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Tracie K. Lindeman  
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IN THE SUPREME COURT OF THE STATE OF NEVADA

SCENIC NEVADA, INC.

Appellant,

Case No. 65364

v.

CITY OF RENO, a Political Subdivision  
of the State of Nevada,

Respondent.

**APPELLANT'S REPLY BRIEF**

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All parent corporations and publicly-held companies owning 10% or more of the party's stock: None.

If litigant is using a pseudonym, the litigant's true name: None.

Dated this 6<sup>th</sup> day of April, 2015.

*Mark Wray*

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I

INTRODUCTION

After years of defending the 2000 ballot initiative before the City staff, the Planning Commission, the City Council, the district court, and ultimately, before this Court, Scenic Nevada finally has been able to obtain a monumental shift in the City's position. The City now impliedly concedes to Scenic Nevada's view that the 2000 ballot initiative did not merely cap the number of billboards, and that issuing permits for construction and allowing construction of new billboards violates the initiative.

The City conceded this huge point to Scenic Nevada by electing in its answering brief not to argue the first issue on appeal, which is the district court's interpretation of the 2000 ballot initiative. By wisely abandoning any attempt to argue in favor of the district court's interpretation of the initiative, the City admits that the district court's reading of the initiative was erroneous.

The consequence of the City's recognition of the prohibition on the issuance of permits and construction of billboards is that the 2012 digital billboard ordinance cannot stand, because it is entirely based on the banking and relocation ordinances adopted in violation of the Nevada Constitution, Article 19. Existing banked receipts for billboard relocations cannot be affected, but going forward, the City's concession that new billboards are not allowed under the 2000 ballot initiative, together with the recognition that the "conforming", banking and relocation ordinances were unconstitutionally adopted, should bring a swift and deserving end to the 2012 digital billboard ordinance.

Also going forward from here, citizens with proposed ballot initiatives will need protection for their initiative rights. Notwithstanding Scenic Nevada's position that the Nevada Constitution protects municipal ballot initiatives to the same extent as statewide initiatives, Respondent's brief contends that under statutes and the Reno city charter, the City Council may immediately repeal a

1 municipal initiative as soon as it is adopted by the voters. The City's untenable  
2 reading of the Nevada Constitution should be addressed in this appeal, for the  
3 benefit of future initiative petitions.

## 4 II

### 5 THE CITY CONCEDES THAT THE DIGITAL BILLBOARD 6 ORDINANCE VIOLATES THE BALLOT INITIATIVE

7 It is well-settled that a party confesses error when that party's answering  
8 brief fails to address a significant issue raised in the appeal. *Polk v. State*, 233  
9 P.3d 357, 360 (Nev. 2010) (applying NRAP 31(d)).

10 The district court devoted eight pages of its written opinion to interpreting  
11 the ballot initiative, and Scenic Nevada spent pages 10 through 22 of its opening  
12 brief explaining why it respectfully believes the district court's interpretation to be  
13 flawed.

14 By electing not to address the district court's interpretation of the ballot  
15 initiative, or even Scenic Nevada's arguments as to why the district court was  
16 wrong, the City confessed the following on the merits:

#### 17 A. The 2000 Ballot Initiative Is Not Merely a Cap on the 18 Number of Billboards

19 The 2000 Initiative prohibits construction of new billboards and the  
20 issuance of permits for their construction. *JA 060, 519, Trial Ex. 2*. It does not  
21 merely cap the number of billboards in existence at the time of the 2000 election.  
22 *See App. Open. Brief, pp. 17-20; JA 491-495*. By not contesting Scenic Nevada's  
23 argument, the City concedes the district court's conclusion that the initiative was  
24 merely a cap on the number of billboards is erroneous.

#### 25 B. A New Billboard Really Is a "New" Billboard

26 The district court held that "while a billboard created pursuant to the  
27 banking or removal ordinance may appear for the first time in a different area, it  
28 isn't genuinely appearing for the first time: the location is new, but the billboard is



1 not.” *JA 494:20-22*. Scenic Nevada argued that this interpretation of “new” is  
2 erroneous. *App. Open. Brief, pp. 12-17*. The City did not respond.

