# EXHIBIT A

**NOTC**
Margaret A. McLetchie, Nevada Bar No. 10931
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701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
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Email: maggie@nvlitigation.com
*Attorney for Plaintiff/Petitioner*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| LAS VEGAS REVIEW-JOURNAL,<br><br>Plaintiff/Petitioner,<br><br>vs.<br><br>STEVEN B. WOLFSON, CLARK COUNTY DISTRICT ATTORNEY,<br><br>Defendant/Respondent. | CASE NO.: A-14-711233-W<br><br>DEPT. NO.: XVII<br><br>**NOTICE OF SETTLEMENT** |



## NOTICE OF SETTLEMENT

PLEASE TAKE NOTICE that the Parties have entered into settlement agreements and therefore requested dismissals in both Nevada Supreme Court Case Nos. 70916 and 73457 on March 29, 2018. Attached as Exhibits 1 and 2 please find executed copies of the settlement agreements.

DATED this 30th day of March, 2018.

*/s/ Margaret A. McLetchie*
Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
Telephone: (702) 728-5300
Facsimile: (702) 425-8220
Email: maggie@nvlitigation.com
*Attorney for Plaintiff/Petitioner*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of March, 2018, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing NOTICE OF SETTLEMENT in *Las Vegas Review-Journal v. Steven B. Wolfson, Clark County District Attorney*, Eighth Judicial District Court Case No. A-14-711233-W, to be served electronically using the Odyssey File & Serve system, to all parties with an email address on record.

I hereby further certify that on the 30th day of March, 2018, pursuant to Nev. R. Civ. P. 5(b)(2)(B), I mailed a true and correct copy of the foregoing NOTICE OF SETTLEMENT by depositing the same in the United States mail, first-class postage pre-paid, to the following:

MARY-ANNE MILLER, ESQ. mary-anne.miller@clarkcountyda.com
**Office of the District Attorney**
500 S. Grand Central Pkwy., Suite 5075
Las Vegas, NV 89106
*Attorney for Defendant/Respondent*

Certified by: */s/ Pharan Burchfield*
An Employee of McLetchie Shell, LLC

MCLETCHIE SHELL
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

# EXHIBIT 1

# SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter the "Agreement") is made by and between the Las Vegas Review-Journal, Inc. (the "Review-Journal") through its counsel, Margaret A. McLetchie, Esq., and Steven B. Wolfson, Clark County District Attorney, through his counsel, Mary-Anne Miller, County Counsel, collectively referred to as the Parties.

WHEREAS the Review-Journal filed a petition for writ of mandamus in the Eighth Judicial District Court Case No. A-14-711233-W, seeking the production of certain records from the Clark County District Attorney and having received partial relief from that petition but has certain matters related to that petition pending on a cross-appeal in the Nevada Supreme Court, Case No. 70916, and

WHEREAS the Clark County District Attorney contested the Petition and was aggrieved in part by the final order of the District Court and has filed an appeal in the above referenced Nevada Supreme Court case, and

WHEREAS it is the intention of the parties hereto to settle and dispose of, fully and completely, any and all claims for records described in the above-referenced litigation (saving the issue of attorney's fees which is pending under a separate Nevada Supreme Court case), to avoid further cost and expense,

NOW, THEREFORE, in consideration of the promises and agreements contained herein, the parties hereto agree as follows:

1. **Revisions to Orders**

   **A.** Paragraph 8(a) of the September 24, 2015 Order of the District Court amending Paragraph 12(a)of the Court's April 27, 2015 Order is superseded and shall read as follows:

