IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Appellant,

vs.

IRA HANSEN, IN HIS OFFICIAL CAPACITY AS NEVADA STATE ASSEMBLYMAN FOR ASSEMBLY DISTRICT NO. 32; AND JIM WHEELER, IN HIS OFFICIAL CAPACITY AS NEVADA STATE ASSEMBLYMAN FOR ASSEMBLY DISTRICT NO. 39,

Respondents.

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Supreme Court Case No. 69100

Appeal from First Judicial District Court, Carson City, Nevada,
Case No. 15 OC 00076 1B

RESPONDENTS' ANSWER TO PETITION FOR REHEARING

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INTRODUCTION

Respondents Assemblymen Ira Hansen and Jim Wheeler (the Assemblymen), by and through their counsel the Legal Division of the Legislative Counsel Bureau (LCB), hereby file this answer to the petition for rehearing filed by Appellant Commission on Ethics (Commission). The Assemblymen respectfully ask this Court to deny the petition for rehearing.

In its published opinion, this Court correctly determined that public bodies must comply with the Open Meeting Law (OML) in NRS Chapter 241 when authorizing legal counsel to file a notice of appeal. Comm'n on Ethics v. Hansen, 396 P.3d 807, 809-10 (Nev.2017). This Court also correctly determined that the Commission failed to comply with the OML because it did not authorize its legal counsel to file the notice of appeal for this case in an OML-compliant meeting. Id. This Court also correctly determined that "the record does not show and nothing in the statutes or regulations concerning the Ethics Commission provides for a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole." Id. Therefore, this Court properly dismissed the Commission's appeal because "the notice of appeal [was] defective, and thus, this court lacks jurisdiction to consider the Commission's appeal." Id.

This Court's published opinion protects the fundamental democratic principle of majority rule because it ensures that public bodies are empowered to authorize appeals only if a majority approves the appeal in an OML-compliant meeting. Mason's Manual Legis. Proc. §50 (NCSL 2010) ("A fundamental and seemingly universal principle is that at least a majority of the vote cast is required to make decisions for a group."); Black's Law Dictionary 967 (7th ed. 1999) (defining "majority rule" as "[a] political principle that a majority of a group has the power to make decisions that bind the group.").

Under the view of the Commission and the dissent, any number less than a quorum would be empowered to authorize an appeal without holding an OML-compliant meeting. Hansen, 396 P.3d at 812-13 (Pickering, J., dissenting). This view would undermine both the principle of majority rule and the purpose of the OML to require public bodies to take actions regarding litigation ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2); Legis. History AB225, 71st Leg., at 1771-75, 1810-16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001).[1]

[1] A copy of Legis. History AB225, 71st Leg. (Nev. LCB Resch. Libr. 2001), is available at: http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225,2001.pdf.

This view would also create the odd situation that a minority of the members of a public body would be empowered to authorize an appeal without holding an OML-compliant meeting, but a majority of the members would be prohibited from authorizing the appeal unless the majority holds such a meeting. Worse yet, if a minority of the members authorized an appeal without holding an OML-compliant meeting, a majority of the members would be prohibited from counteracting the minority's action unless the majority holds such a meeting. This odd imbalance between the respective powers of the majority and minority would stand the principle of majority rule on its head.

Therefore, because this Court correctly determined that public bodies must comply with the OML when authorizing legal counsel to file a notice of appeal, this Court should deny the petition for rehearing.

ARGUMENT

I. Standards for reviewing petitions for rehearing.

In petitions for rehearing, parties may not reargue matters they presented in their briefs, and no point may be raised for the first time. NRAP 40(c)(1); City of N. Las Vegas v. 5th & Centennial, 331 P.3d 896, 898 (Nev.2014). Petitions for rehearing will be granted only when this Court has: (1) overlooked or misapprehended material facts in the record; or (2) overlooked, misapplied or

failed to consider legal authority directly controlling a dispositive issue. NRAP 40(c)(2); Bahena v. Goodyear Tire & Rubber, 126 Nev. 606, 608 (2010).

In the petition for rehearing, if the petitioner claims that this Court has overlooked or misapprehended material facts in the record, the claims must be "supported by a reference to the page of the transcript, appendix or record where the matter is to be found." NRAP 40(a)(2). Additionally, if the petitioner claims that this Court has overlooked, misapplied or failed to consider legal authority directly controlling a dispositive issue, the claims must be "supported by a reference to the page of the brief where petitioner has raised the issue." Id.

In its petition for rehearing, the Commission fails to meet all of these standards. Therefore, its petition must be denied.

II. Because the Assemblymen—in their motion—clearly raised the issue that only the governing board of a public body can authorize an appeal, they did not raise that issue for the first time in their reply.

