Case No. 75197

IN THE SUPREME COURT OF STATE OF NEVADA

APCO CONSTRUCTION, INC.,

Appellant,

v.

ZITTING BROTHERS CONSTRUCTION, INC.,

Respondent.

Appeal from the Eighth Judicial District Court of the State of Nevada
Case No. 08A571228
The Honorable Mark R. Denton

RESPONDENT'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

JORGE A. RAMIREZ
Nevada Bar No. 6787
Email: Jorge.Ramirez@wilsonelser.com

I-CHE LAI
Nevada Bar No. 12247
Email: I-Che.Lai@wilsonelser.com

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
6689 Las Vegas Boulevard South, Suite 200
Las Vegas, Nevada 89119
Telephone: (702) 727-1400
Facsimile: (702) 727-1401

Attorneys for the Respondent, Zitting Brothers Construction, Inc.

NEV. R. APP. P. 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

1. Zitting Brothers Construction, Inc. ("Zitting") is a Utah corporation with its principal office in Utah.

2. It is not a publicly traded company, nor is it owned by a publicly traded company, and is not operating under a pseudonym.

3. The sole members of Zitting are Samuel Zitting, Leroy Zitting, Jared Zitting, and William Zitting.

Over the course of the above-captioned case, Jorge A. Ramirez, Esq., Reuben Cawley, Esq., and I-Che Lai, Esq. of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, have represented Zitting.

Dated: February 18, 2021

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: */s/Jorge A. Ramirez*
Jorge A. Ramirez
I-Che Lai
Attorneys for the Respondent,
Zitting Brothers Construction, Inc.

TABLE OF CONTENTS

I. Table of Authorities iii

II. Argument 1

A. APCO Construction, Inc. failed to articulate any grounds for en banc reconsideration of this Court's decision under Nev. R. App. P. 40A. 1

1. APCO failed to show that the panel's decision was contrary to any prior, published opinion of this Court. 2

2. APCO cannot succeed on its new argument that the panel's decision is inconsistent with other provisions of Chapter 624 of the Nevada Revised Statutes. 11

3. APCO cannot succeed on its new argument that this Court should apply the panel's decision prospectively. 12

4. APCO failed to show that the panel's decision raises a substantial precedential, constitutional, or public policy issue. 17

5. Even if this Court en banc disagrees with the panel regarding the enforceability of the pay-if-paid provisions at issue, the outcome of the appeal is still the same. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Am. First Fed. Credit Union v. Soro,
131 Nev. Adv. Op. 73, 359 P.3d 105 (2015).....4, 18

APCO Constr., Inc. v. Zitting Bros. Constr., Inc.,
136 Nev. Adv. Rep. 64, 473 P.3d 1021 (2020)..... 4, 5, 6, 7, 9, 14, 15, 16, 18

Bejarano v. State,
122 Nev. 1066, 1075-76, 146 P.3d 265 (2006).....13

Breithaupt v. USAA Prop. & Cas. Ins. Co.,
110 Nev. 31, 867 P.2d 402 (1994) 13

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S. Ct. 349 (1971) 13

Cunningham v. State,
94 Nev. 128, 575 P.2d 936 (1978) 16

Edwards v. Emperor's Garden Rest.,
122 Nev. 317, 130 P.3d 1280 (2006) 13, 17

Goldsworthy v. Johnson,
45 Nev. 355, 204 P. 505 (1922) 19

Gundala v. Bank of Am., N.A., No. A-14-695904-C,
2016 Nev. Dist. LEXIS 1692 (Dist. Ct. Oct. 7, 2016) 14

Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.,
124 Nev. 1102, 197 P.3d 1032 (2008) 2, 3, 4, 5, 8, 9, 15