3 **C. Scenic Nevada’s Position Does Not Result in an**  
4 **Unconstitutional Taking of Property**

5 The district court concluded that Scenic Nevada’s “interpretation of the  
6 Initiative and Ballot Question would clearly lead to the permanent loss of a  
7 billboard to its owner.” *JA 495:18-20*. Scenic Nevada disputed this conclusion.  
8 *App. Open. Brief, pp. 20-22*. The 2000 ballot initiative has no effect on existing  
9 property rights and, as applied specifically to digital billboards, there have never  
10 been *any* digital billboards allowed in Reno, including to this day, with the  
11 moratorium in effect. *RM C §18.16.905(l); JA 215-216; JA 542 (Trial Exhibit 4)*.  
12 The City chose not to address this issue in its brief, admitting that Scenic Nevada  
13 is not advocating a position that results in the taking of anyone’s property.

14 **D. Billboards Do Not Enhance the Community**

15 Despite the district court’s pronouncement that the 2012 digital billboard  
16 ordinance balances “the commercial needs of its business community and the  
17 scenic preservation aspirations of its citizens, enhancing both the economy and the  
18 community” (*JA 500:22-24*), there is no evidence in the record that billboards  
19 enhance the economy of Reno or any other place. *See App. Open. Brief, pp. 10-*  
20 *12*. The City confessed error by not responding.

21 **E. Consequence of the City’s Concessions**

22 The 2012 digital billboard ordinance violates the 2000 ballot initiative. In  
23 the intervening years since the voters approved the initiative, the City has issued  
24 banked receipts for new billboards under its “conforming” and banking and  
25 relocation ordinances. The vested rights of those holders of banked billboard  
26 receipts to relocate static billboards shall not be affected by anything decided in  
27 this appeal. Scenic Nevada has never asked for those vested rights as to static  
28 billboards to be taken away, either. *JA 1*. This case always has aimed solely at

invalidating the 2012 digital billboard ordinance. *Id.* Furthermore, no billboard company has any vested rights as to digital billboards because heretofore, digital billboards have been illegal in the City of Reno. Due to the illegality of digitals and the moratorium on issuing permits for digitals during the pendency of this case, no permits have been issued for digitals. *JA 215-216, JA 542 (Trial Ex. 4)*, RMC§18.16.905(l).

Going forward from here, it is now accepted that that the 2000 ballot initiative is a ban, not a cap. Accordingly, issuing any permit for, or allowing construction of a digital billboard violates the initiative.

### III

**MUNICIPAL INITIATIVES MUST BE CONSTITUTIONALLY  
PROTECTED TO THE SAME EXTENT AS STATEWIDE INITIATIVES**

After conceding, implicitly, that the 2000 ballot initiative should be read exactly the way that Scenic Nevada has always said that it should be read, the City argues that Article 19 of the Nevada Constitution protects a statewide initiative from repeal for a period of three years, but Article 19 allegedly provides no similar protection against repeal of a municipal initiative.<sup>1</sup>

It is extraordinarily important that the City's position be rejected, not only for purposes of Scenic Nevada's appeal, but for the benefit of all Nevadans.

If the City's position were to be upheld, to say the very least, it would be incredibly discouraging. As this Court has noted, "the securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Yet the right to initiate change in this state's laws through ballot proposals is one of the basic powers enumerated in this state's constitution." *Univ. & Cmty. College Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 733-734, 100 P.3d 179, 195

<sup>1</sup> Respondent's argument that the 3-year prohibition on repeal in Article 19 does not apply to municipal initiatives is found at page 10, line 7 to page 13, line 2 of Respondent's Brief.

1 (2004), quoting *Meyer v. Grant*, 486 U.S. 414, 423, 100 L. Ed. 2d 425, 108 S. Ct.  
2 1886 (1988).

