Snell & Wilmer
L.L.P.
LAW OFFICES

Hughes Center
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, Nevada 89169-5958
702.784.5200
www.swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
RENO
SALT LAKE CITY
TUCSON

October 24, 2018

Elizabeth A. Brown
Clerk of the Supreme Court
201 S. Carson Street
Carson City, NV 89701

Re: ADKT 501, Proposed NRAP 3F

Dear Ms. Brown:

The undersigned attorneys of Snell & Wilmer write to express their opposition to the petition in ADKT 501 to eliminate briefing in a large number of civil appeals. Undersigned counsel include four partners of this Firm. We include lawyers who are principally appellate lawyers, and lawyers who work more in Nevada district courts, but who also practice in the Nevada Supreme Court. We include two former clerks to the Nevada Supreme Court. We include a fellow of the American Academy of Appellate Lawyers. We are united by a common interest in and concern for the and for the importance to all who litigate in Nevada of being heard before the Court, as it is the final word on Nevada law.

First, and this is our foremost concern, ADKT 501 largely eliminates appellate advocacy in the Nevada Supreme Court. This is concerning in part because motion practice in the district court was not written to identify errors in the district court's decision in the first place, and could not have been, given that Rule 12 and Rule 56 briefing necessarily preceded the district court's resolution of the matter. The proposed change most directly errs in our view by preventing lawyers from explaining situations in which the district court does something on its own or not really proposed to it by the lawyers, because the motions below cannot reflect or articulate that. But it also creates difficulties in cases in which the district court briefs fail to call out waivers of issues to the appellate courts' attention. Relying on district court briefs alone, rather than on analysis after the fact by appellate lawyers, will force the Court and its clerks to identify silences, omissions, and gaps. Those jobs are often done well by appellate lawyers, to the aid of all involved. The proposal also narrows the Court's consideration of matters in which weak lawyering may raise but fail to articulate well issues or facts. That disserves not only litigants but also the development of Nevada law. Ultimately, ADKT 501 suggests by implication that appellate lawyering is generally unhelpful to the resolution of appeals from judgments founded on Rules 12 and 56. For all of the reasons set forth above, our experience and belief are to the contrary.

Second, the fundamentals of due process – and the fundamentals of litigant satisfaction with a system of justice – are notice and an opportunity to be heard. ADKT 501 would eliminate the right to be heard in Nevada's highest court for a large number of litigants. While there is not presently a recognized federal constitutional right to appeal in civil matters, serious thinkers have argued that there should be. *E.g.*, C. Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219 (2013). The serious argument for a right to civil appeals underscores that it would disserve litigants and justice if litigants cannot meaningfully participate in appeal – advocacy, framing of issues, assertions of error – before the Court.

Third, we are not aware of any other state that has adopted such a rule. Justice reform, including changes to rules of civil procedure, typically comes in waves, built upon states carefully analyzing and rolling out pilot projects, looking to scholarly literature, and following other jurisdictions. ADKT 501 builds on no such body of analysis, prior rule changes, study, or trend known to undersigned counsel. That other jurisdictions have not undertaken this very significant truncation of access to the appellate courts underscores what a departure it would be from American models of appellate practice. We believe that counsels against adopting ADKT 501.

Fourth, if adopted, ADKT 501 casts into some doubt how participation by nonparties in appeals, as my amicus briefing, might be impacted. If there are no appellate briefs, it is difficult to understand how non-parties would come to participate as amici. For example, they might not know of an appeal if it were not briefed, or the issues in which the Court is truly interested might not have been presented well below. That will make amici less helpful to the Court over time. Alternatively, if amici were to be permitted to file briefs, that begs the question of how they would be allowed to participate when the parties were not able to. ADKT 501 raises these questions but does not provide a map for resolving them.

Fifth, ADKT 501 will likely lead to a substantial growth in motion for reconsideration practice. Litigants who do not believe the issues were properly framed to the Court will write their appellate brief, but they will do so after the Court has already decided the appeal based on district court briefing. We think the prospect of substantial expenditure of party resources after this Court has already expended its time and care on the district court record will create inefficiency for litigants and undermine some of the intended benefit of what is proposed in ADKT 501.

Sixth, we believe ADKT 501 changes the balance of authority in the court system, and implicitly cedes more authority to the district court than is desirable. Litigants will justifiably fear that they cannot call out errors in the district court's resolution or thinking, for they will be chilled from doing so in the district court, and ADKT 501 will often bar them from doing so later. This will create an unhealthy dynamic in which it will be harder to object to rulings by the district court in the first place. Distance and objectivity are essential to justice and to litigants' feelings of satisfaction with a system of justice. By revoking the important right to briefing all appeals, recourse to a more distant, objective, higher Court is impeded, and the feeling of recourse is

understandably reduced, as all communication litigants are allowed to have as of right will only before the judge of first instance. We believe that model, unfortunately, would disserve substantive justice and public perceptions of being fully and fairly heard.

We are grateful for the opportunity to comment and thank the Court for its time and consideration of these observations.

Very truly yours,

Snell & Wilmer

/s/ Patrick G. Byrne

/s/ Alex Fugazzi

/s/ Andrew M. Jacobs

/s/ Kelly H. Dove

/s/ Holly Cheong

/s/ Adam Tully

4829-7551-6281