

PAUL VALER COLMAN; AND
THE COLMAN FAMILY
REVOCABLE LIVING TRUST,

VS.

Respondent.

APPELLANTS' OPENING BRIEF

Docket 76950 Document 2019-17436

1 **CERTIFICATION PURSUANT TO NEV. R. APP. P. 26.1**

2 The undersigned certifies that the following parties have an interest in the
3 outcome of this appeal. These representations are made to enable judges of the
4 Panel to evaluate possible disqualification or recusal:
5

6 [NOT APPLICABLE].

7 Dated this 21st day of April, 2019.

8
9 /s/Thomas C. Michaelides

10 _____
11 Thomas C. Michaelides, Esq.
12 Nevada Bar No. 5425

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JURISDICTIONAL STATEMENT

Appellants (also referred to as “Petitioners”), appeals the District Court’s denial of their Objection to Petition to Assume Jurisdiction of Trust and For Confirmation of Beneficiary of Real Property, Motion to Dismiss Petition and Motion to Quash Unlawful Lis Pendens

ROUTING STATEMENT

The Appellant filed their notice of appeal in Clark County District Court on September 7, 2018. The Case Appeal statement was filed on October 1, 2018 in District Court. On September 17, 2018 this case was transferred to the Nevada Supreme Court under this instant case number.

STATEMENT OF ISSUES PRESENTED

1. Is NRS 111.781 overbroad and therefore unconstitutional in this case since it resulted in depriving a surviving spouse, who had continued to remain living together as husband and wife with his spouse, and who had obtained their divorce for reasons other than to live apart, of the marital residence that had been placed in their family trust and specifically bequeathed to the surviving spouse?

- 1 2. NRS 111.781 has no application because even assuming the Trust is set
2 aside, there would then be no basis for Collier, a secondary beneficiary, to
3 have rights to the Property or the Trust.
4

5 6 **STANDARD OF APPELLATE REVIEW**

7
8 Generally, this Court reviews the constitutionality of a statute or ordinance *de*
9 *novo*. *Flamingo Paradise gaming, LLC. V. Chanos*, 125 Nev. 502, 509, 2167 P.3d
10 546, 551 (2009).
11

12 **STATEMENT OF FACTS**

13
14 Chari Ann Colman (“Chari”) and Paul Valer Colman (“Paul”) created the
15 Colman Family Trust (“Trust”) while they were married, specifically on June 23,
16 2011. APP, Vol. I, p. 2. Prior to the marriage, Chari owned the real property located
17 5988 Turtle River Avenue, Las Vegas, NV (“Property”) which became their marital
18 residence, as her sole and separate property. *Id.* On June 30, 2011, Chari transferred
19 the Property via quitclaim to the Trust, naming her and Paul as primary beneficiaries
20 of the Trust and the Grantors. *Id.*
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23 Pursuant to the Trust, Chari and Paul were the primary beneficiaries during
24 their life. *Id.* At pg. 3. Tonya Collier, (“Collier”) was the couple’s next-door
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1 neighbor and was listed as an alternate beneficiary of the Trust. *Id.* Page 8 of the
2 Colman Trust, paragraph 5.2 states;

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4 “Upon the death of the last Grantor of this Trust, the trust estate shall be
5 distributed as follows, The Trustee shall distribute the real property located at
6 5988 Turtle River, Las Vegas, Nevada to Tonya Collier. The real property in
7 South Dakota shall be sold to Robert Booth of Ridgeview, South Dakota and
8 Daniel Booth Jr. of Timber Lake, South Dakota. The rest, residue and
9 reminder of the estate shall be distributed to Jessica Diane Colman, pursuant
10 to Article VI herein.

APP, Vol. I, p.47.

