Case No. 77320
Consolidated with 80508

# In the Supreme Court of Nevada



HELIX ELECTRIC OF NEVADA, LLC,

Appellant/Cross-Respondent,

*vs.*

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

**APPEAL**
from the Eighth Judicial District Court, Clark County
The Honorable MARK R. DENTON, District Judge
District Court Case No. 08A571228

## PETITION FOR REHEARING

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. No publicly held company owns ten percent or more of the stock of Appellant/Cross-Respondent, Helix Electric of Nevada, LLC ("Helix").

2. Richard L. Peel and Eric B. Zimbelman of Peel Brimley LLP represent Helix in the district court.

3. Richard L. Peel and Eric B. Zimbelman of Peel Brimley LLP, and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and Chad D. Olsen of Lewis Roca Rothgerber Christie LLP represent Helix in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 11th day of May, 2022.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Rules



### Statutes

**Treatises**

## PETITION FOR REHEARING

Pursuant to NRAP 40, Appellant/Cross-Respondent, Helix Electric of Nevada, LLC petitions for rehearing of the Court's Opinion in this matter filed March 24, 2022.[1] Respectfully, it appears the Court may have "overlooked or misapprehended" points of law and fact relating to the issue of assignment. *See* NRAP 40(a)(2); (Opinion at 10–13).

Based on the Court's Opinion, Respondent/Cross-Appellant APCO Construction, Inc., which served as the general contractor of the condominium project, may be relieved of its obligation to pay the amount it held in retention from its subcontractor, Helix. In part, the Court concluded that the district court did not err in relieving APCO of its contractual obligation to pay the retention because "APCO's obligations under the subcontract were assigned" to Gemstone Development West, Inc. (the project owner) or to Camco Pacific Construction Company (which was retained to "act as construction manager in place of APCO"). (*See* Opinion at 2–4, 10–13).

In addressing this assignment, however, the Opinion (1) does not analyze the necessary issue of novation, (2) overlooks or misapprehends

[1] The citation for the Court's Opinion is: *Helix Elec. of Nevada, LLC v. APCO Constr., Inc.*, 138 Nev. Adv. Op. 13, 506 P.3d 1046, 1049 (2022).

settled contract principles concerning assignments, and (3) overlooks several material facts. Accordingly, Helix requests that the Court rehear this matter and hold that the district court erred in ruling that:

> [T]here is no contractual obligation for APCO to pay Helix for the work it performed for Gemstone and/or Camco after APCO left the Project. Helix knowingly replaced APCO with Camco under the Helix Subcontract on all executory obligations, including payment for future work and retention.

(Appellant's Opening Brief at 50; 84-JA006246 ¶ 18). Indeed, if allowed to stand, the oversights and misapprehensions of law and facts in the Opinion may lead to confusion or ambiguity in the law.

## PETITION FOR REHEARING STANDARDS

NRAP 40 governs this petition. NRAP 40(a)(2) provides that "[t]he petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended." More specifically, for "[a]ny claim that the court has overlooked or misapprehended a material fact," the petitioner must support the petition "by a reference to the page of the transcript, appendix or record where the matter is to be found." And for "any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling

authority," the petitioner must support the petition "by a reference to the page of the brief where petitioner has raised the issue." NRAP 40(a)(2).

## ARGUMENT

### I.

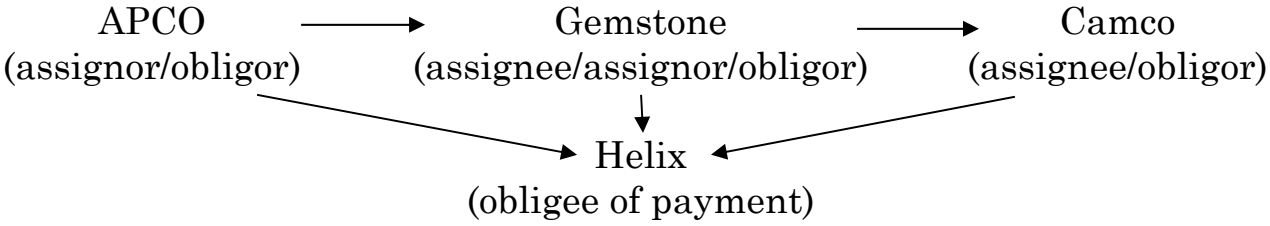
### ABSENT FROM THE COURT'S OPINION IS ANY ANALYSIS OF NOVATION. NEVERTHELESS, A NOVATION DID NOT OCCUR TO DISCHARGE APCO'S OBLIGATION TO PAY

As a preliminary but important issue: The Court's Opinion does not mention or discuss "novation."[2] This oversight or misapprehension is detrimental to the Opinion and its precedential value.

