IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. HOME CORPORATION, A Delaware Corporation, Appellant, v. THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION, Individually; FEDERICO AGUAYO, Individually; FELIPE ENRIQUEZ, Individually; JIMMY FOSTER, JR., Individually; THE GARCIA FAMILY TRUST; ARNULFO ORTEGOGOMEZ, Individually; ELVIRA GOMEZ-ORTEGA, Individually; JOHN J. OLSON, Individually; IRMA A. OLSON, Individually; OMAR PONCE, Individually; BRANDON WEAVER, Individually; JON YATES, Individually; AND MINTESNOT WOLDETSADIK, Individually, Respondents.	Case No. 68810 Appeal from the District Court for Clark County

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel hereby certifies that the following are persons and entities described in NRAP 26.1(a) which must be disclosed. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association is a non-profit corporation of attorneys in the State of Nevada. It did not appear in the district court. It is represented in the pending appeal, as amicus curiae, by Scott K. Canepa, of the firm of Canepa Riedy Abele & Costello.

DATED this 3 day of February, 2017.

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AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

Pursuant to NRAP 29 and this Court's Order Inviting Amicus Curiae Briefs and Supplemental Party Briefs, the Nevada Justice Association ("NJA") hereby submits this brief in support of Respondents' position on appeal. The NJA is an organization of attorneys in the State of Nevada whose purposes, objectives, and interests include participation in matters which directly concern the rights of claimants seeking relief from injuries caused by tortious conduct and whose resources are available to provide assistance to courts in considering issues which have a material impact upon the rights of such persons beyond the interests of the particular litigants in specific cases.

SUMMARY OF THE ARGUMENT

This Court's Order Inviting Amicus Curiae Briefs and Supplemental Party Briefs asks, inter alia, whether an enforceable agreement to arbitrate can arise from a common-interest community's CC&Rs consistent with the Federal Arbitration Act or Nevada law, including the Uniform Arbitration Act (Issue No. 2). The NJA submits that the answer is an emphatic "No".

This Court's decision whether to adopt a proposed legal doctrine, or discard a current one, partly entails a weighing of benefits versus burdens. A rule should be

adopted if its advantages outweigh its disadvantages; and, conversely, rejected if its burdens outweigh its benefits.[1] As applied to the issue at hand, this prudential analysis discloses a lopsided imbalance: embedding arbitration provisions within CC&Rs provides minimal benefit to some builders—and *none* at all to most of the construction industry—while imposing excessive burdens on property owners. Tipping the scales even further against this practice is its baneful effect on the judicial system; for its invidious consequences virtually guarantee a proliferation of lawsuits and appeals, thereby exacerbating the congestion of already bloated court dockets.

These evils are, moreover, unnecessary. They can be obviated by the simple expedient of including arbitration provisions in contracts signed by homebuyers (as was done, indeed, in the case at bar) which, at the same time, provides the construction industry with benefits functionally equivalent to those available from embedding such provisions in CC&Rs. In this instance, in other words, it *is* possible to have one's cake and eat it too.

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[1]*See, e.g., St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 218-19, 210 P.3d 190, 195 (2009) (adopting new doctrine, and repudiating former rule, because "public policy that is furthered by adoption of the [doctrine] significantly outweighs [its disadvantages]"); *State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993) (declining to adopt proposed doctrine whose "burdens would outweigh any possible benefits").

This Court should therefore adopt a *per se* rule that arbitration provisions within CC&Rs are unenforceable.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO ENFORCE ARBITRATION PROVISIONS CONTAINED IN COMMON-INTEREST COMMUNITY CC&RS.

A. *Arbitration Provisions in CC&Rs Provide No Benefit Whatsoever to Most Members of the Construction Trades, and Merely Superfluous Benefits to Developers.*

CC&Rs run with the land; that is, their benefits and burdens are appurtenant to, and dependent upon, the ownership of real property governed thereby.[2] Hence only persons owning property benefitted by CC&Rs have standing to enforce them.[3] The Rancho de Paz CC&Rs, indeed, explicitly so state. *See* Vol. I, JA124 ("[t]he covenants and restrictions in this Declaration shall run with and bind the Properties, and *shall inure to the benefit of and be enforceable by the Association or the Owner of any land subject to this Declaration*, their respective legal representatives, heirs, successive Owners and assigns") (emphasis added). Since most providers of

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[2]*Gladstone v. Gregory*, 95 Nev. 474, 476, 596 P.2d 491, 492 (1979).

