Case Nos. 78341 and 79464

In the Supreme Court of Nevada

In the Matter of the Estate of MILTON I. SCHWARTZ, deceased.	No. 78341
A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ, Appellant/Cross-Respondent, *vs.* THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Respondent/Cross-Appellant.	
In the Matter of the ESTATE OF MILTON I. SCHWARTZ, deceased.	No. 79464
THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Appellant, *vs.* A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ, Respondent.	

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Elizabeth A. Brown
Clerk of Supreme Court

MOTION FOR LEAVE TO EXCEED WORD LIMIT FOR PETITION FOR EN BANC RECONSIDERATION

Appellant/Cross-Respondent A. Jonathan Schwartz, executor of the Estate of Milton I. Schwartz ("Schwartz"), requests leave under NRAP 32(a)(7)(D) and NRAP 40A(d) to file a petition for en banc reconsideration that exceeds the 4,667 word limit in NRAP(40)(d).

Docket 78341 Document 2022-26227

Schwartz's petition contains 5,844 words, 1,177 words over the ordinary type-volume limitations. (Exhibit A.)

Good cause exists for this request to exceed the word limit. This case has an extensive background dating back to 1989, and Schwartz needed 1,177 additional words to sufficiently explain the factual background of this case and make the public policy and legal points necessary to demonstrate why en banc reconsideration is appropriate. Undersigned counsel tried to be as concise as possible, but did not want to sacrifice including important facts or legal arguments demonstrating the substantial public policy and precedential legal matters at issue in this case, including the importance of honoring naming rights agreements. Schwartz accordingly requests that this motion to exceed be granted.

DATED this 22nd day of August, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ M. Dale Kotchka-Alanes*
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DECLARATION OF M. DALE KOTCHKA-ALANES
IN SUPPORT OF MOTION TO EXCEED WORD LIMIT

STATE OF NEVADA)
COUNTY OF CLARK)

1. I, M. Dale Kotchka-Alanes, under penalty of perjury, declare that I am a Nevada licensed lawyer with Lewis Roca Rothgerber Christie LLP and that I am counsel for Appellant/Cross-Respondent A. Jonathan Schwartz, executor of the Estate of Milton I. Schwartz.

2. Schwartz requests leave under NRAP 32(a)(7)(ii) and NRAP 40A(d) to file a petition for en banc reconsideration that exceeds the 4,667 word limit by 1,177 words.

3. This case has an extensive background dating back to 1989.

4. Undersigned counsel tried to be as concise as possible and went through multiple revisions to make the petition as concise as possible. However, an extra 1,177 words are warranted to sufficiently explain the factual background of this case and make the legal arguments demonstrating the substantial public policy and precedential legal matters at issue in this case, including the importance of honoring

naming rights agreements.

Dated this 22nd day of August, 2022.

/s/ M. Dale Kotchka-Alanes
M. DALE KOTCHKA-ALANES

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 40A(d), because it contains 5,844 words.

3. I certify that I have read this brief, 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 22nd day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 22, 2022, I submitted the foregoing "Motion for Leave to Exceed Word Limit for Petition for En Banc Reconsideration" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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EXHIBIT A

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Case Nos. 78341 and 79464

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APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable GLORIA J. STURMAN, District Judge
District Court Case No. 07-P061300-E

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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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. A. Jonathan Schwartz is an individual and the executor of the Estate of Milton I. Schwartz.

2. Alan D. Freer and Alexander G. LeVeque of Solomon Dwiggins & Freer, Ltd. and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and M. Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP represent Schwartz in the district court and in this Court.

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

Dated this 22nd day of August, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ M. Dale Kotchka-Alanes*

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PETITION FOR EN BANC RECONSIDERATION

En banc reconsideration is appropriate where "(1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court … or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). Both circumstances are present here.

The March 30, 2022 panel decision ruled that "the School's bylaws could not qualify as an enforceable contract" with Milton I. Schwartz, who was a member of the school corporation, board member, and signatory to the bylaws. (3/30/22 Order at 2-3.) This ruling contradicts this Court's recent decision that "bylaws are indeed a contract—and … we enforce those bylaws according to their terms." *Nevada State Educ. Ass'n v. Clark Cnty. Educ. Ass'n*, 137 Nev. 76, 85, 482 P.3d 665, 674 (2021). This petition for en banc reconsideration should be granted to ensure uniformity of this Court's decisions on the enforceability of bylaws.