*With regard to the twelve (12) informants who are identified as having testified in Paragraph 12(a) of the April 27, 2015 Order, the District Attorney shall produce redacted copies of the Inducement Index entries to include the name of the prosecutor, the nature of the inducement, the case number, and the original charge the informant faced. The District Attorney may redact the names of the informants, and any details regarding the underlying criminal investigations(s), unless those details were revealed during the informant's testimony. Once these redactions are made, the District Attorney shall update the privilege Log to identify the twelve (12) entries and the redactions therefrom, and produce the records in redacted form. Further, even if the informant has testified, the District Attorney may withhold information if the District Attorney: (1) reasonably determines that the witness is under a present and substantial risk of harm and that providing the information would cause a substantial risk of harm; and (2) documents sufficient information on a privilege log to meet the applicable burdens under the Nevada Public Records Act (Chapter 239 of the Nevada Revised Statutes).*

**B.** Paragraph 8(b) of the September 24, 2015 Order of the District Court and Paragraphs14(a) and (b) of the April 27, 2015 Order of the District Court are superseded by the following:

a. *If the particular victim or witness has testified, the District Attorney shall disclose the record. However, the District Attorney may redact information pertaining to the current location of the witness if the District Attorney (1) reasonably determines that the witness is under a present and substantial risk of harm and that providing that information would cause a substantial risk of harm; and (2) documents sufficient information on a privilege log to meet the*

*applicable burdens under the Nevada Public Records Act (Chapter 239 of the Nevada Revised Statutes).*

b. *If the particular victim or witness has not testified, and the statutory privilege still exists, the District Attorney shall produce a copy of the particular record, redacting only the name of the victim or witness and/or any other information that would reveal the identity of the victim or witness. The case number may also be withheld if the District Attorney: (1) reasonably determines that the witness is under a present and substantial risk of harm and that providing that information would cause a substantial risk of harm; and (2) documents sufficient information on a privilege log to meet the applicable burdens under the Nevada Public Records Act (Chapter 239 of the Nevada Revised Statutes).*

**2. Dismissal of Nevada Supreme Court Case No. 70916.** The parties agree, upon execution of this Settlement Agreement, to execute a stipulation dismissing the appeal pending before the Supreme Court of Nevada, designated No. 70916 and previously set for oral argument on March 5, 2018.

**3. Further Production; Enforcement of NPRA rights.** The District Attorney shall make a production of records and provide an updated Privilege Log consistent with Paragraph 1 of this Agreement within four (4) weeks of the execution of this Agreement (the "District Attorney's Production"). Nothing in this Agreement shall be interpreted as barring the Review-Journal from challenging the sufficiency of the District Attorney's Production, and the parties agree that the Review-Journal may commence a new action under the Nevada Public Records Act if the parties are unable to resolve any issues regarding the District Attorney's Production. Moreover, nothing in this Agreement shall be interpreted as barring the Review-Journal from making any additional

requests to the District Attorney pursuant to the Nevada Public Records Act (the "NPRA," Chapter 239 of the Nevada Revised Statutes) or from seeking fees for doing so.

**4. Modification in Writing Only.** No change to this Agreement shall be effective unless and until confirmed in a writing signed by all affected parties and making express reference to this Agreement.

**5. Interpretation of Agreement.** This Agreement shall not be construed against any party on the basis that its attorney drafted it.

**6. Nevada Law.** This Agreement shall be construed and interpreted in accordance with Nevada law. If any dispute arises in any manner with respect to this Agreement, any action must be filed and maintained in the Eighth Judicial District Court of Nevada, applying Nevada law.

**7. Counterparts.** This Agreement may be executed in any number of separate counterparts, each of which shall be deemed an original but all of which when taken together shall constitute one and the same instrument.

**8. Full Force and Effect.** If any provision of this Agreement is for any reason deemed invalid, the remaining provisions shall remain in full force and effect where possible.

**9. Further Action.** The parties agree to take such further action as may be reasonably necessary to carry out the intent of this Agreement.

**10. Integration.** This Agreement embodies the whole agreement of the parties with regard to the appeal pending before the Supreme Court of Nevada, designated No. 70916. There are no promises, terms, conditions or obligations other than those contained herein, and this Agreement shall supersede all previous communications, representations, or other agreements, either oral or

written, among the parties. In the event of conflicting language between this Agreement and any other document, the language of this Agreement shall be controlling. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of the parties hereto.