[3]*Shaff v. Leyland*, 154 N.H. 495, 914 A.2d 1240, 1244 (2006) ("[t]his principle has been adopted by many jurisdictions") (citing cases).

construction-related services (general contractors, subcontractors, architects, etc.) do not own property in a development project, CC&Rs cannot benefit them.

Developers and some builders, of course, are initially owners, as is the situation here. But even for them, the benefits of CC&Rs are ephemeral. *Former* property owners, by definition, are not owners. Hence an owner of real property benefitted by CC&Rs, after selling the property, no longer has standing to invoke them.[4] This rule applies, in particular, to residential subdivision developers: their standing to invoke CC&Rs expires once all the lots are sold.[5]

Developers have, as well, a further advantage over their more numerous brethren in the construction industry—as owners, and thus vendors, they can enter into contracts with homebuyers, contracts that provide an alternative (and, as discussed below, vastly preferable) means for stipulating to the arbitration of disputes. This is illustrated, as it happens, by the case at bar: here, the developer

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[4]*Snook v. Bowers*, 12 P.3d 771, 784 (Alaska 2000); *Farber v. Bay View Terrace Homeowners Ass'n*, 141 Cal.App.4th 1007, 46 Cal.Rptr.3d 425, 427-28 (2006); *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834, 835 (1993).

[5]*See, e.g., Bramwell v. Kuhle*, 183 Cal.App.2d 767, 6 Cal.Rptr. 839, 845 (1960) (subdivision developer, having sold all lots, lacked standing to enforce CC&Rs: "since the original owners and subdividers parted with title to all lots in the subdivision, they, as such owners, lost the right of enforcement of the restrictions").

sought to compel arbitration not only pursuant to the CC&Rs, but also pursuant to arbitration clauses in purchase agreements signed by homebuyers (J.A. I.33, 145-46).

Admittedly, such contracts are, like CC&Rs, a dwindling asset over time, as signatory homebuyers sell to later purchasers who may not be bound by the arbitration provisions therein. But note the approximate synchrony: a developer's diminishing property ownership, as lots are sold, will tend to parallel, in time, resales by original purchasers; so that, by the time there are significant numbers of successor owners, the developer will no longer be an owner, and thus will be unable to invoke CC&Rs in any event due to lack of standing. Hence, despite their shortcomings, purchase agreements give developers, in practice, arbitration rights comparable to those available through CC&Rs.

B. *Embedding Arbitration Provisions in CC&Rs Unduly and Needlessly Subverts Homebuyers' Fundamental Right to Judicial Redress.*

CC&Rs are widely used in modern land development, and play a valuable role in utilization of land resources[6] by helping to ensure "that the legitimate objectives

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[6]*Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373, 377 (2006) (quoting *Restatement (Third) of Prop.: Servitudes* § 4.1, Cmt. *a* (2000)).

of a development scheme may be achieved."[7] By their very nature, therefore, they are invariably lengthy, detailed and complex documents covering matters such as property use restrictions,[8] architectural control,[9] assessments for common area maintenance,[10] etc. NRS Chapter 116 lists more than 50 topics that must be covered in CC&Rs.[11] The Rancho de Paz CC&Rs at issue here are, as a consequence, nearly 100 pages long (J.A. I.48-139). Towards the end, sandwiched between the declarant's right to repair and the designation of neighborhoods, is the arbitration clause (J.A. I.129).

It is doubtful, to put it mildly, that "the legitimate objectives of a development scheme"[12] include mandatory arbitration. It is one thing, after all, to be responsible for common area maintenance costs, to be unable to erect a boundary fence higher

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[7] *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174, 179 (1981).

[8] *See, e.g., Sowers v. Forest Hills Subdivision*, 129 Nev. Adv. Op. 9, 294 P.3d 427 (2013); *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 625 P.2d 1177 (1981).

[9] *See, e.g., Quirrion v. Sherman*, 109 Nev. 62, 846 P.2d 1051 (1993).

[10] *See, e.g., Thirteen South Ltd. v. Summit Village, Inc.*, 109 Nev. 1218, 866 P.2d 257 (1993); *Long v. Towne*, 98 Nev. 11, 639 P.2d 528 (1982).

[11] *See* NRS 116.2105(1).

