

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 * * * * *

3 CAREY HUMPHRIES; AND
4 LORENZO ROCHA, III,

5 Appellants,

6 vs.

7 NEW YORK-NEW YORK HOTEL &
8 CASINO,

9 Respondent.

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S.C. CASE NO. 65316

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12 **APPELLANTS' ANSWER TO RESPONDENT'S**
13 **PETITION FOR REHEARING**

14
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I. INTRODUCTION

Criminal activity has serious consequences for the victims, community, and reputation of Las Vegas and the State of Nevada. Although Respondent, New York-New York Hotel & Casino ("NYNY") suggests we should simply be resigned to the fact that "crime happens," crime should nonetheless be deterred through every legal mechanism possible to keep our community safe. NYNY states in its petition that "At the broadest level of generality, all crime is to a certain degree foreseeable." Pet. at 1. However, under NRS 651.015 the opposite is true. The Legislature enacted NRS 651.015 to create a statutory framework governing hotel liability for injuries caused by unlawful acts of third parties. NRS 651.015 grants extremely broad protection to hotel and resort operators by codifying a rule that such unlawful acts are presumed to be *unforeseeable*, and an injured patron must establish otherwise. As NYNY concedes, however, the statute was not intended to provide absolute immunity. As such, the otherwise blanket protection given to innkeepers under the statute is limited by the two express exceptions set forth in NRS 651.015(3) which define acts that are foreseeable for purposes of the statute.

Under NRS 651.015(2), the Legislature expressly vested the courts with authority to determine foreseeability and duty as a matter of law. Consistent with this statutory framework, the Panel analyzed the facts of this case, and a majority determined that the battery against Appellants was foreseeable based on NYNY's

1 notice of prior, similar wrongful acts on the premises, and found that NYNY had a
2 duty to Appellants as a matter of law. *See Humphries v. New York-New York Hotel*
3 *& Casino*, 403 P.3d 358, 363 (Nev. 2017). Because this Court did exactly what
4 NRS 651.015 requires, NYNY's petition for rehearing should be swiftly denied.
5

6 As is relevant here, a majority of the Panel reversed the district court's
7 decision that NYNY had no duty to Appellants because the wrongdoing was
8 unforeseeable. In doing so, the Panel found the district court's foreseeability
9 analysis under NRS 651.015(3)(a) was overly restrictive because it focused on the
10 spontaneity of the subject assault, and looked only at notice that a specific individual
11 would engage in a specific act. The Panel further found that the district court failed
12 to even consider NRS 651.015(3)(b), and ignored an extensive record of similar,
13 unlawful acts that had occurred on NYNY's premises. *Id.* at 361-362.
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18 Although NYNY clearly does not like the Panel's decision in this case, the
19 Panel did not depart from any statutory language, did not enact any "radical change"
20 in innkeeper liability, and did not subject innkeepers to any "heightened duty" as
21 NYNY suggests. Pet. at p. 2. To the contrary, it is NYNY that now asks this Court
22 to ignore the plain language of NRS 651.015(3), and to impose an additional
23 requirement on Appellants to establish the third-party wrongdoing was foreseeable
24 as a matter of law – regardless of whether Appellants have already satisfied the
25 exceptions in NRS 651.015(3).
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1 In its petition, NYNY argues for the first time that the Panel misinterpreted
2 NRS 651.015(3). NYNY argues, with no legal support, that NRS 651.015(3) is not
3 the test for determining foreseeability, and that satisfaction of one or both of the
4 express exceptions in NRS 651.015(3) only results in a “threshold” showing of
5 *possible* foreseeability. NYNY maintains that even though a majority of the Panel
6 found that Appellants fully satisfied NRS 651.015(3), the statute requires some
7 additional showing to establish foreseeability as a matter of law. Further, and despite
8 this Court’s de novo review and findings of duty and foreseeability, NYNY now
9 argues that this Court should not have made any findings on duty and causation at
10 all, but should leave that analysis to the district court.
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15 In addition to being untimely raised, NYNY’s arguments are simply incorrect.
16 NYNY’s proposed interpretation contradicts the plain meaning of NRS 651.015(3),
17 and this Court’s prior interpretation of the statute which carves out two express
18 exceptions to the rule that third-party wrongdoing is unforeseeable. Assuming that
19 this Court would even entertain this new argument - or ultimately accept it – the
20 argument lacks merit and should be rejected. Through its de novo review, the Panel
21 followed the statutory framework, considered the totality of the facts, and considered
22 the extensive (and largely undisputed) evidence of prior, similar incidents on
23 NYNY’s premises before concluding that the assault was foreseeable, and that
24 NYNY had a duty to Appellants. Accordingly, even if this Court agrees that
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1 Appellants had to do something more than satisfy the express exceptions of NRS
2 651.015(3) to establish foreseeability, which it should not, the findings of
3 foreseeability and duty in this case are fully supported by the record, and the petition
4 should be denied.
5