This case also involves substantial precedential and public policy issues. At issue is a naming rights agreement with Milton Schwartz that the School later ignored when larger donors (the Adelsons) came

along and wanted the School to be named after them instead. Naming rights are becoming increasingly more common and attracting national attention. If they are to mean anything, contracts granting naming rights must be enforced – even if they later prove to be inconvenient.

This case also presents two precedential legal issues that this Court needs to clarify: (1) when separate contract breaches trigger separate limitations periods; and (2) whether a breach of the implied covenant of good faith and fair dealing needs to be pled separately from a breach of contract claim when both claims seek the same contractual damages. In this case, the panel affirmed the district court's dismissal of all alleged breaches of the naming rights agreement on statute of limitations grounds, even though it was undisputed that some breaches – such as removing Mr. Schwartz's name altogether – did not occur until after the lawsuit was commenced. And the panel affirmed the district court's dismissal of Mr. Schwartz's Estate's implied covenant claim simply because the Estate did not include it as a separate cause of action. If the covenant of good faith and fair dealing is implied in every contract, then breach of that covenant should be subsumed under a breach of contract claim without the need to bring two different counts

for precisely the same contract damages.

BACKGROUND

A. The Agreement

Milton Schwartz Donates $500,000 for Permanent Naming Rights to a Jewish School

In 1989, a Jewish day school known as the Hebrew Academy wanted to build a new campus in Summerlin and urgently needed donors. (17 App. 4239; 14 App. 3253.) So its board members Dr. Tamar Lubin, the school principal, and Dr. Roberta Sabbath solicited money from a known Jewish philanthropist, Milton I. Schwartz. (14 App. 3253.) As Mr. Schwartz later testified, he "donated $500,000 to the Hebrew Academy in return for which it would guarantee that its name would change in perpetuity to the MILTON I. SCHWARTZ HEBREW ACADEMY." (8 App. 1857; *see also* 28 App. 6880 (similar affidavit).) Other board members confirmed this agreement. (17 App. 4100–01; 12 App. 2990-91; 13 App. 3071-73.) Board minutes also contained a pledge list that confirmed Mr. Schwartz pledged and paid $500,000, with "none" outstanding. (28 App. 6876.)

The School Amends Its Articles of Incorporation and Bylaws to Permanently Name the School after Milton Schwartz

In August 1990 the school amended its articles of incorporation: "This corporation shall be known as: The Milton I. Schwartz Hebrew Academy." (27 App. 6607.) In December 1990, the bylaws were amended and signed by the board members, including Mr. Schwartz himself:

> The name of this corporation is The Milton Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity.

(27 App. 6612, 6620; 13 App. 3116.) Lenard Schwartzer, the board's then-secretary who drafted the bylaws, testified that he included the naming provision "[t]o reflect the decision of the board of trustees to name the school the Milton I. Schwartz Hebrew Academy in perpetuity." (13 App. 3012.) This provision "was supposed to be in perpetuity. So that's what it means, forever, to me, which means it's not going to be changed." (13 App. 3013; *accord* 13 App. 3115–16.)

After a temporary falling out between Mr. Schwartz and the School in which the School removed Mr. Schwartz's name and Mr. Schwartz stopped making donations, the School and Mr. Schwartz made amends in 1996. (27 App. 6626; 28 App. 6883.) The board

"passed a resolution returning the name of the school to the Milton I. Schwartz Hebrew Academy. The name would be returned to the stone outside of the school as well as to the school letterhead and other appropriate places." (27 App. 6626.)