MDC Rests., Ltd. Liab. Co. v. Dist. Court,
132 Nev. 774, 383 P.3d 262 (2016) 14

Old Aztec Mine, Inc. v. Brown,
97 Nev. 49, 623 P.2d 981 (1981) 11

Orion Portfolio Servs. 2 LLC v. Cnty. of Clark,
126 Nev. 397, 245 P.3d 527 (2010) 4, 18

Padilla Constr. Co. of Nevada v. Big-D Constr. Corp., No. 67397,
2016 WL 683851 (Nev. Nov. 18, 2016) 6

Rosenstein v. Steele,
103 Nev. 571, 747 P.2d 230 (1987) 19

S. Nev. Homebuilders Ass'n v. Clark Cty.,
121 Nev. 446, 117 P.3d 171 (2005) 8

SIIS v. Buckley,
100 Nev. 376, 682 P.2d 1387 (1984) 16

Skender v. Brunsonbuilt Constr. & Dev. Co.,
122 Nev. __, 171 P.3d 745 (2007) 1

SmithKline Beecham Corp. v. Apotex Corp.,
439 F.3d 1312 (Fed. Cir. 2006).....11

Statutes

Nev. Rev. Stat. 108.222 10
Nev. Rev. Stat. 108.222136 10
Nev. Rev. Stat. 108.226 10
Nev. Rev. Stat. 624.624 ..... 4, 5, 6, 8, 11, 12, 15
Nev. Rev. Stat. 624.626 ..... 11, 12
Nev. Rev. Stat. 624.628 ..... 9, 10, 15

Rules

Nev. R. App. P. 36 6
Nev. R. App. P. 40A 1, 2, 6, 11, 12, 17

ARGUMENT

A. APCO Construction, Inc. failed to articulate any grounds for en banc reconsideration of this Court's decision under Nev. R. App. P. 40A.

APCO Construction, Inc. ("APCO") petitions for en banc reconsideration of the panel's holding that the pay-if-paid provisions in APCO's subcontract (the "Subcontract") with Zitting, whereby Zitting agreed to be paid for its work only if APCO was paid by the project owner, are void as against public policy under Nev. Rev. Stat. 624.628(3). The panel held that the Subcontract's pay-if-paid provisions are void because the provisions require Zitting to forgo its right to prompt payment under the Prompt Payment Act (codified at Nev. Rev. Stat. 624.624 through 624.626). (Petition[1] 1:7-13.) APCO's petition, however, has failed to articulate any ground for this Court—en banc—to overturn the panel's published decision in this case.

En banc reconsideration is disfavored. Nev. R. App. P. 40A(a); *see Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. __, __, 171 P.3d 745, 746 (2007). So "this [C]ourt will only reconsider a matter [en banc] when necessary to ensure consistency in [the court's] decisions or when the case implicates important precedential, public policy, or constitutional issues." *Id.* As explained below, APCO does not explain how the panel's decision is inconsistent with this Court's

[1] Zitting cites APCO's petition for en banc reconsideration as "Petition."

prior, published decisions or implicates any important precedential, public policy, or constitutional issue. The panel has not made any sweeping statements of law. It had instead only applied existing law to the Subcontract. Moreover, the panel's decision comports with the strong public policy favoring subcontractors in "securing payment for labor and material contractors" from general contractors. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117, 197 P.3d 1032, 1042 (2008). This Court should therefore deny APCO's petition.

1. APCO failed to show that the panel's decision was contrary to any prior, published opinion of this Court.

For "full court reconsideration" of a panel's decision based on the need to secure and maintain uniformity of the decisions of this Court, APCO must "demonstrate that the panel's decision is contrary to prior, published opinions of this Court …. and [must] include specific citations to those cases." Nev. R. App. P. 40A(c). APCO has only identified *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* ("*Lehrer*"), 124 Nev. 1102, 1117 n. 50, 197 P.3d 1032, 1042 n. 50 (2008) as the conflicted case. (Petition 1:19-2:13.) This conflict purportedly arose because the panel "fail[ed] to consider that all pay if paid provisions, not just those in … [the S]ubcontract, condition a subcontractor's right to payment for work performed on payment from the owner to the general contractor." (Petition 8:3-6.) The "practical effect" of the decision purportedly renders all pay-if-paid provisions

unenforceable, in contravention of the precedent set by *Lehrer*. (Petition 2:4-13.) APCO's argument mischaracterizes *Lehrer* and the panel's decision's impact on *Lehrer*.