**McLetchie Shell, Attorneys at Law**

By: _____

Margaret A. McLetchie, NBN 10931
Alina M. Shell, NBN 11711
701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
*Counsel for the Review-Journal*

Date: 3.28.18

**Clark County District Attorney**

By: _____

Mary-Anne Miller, NBN 1419
500 S. Grand Central Parkway
Las Vegas, NV 89106
*Counsel for Steven B. Wolfson, Clark County District Attorney*

Date: 3-28-18

# EXHIBIT 2

# SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter the "Agreement") is made by and between the Las Vegas Review-Journal, Inc. ("Petitioner"), through its counsel, Margaret A. McLetchie, Esq., and Steven B. Wolfson, Clark County District Attorney ("Respondent"), through his counsel, Mary-Anne Miller, County Counsel, collectively referred to as the Parties.

WHEREAS Petitioner filed a petition for writ of mandamus in the Eighth Judicial District Court Case No. A-14-711233-W, seeking the production of certain records from the Respondent and, having received partial relief from that petition, sought an award of attorney fees pursuant to NRS 239.011; and

WHEREAS Petitioner was aggrieved by the final order of the District Court denying that request and has filed an appeal in the Nevada Supreme Court; and

WHEREAS it is the intention of the parties hereto to settle and dispose of, fully and completely, any and all claims for attorneys' fees related to the above-referenced litigation, and to avoid further cost and expense attendant upon appellate actions;

NOW, THEREFORE, in consideration of the promises and agreements contained herein, the parties hereto agree as follows:

**1. Consideration.** Respondent shall pay Petitioner the sum of Fifty-Five Thousand Dollars and No Cents ($55,000.00) (the Settlement Funds) payable to McLetchie Shell, Issuance of Settlement Funds requires Petitioner and/or Petitioner's counsel to provide Respondent with executed IRS W-9 tax forms, and Petitioner acknowledges that no Settlement Funds may be issued without provision of said forms.

**2. Board Approval.** This settlement has been approved by the Board of Clark County Commissioners (Board).

**3. Settlement Check.** Settlement Funds will be exchanged for an executed dismissal.

**4. Release of Claims.** In exchange for receipt of the settlement funds, Petitioner acknowledges that this settlement agreement acts as a release of all claims for attorneys' fees relating to District Court Case No. A711233 and any attendant appeals.

**5. Dismissal of Nevada Supreme Court Case No. 73457.** The parties agree, upon execution of this Settlement Agreement, to execute a stipulation dismissing the appeal pending before the Supreme Court of Nevada, designated No.73457.

**6. Modification in Writing Only.** No change to this Agreement shall be effective unless and until confirmed in a writing signed by all affected parties and making express reference to this Agreement.

**7. Interpretation of Agreement.** This Agreement shall not be construed against any party on the basis that its attorney drafted it.

**8. Nevada Law.** This Agreement shall be construed and interpreted in accordance with Nevada law. If any dispute arises in any manner with respect to this Agreement, any action must be filed and maintained in Nevada, applying Nevada law.

**9. Counterparts.** This Agreement may be executed in any number of separate counterparts, each of which shall be deemed an original but all of which when taken together shall constitute one and the same instrument.

**10. Full Force and Effect.** If any provision of this Agreement is for any reason deemed invalid, the remaining provisions shall remain in full force and effect where possible.

**11. Integration.** This Agreement embodies the whole agreement of the parties. There are no promises, terms, conditions or obligations other than those contained herein, and this

Agreement shall supersede all previous communications, representations, or other agreements, either oral or written, among the parties. In the event of conflicting language between this Agreement and any other document, the language of this Agreement shall be controlling. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of the parties hereto.