On behalf of the board, then-school head Dr. Sabbath wrote Mr. Schwartz to reiterate the terms of the naming agreement (the "Sabbath letter"):

> On behalf of myself, President, Geri Rentchler and the entire Board of Directors of the Milton I. Schwartz Hebrew Academy, I am pleased to inform you that we will immediately commence action to implement as soon as practicable the following:
>
> (1) Restore the Hebrew Academy's name to the "Milton I. Schwartz Hebrew Academy."
>
> (2) Amend the Hebrew Academy's Articles of Incorporation to restore its former name of the "Milton I. Schwartz Hebrew Academy."
>
> (3) Restore the marker in front of the Hebrew Academy identifying it as the "Milton I. Schwartz Hebrew Academy."
>
> (4) Change the Hebrew Academy's formal stationary to include its full name, the "Milton I. Schwartz Hebrew Academy", in a form consistent with this letterhead and include our full name on future brochures.
>
> (5) Where practicable, display the full name of the Hebrew Academy. In print advertising of sufficient size, the full name of the school will be displayed in a design consistent with the letterhead. Where impractical by reason of size, utilization of voice media, informal correspondence, informal memoranda, etc., and in answering the telephone, the school will utilize the shorthand version of its name as Hebrew Academy or simply, its logo. You can rest assured it is the intention of the School Head and the school's Officers and Directors that the utilization of the school's full name will be consistent with an intent to recognize and honor your contribution and assistance.

(28 App. 6883; 27 App. 6626.) The school fulfilled these promises, including by amending the bylaws in 1999 to provide that "[t]he name of the Corporation is the Milton I. Schwartz Hebrew Academy and will remain so in perpetuity." (14 App. 3304–05; 13 App. 3178; 27 App. 6629.)

Mr. Schwartz Devises a Bequest to the School Bearing His Name

In 2004, Mr. Schwartz dictated to his son Jonathan a new will with a $500,000 bequest to the Milton I. Schwartz Hebrew Academy. (27 App. 6640, § 2.3; 14 App. 3400–01.) Mr. Schwartz specifically instructed his son Jonathan (who is also a lawyer) to not to include a successor clause because "[i]f the Milton I. Schwartz Hebrew Academy didn't exist as the Milton I. Schwartz Hebrew Academy, he didn't want it going to any other school on that land. It was only supposed to go to a school named the Milton I. Schwartz Hebrew Academy." (14 App. 3402, 3404–06, 3410, 3420.)

B. <u>New Donations</u>

New Donors Arrive

In 2006, Dr. Miriam and Sheldon G. Adelson agreed to donate money to build a high school on the Milton I. Schwartz Hebrew Academy property. (14 App. 3413–14.) Mr. Schwartz was "very happy" about this, as it was a realization of the "vision of the school from the

beginning that at some point there would be a high school on the campus." (14 App. 3414.) He understood that "the high school was going to be known as the Adelson high school," but that the rest of the campus would remain named after him. (14 App. 3420–22.) As the school had been complying with the Sabbath letter for ten years, Mr. Schwartz understood that his naming rights were unaffected. (14 App. 3421.)

Mr. Schwartz Dies

In August 2007, Mr. Schwartz died. (27 App. 6648; 14 App. 3424–25.) His son Jonathan, as the executor of his Estate, petitioned for probate of Mr. Schwartz's will and listed the Milton I. Schwartz Hebrew Academy as a beneficiary. (27 App. 6650, 6652.)

C. The School's Breaches

The School Actively Conceals Its Removal of Mr. Schwartz's Name from the Executor

In 2008 the School thanked the executor for his generous contributions to the School, referring to both the Milton I. Schwartz Hebrew Academy and the Dr. Miriam and Sheldon G. Adelson School. (28 App. 6999; 28 App. 7000.) The letterhead reflected the importance of both names:

(28 App. 6999; 14 App. 3440.)

During the executor's tour of the campus that same year, school head Paul Schiffman pointed out Mr. Schwartz's painting in the hallway, a statue of Mr. Schwartz in the building, and Mr. Schwartz's name above the entry doors to the school. (14 App. 3434.) In fact, according to Mr. Schiffman, the Milton I. Schwartz Hebrew Academy and the Adelson School were operating as "two separate institutions," with the Milton I. Schwartz Hebrew Academy still constituting preschool to eighth grade. (16 App. 3774.) So a sign at the entrance for the "Adelson Educational Campus" referred only to the high school. (17 App. 4009–10, 4028.)[1] And when the entrance sign with Mr. Schwartz's name was removed, the executor was misled that the removal was just temporary, for construction. (17 App. 4010.)

[1] The executor does not recall seeing this sign until March 2010, but regardless of when he first saw it, Mr. Schiffman said that it referred only to the high school. (17 App. 4055-56.)