As an initial matter, *Lehrer* did not set the precedent on the enforceability of pay-if-paid provision; the Prompt Payment Act governs the enforceability. *Lehrer* instead addressed the enforceability of a pay-if-paid provision entered ***before*** the enactment of the Prompt Payment Act, which amended Chapter 624 of the Nevada Revised Statutes to render most pay-if-paid provision as void against public policy. *See Lehrer*, 124 Nev. at 1117, 197 P.3d at 1042. Because the Prompt Payment Act was not before the *Lehrer* court, this meant that the court could not have interpreted specific provisions of the act. *See id*., at 1117 n. 50, 197 P.3d at 1042 n. 50. Rather, the court only referenced in a footnote that the statute allows pay-if-paid provisions to be enforceable in limited circumstances. *See id*. Therefore, the panel in this case could not have contravened a prior, published decision on the enforceability of a pay-if-paid provision under the Prompt Payment Act.

Nevertheless, the panel's discussion of the pay-if-paid provision in this case comports with *Lehrer*. As with the *Lehrer* court, the panel stated that Nev. Rev. Stat. 624.626 and 624.628 clearly and unambiguously set forth the limitations of a "pay-if-paid" provision and the invalidity of the provision if the provision exceeds those limitations. There is no dispute that the "pay-if-paid" provisions in the

Subcontract are clear and unambiguous. (*See* Opening Br. 33-39.) When a contract and statute are clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 108 (2015); *Orion Portfolio Servs. 2 LLC v. Cnty. of Clark*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). The panel correctly applied the plain language of the Prompt Payment Act to the Subcontract and correctly concluded that its pay-if-paid provisions are void.

As the *Lehrer* court and the panel noted, "pay-if-paid" provisions are valid and "enforceable only in [the] limited circumstances" set forth in Nev. Rev. Stat. 624.624 through 624.626. *Lehrer*, 124 Nev. at 1117 n. 50, 197 P.3d at 1042 n. 50; *APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. Adv. Rep. 64, 473 P.3d 1021, 1026 (2020). To be enforceable under those statutes, Nev. Rev. Stat. 624.624(1)(a) requires a general contractor to pay a subcontractor by a certain date. Alternatively, Nev. Rev. Stat. 624.624(1)(b) requires general contractors to pay subcontractors no later than thirty days after the subcontractor requests payment. Based on the plain language of Nev. Rev. Stat. 624.624(1), the statute does not void "pay-if-paid" provisions only if the contract—and not the pay-if-paid provision itself—provide one of two alternatives, requiring a general contractor to pay a subcontractor even if the general contractor did not receive payment from

anyone. These limitations arise from the strong public policy and legislative intent behind the Prompt Payment Act supporting "labor and material contractors" in their effort to recover payment from general contractors. *See Lehrer*, 124 Nev. at 1117-18, 197 P.3d at 1042. As both *Lehrer* and the panel's decision in this case track the statutory language, APCO cannot show that the panel's decision contravenes *Lehrer* or the Prompt Payment Act.

Nev. Rev. Stat. 624.624 also repudiates APCO's argument that the panel's decision had the "effect" of invalidating all pay-if-paid provisions. As the panel noted, a valid pay-if-pay provision must adhere to the "restrictions laid out in" Nev. Rev. Stat. 624.624. *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1026. These restrictions require general contractors to pay subcontractors no later than the payment due date if there is a payment schedule or, absent such schedule, within thirty days after the subcontractor submits a payment request. Nev. Rev. Stat. 624.624(1). Here, the Subcontract does not provide for any of these alternatives.