The Commission and dissent incorrectly claim that "for the first time in reply," the Assemblymen raised the issue that "only the governing board of a public body can authorize an appeal, not the entity's chair, its executive director, or its in-house lawyer." Hansen, 396 P.3d at 813 (Pickering, J., dissenting). However, for 15 pages in their motion, the Assemblymen methodically established that public bodies cannot take any actions authorizing or delegating authority to

counsel to file appeals unless such actions are taken ***only*** in open meetings that comply with the OML. Motion at 14-29.

Because the Assemblymen clearly argued that decisions to file appeals can be made ***only*** by the public body in OML-compliant meetings, that argument establishes that such decisions cannot be made by the body's chair, executive director and in-house lawyer. Indeed, the Assemblymen specifically discussed caselaw holding that a public body's attorney cannot take actions to file appeals without first obtaining the public body's approval in OML-compliant meetings. Id. at 27-28. Therefore, in their motion, the Assemblymen clearly raised the issue that only the governing board of a public body can authorize appeals in OML-compliant meetings, which precludes its chair, executive director and in-house lawyer from directing or filing appeals without the body's prior authorization in OML-compliant meetings.

Furthermore, until the Commission filed its opposition and admitted for the first time that its counsel filed the appeal without the full body's prior authorization, there was no way to know that the Commission never held any meetings to authorize its counsel to file the appeal. Opp'n at 10 ("[T]he Commission did not hold any meeting to provide direction to Commission Counsel to file the Notice of Appeal. The direction was provided by the Commission Chair and Executive Director."). Considering this information was in the exclusive

possession of the Commission and was not revealed until the Commission's opposition, it was not only appropriate but incumbent upon the Assemblymen to address this information in their reply to that opposition. NRAP 27(a)(4) (providing that a reply must present only matters that relate to the opposition); NRAP 28(c) (providing that a reply brief must be "limited to answering any new matter set forth in the opposing brief.).

Additionally, the Commission specifically argued in its opposition that its counsel had the legal authority to file the appeal without the full body's prior authorization. Opp'n at 16-17. Therefore, because the Commission raised this argument in its opposition, the Assemblymen were permitted to address that argument in their reply by counter-arguing that only the governing board of a public body can authorize an appeal. NRAP 27(a)(4); NRAP 28(c). Consequently, because the arguments in the reply directly addressed each matter raised by the Commission in its opposition, the reply conformed with the appellate rules and appropriately discussed the Commission's contention that its counsel had the legal authority to file the appeal without the full body's prior authorization.

Finally, even if the reply had raised matters for the first time, this Court has stated that "it is our prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice." Powell v. Liberty Mut. Fire Ins., 127 Nev. 156, 161 n.3 (2011). Because

the Commission used its opposition to raise and argue the issue that its counsel had the legal authority to file the appeal without the full body's prior authorization, the interests of justice would have permitted this Court to consider the Assemblymen's counter-arguments even if they had been raised for the first time in the reply.

III. The affidavit attached to the petition must be stricken because: (1) the Commission cannot introduce new or additional evidence into the record on rehearing; and (2) the affidavit improperly supports the Commission's new legal arguments and contradicts its prior admissions and legal arguments in which the Commission stated that it never held any meetings to provide direction to its counsel to file the appeal.

Appellate courts universally hold that parties cannot introduce new or additional evidence into the record on petitions for rehearing. United States v. Maxwell Land-Grant Co., 122 U.S. 365, 375 (1887); In re Leslie H., 861 N.E.2d 1010, 1015 (Ill.App.Ct.2006); Ad-Ex, Inc. v. City of Chicago, 565 N.E.2d 669, 680 (Ill.App.Ct.1990); Wantulok v. Wantulok, 223 P.2d 1030, 1031 (Wyo.1950); Gulf Ref. Co. v. Bagby, 7 So.2d 903, 912 (La.1942). Consequently, affidavits attached to petitions for rehearing must be disregarded or stricken. Williamsburg Rural Water & Sewer Co. v. Williamsburg Cnty. Water & Sewer Auth., 627 S.E.2d 690, 693 (S.C.2006); Snyder v. Smith Welding & Fabrication, 746 P.2d 168, 171 (Okla.1986); Ellerbe & Co. v. City of Hudson, 85 N.W.2d 663, 663 (Wis.1957); Woodburn v. Harvey, 191 P. 468, 468 (Kan.1920); Anse La Butte Oil & Mineral Co. v. Babb, 47 So. 754, 758 (La.1908).