11 The Trust provides that the surviving spouse is the beneficiary of the assets of
12 the Trust, including the Property. *Id.* Chari and Paul always resided in the Property
13 as their marital residence. APP, Vol. I, 80-83; Vol II, 93-94. Chari and Paul made
14 all the mortgage payments for the house, provided general upkeep, paid the taxes
15 and treated the property as their marital residence. *Id.*

16
17 Chari became very ill shortly after and needed medical coverage to help pay
18 for her medical treatment. APP, Vol. II, 93-94. Unable to qualify for medical
19 assistance as a married couple, Chari and Paul decided to obtain a divorce in order
20 that Chari would then qualify for the medical treatment she needed. *Id.* This was the
21 reason according to Paul for the divorce, as he and Chari continued to reside in the
22 marital residence after the divorce and after Chari qualified for the medical benefits
23 as a single person. *Id.*

1 On August 29, 2017, Chari and Paul filed a Joint Petition for Summary Decree
2 of Divorce (“Divorce”). APP, Vol. I, 58. The Divorce stated that there “is no
3 community property to divide” and that they have discloses all community assets
4 and debts and that there are no other community assets to divide. Id at 59-60. Chari
5 and Paul had previously quitclaimed the Property that they used as their marital
6 residence into their Trust, believing that it would survive the Divorce, unaware as
7 laymen that a Nevada statute passed by the legislature loomed out there that could
8 their neighbor to take title to the marital residence while Paul was still alive.
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11 As stated, the divorce the couple obtained was solely based on Chari trying to
12 ensure she had medical coverage to address her condition. APP, Vol. II, 93-94.
13 Absolutely nothing changed with respect to any other aspect of the Chari and Paul’s
14 lives after the divorce. APP, Vol. I, 80-83 They continued to reside in the residence
15 as husband and wife in the common law sense. *Id.* Paul paid for all the bills he had
16 paid prior and cared for Chari as his “wife” throughout her treatment. *Id.* They both
17 believed that the Divorce had not changed their status as it related to the marital
18 residence since they had created a Trust to cover that asset.
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23 Unfortunately, Chari died suddenly on October 18, 2017 as a result of her
24 medical condition. APP, Vol. I, 74. Paul buried his wife and thereafter continued
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1 living in the Property after she passed, taking care of all the upkeep, taxes and bills
2 associated with it and continues to do so to date. APP, Vol. I, 80-83; Vol. II, 93-94.

3
4 Collier subsequently swooped in after Chari died, successfully using NRS
5 111.781 to wrest title from Paul of the Property based upon the fact that statute
6 allows for an individual to set aside a valid trust if the parties to the trust obtained a
7 divorce thereafter but continued to live together as they had prior. Collier filed her
8 Petition to Assume Jurisdiction of Trust, and for Confirmation of Beneficiary of Real
9 Property on November 13, 2107. Collier argued in her Petition that “Paul understood
10 the Real Property was not his, and once the Decree was filed, he began the process
11 of moving out of the Real Property. APP, Vol. I, 3-4. Unfortunately, Chari died
12 before he completed his move.” *Id.* However, this is directly contrary to the facts as
13 established by Paul in his Declaration as he never began the process of moving out
14 of the marital residence, and “understood the Property was not his”. APP, Vol. I, 80-
15 82.

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17 Paul always believed that the Property was his as a result of the Trust and the
18 fact he and Chari had always lived there as husband and wife, even after the Divorce.
19 APP, Vol. I, 6-8; 80-81. Paul was never aware that a statute intended to prevent a
20 spouse from forgetting to remove their ex from a trust or insurance policy would be
21 used against him and Chari, to defeat the intent of both of them. There was no
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evidence put forth that Paul ever began moving out of the residence or knew he was no longer the owner. There was also no evidence that Collier ever contributed to the expenses for the Property as Paul and Chari had, and as Paul did after Chari's death. It would be a complete windfall for Collier to be awarded the Property, at least during the life of Paul. There was no evidence that Chari knew, or would expect that Paul, both before and after their divorce, would be kicked out of their marital residence after she died by her neighbor simply because of a statute that neither party would have been aware.