6 **II. LEGAL ARGUMENT**

7 **A. NYNY's Request for En Banc Review is Procedurally Improper.**

8
9 At the outset, NYNY requests "rehearing by the en banc Court." Pet. at p.1.
10 Such a request is inconsistent with NRAP 40A(b) which holds that "[a]ny party may
11 petition for en banc reconsideration of a panel's decision within 10 days after written
12 entry of a panel's decision to deny rehearing." As such, NYNY's request for en
13 banc review is premature.
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16 **B. NYNY's New Statutory Construction Argument Is Not An Appropriate** 17 **Basis to Grant a Petition for Rehearing**

18 Irrespective of the form of the request, reconsideration of the Panel's decision
19 should be denied. Although NYNY's new statutory construction argument lacks
20 merit, this Court should not consider it in the first place. This Court has repeatedly
21 held that questions raised for the first time on petition for rehearing will not be
22 considered. *Chadbourne v. Hanchett*, 35 Nev. 319, 323, 133 P. 936, 937 (1912).
23 Notably, the appeal in the instant case focused entirely on the proper interpretation
24 and application of NRS 651.015, and subsection three (3) in particular. Indeed,
25 Appellants specifically argued that NRS 651.015(3) provided the definition of
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1 “foreseeable” for purposes of the Court’s determination of duty. *See* Opening Brief
2 at 12:11-15. As discussed herein, this Court previously adopted such a definition in
3
4 *Estate of Smith v. Mahoney’s Silver Nugget*, 127 Nev. 855 (2011).

5 NYNY never challenged Appellants’ interpretation, and never argued that
6 Appellants’ satisfaction of either NRS 651.015(3)(a) or (b), or both, would not be
7
8 sufficient to establish foreseeability as a matter of law. NYNY certainly never
9 argued that NRS 651.015(3) was only intended to be a “threshold” indicator of
10
11 “possible” foreseeability, and that Appellants would still be required to satisfy some
12 additional, unspecified burden to establish foreseeability. NYNY provides no
13 explanation for why it did not advance this argument when the Panel conducted its
14
15 de novo review, and NYNY should not be permitted to raise the argument now in a
16
17 petition for rehearing.

18 **C. Rehearing Is Not Warranted Because NYNY’s Proposed Interpretation**
19 **Contradicts The Plain Language of NRS 651.015 and Should Not Be**
20 **Adopted By This Court.**

21 Even if this Court elects to consider NYNY’s new argument, which it should
22 not, the argument is meritless and should be rejected. Words in a statute should be
23 given their plain meaning unless this violates the spirit of the act. *Application of*
24 *Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949). Where a statute is clear on its
25 face, a court may not go beyond the language of the statute in determining the
26 legislature’s intent. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438,
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1 441 (1986).

2 When enacting NRS 651.015, the Legislature specifically directed courts to
3 determine foreseeability of a wrongful act and innkeeper duty as a matter of law,
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5 The court shall determine as a matter of law whether the wrongful act
6 was foreseeable and whether the owner or keeper had a duty to take
7 reasonable precautions against the foreseeable wrongful act of the
8 person who caused the death or injury.

9 NRS 651.015(2)(b).

10 Because foreseeability of a third-party's wrongdoing is a critical component
11 of the court's analysis, the Legislature provided a definition of foreseeability that
12 effectively defined all third-party acts of wrongdoing as unforeseeable **with two**
13 **express exceptions**,
14

15 For the purposes of this section, a wrongful act is not foreseeable
16 unless:

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- 18 (a) The owner or keeper failed to exercise due care for the safety
19 of the patron or other person on the premises; or
- 20 (b) Prior incidents of similar wrongful acts occurred on the
21 premises and the owner or keeper had notice or knowledge of
22 those incidents.

23 NRS 651.015(3)(a) and (b).

24 As such, the Panel looked to NRS 651.015(3), and specifically noted that
25 satisfying either of the two exceptions is sufficient to demonstrate foreseeability,
26 "[f]or purposes of determining duty under NRS 651.015(2)(a), **NRS 651.015(3)**
27 **provides that an incident may be foreseeable in two distinct ways...**"
28

1 *Humphries*, 403 P.3d at 361 (emphasis added). The entire Panel (including the
2 dissent) also expressly relied upon *Smith*, wherein this Court previously examined
3 the plain language of NRS 651.015(3), and correctly interpreted it as setting forth
4 the definition of “foreseeable” for purposes of applying the statute,
5

6 **We further conclude that NRS 651.015(3)'s definition of**
7 **“foreseeable” provides the appropriate framework for conducting**
8 **this inquiry** in the context of innkeeper liability by codifying the
9 common-law approach that we set forth in *Doud*.