As the panel correctly concluded, "despite the subcontract's schedule for payments, Zitting would not be paid as required under [Nev. Rev. Stat.] … 624.624(1)(a) if APCO did not receive payment from the project owner—even if Zitting completed its work, the owner accepted the work, and payment would otherwise be due." *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1027. The provisions at issue condition APCO's payments to Zitting solely "upon receipt of

the actual payments by [APCO] from [the project owner].” (*E.g.*, 9 AA 1920.) APCO does not dispute that the Subcontract provides no exceptions to this condition and that the contract impairs Zitting’s right to be paid at the earlier of the payment due date or within ten days of APCO receiving payment from the owner. *See* Nev. Rev. Stat. 624.624(1)(a). If APCO had followed the plain language of the statute and—as an example—included a provision in the Subcontract that allows Zitting to receive payment within one year of the project owner’s approval of Zitting’s completed work or within thirty days of Zitting submitting a payment request notwithstanding the pay-if-paid provision, then the pay-if-paid provision would not have been void under Nev. Rev. Stat. 624.628(3). The panel therefore correctly concluded that APCO’s denial of the two payment alternatives from Zitting impairs Zitting’s right to payment under Nev. Rev. Stat. 624.628(3)(a) and renders the “pay-if-paid” provisions void as against public policy. *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1027.

APCO continues to rely on *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.* (“*Padilla*”), No. 67397, 2016 WL 683851 (Nev. Nov. 18, 2016) to support its argument that its pay-if-paid provision was enforceable. (Petition 11:2-18.) Notwithstanding the fact that the decision is unpublished and therefore has no precedential value to support en banc reconsideration, *see* Nev. R. App. P. 36(c)(2), 40A(a), the panel correctly concluded that *Padilla* was inapplicable and

therefore did not support APCO's argument. The panel found that in *Padilla*, the owner did not approve the subcontractor's work, which did not trigger the general contractor's obligation to pay the subcontractor. *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1027. This provided a condition—other than a pay-if-paid condition—that excused payment by the general contractor. *Id*. Therefore, the owner's refusal to accept the work—rather than the pay-if-paid condition—impaired the subcontractor's right to payment under Nev. Rev. Stat. 624(1). This would not trigger Nev. Rev. Stat. 624.628(3) to void the pay-if-paid provision. *See id*. In contrast, the project owner in this case approved Zitting's completed work on Buildings 8 and 9. *Id*. The panel correctly found that APCO could only rely on the pay-if-paid provision to avoid paying Zitting. *Id*.

To salvage its pay-if-paid provision, APCO argues that the provision does not violate Nev. Rev. Stat. 624.624(1) because the provision itself provides the "date payment is due." (Petition 10:1-11:1.) But this is an unreasonable position. Applying APCO's interpretation to Nev. Rev. Stat. 624.624(1)(a), this means that Zitting's payment is due either when APCO receives payment from the project owner or within ten days after APCO receives such payment. This outcome runs afoul of the principles governing statutory interpretation.

APCO's position, if adopted, will eviscerate Nev. Rev. Stat. 624.624(1)(a)(2). If payment is due upon receipt of payment from the project

owner, there will never be a scenario where payment under Nev. Rev. Stat. 624.624(1)(a)(2) would be "earlier" than payment under Nev. Rev. Stat. 624.624(1)(a)(1). This renders Nev. Rev. Stat. 624.624(1)(a)(2) superfluous. It is well-settled that "[w]hen interpreting a statute, this court must give its 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." *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). This alone necessitates rejection of APCO's position.