LEGAL ARGUMENT

A. THE DENIAL OF PETITIONER'S OBJECTION TO CONFIRM HIM AS BENEIFCIARY OF REAL PROPERTY WAS IMPROPER AS IT WAS BASED ON NRS 111.781, WHICH IS OVERBROAD AND VAGUE IN ITS APPLICATION, THUS PRODUCING AN UNCONSTITUITONAL RESULT.

The Due Process Clauses of the United States and Nevada Constitutions protect individuals from state actions that deprive them of life, liberty, or property without due process of law. U.S. Const. Amend XIV, sec. 1; Nev. Const. art. 1, sec 8(5); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

NRS 111.781(1)(a)(1) states, in relevant part;

1 Except as otherwise provided by the express terms of a governing
2 instrument, a court order or a contract relating to the division of the
3 marital estate made between the divorced persons before or after the
4 marriage, divorce or annulment, the divorce or annulment of a
5 marriage, revokes any revocable disposition or appointment of property
6 made by a divorced person to his or her former spouse in a governing
7 instrument.

8 Nevada's "Non-Probate Transfer of Property on Death" statute, NRS 111.700
9 through 111.815 inclusive, is modeled after the Uniform Probate Code, and was
10 enacted by the 2011 Session of the Nevada Legislature and was effective October 1,
11 2011. NRS 111.781 was adopted in Nevada in 2011 as Section 47 of SB 221. SB
12 221 was proposed by the Legislative Subcommittee of the Trust and Estate Section
13 State Bar of Nevada. Prior to the enactment of SB 221 Nevada law did not specify
14 or deal with the effect of a divorce on wills and trusts and did not address the effect
15 of a divorce on a beneficiary designation, joint tenancy community property with
16 right of survivorship rather it was left to the marital settlement agreement (MSA) or
17 decree of divorce to specifically address those issues.

18
19 The purpose of Section 47 of SB 221 (NRS 111.781) was to clarify the effect
20 of a divorce on wills, trusts, beneficiary designations and joint tenancy community
21 property with right of survivorship if those matters were not addressed in the MSA
22 or decree of divorce and to address situations where insurance companies or third
23 parties refuse to honor a MSA or decree of divorce.
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Whether or not a statute is overbroad depends upon the extent to which it lends itself to improper application to protected conduct. *N.Nev. Co. Menicucci*, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980). Specifically, the overbreadth doctrine invalidates laws that infringe upon Constitutional rights. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 297, 129 P.3d 682, 687 (2006). The overbreath doctrine applies to statues that have seemingly legitimate purposes but are worded so broadly that they also apply to protected rights. *Id.*

Nevada has held that the overbreadth doctrine is strong medicine and that a statute should not be void unless it is substantially overbroad in relation to the statutes plainly legitimate sweep. *Id* at 298, 129 P.3d at 688

Paul Valer Colman was married to Chari Colman on December 15, 2009. At that time, they decided to reside in Chari's house located at 5988 Turtle River Avenue, Las Vegas, NV 89156. Prior to and following the marriage the Colman's, as a married couple, made all the mortgage payments for the house, provided general upkeep, paid the taxes and treated the property as their marital residence. APP, Vol. I, 80-82. The couple never had any discussions between them about Chari believing the property should be her sole and separate property after the marriage. They treated the property much like any other couple would when they get married and one spouse already has a personal residence, they believed it was both of theirs. *Id*