10 *Id.*, 127 Nev. at 856 (emphasis added).

11 Based on the plain meaning of the statute, as adopted in *Smith*, a majority of
12 the Panel ruled that the trial court improperly applied NRS 651.015 to the facts of
13 this case because the district court improperly applied NRS 651.015(3)(a) by
14 focusing on the “spontaneous” nature of the attack, and unduly limited its review to
15 notice of specific wrongdoing by specific individual. The majority held that nothing
16 in the statute so limited the court’s review, but instead the standard set forth in NRS
17 651.015(3)(a) “is akin to a totality of the circumstances approach.” *Id.* at 362. The
18 majority also found that the district court erred by not considering NRS
19 651.015(3)(b) and numerous similar acts that occurred at NYNY, and noted that an
20 evaluation of foreseeability under NRS 651.015(3), “requires a case-by-case
21 analysis of similar wrongful acts, including, without limitation, the level of violence,
22 location of attack, and security concerns implicated.” *Id.* at 360.
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1 NYNY now argues for the first time that NRS 651.015(3) is not the test for
2 foreseeability. NYNY argues that the test in NRS 651.015(3) is only conclusive as
3 to whether third-party wrongdoing is *unforeseeable*, but is not conclusive as to
4 whether the same conduct was *foreseeable*. As such, NYNY asks this Court to rule
5 that satisfaction of one of the two express exceptions in NRS 651.015(3) is not
6 enough to establish foreseeability because the “Legislature couched the statutory
7 language in terms of setting two threshold requirements for foreseeability to *possibly*
8 exists.” Pet. at p. 5 (emphasis added). NYNY asserts that “while the absence of
9 either of the two threshold requirements [automatically] precludes a finding of
10 foreseeability, it does not follow that the presence of either automatically establishes
11 foreseeability.” Id. at p. 3. NYNY essentially argues that rehearing is required
12 because the Panel only found that Appellants satisfied NRS 651.015(3), but that
13 Appellants must still satisfy some additional requirement not expressly described in
14 NRS 651.015(3) to establish foreseeability as a matter of law.

15 "The construction of a statute is a question of law subject to review de novo."
16 "If the plain meaning of a statute is clear on its face, then [this court] will not go
17 beyond the language of the statute to determine its meaning." However, when a
18 statute "is susceptible to more than one natural or honest interpretation, it is
19 ambiguous, and the plain meaning rule has no application." In construing an
20 ambiguous statute, we must give the statute the interpretation that "reason and public
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1 policy would indicate the legislature intended." *Beazer Homes Nev., Inc. v. Eighth*
2 *Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

3
4 Simply put, an act that is legally "not unforeseeable" is foreseeable. The
5 Legislature clearly intended NRS 651.015(3) to carve out two, distinct exceptions to
6 the general rule that third-party wrongdoing is considered unforeseeable under the
7 statute. As such, wrongdoing that meets one of the two exceptions is necessarily
8 foreseeable for purposes of the statute. Notably, although Justice Pickering did not
9 believe the evidence was sufficient to establish foreseeability, in her dissent she also
10 interpreted NRS 651.015(3) as providing the definition of foreseeability.
11 *Humphries*, 403 P.3d at 364. As such, all three members of the Panel interpreted the
12 statute the same way. The Panel's unanimous agreement on that point is not
13 surprising because there is nothing in the language of the statute itself, or in the
14 legislative history, that suggests NRS 651.015(3) was intended to create a gray area
15 with regard to foreseeability in which a court could conclude a third-party's
16 wrongful act satisfies one of these two exceptions to unforeseeability, but then still
17 find the subject wrongdoing to be unforeseeable anyway.