On August 28, 2008, the executor wrote Mr. Schiffman to congratulate him, the Adelsons, and the board for the growth of the Milton I. Schwartz Hebrew Academy (MISHA) and the Adelson School. (27 App. 6685.) The executor also asked for the MISHA board[2] to send him written confirmation that the anticipated gift from Mr. Schwartz's estate would be used to fund annual scholarships "in perpetuity at the MISHA for the purpose of educating Jewish children only." (27 App. 6685.)

The School Changes Its Corporate Name

In December 2007, four months after Mr. Schwartz's death and unbeknownst to Jonathan, the board entered a naming rights agreement with the Adelsons and changed the school's corporate name to "The Dr. Miriam and Sheldon G. Adelson Educational Institute.'" (27 App. 6676–77, 6683; 16 App. 3876.) But "the Corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity." (27 App. 6676; 16 App. 3752–53.)[3]

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[2] The executor did not know that there was no MISHA board. (14 App. 3438.) By now, there was only a board of trustees for the Dr. Miriam and Sheldon G. Adelson Educational Institute.

[3] That same day, the school purportedly agreed "that the Corporation, the campus, the high school, the middle school and the classroom buildings themselves will be named in perpetuity in honor of Dr. Miriam Ad-

The name change prompted the board members to agree to indemnify and hold themselves harmless for "all liabilities related to their functions as trustee of the school, including all legal costs incurred." (27 App. 6647; 17 App. 4120–21.) As then-board member Sam Ventura explained, the board did not want "to worry about the legality what happened 10, 15 years earlier." (17 App. 4120–21.)

Mr. Adelson Threatens the Naming Rights, but the School Assuages the Executor

Around February 2010, Sheldon Adelson called the executor to complain that Mr. Schwartz gave "a paltry sum of money compared to what [Mr. Adelson] gave, and that if I [the executor] didn't give him more money, he was going to take my dad's name off the school. He threatened me." (14 App. 3444.) Following that alarming call, the executor met with the board and was assured that "what Sheldon [Adelson] threatened wasn't going to happen." (14 App. 3444–45.)

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elson and Sheldon G. Adelson." (27 App. 6680, ¶ 3.) There is no mention of the elementary school, presumably because it was supposed to be named after Mr. Schwartz in perpetuity.

The School Continues to Actively Conceal Changes in the School's Name

The Milton I. Schwartz Hebrew Academy logo had been removed from the school's letterhead on May 30, 2008. (16 App. 3772.) When the school corresponded with the executor later in 2008 and all the way through 2011, however, the school used the discontinued letterhead referring to the Milton L. Schwartz Hebrew Academy. (28 App. 6999; 28 App. 7000; 29 App. 7001, 29 App. 7002.) When Mr. Schiffman saw these letters at trial, he testified "this letterhead should not have been used" and he was "embarrassed" that it was apparently used only with the executor. (16 App. 3777–80.)

The Executor Learned of the School's Breach No Earlier than March 2010

In March 2010, the executor met with Paul Schiffman, Victor Chaltiel, and Sam Ventura at the school campus and saw a sign for "Adelson Middle School." (14 App. 3445, 3452.) As the executor understood that only the high school was named for the Adelsons (28 App. 6889–90), he complained to Mr. Chaltiel:

> What's this? Pointing to the sign that said Adelson Middle School. And he said, Well, the middle school is now named after the Adelsons. And I turned to him and I said, That's a violation of my dad's agreement

> with the school. I said, What are you doing? And he turned to me, and he said, Sheldon [Adelson] gave $65 million[;] he can do whatever he wants.

(14 App. 3452.)

The School Refuses to Recognize Mr. Schwartz's Naming Rights

In May 2010, the executor proposed a settlement to the board to preserve Mr. Schwartz's naming rights and prevent further erosion of his legacy. (27 App. 6710; 14 App. 3448; 27 App. 6687.) At this point, the board had still not revealed its corporate name change or the naming rights agreement with the Adelsons. (16 App. 3876.)

Instead of resolving matters with the executor, three years later the school filed a petition demanding that the $500,000 bequest for the Milton I. Schwartz Hebrew Academy be paid to the school. (14 App. 3458–59; 27 App. 6714.) On May 31, 2013, the Estate filed its petition for declaratory relief. (28 App. 6900.)