The Opinion upholds an assignment based on implied consent arising from the circumstances and parties' conduct. (*See* Opinion at 10–13). As described in the Opinion, the subcontract between Helix and APCO (which includes APCO's obligation to pay the retention) was "assigned to Gemstone/Camco." (*Id.* at 12). In particular, APCO is the original assignor and payment obligor; Gemstone is the original assignee, subsequent payment obligor, and subsequent assignee; Camco

[2] Novation was raised in the parties' briefs. (*See* Appellant's Opening Brief at 50–53; Respondent's Answering Brief at 45–48; and Appellant's Reply Brief at 19–24).

is the final assignee and a third payment obligor; and Helix remains the obligee of the right to payment, as follows:




And based only on a finding of such an implied assignment, the Opinion provides that Helix's right to payment from APCO (the original payment obligor) was terminated. (*See id.* at 12–13). This is incorrect.

The law is clear in that substituting an obligor with another obligor, along with terminating an obligee's right to payment from the original obligor/assignor, requires a novation, not just a mere assignment. *See Easton Bus. Opp. v. Town Executive Suites*, 126 Nev. 119, 124, 230 P.3d 827, 830 (2010) (citing Restatement (Second) of Contracts § 318 cmt. d (1981)) ("An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. Otherwise, the obligee retains his original right against the obligor."). Thus, analyzing any transfer of obligations or termination of contractual rights in this case cannot be solved or determined only by analyzing the basic contract principle of assignment—which is all that

the Opinion does in this case.

A novation requires more than evidence of an assignment. For instance, it requires a heightened "clear and definite" standard to determine if "all parties" intended the novation. *See United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) ("A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid. … Additionally, the intent of all parties to cause a novation must be clear. … "[T]he party asserting novation has the burden of proving all the essentials of novation by clear and convincing evidence."); 30 Williston on Contracts § 76:12 (4th ed.) ("[I]n order to effect a novation, all of the parties concerned must have the clear and definite intention to do so by their agreement.").

Here, the Opinion does not mention the term novation, cite to the principles or elements of novation, or analyze whether the clear and definite standard as to all parties' consent was ever satisfied. Thus, a rehearing is required. Otherwise, the Opinion would create an incomplete and potentially misleading precedent.

In addition, even if the facts that the Court analyzed to uphold the implied assignment were applied to the issue of novation,[3] the novation standard would not be met. In other words, this was no harmless error by the Court. Indeed, several material facts concerning novation were overlooked in the Opinion, including the following, which show that Helix (plus APCO, Gemstone, and Camco) never *all* "clearly and definitely" consented to APCO being completely and forever discharged of the payment obligation:

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[3] The facts the Court analyzed to uphold the implied assignment include:

- The prime contract between Gemstone and APCO allows Gemstone to accept assignment of subcontracts under certain circumstances. (Opinion at 11).
- Gemstone notified Helix of "its intent to continue with Helix's services." (*Id.* at 12).
- Gemstone provided Helix with a ratification agreement. And "[a]lthough Helix did not sign the ratification, it negotiated terms, continued to work on the project under Camco, and submitted billing statements to Camco." (*Id.*)
- Neither the prime contract nor subcontract "required Helix to approve the assignment" between APCO and Gemstone. (*Id.*)
- "Gemstone manifested an intent to assign contract obligations to Camco by telling subcontractors their contracts would be assumed by Camco, and Camco thereafter direct the project." (*Id.*)
- Helix worked "with Gemstone and Camco after APCO left the project." (*Id.*)
- "Helix billed Camco for its payments, including for the retention." (*Id.*)

- Even while APCO stopped work and was threatening to terminate its prime contract with Gemstone, APCO explicitly and repeatedly informed Helix that it remained under contract with APCO.[4]

- APCO admits it never gave Helix written notice of termination of the Helix-APCO subcontract.[5]