The Commission has attached the affidavit of its executive director to its petition for rehearing in an attempt to introduce new or additional evidence into the record. Because this is improper, the affidavit must be disregarded or stricken. Furthermore, the affidavit also must be disregarded or stricken because it improperly supports the Commission's new legal arguments and contradicts its prior admissions and legal arguments in which the Commission stated that it never held any meetings to provide direction to its counsel to file the appeal.

In its opposition, the Commission admitted that it "did not hold any meeting to provide direction to Commission Counsel to file the Notice of Appeal," and the Commission's legal arguments were based entirely on the premise that a quorum of the Commission never met to authorize the appeal because "the direction to appeal the case was provided to Commission Counsel by the Chair and Executive Director." Opp'n at 10. Based on the Commission's admissions and arguments, this Court correctly stated "the record does not show . . . a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole." Hansen, 396 P.3d at 810.

Now, in direct contradiction to the Commission's prior admissions and legal arguments, the executive director states for the first time in the affidavit that more than 3 years ago—which was long before this case was filed in the district court or

subject to an appeal—the Commission anticipated the need for an appeal and secretly met and provided its counsel with express authority to file the appeal:

> Upon receipt of the complaints concerning Assemblymen Hansen and Wheeler in 2014, the Commission anticipated immediate litigation involving the scope of the Commission's jurisdiction of the State legislators and provided me direct, express authority to proceed in the matters in any manner I deemed legally appropriate, in consultation with the Chair, including pursuing appellate review of its jurisdiction through the Nevada Supreme Court. The Commission granted this authority early in the proceedings through confidential attorney/client communications while the matter was statutorily confidential and within the Commission's Open Meeting Law exemption.

Pet. Aff. at 3.

Thus, despite the Commission's previous admissions in its briefs that "[t]he Commission simply did not hold a meeting, serial or otherwise, to provide direction to file the Notice of Appeal," Opp'n at 10, the Commission's executive director now attests that the Commission secretly met and provided counsel with "direct, express authority" to file an appeal more than 3 years ago, which was long before this case was filed in the district court or subject to an appeal. Because both of these statements of fact cannot be true, it appears that one of them may be a false statement of fact that implicates the rules of professional conduct. NRPC 3.3(a) ("A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); Indep. Living Ctr. v. Maxwell-

Jolly, 590 F.3d 725, 730 (9thCir.2009) (finding lawyers who make contradictory statements of fact in their briefs transgress the rules of professional conduct).

Furthermore, the Commission's contradictory statements demonstrate why the OML requires public bodies to authorize appeals only in OML-compliant meetings so there are verifiable public records conclusively proving when and how their actions were taken, instead of contradictory statements and unverifiable assertions by staff which can easily evolve and change to suit their circumstances like they have evolved and changed in this case. Therefore, since the unverifiable assertions in the executive director's affidavit are merely self-serving statements designed to fit the Commission's new legal arguments, they should be rejected because they cannot serve as a proper substitute for verifiable actions of public bodies taken in OML-compliant meetings.

Finally, even assuming the assertions in the executive director's affidavit are accurate, all they prove is that the Commission has been improperly taking actions to delegate authority to file appeals to its chair and staff without any statutory authority under the Ethics Law and without holding OML-compliant meetings.

It is well established that "[a] public body cannot delegate its powers, duties or responsibilities to any other person or groups, including a committee of its own members," so "[w]here duties or responsibilities are imposed on a public body . . . that body is bound to exercise those duties and responsibilities and cannot

divest itself of them by delegation to others." Mason's Manual Legis. Proc. §51(1)-(2) (NCSL 2010). For example, in Knight v. Higgs, 659 S.E.2d 742, 746-49 (N.C.App.2008), the court held a public body could not delegate its decision-making authority to its attorney and, since the body failed to make the improperly delegated decision in a public meeting, it violated the state's OML.

As correctly observed by this Court, "nothing in the statutes or regulations concerning the Ethics Commission provides for a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole." Hansen, 396 P.3d at 810. Consequently, if the Commission has been delegating authority to file appeals to its chair and staff, it has been doing so without statutory authority under the Ethics Law.

Additionally, based on its plain language and legislative history, the OML does not allow public bodies to take actions regarding potential or existing litigation in private conferences with their attorneys. Legis. History AB225, 71st Leg., at 1771-75, 1810-16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001). Instead, such actions must be taken ***only*** in OML-compliant meetings. NRS 241.010(1), 241.015(1)-(3), 241.016(4) & 241.020(1); McKay v. Bd. of Cnty. Comm'rs (McKay II), 103 Nev. 490, 491-96 (1987). Consequently, even if the Commission had any statutory authority to take actions delegating its power to file

appeals to its chair and staff, the Commission could not have validly made such delegations without holding OML-compliant meetings.