1 The Colman's both continued to maintain the property and later June 23, 2011,
2 Chari and Paul executed the Trust documents, in conjunction with their respective
3 wills and Powers of Attorneys. APP, Vol. I, 39-45; 80-81. Because they treated the
4 Property as their marital residence, equally owned by them, the Colman's transferred
5 the property into the Colman Trust by Quitclaim Deed filed on June 30, 2011. Id at
6 39-45.
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9 The statute in question revokes a former spouse's rights to a beneficial
10 disposition made by the ex-spouse and was clearly intended to cure a situation where
11 after a divorce, when the parties separate their lives both financially and physically,
12 one forgets that their ex is still listed as a beneficiary under a life insurance policy
13 or trust. The legislative intent is filled with examples of a party that years later
14 learned that their ex was still listed as a beneficiary, although both sides had moved
15 on from the marriage. The statute presumed that every divorce is sought for the
16 purposes of ending a relationship in its entirety, and that the ex-spouse would not
17 want their ex to continue to be the beneficiary of real property or other asset. This is
18 a presumption that is not always true, as this case illustrates.
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23 By simply relying on the Divorce alone, the lower court ignored the intent of
24 Chari, and Paul and their intent was undermined. To the extent that Paul, though his
25 counsel at the hearing on the Petition failed to establish that he and Chari did not
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1 intend to defeat the terms of the Trust and still lived together as if they were married,
2 Paul would ask this court to remand the matter for further proceedings to establish
3 facts to support Chari's intent. Paul's Declaration does attempt to establish that he
4 and Chari only obtained the divorce for financial reasons to secure enough insurance
5 coverage for Chari. APP, Vol. II, 93-94. There are no facts that were established,
6 other than the Divorce decree, to support the presumption that Chari did not intend
7 the Trust to be enforced and for Paul to continue to be able to reside in the Property.
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10 In fact, after their marriage the Colman's both continued to maintain the
11 Property and on June 23, 2011, Chari and Paul executed the Trust documents, in
12 conjunction with their respective wills and Power of Attorney. APP, Vol. I, 39-42.
13 They never altered the Trust with respect to the Property, even after they obtained
14 the divorce in 2017. After the divorce they both continued to reside together in the
15 Property as they had before, treating each other as husband and wife. Had Chari
16 wanted to alter the Trust directives that listed each of them as beneficiary with
17 respect to the residence, she could have included the Property in the divorce and
18 demanded that it return to her as her separate property. Clearly, she never did that,
19 leaving the Property out of the Divorce because she assumed it would go to Paul if
20 she pre-deceased him, because to assume she was aware of NRS 111.781 and its
21 possible effect on her Trust is highly unlikely given her layperson status.
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1 It is reasonable to assume that the Colman's did not include the Property as
2 an asset or community property because it had already been placed in the Trust. Even
3 though they were going to be legally divorced they still considered it property of the
4 Trust, which they both were Primary Beneficiaries of. There was no evidence
5 introduced regarding any discussion between Paul and Chari that she was going to
6 quitclaim deed the property back to Chari alone. As the Colman Family Trust
7 evidences. it was their desire to have the property remain in the Trust. This was done
8 primarily because they did not want to deal with the uncertainties in transferring the
9 Property if something should happen to them. *Id.* Tragically, an event for which they
10 had planned, but did not anticipate coming so soon, occurred when Chari passed
11 away on October 18, 2017. APP, Vol. I, 74.
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16 Collier and the lower court assumed that because the Property was formerly
17 separate property before it was transferred to the Trust, that NRS 111.781 dictates it
18 is again separate property. Though NRS 123.130 presumes that all property brought
19 into the marriage is separate property, that character can be lost. The Nevada
20 Supreme Court has consistently held that conveying title to a spouse creates a
21 presumption of a gift;
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24 We have consistently held that a spouse to spouse conveyance of title
25 to real property creates a presumption of gift that can only be
26 overcome by clear and convincing evidence. *Graham v. Graham*,
27 104 Nev. 472, 760 P.2d 772 (1988); *Todkill v. Todkill*, 88 Nev. 231,
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495 P.2d 629 (1972); *Peardon v. Peardon*, 65 Nev. 717, 201 P.2d 309 (1948).