[12] *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., supra*, 274 S.E.2d at 179.

than five feet, etc., and quite another to forfeit one's constitutional right of access to the courts.[13] This can, of course, be done, But it should be done knowingly and deliberately, not by an unsigned provision buried amidst an aggregation of property definitions and development details within a document recorded somewhere in the chain of title. To insist that such a convoluted scavenger hunt qualifies as the knowing abandonment of a vital civic right would be formalism at its most preposterous and pernicious. As this Court long ago cautioned, "the great principles of right and justice" are thwarted when "the form has triumphed over the substance."[14]

The solution? Again, a written *contract*—which, to be effective, must be signed by a homebuyer, and hence is more likely to be genuinely consensual. It is instructive, by analogy, that the Uniform Common-Interest Ownership Act mandates a residential unit buyer's waiver of warranties to be "in an instrument signed by the

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[13]"[T]he right of access to the courts is a fundamental right protected by the Constitution." *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998); *see also* Order Creating the Nevada Supreme Court Access to Justice Commission and Adopting Rule 15 of the Supreme Court Rules (ADKT No. 394) (June 15, 2006), p. 1 (emphasizing "the importance of access to justice in a democratic society").

[14]*Horton v. New Pass Gold & Silver Min. Co.*, 21 Nev. 184, 188, 27 P. 376, 377 (1891).

purchaser."[15] This requirement "is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties."[16] Obviously, locating an arbitration in a contract will not, by itself, guaranty that the agreement *is*, in fact, consensual. Decisions by this Court invalidating such contract provisions demonstrate otherwise.[17] It is, nevertheless, far preferable to embedding them within the bowels of CC&Rs.

C. *Permitting Arbitration Provisions in CC&Rs Will Deluge Nevada's Already Overburdened Courts with a Flood of Additional Litigation.*

It is not litigants alone who are affected by arbitration provisions. Our judicial system too has a stake because "[a] concern for preserving scarce judicial resources lies at the heart of the preference for arbitration[.]"[18] This objective is among the

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[15]NRS 116.4115(2).

[16]UCIOA § 4-115, Cmt. *4* (1982).

[17]*See, e.g., Gonski v. Second Judicial Dist. Ct.*,, 126 Nev. 551, 245 P.3d 1164 (2010); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004); *Burch v. Second Judicial Dist. Ct.*, 118 Nev. 438, 49 P.3d 647 (2002).

[18]*Board of Educ. Taos Mun. Sch. v. The Architects, Taos*, 103 N.M. 462, 709 P.2d 184, 185 (1985).

goals of both the Federal Arbitration Act and the Uniform Arbitration Act.[19] Balancing the benefits and burdens of allowing arbitration provisions in CC&Rs thus requires a *tri*partite analysis which considers the impact on courts also.

Among the questions in this appeal is whether the arbitration provision in the CC&Rs is unconscionable, as the district court concluded. The NJA does not take a position on this issue. The salient point for present purposes is this: regardless of how this Court decides the issue, future such challenges, in increasing numbers, are not just likely but almost certain.

Determining unconscionability is a fact-specific inquiry based on the totality of the circumstances.[20] Consequently, a holding that the CC&Rs' arbitration provision is, or is not, unconscionable *here* will not settle the question beyond the narrow confines of this case. Two successive decisions refusing to enforce arbitration clauses in home purchase agreements, for instance, did not prevent this Court from

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[19]*Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1329 (11th Cir.), *cert. denied*, __ U.S. __, 134 S.Ct. 2886, 189 L.Ed.2d 836 (2014) (FAA); *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 656 P.2d 1359, 1361 (1982) (Uniform Arbitration Act).

[20]*Elite Logistics Corp. v. Hanjin Shipping Co.*, 589 Fed. Appx. 817, 820 (9th Cir. 2014); *Smith v. Jem Group., Inc.*, 737 F.3d 636, 640 (9th Cir. 2013); *Restatement (Second) of Contracts* § 208, Cmt. *a* (1981).

having to revisit the issue a few years later[21]—or, indeed, yet again in the present and other pending cases.[22]

Because CC&Rs are, by their very nature, complex and mammoth documents seldom seen (much less signed) by home purchasers, unconscionability challenges to arbitration provisions in CC&Rs will inevitably recur. Given the frequency of such issues on the Court's docket to date,[23] this is an extra burden our judicial system can ill afford. In theory, arbitration should benefit the courts. But inviting endless litigation over ad hoc variations of arbitration provisions in CC&Rs will achieve precisely the opposite result. And practices whose costs to the legal system outweigh the benefits should be prohibited.[24]

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[21]The two earlier opinions are *Burch v. Second Judicial Dist. Ct.*, *supra*, and *D.R. Horton, Inc. v. Green*, *supra*, decided in 2002 and 2004, respectively. The later one (2010) is *Gonski v. Second Judicial Dist. Ct.*, *supra*.