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Allowing a court to rule that wrongdoing that satisfies the exceptions in NRS
651.015(3) can still be unforeseeable would render the exceptions meaningless (or
permit courts to ignore the exceptions entirely). Such an interpretation would also
defeat the public policy concerns that led the Legislature to include these express

1 exceptions in the statute. Moreover, there is nothing in the statute that describes or
2 even suggests what additional proof a plaintiff would need to show to establish
3 foreseeability once an exception is met.
4

5 NYYN boldly declares that “The Panel's decision here effectively eviscerates
6 the explicit requirements the Legislature imposed for an innkeeper to be responsible
7 for the criminal acts of third parties.” Pet. at p. 4. However, it is NYYN that is
8 advocating for an interpretation that “eviscerates” two express provisions of the
9 statute. NYYN concedes the statute was never intended to create immunity for
10 innkeepers (Pet. at p.1), yet it now requests this Court adopt an interpretation that
11 effectively eliminates the only two exceptions to immunity. If the Legislature
12 wanted plaintiffs to satisfy additional requirements to establish foreseeability, it
13 could have done so when it drafted the two exceptions in NRS 651.015(3). NYYN's
14 proposed interpretation would re-write NRS 651.015(3) to impose requirements not
15 intended by the Legislature, would unduly burden plaintiffs suing under the statute,
16 is contrary to reason and public policy. In any event, NYYN's petition should be
17 denied.
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23 **D. Rehearing is Not Warranted Because This Court Conducted a Complete**
24 **Analysis of All the Facts and Evidence Before Concluding NYYN Owed**
25 **Appellants a Duty under NRS 651.015.**

26 Ultimately, NYYN's petition provides no basis for rehearing because,
27 regardless of whether Appellants were required to do *more* than satisfy the
28

1 exceptions in NRS 651.015(3) to establish foreseeability, Appellants met that burden
2 here. Consistent with the Legislative directive set forth in NRS 651.015(2), the
3 Panel conducted a complete, de novo review of all the facts and evidence in this
4 case, and a majority concluded that the third-party's wrongdoing was foreseeable,
5 and that NYNY owed Appellants a duty as a matter of law. As noted above, although
6 Justice Pickering disagreed that the evidence established foreseeability, she
7 otherwise agreed with the interpretation of NRS 651.015(3). NYNY therefore
8 should not be permitted to use its petition for rehearing to request the Court reweigh
9 the evidence, or second guess the majority, in the hopes of a different result.
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13 Regardless, the totality of the facts and evidence in this case fully supports the
14 majority's decision. Throughout the petition, NYNY improperly attempts to
15 minimize and misrepresent the record to suggest that the majority based its entire
16 decision on "a few attenuated prior incidents of fights between patrons." Pet. at p.
17 3. The record, however, establishes the extensive number of prior, similar, incidents
18 at NYNY, and demonstrates that the Panel considered much more evidence than just
19 prior incidents in reaching its conclusions.
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23 As is relevant here, the majority noted that the district court failed to consider
24 "a year's worth of incident reports detailing on-premises assaults and batteries" at
25 NYNY. *Humphries* 403 P.3d at 362. The majority also referenced multiple reports
26 of patron-on patron batteries in NYNY nightclubs, and at the Center Bar near where
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1 the assault occurred. *Id.* As part of its review, the Panel examined testimony given
2 by NYNY's corporate NRCP 30(b)(6) designee on topics related to "knowledge of
3 security, crime prevention and assaults and batteries" at NYNY. AA Vol. I at 0085.
4 NYNY's corporate designee, who was the Security Manager for NYNY for four
5 years prior to the incident, estimated there were **2-3 fights per week** on the NYNY
6 casino floor (where this incident took place). *Humphries* 403 P.3d at 362. The Panel
7 also considered the location of the prior incidents, and the similarity of injuries
8 resulting from the subject incidents.¹

12 In addition to the extensive evidence of similar, prior incidents, the Panel also
13 considered evidence regarding NYNY security practices. NYNY's corporate
14 designee testified that he did not know how many patrons would be on the casino
15 floor on a given night, or how much security was needed to keep patrons safe on the
16 85,000-square foot casino floor. Opening Br. at 6:6-27. As such, he had only three
17 security personnel assigned to the entire casino floor. *Id.* at 6:22-7:4. Such testimony
18 is binding on NYNY, and supports the Panel's findings here. Finally, regarding the
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24 ¹ A detailed discussion of prior incidents at NYNY can be found at pp. 18-20 of
25 Appellants' Opening Brief. Appellants' Reply also outlined specific incidents of
26 "similar" wrongdoing on NYNY's premises. Reply Br. at pp. 2-3 (citing to AA Vol.
27 II, Exhibit H at 0216, 0218, 0219, 0230, 0236, 0240, 0243, 0244 and 0245). The
28 reports produced by NYNY include instances of threats, altercations, hitting,
punching, assaulting, shoving and verbal harassment at NYNY. *Id.* at 3:15-19
(citing AA Vol. II at 0205-0251).

1 actual assault in this case, the majority found it significant that only one security
2 guard initially responded to the assault on Appellants, and the responding guard
3 stood by and watched the attack for 12-15 seconds before intervening. *Humphries*,
4 403, Nev. at 363.