APCO's position also invites abuse of subcontractors. APCO claims that the "construction industry" relies on the same pay-if-paid provision it uses. (*See* Petition 8:3-14.) If the industry can use the pay-if-paid provision to set the payment due date, there will never be a scenario where subcontractors would be paid if the general subcontractor receives no payment. This runs contrary to the Prompt Payment Act's purpose of "securing payment for labor and material contractors." *See Lehrer*, 124 Nev. at 1117, 197 P.3d at 1042. Thus, the payment date condition in Nev. Rev. Stat. 624.624(1)(a) should parallel the payment request condition in Nev. Rev. Stat. 624.624(1)(b)—being independent of the pay-if-paid condition. *See S. Nev. Homebuilders Ass'n*, 121 Nev. at 449, 117 P.3d at 173 (stating that "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance

with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent"). This furthers the purpose of the Prompt Payment Act. This Court should therefore reject APCO's position.

APCO also argues its pay-if-paid provision was enforceable under *Lehrer* because the provision did not impair Zitting's mechanic's lien rights. (Petition 17:2-18.) But neither *Lehrer* nor Chapter 624 validates a "pay-if-paid" provision just because the provision did not impair a subcontractor's mechanic's lien rights. *Lehrer*, 124 Nev. at 1106, 197 P.3d at 1035, addressed mechanic's lien rights only because the parties asked this Court to consider the enforceability of a mechanics lien waiver provision entered before the enactment of the Prompt Payment Act. *See id*. This Court never held that the statute is limited to mechanic's lien rights. *See id*. APCO failed to identify any provisions in Chapter 624 that expressly limits its applicability to mechanic's lien rights. Nor could it. The statute expressly voids all contractual provisions that waive or otherwise impair a lower-tiered subcontractor's right to payment under Nev. Rev. Stat. 624.624(1), which is broader than Zitting's mechanic's lien rights. *See* Nev. Rev. Stat. 624.628(3)(a). APCO ignored the fact that Nev. Rev. Stat. 624.624 gives subcontractor the "right to prompt payment," as the panel correctly found. *E.g.*, *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1026. Consideration of Zitting's mechanic's lien rights is therefore irrelevant here.

In any event, enforceability of APCO's pay-if-paid provision against Zitting does impair Zitting's mechanic's lien rights. If APCO enforces the provision, then it owes no money to Zitting for Zitting's completed work so long as APCO receives no payment from the project owner. This means that there is no "lienable amount" to support a lien. *See* Nev. Rev. Stat. 108.222136, 108.222, 108.226. Therefore, APCO would still run afoul of its own characterization of *Lehrer*.

APCO seeks a dangerous precedent by advocating for the enforceability of illegal contracts. APCO suggests that so long as the parties agree to a certain contractual provision, no laws can intervene to void that provision. (*See* Petition 2:14-3:3, 21:6-9.) This runs contrary to Nevada law prohibiting illegal contracts. *See, e.g.*, Nev. Rev. Stat. 624.628(3). The Subcontract acknowledges this via a severability clause stating that the parties cannot circumvent Nevada law:

> To the best knowledge and belief of the parties, the Subcontract contains no provision that is contrary to … State law. However, if any provision of this Subcontract … conflict[s] with … such law…, then such provision shall continue in effect to the extent permissible. The illegality of any provision, or parts thereof, shall not affect the enforceability of any other provisions of this Subcontract.

(9 AA 1932.) Thus, based on APCO's own contract, it was permissible for the panel to void the pay-if-paid provision under Nev. Rev. Stat. 624.628(3) and enforce the Subcontract without it.

2. APCO cannot succeed on its new argument that the panel's decision is inconsistent with other provisions of Chapter 624 of the Nevada Revised Statutes.

APCO also argues that the invalidation of the pay-if-paid provision under Nev. Rev. Stat. 624.624(1) and 624.628(3) conflicts with Nev. Rev. Stat. 624.626(1). (Petition 3:4-14, 13:11-16:13.) But it never raised this argument before the district court or the panel—even though it could have. An argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *accord SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (argument waived when not developed in the opening brief). Also, "no point may be raised for the first time" in a petition for en banc reconsideration. Nev. R. App. P. 40A(c). Thus, APCO's new argument cannot support a petition for en banc reconsideration.