[22]*See Greystone Nevada, LLC v. Oliver M. McCoy, Jr., et al.* (No. 68769).

[23]Within the last few years alone, *see*, *e.g.*, *Fat Hat, LLC v. DiTerlizzi*, 2016 WL 5800335 (Nev. Sept. 21, 2016) (unpublished); *Jones v. Jones*, 2016 WL 3856487 (Nev. July 14, 2016) (unpublished); *Dombroski v. NV Energy, Inc.*, 2016 WL 1103823 (Nev. Mar. 18, 2016) (unpublished); *Gonzales-Alpizar v. Griffith*, 130 Nev. Adv. Op. 2, 317 P.3d 820 (2014); *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. Adv. Op. 18, 300 P.3d 124 (2013).

[24]*Tower Homes v. Heaton*, 132 Nev. Adv. Op. 62, 377 P.3d 118, 122 (2016) (quoting *In re J.E. Marion, Inc.*, 199 B.R. 635, 639 (Bankr. S.D. Tex. 1996)).

Courts have adopted *per se* rules for this very reason, i.e., to alleviate the strain on limited judicial resources when courts are forced to conduct case-by-case analyses.[25] Specifically, a *per se* rule declaring certain practices void as against public policy eliminates the need to decide, in case after case after case, whether a given set of circumstances creates unconscionability.[26] Given that developers have equivalent rights by contract, and homebuyers even more so, a blanket rule refusing to enforce arbitration provisions in CC&Rs thus commends itself. True, such a rule is no panacea (unconscionability issues will occur in other contexts), but reducing docket congestion, even relatively, is an eminently worthwhile goal.

D. *The California Supreme Court's* Pinnacle *Decision Is Neither Pertinent Nor Persuasive.*

In *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*,[27] the California Supreme Court upheld an arbitration provision in residential CC&Rs. For

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[25]*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16, 97 S.Ct. 2549, 2557 n.16, 53 L.Ed.2d 568 (1977); *Dawson v. Cowan*, 531 F.2d 1374, 1376 (6th Cir. 1976).

[26]*Cate v. Dover Corp.*, 790 S.W.2d 559, 567 (Tex. 1990) (Spears, J., concurring).

[27]55 Cal.4th 223, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012).

several reasons, however, that decision is inapplicable under, and inimical to, Nevada law.

First of all, *Pinnacle*'s holding is based on a statute not only unique to California, but incompatible with its Nevada counterpart. The opinion applies the idiosyncratic provisions of the Davis-Stirling Common Interest Development Act[28] and is, as a consequence, a ruling with little pertinence in situations not governed by that particular statute.[29]

Beyond California's borders, the anomaly is even greater because, unlike the condominium statutes of most states (including Nevada), the Davis-Stirling Act is not modeled on the UCIOA, but is *sui generis*. Hence cases applying it are not germane outside California.[30]

One of the Davis-Stirling Act's provisions pivotal to the result in *Pinnacle* is its requirement that homeowners submit their claims to alternative dispute resolution

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[28]Cal. Civ. Code §§ 4000-6150. The *Pinnacle* opinion applies the statute as previously codified in Cal. Civ. Code § 1350-1376. Effective January 1, 2014, the statute was recodified as Civ. Code § 4000 et seq. References to the statute herein will cite its current location.

[29]*McArthur v. McArthur*, 224 Cal.App.4th 651, 168 Cal.Rptr.3d 785, 792-93 (2014).