- Helix testified at trial that (1) during its negotiations with Camco, Helix believed "we're still under contract with APCO"[6]; (2) Helix's belief was that, "until APCO does something contractually to inform me our relationship is different, it's not changed"[7]; and (3) Helix did not believe it could stop work on the project after APCO did so, even worrying that if it had stopped work, it "would have been at full risk of [APCO] pursuing us for abandoning the contract."[8]

- Gemstone, the project owner, "directed Helix to start directing its payment applications to Camco." (84-JA006233 ¶ 200). In

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[4] (*See* Trial Exhibit 48, 41-JA-002357 (an emailed notice advising APCO's subcontractors that it was issuing "a STOP WORK NOTICE to GEMSTONE" but that "ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION …." (emphasis in original)); Trial Exhibit 23, 33-JA-002015 (A notice that APCO was stopping work but informing the subcontractors that "**APCO CONSTRUCTION is only stopping work on this project**" and that "**all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION**.") (emphasis in original)).

[5] (*See* Bench Trial Transcript Vol. 1, at 70:15–19, 29-JA-001737 ("Q: Did APCO ever notify Helix that it was terminating its subcontract? A: Not that I know of. Q: Did it ever notify any of the subcontractors that it was terminating their subcontracts? A: Not that I know of.").

[6] (*See* Bench Trial Transcript Vol. 1, at 124:22–125:25, 29-JA-001792).

[7] (*See* Bench Trial Transcript Vol. 2, at 23:17–19, 78-JA-005306).

[8] (*See* Bench Trial Transcript Vol. 1, at 128:12–16, 29-JA-001793).

other words, Helix did not simply voluntary start billing Camco out of some intention to discharge APCO.

- In the only meeting Helix ever had with Camco and Gemstone, Gemstone represented that "nothing had changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract. And that was about it."[9]

- As this case indicates and the district court stated, Helix has attempted to collect from Camco for work after APCO stopped work, and is also "seeking to hold APCO responsible for retention" (84-JA006239 ¶ 239; 84-JA006243 ¶ 246) that Helix earned before APCO stopped work.[10] Indeed, Helix has never agreed to stop seeking or not seek payment from APCO.[11]

In short, even when considered with the facts that the Court concluded supported the implied assignment (*see supra*, footnote

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[9] (*See* Bench Trial Transcript Vol. 2, at 23:1–4, 78-JA005306).

[10] (*See, e.g.*, Bench Trial Transcript Vol. 1, at 124:3–8, 29-JA001791 ("Camco was presented to us through Gemstone as the entity to continue billing the work through. And through that process Camco issued, which we had no contract with Camco, our only contract was APCO so we had a difficult time with this because we did not know how to handle it. So in order to get paid we went ahead and followed this process but in terms of contractual, we would never agree to the agreement—it never got agreed to."); Bench Trial Transcript Vol. 2, at 14:5–20, 78-JA005297 (where Helix payment applications started going to a disbursement account vendor before and after APCO left "because that's how [the disbursement account vendor] wanted it."). Thus, while those payment applications included the retention that had accrued under APCO, Gemstone had directed this format and was indirectly responsible for paying those sums to Helix and other subcontractors.

[11] (*See, e.g.*, Bench Trial Transcript Vol. 1, at 126:23–25, 29-JA001793 ("Q: Did Helix ever agree not to seek compensation from APCO for its work on the project? A: No.").

3), the circumstances indicate only that, while Helix was at one point open to working with Camco for work going forward and hoped to collect payment from any potential source (i.e., APCO or Camco), Helix never clearly and definitely consented to discharging APCO of its payment obligation. Instead, just as any subcontractor needing payment would be forced to do under such a "between-a-rock-and-a-hard-place" circumstance, Helix remained hopeful to collect from any obligor.[12]

It would be unjust, bad precedent, and in direct contradiction of any implied consent to hold that a lower-tiered subcontractor forever releases its high-tiered contractor of payment obligations merely by continuing work, trying to collect from an additional party, etc. The absence of any real, legitimate choice negates consent.[13] *Cf. Henderson*

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[12] *See generally* 58 Am. Jur. 2d Novation § 12 ("Economic duress is a circumstance indicating a lack of intent and therefore vitiates a novation."); *see also* (Appellant's Opening Brief at 52 ("Helix's agreement to work for Camco was a reasonable means of seeking an additional means of payment of the work it had agreed to perform for APCO … but it does not relieve APCO of its continuing obligation to pay Helix ….")).