In this case the transfer of Property to the Trust was unequivocal, and there was no evidence to support that Chari intended for the property to be withdrawn from the Trust, despite the divorce proceeding. The transfer of title to the Property would have been a gift to Paul, which was held by the Trust. The only conclusive evidence of Chari's intent were the Trust documents and the quitclaim deed of property to the Trust, without any additional evidence, that would be considered clear and convincing proof of her intent. Because the statute in question violated the only clear evidence of Chari's intent with respect to the Property after her death, and because NRS 111.781 was construed and applied in contradiction of that intent, it must be found to be overbroad and unconstitutional.

B. NRS 111.781 HAS NO APPLICATION BECAUSE EVEN ASSUMING THE TRUST IS SET ASIDE, THERE IS NO BASIS FOR COLLIER, A SECONDARY BENEFICIARY, TO HAVE ANY RIGHTS TO THE PROPERTY OR THE TRUST.

By claiming that NRS 111.781 applies in this case, that contention likewise should have destroyed any credible argument that she had an interest in the property because she is only associated with the property by being named a secondary beneficiary if both Paul and Cheri die. If Collier claims that NRS 111.781 has any

1 effect, such contention likewise destroys any credible argument that she had an
2 interest in the Property because she is only associated with the property by the Trust.

3
4 Prior to NRS 111.781 passage in 2011, it was held that a party had to
5 specifically revoke a specific transfer of property within the divorce decree and
6 general statements were not sufficient:
7

8 Prior to the 2011 enactments of NRS 111.781, this Court held that only
9 explicit language in a divorce decree ...divested a former spouse of his or
10 her rights as designated beneficiary. “ *Redd. V. Brooke*, 96 Nev. 9, 12, 604
11 P.2d 360, 362 (1980)(evaluating whether a divorce decree divested a
12 designated beneficiary of a life insurance policy). As such, “general
13 expressions or clauses in [the divorce decree] were not construed as
14 including an assignment or renunciation of expectancies.” *Id.* At 11, 604
15 P.2d at 361;

16 *Stanford v. Browne*, 402 P.3d 1253 (Nev. 2017).

17 This followed Nevada Court’s well-founded rule that “this Court should
18 require explicit language in divorce decrees to divest a former spouse of his or her
19 rights as designated beneficiary.” *Redd v. Brooke*, 96 Nev. 9, 11-12, 604 P.2d 360,
20 362 (1980). As such, without any specific and explicit language in the Colman
21 divorce decree, Paul was not divested of his rights to the Property as outlined in the
22 Trust. Therefore, Collier was forced to rely on NRS 111.781.
23

24 NRS 111.781 does not aid Collier’s argument that she was entitled to relief
25 for her Petition because it eliminated the Trust. If it is argued that the statute
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1 eliminates the terms and conditions in the Trust which gave Paul his property rights
2 to the Property, then it also eliminated any rights that Collier would have had.
3 Therefore, the lower court should have looked to the divorce decree to determine if
4 it that explicitly eliminated Paul's rights to the Property. Even if the Trust is
5 unwound, negating the implication of NRS 111.781 for both parties, Collier cannot
6 prove that the Decree of divorce specifically removed the property from the Trust or
7 rightful ownership of Paul. As described above, Nevada has long considered the
8 explicit language is required to remove property from the former spouse, which
9 closes her argument. See *Stanford v. Browne*, 402 P.3d 1253. Collier is trying to take
10 advantage of the unfortunate situation in that the Colman's were unaware that the
11 statute in question existed. Even though she is not a primary beneficiary under the
12 Trust that she claims has no effect as a result of NRS 111. 781, she attempts to assert
13 her rights under the same Trust. If the Trust is invalid as to Paul, it should also be
14 invalid as to her.