3 Scenic Nevada is not some loose band formed on a whim with a casual  
4 interest in politics. The organization grew from the grass roots around the issue of  
5 the refusal of the City Council to enact any reasonable billboard controls. *JA*  
6 *189:1-18*; *JA 1867, Trial Ex. 223 (Scenic Nevada history)*; *JA 1113, Trial Ex. 36*  
7 *(comments of W. Chris Wicker, Esq.)*. Volunteers met in January 2000 and agreed  
8 to form a Nevada non-profit corporation, and indeed did so two months later. *JA*  
9 *187*; *JA 190-191*; *JA 1876, Trial Exhibit 226 (corporate records of Scenic*  
10 *Nevada)*. Members wrote the initiative and collected signatures of sufficient  
11 voters to submit the initiative to the clerk, then went out on the campaign trail to  
12 get the initiative passed. *JA 179-180*. A well-financed and aggressive counter-  
13 campaign was mounted by the billboard industry, which actually circulated a  
14 petition in opposition to Scenic Nevada's petition, then withdrew the industry  
15 petition to concentrate on defeating Scenic Nevada. *JA 189:1-18*; *JA 191*; *JA*  
16 *192:8-13*. Scenic Nevada had little funding and was greatly out-spent by the  
17 billboard companies. *JA 193:1-10*. After the billboard industry filed a lawsuit  
18 alleging procedural grounds to stop the initiative, only a favorable ruling by  
19 Jerome Polaha, District Judge, kept the initiative on the ballot for the 2000  
20 election. *JA 193:11-16*. On November 7, 2000, 57% of the voters approved of  
21 the billboard initiative. *JA 193:17-24*; *JA 595 (Trial Ex. 8)*.

22 In the ensuing appeal, Scenic Nevada participated in the briefing that led to  
23 this Court's opinion in *Eller Media Co. v. City of Reno*, 118 Nev. 767, 59 P.3d  
24 437 (2002), which holds that the 2000 ballot initiative sought to establish new  
25 policy for Reno, it was legislative in character and therefore a proper subject of an  
26 initiative. *JA 193*; *JA 1834, Trial Ex. 221 (Eller Media case, at p. 772, 59 P.3d at*  
27 *440)*.

1        Passing the billboard initiative thus was “no small undertaking”. *Nevadans*  
2 *for Sound Gov’t* at 733, 100 P.3d 195. If all of Scenic Nevada’s efforts could be  
3 undone by the same officials whose refusal to adopt reasonable legislation led to  
4 the initiative petition in the first place, there would be no point to the process of  
5 bringing municipal legislation to the people for a vote.

6        The City’s position that Article 19 of the Nevada Constitution should be  
7 interpreted narrowly to avoid protecting a municipal initiative from repeal is at  
8 odds with the reasoning of previous decisions of this Court. This Court has stated  
9 “our Constitution reserves to the people the initiative power. . . . this court, in  
10 interpreting and applying such laws, must make every effort to sustain and  
11 preserve the people's constitutional right to amend their constitution through the  
12 initiative process. . . .” *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122  
13 Nev. 894, 912, 141 P.3d 1235, 1247 (2006). In *We the People Nev. v. Miller*, 124  
14 Nev. 874, 886-887, 192 P.2d 1166, 1174 (2008), this Court stated that “the  
15 initiative powers granted to Nevada’s electorate are broad” and “the procedural  
16 laws enacted by the Legislature may not unreasonably inhibit the powers reserved  
17 to the people in Article 19.”

18        Indeed, in *Eller Media*, this Court reasoned that the billboard initiative of  
19 2000 enacted a city-wide change in policy that was legislative in character and  
20 thus the proper subject of an initiative petition. *Eller Media*, at p. 772, 59 P.3d at  
21 440. It is incongruous that the City and the district court in the proceedings below  
22 did not recognize the rights upheld in *Eller Media*.