In any event, the argument has no merit. The panel's decision is harmonious with Nev. Rev. Stat. 624.626. Whereas Nev. Rev. Stat. 624.624 protects a subcontractor's right to payment, Nev. Rev. Stat. 624.626 protects the subcontractor's right to stop work and to terminate a subcontract. Both statutory provisions provides different rights and complement each other to give subcontractors means to protect themselves from a non-paying general contractor—by giving them the right to pursue general contractors for unpaid work

despite agreeing to a pay-if-paid provision and a right to seek alternative, gainful work. *See* Nev. Rev. Stat. 624.624(1), 624.626(1), (6). The plain language of Nev. Rev. Stat. 624.626(8) (emphasis added) makes this result clear:

> The right of a lower-tiered subcontractor to stop work or terminate an agreement pursuant to this section ***is in addition to all other rights that the lower-tiered subcontractor may have at law*** or in equity and ***does not impair or affect the right of a lower-tiered subcontractor to maintain a civil action***….

APCO cannot identify any language in Nev. Rev. Stat. 624.626 that validates a pay-if-paid provision. The statute says nothing nor implies anything about the enforceability of pay-if-paid provisions. Therefore, this Court should reject APCO's argument.

3. APCO cannot succeed on its new argument that this Court should apply the panel's decision prospectively.

Alternatively, APCO argues that this Court should apply the panel's decision prospectively. (Petition 21:10-14.) But APCO did not first ask the panel for prospective relief. Therefore, APCO has also waived this argument. *See* Nev. R. App. P. 40A(c) (prohibiting a petitioner from raising a point for the first time in a petition for en banc reconsideration).

In any event, the argument fails on the merits. In determining whether this Court should apply its decision prospectively, the court considers three factors: (1) "the decision to be applied nonretroactively must establish a new principle of law,

either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results." *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35-36, 867 P.2d 402, 405-06 (1994) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349 (1971)). Here, APCO has failed to meet all of these factors.

APCO offers only conclusory statements and does not addresses any of the factors. (*See* Petition 21:10-14.) This Court need not consider arguments not cogently presented or supported by relevant authority. *See, e.g., Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 130 P.3d 1280, 1288 n.38 (2006). In any event, all factors reject prospective application of the panel's decision.

First, APCO cannot show that the panel established a new principle of law. A rule is not "new" when it has merely "interpreted and clarified an existing rule," but it is "new" when it "overrules precedent, disapproves a practice sanctioned by prior cases, or overturns a long-standing practice uniformly approved by lower courts." *Bejarano v. State*, 122 Nev. 1066, 1075-76, 146 P.3d 265, 271 (2006); *see also MDC Rests., Ltd. Liab. Co. v. Dist. Court*, 132 Nev. 774, 782, 383 P.3d 262,

268 (2016). Here, the panel did not directly overrule prior decisions relied upon for its decision, nor did it overturn a longstanding practice uniformly approved by lower courts as *Bejarano* requires. The panel expressly stated that it only clarified the statements in *Lehrer*:

> To resolve any confusion that parties mays till have on the enforceability of pay-if-paid provisions in Nevada, we clarify today that pay-if-paid provisions entered subsequent to the Legislature's 2001 amendments are not per se void and unenforceable. Rather, such provisions require a case-by-case analysis to determine whether they are permissible under NRS 624.628(3), and we hold that they are unenforceable if they require any subcontractor to waive or limit its rights provided under NRS 624.624-.630, relief general contractors of their obligations or liability under NRS 624.624-.630, or require subcontractors to waive their rights to damages or time extensions.

APCO Constr., 136 Nev. at ___, 473 P.3d at 1027. This factor weighs in favor of retroactive application.