**McLetchie Shell, Attorneys at Law**

By: _____

Margaret A. McLetchie, NBN 10931
Alina M. Shell, NBN 11711
701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
*Counsel for Las Vegas Review Journal*

Date: 3/28/18

**Clark County District Attorney**

By: _____

Mary-Anne Miller, NBN 1419
500 S. Grand Central Parkway
Las Vegas, NV 89106
*Counsel for Steven B. Wolfson, Clark County District Attorney*

Date: 3.28.18

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

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|---|---|
| CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER<br><br>Appellant,<br><br>vs.<br><br>LAS VEGAS REVIEW JOURNAL,<br><br>Respondent. | Electronically Filed<br>May 01 2018 09:17 a.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court<br><br>CASE NO.: 75095<br><br>DISTRICT COURT CASE NO.:<br>A-17-758501-W |

# PETITION FOR REHEARING

Respondent Las Vegas Review-Journal (the "Review-Journal"), by and through its counsel of record, hereby petitions this Court pursuant to Nev. R. App. P. 40 for a rehearing as to whether Rule 62 of the Nevada Rules of Civil Procedure entitles the Clark County Office of the Coroner/Medical Examiner a stay of the district court's order awarding the Review-Journal attorney's fees. This Petition is supported by the following memorandum of points and authorities.

Margaret A. McLetchie, Nevada Bar No. 10931
Alina M. Shell, Nevada Bar No. 11711
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
*Counsel for Respondent, Las Vegas Review-Journal*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

The Las Vegas Review-Journal (the "Review-Journal") respectfully seeks rehearing of this Court's holdings in its April 12, 2018 order[1] in this case. Specifically, the Review-Journal seeks rehearing as to the court's holdings that Rule 62(d) of the Nevada Rules of Civil Procedure entitles an appellant to a stay as a matter of right upon posting a supersedeas bond, and that Rules 62(d) and 62(e) of the Nevada Rules of Civil Procedure operate in tandem to entitle a state government appellant to a stay as a matter of right upon filing notice of appeal and a motion for a stay. Rehearing is warranted for two reasons.

First, rehearing is merited pursuant to Nev. R. App. P. 40(c)(2)(B) because the Court failed to consider a directly controlling decision because it did not consider the United States Supreme Court's 2009 holding in *Nken v. Holder*, 556 U.S. 418 (2009)—which explicitly mandates that stays are not a matter of right.

Second, rehearing is appropriate pursuant to Nev. R. App. P. 40(c)(2)(A) because the Court overlooked a material fact in the record—namely, that the Coroner's Office's appeals and subsequent motion for stay in the instant case arose in the context of a petition for public records pursuant to the Nevada Public Records

[1] *Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24 (April 12, 2018).

Act (the "NPRA"), Nev. Rev. Stat. § 239.001 *et seq.*, an act that demands swift resolution of disputes over access to government records "to encourage transparency within the government," *Clark Cty. Office of Coroner/Med. Exam'r*, 134 Nev. Adv. Op. 24 at *10 (Cherry, J., dissenting in part), and discourage the sort of gamesmanship and delay the Coroner's Office is engaging in here. Specifically, the NPRA requires all its provisions—including the fees and costs provision in Nev. Rev. Stat. § 239.011(2)—be interpreted liberally to further access to public records. Providing governmental entities with an automatic stay in public records matters will only hinder public access to records by incentivizing governmental entities to appeal every time a court orders them to disclose public records even when, as here, their appeal lacks merit.