23        The City argues instead that Article 19, §2.3 applies only to statutory  
24 initiatives, while Article 19, §4 applies to municipal initiatives, and “*nowhere in*  
25 *§4 does it state that municipal initiatives approved by the voters of a city cannot*  
26 *be amended, annulled, repealed, set aside or suspended by a city council within*  
27 *three years from the date of adoption.*” *Resp. Ans. Brief*, p. 12, lines 5-8 (italics in  
28 original).

1           Actually, the opening sentence of §4 states: “The initiative and referendum  
2 powers provided for in this article are further reserved to the registered voters of  
3 each county and each municipality as to all local, special and municipal  
4 legislation of every kind in or for such county or municipality.” (Emphasis added).  
5 Based on a plain reading of the first sentence of §4, because §2.3 is part of the  
6 same article as §4, the initiative power in §2.3 includes the protection from repeal  
7 for a period of at least three years. Because §4 further reserves the initiative  
8 power in §2.3 to the registered voters of Reno as to all legislation of every kind in  
9 Reno, a municipal initiative under §4 is protected from repeal to the same extent  
10 as a statewide initiative under §2.3.

11           Scenic Nevada’s interpretation of Article 19 should be non-controversial.  
12 Although merely referenced in a footnote, this Court already has stated that the  
13 three year limitation under Article 19 applies to a *county* ballot initiative.  
14 *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 67, 128 P.3d  
15 452, 462 fn. 3 (2006) (citing Nev. Const. Art. 19, §2.3). In another footnote, the  
16 Court stated “after the three year limitation on amending an initiative, the voters  
17 can amend or repeal the initiative.” *Id.*, fn. 4.

18           Part of the reason Scenic Nevada’s straightforward reading makes sense is  
19 that Scenic Nevada is reading all of Article 19 together, and this Court has  
20 recognized that “[t]he Nevada Constitution should be read as a whole, so as to  
21 give effect to and harmonize each provision.” *We the People* at 881, 192 P.3d at  
22 1170. In the ruling from which this appeal is taken, the district court quoted the  
23 first sentence of §4 but then completely left it out of its analysis. *JA* 487-489.  
24 Likewise, in Respondent’s brief, the first sentence of §4 is mentioned, but then not  
25 analyzed. Even while they implicitly disagree with Scenic Nevada’s  
26 interpretation, surely, the City must reasonably agree that the first sentence of §4  
27 has to be there for a purpose. The sentence must mean *something*. The City has  
28 no interpretation of §4. For the City to entirely ignore the first sentence of §4

1 clearly is inappropriate. *City of Reno v. Citizens for Cold Springs*, 236 P.3d 10, 16  
2 (Nev. 2010) (“Courts should read each sentence, phrase, and word to render it  
3 meaningful within the context of the purpose of the legislation.”)

4 While omitting to analyze the first sentence of §4, the district court and the  
5 City refer to NRS 295.220, which states that in the case of a municipal initiative,  
6 “it shall be treated in all respects as other ordinances of the same kind adopted by  
7 the council.” Reasoning that any other ordinance adopted by the City Council  
8 may be repealed, the City argues that the 2000 ballot initiative was like any other  
9 ordinance and thus subject to immediate repeal by the City Council. *Resp. Ans.*  
10 *Brief*, pp. 12-13.

11 Arguably, a ballot initiative is not an ordinance “of the same kind” as any  
12 other ordinance, because it is a legislative act of the people under the Nevada  
13 Constitution. *See NRS 295.220; Nev. Const., Art. 19.* Merely because the City  
14 Council was required to treat the ballot initiative as any other ordinance does not  
15 mean that NRS 295.220 overrides initiative rights of the Nevada Constitution.  
16 This Court stated in *Nevadans for the Prot. of Prop. Rights*, at 902, 141 P.3d at  
17 1240:

18 Nevada Constitution Article 19, Section 2 provides that “the people”  
19 reserve unto themselves the power to propose and enact statutes,  
20 amendments to statutes, and amendments to the Nevada Constitution  
21 by initiative petition. Article 19, Section 5, however, provides that  
22 “the legislature may provide by law for procedures to facilitate the  
23 operation of [Article 19's provisions].” Thus, the Nevada Constitution  
24 explicitly authorizes the Legislature to enact laws regulating the  
25 initiative process, so long as those laws facilitate the provisions of  
26 Article 19.  
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1 If a city council could amend or repeal a ballot initiative immediately after its  
2 passage, it would not facilitate the provisions of the Nevada Constitution,  
3 particularly Article 19, §2.3 and §4.