Second, retroactive operation will further the purpose of the Prompt Payment Act. Courts hesitate to apply its decision prospectively when the issue before the court is one of statutory interpretation. *See, e.g.*, *Gundala v. Bank of Am., N.A.*, No. A-14-695904-C, 2016 Nev. Dist. LEXIS 1692, *24 (Dist. Ct. Oct. 7, 2016) (expressing reluctance to apply its decision prospectively despite a "frustrating lack of guidance" on Nevada law because the decision was "based in statutes"). Here, APCO has not shown how the purpose of the statute would be

hampered based on the lack of statutory clarity. Nor could it. Rather, a prospective application would hurt the purpose of the statute, which is to protect subcontractors from non-paying general contractors. With this case as an example, if this Court voids future pay-if-paid provisions, and not the one at issue in this case, Zitting would suffer harm after providing material and labor—in contravention of Nevada's "strong public policy favoring "securing payment for labor and material contractors." *See Lehrer*, 124 Nev. at 1117, 197 P.3d at1042. Therefore, this factor also favors retroactive application.

Lastly, there is no evidence of voiding APCO's pay-if-paid provisions producing substantial inequitable results. APCO alleges harm to the "construction industry" but it fails to provide any evidence or authority supporting this. (Petition 2:14-3:3.) Nor can it. Notably, the panel has limited its analysis to the specific contract at issue in this case—not all contracts. *E.g.*, *APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1027. There can be no inequitable impact because the panel's decision merely clarifies what Nev. Rev. Stat. 624.624 and 624.628 says. *Id*. at ___, 473 P.3d at 1023. The statutes warn general contractors of a risk that their pay-if-paid provisions may be void if the provisions do not adhere to the two restrictions—despite agreement by the parties to the contrary. *See* Nev. Rev. Stat. 624.624(1), 624.628(3). The Subcontract's severability clause—which the panel noted—acknowledges this risk. *See APCO Constr.*, 136 Nev. at ___, 473 P.3d at

1024. APCO took a calculated risk of proceeding with a pay-if-paid provision, which did not pan out.

APCO claims that the panel's decision will force APCO to accept responsibility for the project owner's conduct as the owner's business partner. (Petition at 18:8-16.) But the Subcontract rejects this conclusory argument. APCO is liable to Zitting under a contract to which both are parties. (*See, e.g.*, 9 AA 1918.) Zitting has no contractual relationship with the project owner. (*See, e.g.*, 8 AA 1878.) As the panel's decision addresses the enforceability of a contractual provision that binds both general contractor and subcontractor, the decision does not permit non-contracting parties to sue a general contractor. APCO does not explain how this would be the case. This Court should reject APCO's conclusory argument. *See SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984); *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978).

In contrast, prospective application would be inequitable to subcontractors who provided materials and labor, like Zitting. APCO's argument overlooks harm to those subcontractors, who are less able to weather the consequences of non-payment. Someone ultimately will not receive payment—either the general contractor or the subcontractor. As discussed above, Nevada has a long-standing public policy of favoring sub-contractors like Zitting over general contractors like APCO. APCO ignores the Nevada legislature's intent to have general contractor

bear the burden of paying its subcontractors if the construction project's owner is unable to pay. APCO's objections to the Nevada legislature's intent should be addressed with the legislature, not this Court.

4. APCO failed to show that the panel's decision raises a substantial precedential, constitutional, or public policy issue.

APCO argues that the panel's conflict with a prior decision "creates substantial precedential and public policy issues that have not been addressed." (Petition 1:19-2:3.) It bears the burden to "demonstrate the impact of the panel's decision beyond the litigants involved." Nev. R. App. P. 40A(c). Here, APCO has failed to meet this burden. APCO argues that the panel's decision impacts the "construction industry," (Petition 8:17-9:4), but this is no more than a conclusory argument that this Court should ignore. *See, e.g., Edwards*, 122 Nev. at 317 n. 38, 130 P.3d at 1288 n. 38. The panel's decision was very clear that a case-by-case contractual interpretation is needed in these types of cases, which will only affect contractors like APCO who wrote subcontracts in violation of Chapter 624.

