in the civic affairs of the Nevada community.

10 117. Hereford enjoys her exercise of all of the constitutional freedoms afforded to
11 American and Nevada citizens, and as an immigrant recognizes the invidious threat to the bill of
12 rights AB 291 presents.

13 118. Hereford has expended more than 200 hours since the end of the 2019 legislative
14 session to formulate this legal challenge to AB 291. Weekly, she labors full time on the business
15 of NevadansCAN, with its current focus on this threat to civil rights.

16 **FIRST CAUSE OF ACTION**

17 **(Declaratory Judgment re: Infringement of the Right to Keep and Bear Arms)**

18 119. Plaintiffs repeat and re-allege the allegations of all preceding paragraphs as though
19 set forth fully herein.

20 120. The Second Amendment to the U.S. Constitution states: “A well[-]regulated
21 Militia, being necessary to the security of a free State, the right of the people to keep and bear
22 Arms, shall not be infringed.”

23 121. In *D.C. v. Heller*, the United States Supreme Court affirmed that the right to “keep
24 and bear arms” belongs to individuals, for self-defense and protection. 554 U.S. 570, 595, 128 S.
25 Ct. 2783, 2799 (2008).

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1 122. In *McDonald v. City of Chicago, Ill.*, the United States Supreme Court clarified that
2 the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment
3 against state and local governments, to restrict overly burdensome laws impairing upon the right
4 to “keep and bear arms.” 561 U.S. 742, 130 S. Ct. 3020 (2010).

5 123. In the 1982 Nevada General Election, the voters approved an amendment to the
6 Nevada Constitution to add an additional subpart to Article 1, Sec. 11 of the constitution, by
7 enumerating a right of private citizens: “1. Every citizen has the right to keep and bear arms for
8 security and defense, for lawful hunting and recreational use and for other lawful purposes.”

9 124. In the argument for passage, the proponents stated the purpose of the 1982
10 amendment thusly: “Passage of the amendment would prohibit the legislature from enacting
11 restrictive gun control measures.” This statement of purpose for passage was sufficiently
12 convincing that voters approved the amendment by 70% of the votes cast.

13 125. Nevada and other states enacted such constitutional provisions to curb states’
14 “police powers” to enact gun control laws. The 1982 constitutional enactment by Nevadans made
15 “the right to keep and bear arms for security and defense” a fundamental right and expanded upon
16 Article 1, Sec. 1’s enumerated inalienable rights, which already included among them the express
17 right of “*defending life and liberty...and obtaining safety.*”

18 126. The term “police power” refers to the general authority of state governments to
19 enact legislation protecting or promoting the public health, safety, morals, or general welfare. The
20 notion of police power reflects the doctrine that, although the federal government is one of
21 enumerated powers, the state governments generally have plenary authority to act, except where
22 restricted by their respective constitutions.

23 127. Thus, a state without a “keep and bear arms” provision might be free to enact any
24 form of firearms legislation under the general police power. The police power of the Nevada
25 Legislature does not extend to enacting laws governing “pre-crime” offenses such as enumerated
26 in AB 291 because that police power clashes with the enumerated fundamental right to “keep and
27 bear arms.”

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1 128. The addition of an express right of Nevada citizens to “keep and bear arms for
2 security and defense” is a restriction upon the police power of the Nevada Legislature to enact
3 laws infringing on that right (and others constitutionally protected such as due process, the right
4 to confront witnesses, etc.) willy-nilly and without appropriate opportunities of the citizenry to
5 participate in the legislative process in accordance with the Nevada Constitution.

6 129. The burden on constitutional rights imposed by this gun seizure law is far too great
7 to survive judicial scrutiny under any other tier of review, as AB 291’s touted benefits can be
8 achieved through means far less destructive to the enumerated right to “keep and bear arms.”

9 130. A legitimate governmental purpose in regulating the right to bear arms cannot be
10 pursued by means that broadly stifle the exercise of this right where the governmental purpose can
11 be more narrowly achieved, without attendant violations of the Fourth, Fifth, Sixth, and Fourteenth
12 Amendments to the U.S. Constitution.