4 This Court previously has held that NRS Chapter 295 should not be  
5 interpreted to yield absurd results. In *Las Vegas Taxpayer Accountability v. City*  
6 *Council of Las Vegas*, 125 Nev. 165, 208 P.3d 429, 437 (2009), the petitioners  
7 argued that NRS 295.009 applied only to statewide initiatives. NRS 295.009 is  
8 the first section of Nevada Revised Statutes that appears under the heading “State  
9 Initiative and Referendum”. It states that each petition for an initiative must  
10 embrace but one subject and set forth a description of the effect of the initiative if  
11 approved by the voters. Notwithstanding the title of the subsection, this Court  
12 held that NRS 295.009 applies both to statewide and municipal initiatives. Noting  
13 that nothing in NRS 295.009 indicated that it was intended to apply solely to  
14 statewide initiatives, this Court held: “Also, the reasons for the statute's  
15 requirements apply equally to statewide and municipal measures, and to interpret  
16 the statute to exclude municipal ballot measures would therefore yield an  
17 unreasonable and absurd result.” *Id.* Similarly, the reason for Article 19’s  
18 requirement that an initiative may not be repealed for three years applies equally  
19 to statewide and municipal measures. The contrary interpretation yields an absurd  
20 result.

#### 21 IV

#### 22 THE 2000 BALLOT INITIATIVE DOES NOT CONFLICT WITH THE 23 CITY CHARTER

24 The City’s second argument is that the 2000 ballot initiative must be subject  
25 to immediate repeal by the City Council because otherwise the initiative would  
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1 violate the enumerated powers of the city council to enact and repeal ordinances  
2 under state law.<sup>2</sup>

3 The City's argument inexplicably fails to account for this Court's holding in  
4 *Eller Media*. This Court held that the very ballot initiative at issue in this appeal  
5 was a valid legislative act. The City cannot plausibly maintain that the voter-  
6 approved initiatives that ran afoul of conflicting state laws in *Horne v. City of*  
7 *Mesquite*, 120 Nev. 700, 100 P.3d 168 (2004), can be compared by analogy or in  
8 any other way with the 2000 ballot initiative in this case. The holding in *Eller*  
9 *Media* disposes of that contention and *Horne* does not hold otherwise.

10 Interestingly, the City states that a municipal ballot initiative may be  
11 amended or repealed at any time, for any reason, because to hold otherwise would  
12 be repugnant to NRS 295.220 and § 2.080 of the Reno City Charter. *Resp. Ans.*  
13 *Brief, p. 9:17-21*. In reality, the inverse is more the case. The City cannot use its  
14 general powers to adopt and repeal ordinances to justify its premature repeal of a  
15 municipal initiative, because it would be repugnant to Nev. Const. Article 19, §2.3  
16 and §4. *See: Sustainable Growth*, at 67, 128 P.3d at 462 fn. 3 (applying the three-  
17 year limitation to a county initiative). The Constitution trumps a statute or a city  
18 charter. *Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 521 (Nev. 2014). A  
19 statutory provision will not be enforced when to do so would infringe upon rights  
20 guaranteed by the state constitution. *We the People, supra*, at 890, 192 P.3d at  
21 1177. Indeed, § 2.080(1) of the city charter states that the charter is subject to the  
22 Nevada Constitution by stating the city may pass an ordinance "not repugnant to  
23 the Constitution of the United States or the State of Nevada." In other words, a  
24 statute can be found to be unconstitutional, but the Constitution cannot be found to  
25 be "unstatutory".