[13] 58 Am. Jur. 2d Novation § 15 provides:

> The mere acceptance by an obligee of performance by a substituted obligor of a contract is not sufficient to establish a novation, absent words or conduct tending to show the intention or agreement on part of the obligee to release the original obligor and extinguish his or her liability. Thus, the

*v. Watson*, No. 64545, 131 Nev. 1290, *2 (Apr. 29, 2015) (procedural unconscionability may occur in "an absence of meaningful choice"); *Lanigan v. City of Los Angeles*, 132 Cal. Rptr. 3d 156, 169 (2011) (oppression may occur when there is "a lack of real negotiation and an absence of meaningful choice").

Moreover, all facts and the parties' intentions must be viewed within the framework of statutory rights. In Nevada, any "condition, stipulation or provision in an agreement" that [r]elieves a higher-tiered contractor of any obligation or liability" for payment of, for example, an agreed-upon retention, or "[r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages … is against public policy and is void and unenforceable." NRS 624.628(3)(b)-(c); *see also APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. 569, 574, 473 P.3d 1021, 1027 (2020) (contract provisions that "require any

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> payment of a debt by a third person that is accepted by an obligee does not, without more, establish a novation.
>
> A novation may be inferred by the obligee's acceptance of part performance from a new obligor if the performance is made with the clear understanding that a complete novation is proposed. A novation also occurs where a contracting party accepts performance by an assignee with knowledge that the assignor does not intend to be liable under the original contract as where the creditor deals exclusively with, or pursues only, the assignee for payment.

subcontractor to waive or limit its rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages or time extensions" are not permissible).[14]

Thus, to Helix, discharging APCO of the payment obligation was never even considered, let alone intended or consented to. *Cf. Rogers v. Ricane Enterprises, Inc.*, 930 S.W.2d 157, 174 (Tex. App. 1996) ("It is reasonable to conclude that before even implied consent to a transaction can be considered, acquiescence requires knowledge of that to which consent is implied."); *see also Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855 (9th Cir. 2022) (citing Restatement (Second) of Contracts § 19(2) (1981)) ("[T]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.")

In short, not analyzing these facts, including under the framework of NRS 624.628(3)(b)-(c), constitutes an oversight or misapprehension of law and material fact. Therefore, a rehearing is required.

[14] This issue was raised and demonstrated in Helix's briefs. (Reply Brief at 2 (note that Helix inadvertently switched the citations to NRS 624 and NRS 108 in sub-points (i) and (ii)), 5, 13; Opening Brief at 41, 52).

## II.

## THERE WAS NO ASSIGNMENT, AND HOLDING OTHERWISE OVERLOOKS OR MISAPPREHENDS MATERIAL FACTS AND THE LAW

Although the Court upheld the district court and concluded that there was an implied assignment based on the circumstances listed above in footnote 3 (*see also* Opinion at 11–12), it appears from the Opinion that the Court overlooked or misapprehended the material facts referenced above on pages 7 and 8. Accordingly, a rehearing on the issue of assignment is required to account for these material facts.

Moreover, as discussed next, neither does the law allow for such an assignment of APCO's obligations in these circumstances.[15]

### A. There Can be no Assignment Because it Would Violate Statute

As discussed above on pages 10 through 11, NRS 624.628 affects the general "free assignability" of contract rights or obligations in this case. (*Cf.* Opinion at 10 (citing *Easton Bus. Opp.*, 126 Nev. at 124, 230

[15] There may be circumstances where a contractor's liability is transferred to another without violating NRS 624, but that would require at least a novation, not a mere assignment, which leaves the assignor liable to the obligee. *See Easton Bus. Opp.*, 126 Nev. at 124, 230 P.3d at 830 (an obligor is discharged by the substitution of a new obligor if there is a novation; otherwise, "the obligee retains his original right against the obligor").

P.3d at 830). In particular, under NRS 624.628(3)(b)-(c), any "condition, stipulation or provision in an agreement," such as APCO's purported assignment (or novation), which "[r]elieves a higher-tiered contractor of any obligation or liability … or [r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages," including relating to APCO's obligation to pay the retention, "is against public policy and is void and unenforceable."

The Court, however, did not discuss or analyze this issue in the Opinion. Accordingly, this oversight or misapprehension of the law must be remedied through a rehearing. Indeed, if it were allowed to stand, the Opinion would set a bad precedent by potentially permitting general contractors to escape important rights or circumvent vital safeties provided by NRS 624.628 through a mere assignment.