## II. ARGUMENT

### A. Rehearing is Necessary Because the Court Failed to Consider a Controlling United States Supreme Court Opinion.

Pursuant to Nev. R. App. P. 40(a)(2), any claim that the Court has "overlooked, misapplied, or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue." The Review-Journal cited the United States Supreme Court decision in *Nken v. Holder*, 556 U.S. 418 (2009), in its February 13, 2018 Opposition to Renewed Motion for Order Shortening Time on Motion for Stay of District Court Order. (*See* Exhibit 11 to the Coroner's Office's March 3, 2018 Emergency Motion for Stay at

p. 3:22-27.) The Review-Journal cited *Nken* there for the legal proposition that a "stay is not a matter of right, even if irreparable injury might otherwise result." (*Id.*, quoting *Nken*, 556 U.S. at 433.) The Review-Journal reiterated this legal proposition in the March 21, 2018 Opposition it filed with this Court. (See March 21, 2018 Opposition at pp. 8-10 (section of opposition entitled "Stays for Monetary Judgment are not Allowed as a Matter of Right").)[2] In its April 12, 2018 Order, this Court cited federal case law that pre-dated *Nken* but failed to address the controlling *Nken* decision. Thus, this Court can—and should—reconsider its April 12 order pursuant to Nev. R. App. P. 40(c)(2)(B).

**1. The Court's Order is in Direct Conflict with *Nken*.**

In *Nelson v. Heer*, this Court "overruled *Public Service Commission* to the extent it implied a stay is discretionary [when an appellant posts a supersedeas bond]." *Clark Cty. Office of Coroner/Med. Exam'r,* 134 Nev. Adv. Op. 24 at *4. In doing so, this Court based its analysis of Nev. R. Civ. P. 62(d) on the federal courts' interpretation of its federal counterpart, Fed. R. Civ. P. 62(d), and found that "[m]ost federal courts interpreting the rule generally recognize that FRCP 62(d) allows an

[2] Although the Review-Journal discussed the legal principles embodied in *Nken* in its Opposition—namely, that a stay is not a matter of right—it did not cite *Nken* in that filing. The Review-Journal apologizes for this, but as noted above, did cite *Nken* in its district court filing. The Review-Journal also notes that the Coroner's Office—which urged this Court to adopt what it represented as the federal standard—also failed to mention this controlling case in either its Motion or Reply.

appellant to obtain a stay pending appeal as of right upon the posting of a supersedeas bond for the full judgment amount." *Id*. (citing *Nelson*, 121 Nev. at 834 n.4).

*Nelson* was decided in 2005. However, in 2009, the United States Supreme Court held that the "traditional test for stays," rather than a statutory provision restricting injunctive relief for aliens subject to a removal order, governs whether a court may stay a removal order pending appeal. *Nken*, 556 U.S. at 433-34. In articulating the "traditional test for stays," the Court emphasized judicial discretion, noting that a "stay is not a matter of right" but rather "an exercise of judicial discretion" for which "the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. (quotation and citations omitted). Taken at face value, this language implies that an appellant may ***never*** obtain a stay automatically—under Fed. R. Civ. P. 62(d) or any other law authorizing stays pending appeal—even if the appellant posts a supersedeas bond (or is a governmental entity for which this supersedeas bond requirement is waived by statute).

Nothing in the *Nken* decision limits its holding to stays pending appeals of removal proceedings. Thus, in light of the *Nken* Court's holding that stays are not a matter of right, it is appropriate to read Fed. R. Civ. P. 62(d)—and therefore Nev. R. Civ. P. 62(d)—as this Court did in *Public Service Commission v. First Judicial District Court*, 94 Nev. 42, 574 P.2d 272 (1978). To wit, that a supersedeas bond is

an often-necessary, but never-alone-sufficient, factor that the court considers when deciding whether to issue a stay pending appeal pursuant to Nev. R. Civ. P. 62(d). This interpretation comports with the plain, permissive language of the Federal and Nevada Rules of Civil Procedure, which state that an "appellant ***may*** obtain a stay by supersedeas bond." Fed. R. Civ. P. 62(d); Nev. R. Civ. P. 62(d) (emphasis added). That an appellant ***may***—rather than ***shall***—obtain a stay by supersedeas bond implies that the courts retain their discretion to deny stays even when a supersedeas bond is posted. *See also* Nev. R. App. P. 8(a)(2)(E) ("The court ***may*** condition relief on a party's filing a bond or other appropriate security in the district court."). To read otherwise, as this Court did in the instant case and in *Nelson*, strips courts of their discretion to issue (or deny) stays in direct contradiction of the United States Supreme Court's mandate in *Nken*.