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28 <sup>2</sup> The City's argument that the ballot initiative cannot impinge upon the City  
Council's powers under the City Charter to revoke any ordinance is found at page  
5, line 17 to page 10, line 5 of Respondent's Brief.



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V

**THE STATUTE OF LIMITATIONS DOES NOT BAR SCENIC NEVADA'S  
CASE**

The City argues that even assuming the “conforming” ordinance (which became part of the 2012 digital ordinance) was adopted in violation of Article 19, Scenic Nevada’s complaint is time-barred. *Resp. Ans. Brief*, p. 13.

Of all the rationales used by the district court for its ruling in favor of the City, the statute of limitations was not one of them. Perhaps the reason the district court did not deem the statute of limitations argument to be meritorious is that the district court realized that the ordinance being challenged is the 2012 digital billboard ordinance. The digital billboard ordinance was adopted on October 24, 2012. *JA 539 (Trial Exhibit 29: “Ordinance No. 6258, Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)” )*. Scenic Nevada filed its lawsuit November 16, 2012, 23 days later. *JA 1*.

VI

**THE ISSUES IN THIS APPEAL ARE NOT MOOT**

The City’s fourth and final argument is that Scenic Nevada’s challenge to the constitutionality of the digital billboard ordinance became moot on November 14, 2003, three years after adoption of the 2000 ballot initiative. *Resp. Ans. Brief*, p. 14.

The rationale behind the City’s mootness argument is that after three years elapsed, the City had the “full right” to pass a digital billboard ordinance that was inconsistent with the initiative. That is not what the City did, however. The City adopted a digital billboard ordinance which is entirely dependent upon the “conforming” and banking and relocation ordinances, each of which is unconstitutional by having been adopted in violation of Article 19. Beginning with the initial draft in 2008 and at all times, the text amendment for the proposed digital billboard ordinance was based upon, and dependent upon, the City

1 Council's adoption of the 2002 and 2003 "conforming" and banking and  
2 relocation ordinances. *See Trial Transcript, JA 227:11 – 228:13; JA 283:6-8; JA*  
3 *326:4 – 327:3* (testimony of City Planner Claudia Hanson confirming that to build  
4 a digital billboard requires banked receipts, or, billboard removals and  
5 relocations). Without those offending enactments, the digital billboard ordinance  
6 fails. *Id.* The digital/banking and relocation ordinance constitutes an ongoing  
7 violation of constitutional rights guaranteed by Article 19 of the Nevada  
8 Constitution, which cannot be insulated merely because no one challenges it  
9 within so many years of its enactment. *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d  
10 653, 663 (4<sup>th</sup> Cir. 1989); *Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 522  
11 (6<sup>th</sup> Cir. 1997). If unconstitutional laws were immunized in such a fashion,  
12 decisions like *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct.  
13 686 (1954) would not have been possible and separate but equal would still be the  
14 law of the land.

15 The issue raised by this appeal therefore is moot. In fact, the 2000 ballot  
16 initiative actually is codified in the Reno Municipal Code. *See RMC*  
17 *§18.16.902(a)*. It is the law and so long as it remains the law, Scenic Nevada's  
18 case will not be moot.

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**VII**  
**CONCLUSION**

Scenic Nevada respectfully requests that this Honorable Court reverse the judgment of the district court and direct the entry of a judgment by the district court invalidating the Digital Billboard Ordinance, finding it unlawful, void, and of no force and effect.

DATED: April 6, 2015

LAW OFFICES OF MARK WRAY

By   
MARK WRAY  
Attorneys for Appellant  
SCENIC NEVADA, INC.

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[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

Finally, I hereby certify that I have read this *Appellant's Reply Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Appellant's Reply Brief* complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding facts 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.

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1 I understand that I may be subject to sanctions in the event that the  
2 accompanying brief is not in conformity with the requirements of the  
3 Nevada Rules of Appellate Procedure.

4 Dated this 6<sup>th</sup> day of April, 2015.

6 

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