### B. An Assignment Under These Circumstances Would Violate a Settled Principle of Contract Law

There can be no assignment of Helix's subcontract right to payment from APCO because such an assignment would materially change APCO's obligation, in violation of a well-settled principle of contract law. (*Cf.* Appellant's Opening Brief at 50–55; Appellant's Answering Brief at 19–24). As cited by the Court, "a contract right is

assignable unless the assignment '*would materially change the duty of the obligor*.'" (Opinion at 11 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)).[16]

Here, the purported assignment would completely discharge APCO (i.e., the obligor) of the obligation to pay the retention that Helix earned *before* APCO stopped work.[17] Thus, there can be no assignment, because being *completely discharged* of a duty certainly qualifies as a "material change" of the obligor's duty.

And although the Court cited to this prohibition on assignments involving a material change in its Opinion, the Court did not address or analyze this prohibition. Accordingly, it appears this issue of law was overlooked—and, as is, the Court's Opinion could create confusion or be interpreted as incomplete.

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[16] This, again, illustrates why a novation is required.

[17] As described by APCO in its Answering Brief on page 35, a retention is "money that *has been earned* but has been held back until the project is completed." (emphasis added).

## III.

## EVEN IF THERE WERE AN ASSIGNMENT OF APCO'S OBLIGATIONS, IT WOULD NOT CUT OFF HELIX'S RIGHT TO PAYMENT FROM APCO

Even if there were an assignment (which there was not), it would not automatically cut off Helix's right to collect the retention from APCO. As stated by the Court, "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the *assignor's right* to performance by the obligor is extinguished[18] in whole or in part and the assignee acquires a right to such performance." (Opinion at 10 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)). Further, "[A]n assignment *does not modify the terms of the underlying contract*. It is a *separate agreement between the assignor and assignee* which merely transfers the *assignor's contract rights*, leaving them in full force and effect as to the party charged." (*Id.* (citing *Easton Bus. Opp. v. Town Executive Suites*, 126 Nev. 119, 125, 230 P.3d 827, 831 (2010) (emphasis added)).

Thus, while an assignment of an obligor's obligation to pay might

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[18] For example, under an assignment, APCO's (i.e., the assignor's) "rights" to, for example, attorneys' fees under a subcontractor can be transferred and extinguished as to APCO, but such an assignment does not extinguish the non-assigning party's rights or benefits.

occur in certain circumstances,[19] such an assignment does not then automatically terminate the obligee's payment rights against the original obligor. Instead, an assignment creates a "separate agreement" between the "assignor and assignee" but "does not modify the terms of the underlying contract"—which, in this case, is the subcontract between the original obligor and the obligee. (*See* Opinion at 10); Restatement (Second) of Contracts § 318(3) (1981) ("Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.").

Here, however, the Court cited to the law relating to the assignment of rights (Opinion at 10–11), discussed facts (*id.* at 11–13), and then straightway concluded that APCO's obligations were assigned, meaning that "APCO owes [no] further payment for retention or other

[19] The Court's citations on page 10 of the Opinion focus on an assignment of contract rights or benefits, not of contract obligations, duties, or burdens. *See generally* Restatement (Second) of Contracts § 316 (1981) ("'Assignment' is the transfer of a right by the owner (the … assignor) to another person (the assignee). [citation omitted]. A person subject to a duty (the obligor) does not ordinarily have such a power to substitute another in his place without the consent of the obligee; this is what is meant when it is said that duties cannot be assigned.").

amounts" (*id.* at 12–13). This is in err because the mere assignment of an obligor's obligations to a subsequent obligor does not, without more, automatically mean that the obligee's rights to payment from the original obligor is cut off.

Thus, Helix requests that the Court rehear this matter. It appears the issue of an automatic termination of APCO's obligations was overlooked, misapprehended, or misapplied in the Opinion.

## CONCLUSION

Based on the foregoing, this Court should grant this petition and reverse the district court's order. If this Opinion is allowed to stand, it would almost certainly lead to confusion or ambiguity regarding assignments and novations.

DATED this 11th day of May, 2022.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this petition complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2019 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3), because it contains 3,722 words.

3. I certify that I have read this petition, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 11th day of May, 2022.

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## CERTIFICATE OF SERVICE

I certify that on May 11, 2022, I submitted the foregoing "Petition for Rehearing" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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