If the assertions in the executive director's affidavit are accurate, the Commission has been improperly making delegations without holding OML-compliant meetings. Therefore, if the executive director's affidavit proves anything, it is that the Commission has been improperly taking actions without statutory authority under the Ethics Law and without holding OML-compliant meetings.

IV. This Court is the only judicial body that may determine whether it has appellate jurisdiction to hear this appeal.

The Commission argues that this Court lacks jurisdiction to determine whether the Commission properly and timely filed a notice of appeal because the OML issues must be decided first by the district court. However, every appellate court has the power, at any time in the appellate proceedings, to determine whether the party asserting the right to appeal has properly invoked the court's appellate jurisdiction. United States v. Ruiz, 536 U.S. 622, 628 (2002) (stating that an appellate court "always has jurisdiction to determine its own jurisdiction."); Davis v. Packard, 33 U.S. 312, 323 (1834) (stating that "the court of [last] resort in every state, decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends."). Therefore, this Court was the only judicial body that could determine whether it had appellate jurisdiction to hear this

appeal because "[i]t and it alone necessarily had jurisdiction to decide whether the case was properly before it." United States v. United Mine Workers, 330 U.S. 258, 291 (1947).

In determining that it lacked appellate jurisdiction to hear this appeal, this Court correctly concluded that the Commission did not have the proper legal authority to file its notice of appeal due to its violation of the OML. Johnson v. Tempe Elementary Sch. Dist., 20 P.3d 1148, 1151 (Ariz.Ct.App.2000), *review denied* (Ariz. Oct. 3, 2001). This Court also correctly concluded that because the Commission failed to file a legally valid notice of appeal during the jurisdictional appeal period, this Court could not treat the "improperly-filed notice of appeal as vesting jurisdiction in this court." Guerin v. Guerin, 116 Nev. 210, 214 (2000). Therefore, this Court properly dismissed the appeal because "the notice of appeal [was] defective, and thus, this court lacks jurisdiction to consider the Commission's appeal." Hansen, 396 P.3d at 810.

V. The Commission's substantive rights to appeal are governed by the OML, and the Commission's decision to appeal was not exempt from the OML.

The Commission and amici argue that the OML cannot deprive the Commission of its rights to appeal under the rules of appellate procedure and that those rules take precedence over the OML. However, because public bodies are wholly creatures of the Legislature whose powers and rights are defined

exclusively by statute, the Legislature has the exclusive authority to determine whether public bodies are given any substantive rights to appeal and, if so, the steps they must take to exercise those substantive rights.

In Nevada, each public body "is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication." State ex rel. Rosenstock v. Swift, 11 Nev. 128, 140 (1876); Andrews v. Nev. State Bd. of Cosmetology, 86 Nev. 207, 208 (1970). Therefore, to determine whether public bodies have any substantive rights to appeal, this Court looks to the statutes that govern the public bodies. Mead v. State Dep't of Health, 91 Nev. 152, 153-55 (1975).

With certain limited exceptions, the OML governs all public bodies, including the Commission. NRS 241.015(4) & 241.016. In the OML, the Legislature expressly provided a limited attorney-client litigation exception that allows public bodies to "receive information" and "deliberate toward a decision" regarding litigation in private conferences with their attorneys, but public bodies cannot take action in such conferences and instead must take such action ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2). By expressly creating this limited attorney-client litigation exception, it must be presumed the Legislature did not intend to create other litigation exceptions by implication. McKay II, 103 Nev. at 491-96 (there are no implied OML litigation exceptions).

In its opposition, the Commission did not argue that it was acting under the limited attorney-client litigation exception, thereby waiving that issue. Instead, it argued that it was acting under the OML exception in NRS 281A.440.[2] Having already argued this matter in its opposition, the Commission cannot reargue it on rehearing. 5th & Centennial, 331 P.3d at 898. Moreover, the Commission's arguments have no merit.

First, the Commission incorrectly argues that NRS 281A.440 created a complete exemption from the OML instead of a limited exception. However, because NRS 281A.440 is listed with the other OML limited-exception statutes in NRS 241.016(3), the Legislature clearly intended NRS 281A.440 to be a limited-exception statute. Chanos v. Nev. Tax Comm'n, 124 Nev. 232, 239-44 (2008) (holding that a statute—NRS 360.247—listed in NRS 241.016(3) is a limited-exception statute). If the Legislature wanted to create a complete exemption, it would have listed the Commission's proceedings with the other proceedings given complete OML exemptions in NRS 241.016(2) (listing the Legislature, judicial proceedings and certain meetings of the State Board of Parole Commissioners as complete exemptions).