[30]*In re Oak Park Calabasas Condo. Ass'n*, 302 B.R. 665, 666 (Bankr. C.D. Cal. 2003); *Ruoff v. Harbor Creek Community Ass'n*, 10 Cal.App.4th 1624, 13 Cal.Rptr.2d 755, 759 n.6 (1992).

before filing suit.[31] NRS Chapter 116 contains no such requirement. On the contrary, it allows aggrieved homeowners or their association to "bring *a civil action*".[32] The Legislature's authorization of "a civil action" is significant because that phrase does not appear in the UCIOA, which more generally allows "a claim for appropriate relief".[33] The phrase "civil action" is a well-established term of art denoting a judicial lawsuit *in contrast to* arbitration,[34] a distinction graphically highlighted by statutes making arbitration a condition precedent to "a civil action"[35] and explicitly recognized within Chapter 116 itself.[36] In stark contrast to the Davis-Stirling Act, in other words, NRS Chapter 116 preserves the right to judicial relief as a primary remedy in lieu of arbitration. Following the *Pinnacle* decision in Nevada would thus

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[31]Cal. Civ. Code § 5930(a). *See Pinnacle*, 145 Cal.Rptr.3d at 529-30, 282 P.3d at 1230 (citing former Cal. Civ. Code § 1369.510 et seq.).

[32]NRS 116.4117(1) (emphasis added). Although this right is "[s]ubject to the requirements set forth in [NRS 116.4117(2)]", those requirements do not, in stark contrast to the Davis-Stirling Act, include arbitration.

[33]UCIOA § 4-117 (1982).

[34]*See, e.g.*, NRS 108.238; NRS 338.645.

[35]*See, e.g.*, NRS 38.310(1); NRS 38.330(5).

[36]*See, e.g.*, NRS 116.31083(6)(f) ("any civil action *or* claim submitted to arbitration") (emphasis added); NRS 116.770(2) ("arbitration *or* a civil action") (emphasis added).

ignore the Nevada Legislature's intent while implementing, instead, the dissimilar wishes of *California*'s legislators. The incongruity of this aberration is self-evident.[37]

Furthermore, the *Pinnacle* opinion relies partly on a California administrative regulation allowing arbitration provisions in CC&Rs.[38] Unsurprisingly in light of NRS Chapter 116's dissimilarity to the Davis-Stirling Act, the Real Estate Division has issued no such regulations under NRS Chapter 116.[39]

Finally, it largely turned on considerations of unconscionability.[40] As such, it is a fact-specific outcome which fails to evaluate the broader policy implications discussed herein.

And, because it overlooks these concerns, the *Pinnacle* decision is, as the dissent trenchantly observes, a triumph of hollow technical theory (i.e., fictional

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[37]*See, e.g., Zgombic v. State*, 106 Nev. 571, 576, 798 P.2d 548, 551 (1990) (declining to follow precedent which applied a California statute worded differently from its Nevada counterpart).

[38]*See Pinnacle*, 145 Cal.Rptr.3d at 528, 282 P.3d at 1229 (citing Cal. Code Reg., tit. 10, § 2791.8).

[39]NAC 116.520(1) permits the Division to subsidize mediation under NRS 38.300 to 38.360. And NRS 38.310(1), in turn, authorizes agreements to arbitrate disputes regarding CC&Rs. But the latter statute governs arbitration *concerning* CC&Rs rather than arbitration provisions *within* them. It only applies, moreover, to disputes between unit owners and the association. *Bank of America v. SFR Invs. Pool 1, LLC*, 2015 WL 6163452, at *1-2 (D. Nev. Oct. 19, 2015); *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 183 P.3d 895 (2008).

[40]*Pinnacle*, 145 Cal.Rptr.3d at 541, 282 P.3d at 1240 (Liu, J., concurring).

consent) over reality; and, consequently, of formalism over justice.[41] What is strictly permissible may be unwise. And what is unwise—where, as here, the detriment is both widespread and unnecessary—is bad law. The *Pinnacle* decision is, in short, bad law even in California. This mistake should not be repeated in Nevada.

CONCLUSION

For the reasons explained above, this Court should affirm the ruling below; and, in so doing, this Court should adopt and announce a rule that arbitration provisions in CC&Rs are *per se* unenforceable.

Respectfully submitted this 7 day of February, 2017.

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[41] *See Pinnacle*, 145 Cal.Rptr.3d at 541-43, 282 P.3d at 1240-41 (Kennard, J., dissenting).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 this brief was prepared in a proportionally spaced typeface (14-point Times New Roman) using WordPerfect 12.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. I hereby certify that I have read this appellate 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 3 day of February, 2017.

Scott K. Canepa
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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing Amicus Curiae Brief of the Nevada Justice Association was served upon all counsel of record by electronically transmitting same via the Court's electronic filing system consistent with NEFCR 8, this 3 day of February, 2017.

Nancy Taylor