It is true that even after the Supreme Court's decision in *Nken*, federal courts have still held—like an old canard that has been repeated so many times it is unquestioningly assumed to be true—that Fed. R. Civ. P. 62(d) allows for a stay as a matter of right upon posting a supersedeas bond. *See Butler v. Ross*, No. 16CV1282 (DLC), 2017 WL 6210843, at *1 (S.D.N.Y. Dec. 7, 2017); *United States v. Nebraska Beef, Ltd.*, No. 8:15CV370, 2017 WL 5953159, at *2 (D. Neb. Feb. 9, 2017); *Bridgefield Cas. Ins. Co. v. River Oaks Mgmt., Inc.*, No. CIV.A. 12-2336, 2013 WL 5934434, at *1 (E.D. La. Nov. 4, 2013); *O.W. Bunker Malta Ltd. v. M/V Trogir*, No.

CV 12-5657-R, 2013 WL 12131547, at *1 (C.D. Cal. June 17, 2013); *Marcus I. ex rel. Karen I. v. Dep't of Educ.*, No. CIV. 10-00381 SOM, 2012 WL 3686188, at *2 (D. Haw. Aug. 24, 2012); *Gesualdi v. Laws Const. Corp.*, 759 F. Supp. 2d 432, 449 (S.D.N.Y. 2010).

However, some federal courts have also interpreted these rules differently. Indeed, after *Nken*, some courts have interpreted Fed. R. Civ. P. 62(d) (and similar statutory provisions) as this Court originally interpreted Nev. R. Civ. P. 62(d) in *Public Service Commission*—i.e. that the court considered whether a stay is warranted before considering the sufficiency of a supersedeas bond. In *In re Kenny G. Enterprises, LLC*, No. 8:14-CV-00246-ODW, 2014 WL 1806891 (C.D. Cal. May 7, 2014) the court cited *Nken* for the proposition that stays are not a matter of right, then denied a stay pursuant to Fed. R. Bankr. P. 8005 to an appellant which had agreed to post a $2,000,000.00 supersedeas bond. *Id*. at *3. This is because the *Kenny G* court first determined that the appellant did not establish that it would suffer irreparable injury, which "alone is … fatal to the [appellant's] Motion." *Id*.

Similarly, in *Moore v. Navillus Tile, Inc*. No. 14 CIV. 8326, 2017 WL 4326537, at *1 (S.D.N.Y. Sept. 28, 2017), a New York federal court interpreted Fed. R. Civ. P. 62(d) not as giving appellants a stay as a matter of right upon posting a bond, but as a mere prerequisite: "a bond must be posted in order to stay execution of a judgment while that appeal is pending." *Id*. at *1. In *Solis v. Blue Bird Corp*.,

No. 5:06-CV-341 (CAR), 2009 WL 4730323 (M.D. Ga. Dec. 4, 2009), a federal court denied an appellant's motion to stay execution under the *Nken* factors even though the appellant had filed an "appeal bond in an amount stipulated between the parties as being satisfactory." *Id*. at *1.

### 2. The Court's Failure to Consider *Nken* Creates a Result that is Contrary to Public Policy and Principles of Statutory Construction.

Judicial discretion to deny stays to governmental appellants provides an important check on the power of other governmental entities. Under the Supreme Court's decisions in this case and *Nelson*, state and local agencies now have *carte blanche* to delay satisfying a judgment creditor—without regard to how meritorious the appeal is or how seriously a judgment creditor is harmed by delayed satisfaction—simply by filing a notice of appeal and a motion for a stay. While adding interest to a judgment award pursuant to Nev. Rev. Stat. § 17.130(2) after a failed appeal may be adequate to deter a state agency from filing frivolous appeals against appellees who can afford to fight back, it will not be an effective deterrent when delaying payment by itself may allow a state agency to escape liability entirely. This will happen when a litigant wins a judgment against a governmental entity but cannot afford to litigate at the appellate level without the money that entity owes him or her pursuant to the judgment.