[2] All citations to NRS 281A.440 are to the 2015 version of the statute.

Second, the Commission incorrectly argues that the provisions of NRS 281A.440(8), (10) and (17) created complete exemptions from the OML, regardless of whether the Assemblymen waived confidentiality under those provisions. However, those provisions did not create OML exceptions at all. By their plain language, the provisions expressly created exceptions to the Public Records Act in NRS Chapter 239, not to the OML in NRS Chapter 241.

The only OML exception in the statute was codified in NRS 281A.440(16), which exempted "[a] meeting or hearing that the Commission . . . holds to receive ***information or evidence*** concerning the propriety of the conduct of a public officer or employee ***pursuant to this section*** and the ***deliberations*** of the Commission . . . on such information or evidence." NRS 281A.440(16) (emphasis added). The meetings or hearings contemplated by NRS 281A.440(16) were adjudicatory proceedings at which the merits of the ethics complaints were adjudicated by the Commission after notice and opportunity for the subject to be heard. NRS 281A.440(11) (describing the adjudicatory proceedings conducted "pursuant to this section"). Therefore, the meetings or hearings contemplated by NRS 281A.440(16) did not include any meetings or hearings at which the Commission authorized appeals from district court decisions.

Furthermore, the plain language of NRS 281A.440(16) expressly exempted only the Commission's receipt of "information or evidence" and its "deliberations"

on such information or evidence. It did not expressly exempt the Commission's ultimate decisions to take action, which must occur only in OML-compliant meetings. Accordingly, NRS 281A.440(16) did not expressly exempt the Commission's decision to appeal from the OML.

Finally, amicus State Board of Medical Examiners argues that the OML exemption for "judicial proceedings" applies to the Commission's decision to appeal. NRS 241.016(2)(b). This is absurd. The Commission did not make its decision to appeal while it was in meetings or hearings before courts or other judicial bodies within the judicial branch of government under Article 6 of the Nevada Constitution. The Commission made its decision to appeal during its own executive-branch meetings which have always been subject to the OML. Comm'n on Ethics v. Hardy, 125 Nev. 285, 298 (2009) (holding that the Commission is "an agency of the executive branch with its basic source of power provided by Article 5 of the Nevada Constitution."). Therefore, the OML exemption for "judicial proceedings" has no application to this case.

VI. The OML requires attorneys for public bodies to perform their professional duties and provide their attorney-client representation within the reasonable parameters established by the OML.

The Commission and amici argue that the Commission did not need to authorize the appeal in an OML-compliant meeting because its counsel had express and implied authority to file the appeal without the full body's prior authorization.

They also suggest that because counsel was performing professional duties under court rules to carry out the attorney-client representation, those professional duties supersede the OML.

However, in McKay II, 103 Nev. at 491-96, this Court clearly held that the OML requires attorneys for public bodies to perform their professional duties and provide their attorney-client representation within the reasonable parameters established by the OML. Thus, this Court rejected creating implied attorney-client exceptions based on claims that holding public meetings imposed extra burdens on the attorney-client relationship between public bodies and their attorneys because:

> Any detriment suffered by the public body in this regard must be assumed to have been weighed by the legislature in adopting this legislation. The legislature has made a legitimate policy choice—one in which this court cannot and will not interfere.

103 Nev. at 496. The same reasoning applies to this case.

Therefore, because this Court correctly determined that public bodies must comply with the OML when authorizing legal counsel to file a notice of appeal, this Court should deny the petition for rehearing.

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CONCLUSION

Based on the foregoing, the Assemblymen respectfully ask this Court to deny the petition for rehearing.

DATED: This **15th** day of September, 2017.

Respectfully submitted,

BRENDA J. ERDOES
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CERTIFICATE OF COMPLIANCE

1. We certify that the foregoing Answer to Petition for Rehearing complies with the formatting requirements of NRAP 40(b) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font and Times New Roman type.

2. We certify that the foregoing Answer to Petition for Rehearing complies with the type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), the answer is proportionately spaced, has a typeface of 14 points or more, and contains **4,106** words, which is less than the type-volume limit of 4,667 words.

3. We certify that we have read the foregoing Answer to Petition for Rehearing, and to the best of our knowledge, information and belief, the answer is not frivolous or interposed for any improper purpose. We further certify that the answer complies with all applicable Nevada Rules of Appellate Procedure and that every assertion in the answer regarding matters in the record is supported by a reference to the record where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **15th** day of September, 2017.

BRENDA J. ERDOES
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **15th** day of September, 2017, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of the foregoing Answer to Petition for Rehearing, by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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