The School Again Breaches After the Executor's Petition

After litigation commenced, the school removed Mr. Schwartz's name from the building that had been the elementary school through eighth grade (now through fourth grade)—contrary to the naming-rights agreement and the board's own resolution that "the Corporation's

elementary school shall be named in honor of Milton I. Schwartz in perpetuity." (27 App. 6676; 14 App. 3462–63; 16 App. 3774, 3787.)

Citing his contributions as "228 times" those of Mr. Schwartz, Mr. Adelson (now board chairman) testified that "it's always the person putting up the maximum amount of money that gets the naming rights[]" (15 App. 3624), so it would be "ridiculous" for Mr. Schwartz to have them. (15 App. 3623; 15 App. 3625.)

D. The Trial

The District Court Prohibits the Estate from Presenting Its Oral Contract Theory to the Jury

In August 2018, the district court granted summary judgment on the Estate's breach-of-contract claim to the extent the contract was oral. (10 App. 2466–67.) The court admitted that there were "questions of fact" and that the school "may have lured [the executor] into a false sense of relief by saying look, your dad's name is still on the wall in 2009." (10 App. 2458, 2464.) Nevertheless, applying a four-year statute of limitations from the Estate's May 2013 petition, the court concluded that the Estate "had notice long before 2010…. I just can't see this any other way." (10 App. at 2464.) The court held that the executor "stands in different shoes because he's the Executor, and he needs to get these

claims resolved to the benefit of the creditors and to the beneficiaries," so he should have "figure[d] this out sooner." (10 App. 2460.)

The Jury Finds that Mr. Schwartz Believed He Had a Valid Naming Rights Agreement, but That It Was Unenforceable

After seven days of trial, the jury found that Mr. Schwartz intended that the bequest in his will "be made only to a school known as the 'Milton I. Schwartz Hebrew Academy'" and not to the "school presently known as the Adelson Educational Institute." (19 App. 4515, Question 8.) The jury also found that "the reason Milton I. Schwartz made the Bequest was based on his belief that he had a naming rights agreement with the School which was in perpetuity." (*Id.*, Question 9.)

But the jury did not think that Milton I. Schwarz had an enforceable written naming-rights contract. (19 App. 4513, Question 1.)

ARGUMENT

I.

BYLAWS NEED TO BE ENFORCED TO MAINTAIN UNIFORMITY OF DECISIONS OF THIS COURT

The panel decision affirmed the district court's grant of summary judgment on the Estate's oral contract claim, rejecting the Estate's argument that its contract claim was "founded upon an instrument in

writing"[4] – namely the bylaws. (*Contrast* 1/29/20 AOB at 49-51, 55-58 and 2/26/21 ARB at 5-17, *with* 3/30/22 Order.) The panel reasoned, "The evidence in the record supports the district court's conclusion that Milton's naming rights agreement was an oral contract because … the School's bylaws could not qualify as an enforceable contract with a third party, and the only written document reflecting the agreement was un-signed by the School." (3/30/22 Order at 2-3.)

In its petition for rehearing, the Estate pointed out that the by-laws were signed by the School and that Milton Schwartz was not a third party:

> He was a member of the corporation, a board member, and he himself signed the bylaws. (27 App. 6620.) The bylaws specified that the "governing board of the corporation shall be known as the Board of Trustees and the membership of the Board of Trustee shall constitute the corporation." (27 App. 6612.) Milton Schwartz was on the Board of Trustees and thus was a member of the corporation – and he also had voting power to elect board members (27 App. 6612), making him a member of the corporation statutorily. *See* NRS 82.031 ("Unless otherwise provided in the articles or bylaws, the word 'member' means … any person who on more than one occasion has the right pursuant to the articles or bylaws to vote for the election of a director or directors.").

[4] NRS 11.190(1).