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Moreover, the Court's order essentially divests the district courts of their discretion to determine whether a state entity is entitled to a stay of a judgment or order, thereby rendering the bulk of Nev. R. App. P. 8(a) a nullity in cases similar to the one at bar. This is contrary to the canons of statutory construction, which, among other things, mandates that this Court "must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation and citation omitted); *accord Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011).

As the *Nken* Court noted, courts "are loath to conclude that Congress would, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Nken*, 556 U.S. at 433 (citing *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)) (internal marks omitted). Indeed, had Congress or the Nevada Legislature intended to strip courts of their discretion to issue (or deny) stays pending appeal any time a sufficient supersedeas bond is posted, those legislative bodies could have used the word "shall" instead of "may" in Rule 62(d).[3] Because neither Congress nor

[3] *See, e.g.*, *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9–10, 866 P.2d 297, 302 (1994). ("It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those

the Nevada Legislature expressed a clear purpose to deprive the courts of their discretion in this context, the courts must retain it.

The same reasoning applies to Rule 62(e). This rule states that "[w]hen an appeal is taken by [a governmental agency] and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." Fed. R. Civ. P. 62(e); Nev. R. Civ. P. 62(e). Read through the lens of *Nken*, this rule does not imply that governmental appellants are entitled to a stay of judgments pending appeal as a matter of right. Rather, it implies that the court must first decide whether a governmental appellant has demonstrated its entitlement to a stay under the circumstances of the case—if so, Rule 62(e) simply waives the bond requirement of Rule 62(d). *See* 134 Nev. Adv. Op. at *9 (Cherry, J. dissenting) ("subsection (e) independently waives any bond requirement when a state or local government has obtained a stay, which necessarily must have been obtained under separate authority"). Again, had Congress or the Nevada Legislature intended to grant governmental entities an automatic stay pending appeal, it could have done so in unambiguous language. Indeed, the legislatures have already used such plain language to grant a stay as of right—the automatic 10 and 14-day stays of execution in Nev. R. Civ. P. 62(a) and Fed. R. Civ. P. 62(a), respectively. That neither

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that employ the term 'shall' are presumptively mandatory."); *accord Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013).

legislative body saw fit to use such language in Rules 62(d) and 62(e) evinces a lack of intent to curtail the courts' discretion to issue and deny stays pending appeal.

In addition, this policy will cause lengthy litigation which needlessly delays the disposition of cases. Now, every governmental entity that fails to prevail at district court will have almost nothing to lose by filing a *pro forma* notice of appeal and motion for a stay. This result is contrary to Nevada Rule of Civil Procedure 1, which mandates that the Nevada Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *See also* Nev. R. App. P. 1(c) (mandating that the Rules of Appellate Procedure "shall be construed liberally to secure the proper and efficient administration of the business and affairs of the courts and to promote and facilitate the administration of justice by the courts").

### B. Rehearing is Necessary Because the Court Failed to Consider the Material Fact that this Matter Arose in the Context of a Petition for Public Records.