6 As part of its review, the Panel also considered *Estate of Smith v. Mahoneys*
7 *Silver Nugget*, and its prior ruling that “courts should consider...circumstances
8 regarding the basis minimum precautions that are reasonable expected of an
9 innkeeper.” 127 Nev. 855 (2011), at 862. As is highly relevant here, the *Smith* Court
10 examined the Legislative history for NRS 651.015(3)(b), and cited to the drafter’s
11 comment that use of the word “similar” in the statute was “chosen very specifically
12 to allow the judge to have some leeway” when evaluating prior incidents. *Id.* at 861.
13 In *Smith*, the Court found that a deadly shooting inside a casino was unforeseeable
14 because in the five years prior to the incident, there were no prior incidents involving
15 weapons, no serious injuries, and “casino security handled the disturbances by
16 escorting the individuals off the premises while maintaining the safety of customers
17 inside the casino.” *Id.* Here, however, Appellants provided extensive, detailed, and
18 undisputed evidence of similar prior incidents, and established that “a proportional
19 level of violence was involved in the prior wrongful acts on and around NYNY’s
20 casino floor.” *Humphries* at 363.

21 Ultimately, the record reflects that the Panel meticulously discharged its duty
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1 under NRS 651.015(2) by examining all of the facts and evidence related to the
2 subject assault, all the events leading up to it, and the resulting injuries. A majority
3 of the Panel ultimately concluded that “documented prior wrongful acts [at] NYNY
4 involved a similar level of violence,” that there were “reports of casino security
5 being punched, attacked, and assaulted on the casino floor,” and that other wrongful
6 acts occurred that “also appear to call into question NYNY’s staffing and response
7 times.” *Id.* Given this thorough analysis, it is ultimately irrelevant whether
8 Appellants were only required to satisfy the exceptions in NRS 651.015(3), or some
9 additional foreseeability requirement not addressed in the statute (which Appellants
10 dispute exists). The Panel conducted a complete and thorough NRS 651.015
11 analysis, and based on the totality of the circumstances, a majority correctly
12 concluded that the assault against Appellants was foreseeable, and that NYNY owed
13 a duty to Appellants.

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19 **E. This Court Need Not Defer the District Court To Conduct Another**
20 **Review of Foreseeability and Duty under NRS 651.015.**

21 Finally, this Court has the authority to make the final determination of the
22 legal issues presented in the appeal. The district court had the initial opportunity to
23 analyze foreseeability and duty under NRS 651.015, and did so improperly. Under
24 *Wood v. Safeway*, this Court properly conducted a de novo review of the district
25 court’s ruling, “without deference to the findings of the lower court.” 121 Nev. 724,
26 729, 121 P.3d 1026, 1029 (2005). Further, issues of statutory construction are also
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1 reviewed by this Court de novo. See *Martinez v. Maruszczak*, 123 Nev. 433, 168
2 P.3d 720 (2007). Accordingly, this Court was free to conduct its own analysis under
3 NRS 651.015(2), without deferring any part of the analysis to the district court.
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5 Moreover, this case has already been before this Court twice for review. The
6 Court previously reversed a different ruling of the district court via a petition for writ
7 relief. See *Humphries vs. New York-New York Hotel and Casino*, 129 Nev. Advance
8 Opinion 85 (2013) (issuing a Writ of Mandamus instructing the district court to
9 vacate a previous order compelling joinder of the intentional tortfeasor by the
10 Plaintiffs). Given this Court's authority to conduct a de novo review, it would be an
11 inefficient use of judicial resources, and could unduly protract and delay these
12 proceedings, to remand any part of the NRS 651.015 analysis to the district court -
13 especially given the potential prejudice to Appellants if required to obtain a *third*
14 round of appellate review. This Court competently reviewed the record, and
15 concluded that foreseeability and duty exist as a matter of law, and the case should
16 proceed accordingly.
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22 **III. CONCLUSION**

23 For the reasons stated herein, the Court should deny NYNY's request for
24 rehearing. This majority's decision is correct, is consistent with the plain meaning
25 of the statute as well as the drafter's original understanding of "similar" criminal
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1 activity under NRS 651.015(3). This Court should remand this case back to the
2 District Court with instructions to follow its ruling related to foreseeability and duty.
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4 DATED this 19th of December, 2017

5 Respectfully Submitted,

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7

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

1. I hereby certify that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ It has been prepared in a proportionally spaced typeface using Microsoft Word 2017, in 14 point-Times New Roman; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 3,779 words; or

☐ Does not exceed _____ pages.

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

DATED this 19 day of December, 2017.

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