13 131. A governmental purpose to control or prohibit certain activities, which may be
14 constitutionally subject to state regulation under the police power, may not be achieved by means
15 which sweep unnecessarily broadly and thereby invade the realm of a protected freedom, such as
16 the right to keep and bear arms guaranteed in the Nevada and U.S. Constitutions.

17 132. AB 291 violates the Second Amendment to the U.S. Constitution and Article 1,
18 Sec. 11(1) of Nevada’s Constitution, and is thus void and unenforceable.

19 **SECOND CAUSE OF ACTION**

20 **(Declaratory Judgment re: Intervening Nevada Supreme Court Precedent)**

21 133. Plaintiffs repeat and re-allege the allegations of all preceding paragraphs as though
22 set forth fully herein.

23 134. AB 291 is to take effect on January 1, 2020; its “red flag” gun confiscation
24 component cannot be implemented, as the statute structured by the Legislature employs means
25 which the Supreme Court of Nevada declared unconstitutional.

26 135. On September 12, 2019, the Supreme Court of Nevada announced its decision in
27 *Andersen*, holding that first-offense domestic battery was a serious offense to which the right to a
28 jury trial attached. 135 Nev. Adv. Op. 42, 448 P.3d 1120.

1 136. *Andersen* imposes a major stumbling block to the implementation and practical use
2 of the “arms” confiscation framework, in recognizing that the “arms” civil right cannot be
3 infringed in proceedings which are “summary.”

4 137. In *Andersen*, Petitioner Chris Andersen was charged with an offense, which if he
5 was convicted of, would cause the automatic forfeiture of his right to keep and bear arms, as the
6 Nevada and U.S. Constitutions guarantee.

7 138. *Andersen* posited the question as whether the elements making out an offense, if
8 proven, was to be decided by a jury or by a judge as the finder of fact. At stake was Anderson’s
9 right to continue to exercise a fundamental constitutional right – i.e., gun possession.

10 139. In the specific scenario presented in *Andersen*, if Petitioner was found guilty of the
11 crime of domestic violence, he lost his right to keep and bear arms on the say-so of a single judge,
12 after a truncated bench trial, in an inferior court, in a courtroom so small a jury could not fit.

13 140. The Nevada Supreme Court’s September 12, 2019 decision in *Anderson* invalidates
14 the process of deprivation of the “arms” right, unless a jury trial is afforded, and the role of a judge
15 as the finder of facts is replaced by a jury.

16 141. In a “red flag” proceeding, the consequence of what is to be adjudicated is the
17 same as the domestic crime case in *Andersen* – i.e, the loss of the right to possess arms, the gun
18 “civil right” set forth in both the Bill of Rights and the Nevada Constitution.

19 142. In the instance of one subjected to “red flag” treatment, this “red flag law” slated
20 to go into effect provides that it is a judge who decides whether arms are to be seized after factual
21 proof adduced that one poses an “imminent risk of danger” in the law’s Stage I; and that the
22 individual poses “a high risk of danger” in the law’s Stage II.

23 143. In both of its Stages, the new “red flag” law consigns to a judge the role of fact
24 finding, which *Andersen* now forbids.

25 144. That “red flag” statutory framework thus violates *Andersen*’s premise that gun
26 deprivation requires *fact finding* (upon the critical factual elements) to be determined by a jury of
27 one’s peers, as protected by the Sixth Amendment.

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1 145. *Andersen* mandates that the role of “red flag” fact finding be taken from a judge
2 and transferred to a jury, upon a trial of the pertinent facts – i.e., whether “an imminent risk of
3 danger” or “a high risk of danger” is posed by the gun owner’s continued possession of arms.

4 146. The “red flag law” component of the 80th Session’s AB 291, as configured and
5 structured by the Legislature, is unconstitutional according to *Andersen*, and cannot take effect on
6 January 1, 2020.

7 147. Red flagging, according to *Andersen*, cannot be used to deprive gun owners of their
8 right to keep and bear arms unless a jury is empaneled to be the fact decider, ousting the judicial
9 officer’s role in each “red flag” process.

10 148. The seating of a jury to be the decider of facts defeats the *sine qua non* of the red
11 flagging ambush created by the 80th Session of the Legislature and invalidates the process to obtain
12 an ERPO in Nevada.