As Justice Cherry noted in his partial dissent, the purpose of the NPRA, "and the fees and costs provision in particular . . . is to encourage transparency within the government." *Clark Cty. Office of Coroner/Med. Exam'r*, 134 Nev. Adv. Op. 24 at *10 (Cherry, J., dissenting in part). The NPRA mandates that its provisions must be interpreted liberally to further the "important purpose" of "fostering democratic principles by providing members of the public with access to inspect and copy public

books and records to the extent permitted by law." Nev. Rev. Stat. § 239.001(1) and (2). As Justice Cherry correctly observed, Nev. Rev. Stat. § 239.011(2) furthers that important purpose by requiring courts to give priority to petitions brought under the NPRA and award attorney's fees and costs to a prevailing requester. By requiring a governmental entity to pay a prevailing requester fees and costs for failing to disclose public records, the NPRA operates to discourage the sort of delay tactics the Coroner's Office employs here—refusing to disclose public records, and then resisting payment of the Review-Journal's attorney's fees and costs after the district court issued a decision adverse to it. This Court's April 12 Order will embolden other governmental entities to engage in precisely the same sort of gamesmanship, thereby thwarting the purpose of the NPRA.

As the recent spate of governmental appeals of NPRA cases illustrates, Nevada's governmental entities have declared war on the NPRA and the organizations and attorneys that seek enforcement of its provisions. The Court's April 12 order will operate as another tool in that war by allowing a governmental entity to evade production of public records and payment of attorney's fees by filing an appeal every time a district court directs them to produce records or pay a prevailing requester fees and costs by simply filing an appeal, no matter how tenuous the claims or likelihood of success. *See, e.g., Clark Cty. Office of Coroner/Med. Exam'r*, 134 Nev. Adv. Op. 24 at *10 (Cherry, J., dissenting in part) (observing that

the Coroner's Office is unlikely to prevail in the instant appeal given the plain language of Nev. Rev. Stat. § 239.011(2) and noting that "I do not believe that the Coroner's Office has presented a legal question sufficient . . . to warrant staying a payment of the judgment").

Moreover, as the Court recognized in *Mikhon Gaming Corp. v. McCrea*:

> Because the object of an appeal seeking to compel arbitration will be defeated if a stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted. However, we recognize the potential for abuse of a rule that requires an automatic stay in this context. Therefore, the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable. In particular, if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay. Under this approach, a stay should be denied when arbitration is clearly not warranted, but a stay should generally be granted in other cases.

*Mikhon Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004). Consistent with this holding, governmental entities like the Coroner's Office should not be granted an automatic stay pending appeal of an order awarding a party prevailing in an NPRA petition its attorney fees and costs. At the very least, the prevailing requester should be afforded the opportunity at the district court to make a "strong showing that appellate relief is unattainable."

The Review-Journal made just such a showing in this case. The crux of the Coroner's Office's argument is that a district court can only award attorney fees and costs under Nev. Rev. Stat. § 239.011(2) upon a showing that the governmental

entity acted in bad faith in refusing to disclose public records. This argument is not supported by the plain language of the NPRA. The Coroner's Office has relied on an order from a district court to support its interpretation of § 239.011(2) (*See* Exh. 9 to Motion for Stay (April 14, 2017 order in *Las Vegas Review-Journal v. Steven Wolfson, Clark County District Attorney*, Dist. Ct. Case No. A-14-711233-W).) This order, however, must be viewed in light of the fact that the parties to that litigation and the subsequent appeal settled the matter for $55,000.00. (*See* Exh. A (March 30, 2018 notice of settlement).) Moreover, this order is an outlier; to the best of the Review-Journal's knowledge, no other district court has accepted this argument, which is fundamentally inconsistent with the plain language of the NPRA.

## III. CONCLUSION

For these reasons, this Court should grant this petition for a rehearing of its April 12, 2018 decision in light of the United States Supreme Court's controlling precedent in *Nken* and the mandates of the Nevada Public Records Act.

DATED this 30th day of April, 2018.

*/s/ Margaret A. McLetchie*

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## CERTIFICATE OF COMPLIANCE

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 the PETITION FOR REHEARING has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this PETITION FOR REHEARING complies with the type-volume limitation of NRAP 40(b)(3) because it contains 3,372 words.

DATED this 30th day of April, 2018.

*/s/ Margaret A. McLetchie*
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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR REHEARING was filed electronically with the Nevada Supreme Court on the 30th day of April, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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