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20 The text of the Trust provides that Collier is only a beneficiary if and when
21 both Chari and Paul are deceased. Section 5.2 states as follows;

22 23 5.2 Distribution of Assets Upon Death of Grantors

24 Upon the death of the last Grantor [Chari Colman and Paul Colman] of this
25 Trust, the trust estate shall be distributed as follows; The Trustee shall
26 distributed the real property located at 5988 Turtle River, Las Vegas,
27 Nevada, to TONYA COLLIER.....
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1 Collier's filing of *a lis pendens* for property in which she was not a beneficiary
2 of at the time was premature. Pursuant to section 5 .2 of the Trust, Mr. Colman has
3 a lifelong interest in the Property. Collier had no beneficiary status or any rightful
4 claim to the Property until Paul's demise, and her Petition should have been
5 dismissed and/or Colman's Objections should have been sustained. Collier had no
6 standing to bring the Petition before Paul's demise because she had no legal interest
7 in the Trust if as he argued that NRS 111.781 invalidated the Trust. If the Trust is
8 valid despite the statute, then her interests under the trust only comes to fruition if
9 Paul also dies, and her general interest is not enough to prove standing. See *Schwartz*
10 *v. Lopez*, 132 Nev. Adv. Op. 73, 382 P.3d 886, 894 (2016)("To have standing, the
11 party seeking relief must have a sufficient interest in the litigation so as to ensure the
12 litigant will vigorously and effectively present his or her case against an adverse
13 party"). The party must show a personal injury, not just a general interest. *Id.*

14
15 As stated, Collier never put any money into the property, and still hasn't.
16
17 There was no evidence that Chari wanted her to have a legal interest in the Property
18 before her and Paul deceased. She will not suffer a personal injury from this case if
19 denied the property before Paul dies, she has no tie to the Property other than being
20 Chari's neighbor; The property to her is only a windfall, one undeserved and
21 unearned.

It is not in dispute that NRS 111.781 was construed and applied to defeat the purpose of the Colman Family Trust to the extent it had clearly bequeathed the Property to Paul. Since the only standing that Collier had to seek title to the Property was that of her inclusion as a secondary beneficiary of the Trust, and the Trust was displaced by the statute, then Collier's rights under the Trust should have also been revoked.

CONCLUSION

Wherefore based on the foregoing, the District Court Probate Commissioner erred in relying on NRS 111.781 as the statute is overbroad in its scope and application to the extent the intent behind the statute deprives Appellant of his property rights to his home without Due Process.

1 **CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2**
2

3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
5 the type style requirements of NRAP 32(a)(6) because:
6

7 ☒ This brief has been prepared in a proportionally spaced typeface using
8 Microsoft Word version 14 in Times New Roman with a font size of 14; or
9

10 ☐ This brief has been prepared in a monospaced typeface using [*state name*
11 *and version of word-processing program*] with [*state number of characters per inch*
12 *and name of type style*].
13

14 2. I further certify that this brief complies with the page- or type-volume
15 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted
16 by NRAP 32(a)(7)(C), it is either:
17

18 ☐ Proportionately spaced, has a typeface of 14 points or more, and contains
19 _____ words; or
20

21 ☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____
22 words or _____ lines of text; or
23

24 ☒ Does not exceed 30 pages.
25

26 3. Finally, I hereby certify that I have read this appellate brief, and to the
27 best of my knowledge, information, and belief, it is not frivolous or interposed for
28

1 any improper purpose. I further certify that this brief complies with all applicable
2 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
3 every assertion in the brief regarding matters in the record to be supported by a
4 reference to the page and volume number, if any, of the transcript or appendix where
5 the matter relied on is to be found. I understand that I may be subject to sanctions
6 in the event that the accompanying brief is not in conformity with the requirements
7 of the Nevada Rules of Appellate Procedure.
8
9

10 Dated this 21st day of April, 2019.

11 /s/ Thomas C. Michaelides
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Pursuant to NRAP 25(c)(1), I hereby certify that on this 21st day of April, 2019, service of the foregoing **APPELLANTS' OPENING BRIEF** was made by submission to the electronic filing service for the Nevada Supreme Court upon the following registered users to the email addresses on file:

/s/ S.Almazan
An employee of TCM Law