13 **THIRD CAUSE OF ACTION**

14 **(Injunctive Relief - Against Administering and Enforcing the Red Flag Law)**

15 149. Plaintiffs repeat and re-allege the allegations of all preceding paragraphs as though
16 set forth fully herein.

17 150. NRS 33.010(2) permits the entry of an injunction in the event the action
18 complained of, if allowed to occur, would produce great or irreparable injury to the plaintiff.

19 151. Plaintiffs seek an injunction against the enforcement of the red flag component of
20 AB 291 prior to its effective date, to prevent the occurrence of great and/or irreparable injury which
21 will befall Plaintiffs when this unconstitutional law is due to take effect.

22 152. No equivalent type of the proposed red flag law processes currently exist in
23 Nevada against gun owners. Thus, barring enforcement of this law by the issuance of an injunction
24 would maintain the status quo.

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1 153. Greater injury will result to Plaintiffs than Defendant, because it is plaintiff-
2 citizens who risk enforcement of this law against their interests in contravention of their rights
3 under the Nevada and U.S. Constitutions. The enforcement of AB 291 is violative of not only
4 keep and bear arms rights, but denial of the right to counsel, denial of right to put on a defense to
5 an unlawful taking of property and resultant Second Amendment infringement, denial of notice
6 and opportunity to be heard in advance of an unlawful search and seizure of property, denial of
7 rights to confront witnesses who can accuse another citizen of pre-crime motives and intentions
8 (not gauged or measured by an inappropriately low standard or proof), and the right to have a jury
9 of one's peers (rather than a judge as fact finder) decide whether gun confiscation should occur,
10 as *Andersen* secures.

11 154. Defendant's person and residence is protected by armed personnel supplied by the
12 State of Nevada, while the ordinary Nevada citizen is defenseless without access to arms if this
13 unconstitutional mechanism is visited upon them and their means of defense and protection is
14 seized.

15 155. As the foregoing allegations demonstrate, Plaintiffs are likely to succeed on the
16 merits.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs pray for judgment as follows:

- 19 1. That the Court finds that Plaintiffs' claims are justiciable and they have standing
20 without awaiting an actual prosecution of a victim under AB 291, and an unlawful gun
21 confiscation/seizure and deprivation of constitutional rights, in order to challenge this overreach
22 of the police powers by the State of Nevada;
- 23 2. That the Court finds that AB 291's red flag component is an unlawful infringement
24 of the Second Amendment of the U.S. Constitution and deprives Nevadans and Plaintiffs due
25 process of law;
- 26 3. That the Court finds that AB 291's red flag component is gun control which Article
27 1, Sec. 11(1) of the Nevada Constitution was intended to prohibit;

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1 4. That the Court finds that the red flag component of AB 291 as an exercise of the
2 State’s police power sweeps unnecessarily broadly, invading the realm of an enumerated right, the
3 right to keep and bear arms, when less drastic means are available to accomplish the desired ends;

4 5. That the Court applies the rule of law *Andersen* reveals to AB 291’s features, and
5 finds that the “red flag” component of the legislation cannot be implemented as the 80th Session
6 of the Nevada Legislature enacted it;

7 6. That the Court further finds that the application of *Andersen’s* holding to the red
8 flag process does not permit severance of the unconstitutional processes from the remaining
9 procedure, to enable any practical use of the law as contemplated by the framers of the “red flag
10 model” used to pattern AB 291;

11 7. That the Court further finds and declares that AB 291’s deprivation of the right to
12 a jury determination of all facts to be adduced in a red flag proceeding renders the statute
13 unconstitutionally defective, and thus, not enforceable upon the date it is due to become effective
14 (January 1, 2020); and

15 8. For the issuance of an injunction enjoining Defendant as the head of the executive
16 branch of government, from administering or enforcing the red flag components of AB 291 and
17 ordering him to so instruct subordinate organs of state government and its subdivisions to consider
18 the law void, unconstitutional, and of no effect, to such extent that any attempted enforcement
19 would not be shielded from finding personal liability of the actor, and the protection of sovereign
20 immunity stripped from such actor;

21 9. For an award of attorney’s fees and costs of suit; and

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10. For such other and additional relief as the Court deems just and proper, and as the evidence shows.

DATED this 3rd day of December, 2019.

KOLESAR & LEATHAM

By 

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