APCO also argues that the panel created a public policy issue by misinterpreting Nev. Rev. Stat. 624.624. (Petition 19:11-21:14.) APCO ignores, however, the fact that the panel merely applied the plain language of the statute, without resorting to the rules of construction. *See APCO Constr.*, 136 Nev. at ___, 473 P.3d at 1027. This comports with well-settled principles governing statutory

interpretation. *Am. First Fed. Credit Union*, 131 Nev. at ___, 359 P.3d at 108; *Orion Portfolio Servs. 2 LLC*, 126 Nev. at 402, 245 P.3d at 531.

Ultimately, APCO seeks to have this Court to ignore the plain language of the statute by pursuing a policy favoring general contractors over subcontractors. (*See* Petition 20:19-21:9.) But public policy is irrelevant when the statute is clear and unambiguous, as it is here. *See, e.g., Am. First Fed. Credit Union*, 131 Nev. at ___, 359 P.3d at 108. Nevada law requires courts to only apply the statutes as plainly written, which would void the "pay-if-paid" provisions in the parties' contract for the reasons discussed in the panel's decision.

5. Even if this Court en banc disagrees with the panel regarding the enforceability of the pay-if-paid provisions at issue, the outcome of the appeal is still the same.

Even without the pay-if-paid provision, summary judgment on Zitting's breach of contract claim is still proper. APCO admits that it terminated its contract with the owner and then terminated its subcontract with Zitting under Chapter 624 of the Nevada Revised Statutes. (8 AA 1867-69; 9 AA 2128; see 10 AA 2269.) The evidence show that prior to the termination and before APCO departed the project, Zitting completed its work on Buildings 8 and 9 and that neither the project owner nor APCO ever expressly rejected any of the change orders regarding those two buildings within 30 days of submission. Critically, APCO never addressed that under Nev. Rev. Stat. 624.626(6), the termination of the

subcontract triggered APCO's obligation to pay Zitting for work completed on Buildings 8 and 9. (Opening Br. 44-47; 19 AA 4386.) This waiver alone should result in the affirmance of the summary judgment, justifying payment to Zitting for the work completed on the change orders plus the retention amount without consideration of the conditions precedent for payment. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons."); *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505, 507 (1922) (noting that appellate courts have a duty to affirm where the judgment is "right on any theory").

CONCLUSION

APCO fails to substantiate its' arguments that the panel's decision run contrary to this Court's prior published decisions or implicates a substantial precedential, constitutional or public policy issue. The panel applied the plain language of the Prompt Payment Act to specific contractual provisions and correctly voided those provisions for violating the statute. In doing so, the panel had only clarified existing law. Moreover, APCO waived some of the arguments raised in its petition by not raising them before the district court on appeal before

/ / /

the panel. This Court should therefore deny APCO's petition for en banc reconsideration.

Dated: February 18, 2021.

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: */s/Jorge A. Ramirez*
Jorge A. Ramirez
I-Che Lai
Attorneys for the Respondent,
Zitting Brothers Construction, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5), and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font style.

I further certify that this answer complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) and 40A(d) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,598 words.

Finally, I hereby certify that I have read this answer, 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 Nev. R. App. P. 28(e)(1), which requires every assertion in the answer 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: February 18, 2021.

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: */s/Jorge A. Ramirez*
Jorge A. Ramirez
I-Che Lai
Attorneys for the Respondent,
Zitting Brothers Construction, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021, a true and correct copy of Respondent's Answer to Petition for En Banc Reconsideration was served via the Nevada Supreme Court's electronic filing system upon all parties registered with the court in this case.

/s/Annemarie Gourley
An Employee of Wilson Elser Moskowitz Edelman & Dicker LLP