(6/17/22 Pet. for Reh'g at 1-2.) The Estate collected case law and authorities to reiterate the point that "bylaws are a contract among the members of a corporation, and corporations are prohibited from amending their bylaws so as to impair a member's contractual rights." (*Id.* at 3.)[5]

The Estate also pointed out that even if Milton Schwartz "were a third party, the bylaws were communicated to him to induce his reliance on them, meaning he was an intended third-party beneficiary and the School cannot contend the bylaws do not apply." (Pet. for Reh'g at 4 n.2 (citing AOB at 56 n.27; *Williams v. Univ. Med. Ctr. of S. Nevada*, 688 F. Supp. 2d 1134, 1144 (D. Nev. 2010) ("a reasonable jury could find

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[5] *See, e.g.*, *Hickman v. Kline*, 71 Nev. 55, 69, 279 P.2d 662, 669 (1955) (union's "constitution amounts to a binding agreement between the union and its members"); *WSB Investments, LLC v. Pronghorn Dev. Co., LLC*, 344 P.3d 548, 557–58 (Or. App. 2015) ("the bylaws of a corporation are a contract between the members of the corporation, and between the *corporation* and its members") (quotations and citation omitted); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005) ("It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members"); 8 Fletcher Cyc. Corp. § 4198 (updated Sept. 2021) ("The bylaws become an integral part of the contract [between the members of a corporation] as a matter of law"); *First Fla. Bank, N.A. v. Fin. Transaction Sys., Inc.*, 522 So. 2d 891, 892 (Fla. Dist. Ct. App. 1988) ("It is firmly established that a corporation is prohibited from amending its bylaws so as to impair a member's contractual right.").

that [doctor] was an intended third party beneficiary of" hospital bylaws establishing "contract for privileges between [chief of staff] and the hospital")).)

The panel denied the Estate's petition for rehearing. (7/7/22 Order.) Thus, there now exists the panel's decision that "the School's bylaws could not qualify as an enforceable contract" (3/30/22 Order at 2-3) and the contradictory ruling from this Court that "bylaws are indeed a contract—and … we enforce those bylaws according to their terms." *Nevada State Educ. Ass'n v. Clark Cnty. Educ. Ass'n*, 137 Nev. 76, 85, 482 P.3d 665, 674 (2021).

In *Nevada State Education Association*, this Court discussed union bylaws, similar in nature to a nonprofit school's bylaws. The Court explained that the "individual members are not the only parties to these agreements," as they bind the union as well. *Id.*, 137 Nev. at 83, 482 P.3d at 672. Here, too, the School's 1990 and 1999 bylaws bound the School itself, as well as its Board members. Those bylaws clearly provide "The name of the Corporation is The Milton Schwartz Hebrew Academy and will remain so in perpetuity." (27 App. 6612, 6629.)

As in *Nevada State Education Association*, "the bylaws are indeed

a contract—and the district court erred by holding they were not.… And ultimately, there is only one reasonable interpretation of the bylaws." 137 Nev. at 85, 482 P.3d at 674. Bylaws stating that the School would be named "The Milton Schwartz Hebrew Academy" "in perpetuity" can mean only one thing: that the School must bear Milton Schwartz's name forever.

As the so-called Delaware of the West, it is important for Nevadans and those doing business in Nevada to know that bylaws will be enforced. This petition for en banc reconsideration should be granted to ensure uniformity of this Court's decisions on the enforceability of bylaws.

II.

NAMING RIGHTS CONTRACTS NEED TO BE ENFORCED EVEN IF – AND ESPECIALLY WHEN – A BIGGER DONOR COMES ALONG

With names of airports, stadiums, and schools being the frequent subject of naming rights agreements, this case presents the important public policy issue of when naming rights agreements will be enforced.

Offering naming rights as a charitable fundraising technique "has

exploded since the mid-1990s." William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?*, 2016 MICH. ST. L. REV. 1267, 1271 (2016). "Donors emblazon their names on all sorts of real and personal property from the otter playground at the Louisville Zoo to the restrooms at Harvard Law School[.]" *Id.* at 1273 (footnotes omitted).

To keep generating funds for charitable organizations, donors need to know that their naming rights will be enforced. While the state generally "limits dead hand control through the rule against perpetuities, . . . the state strikes a more generous bargain" with charitable donors. Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114 (1993). They "get to extend their control indefinitely" because "[i]n exchange for perpetual donor control, society gets wealth devoted to recognizably 'public' purposes." *Id.*; *see generally* NEV. CONST. art. 15, § 4 (allowing perpetuities "for eleemosynary purposes").

Without enforcement, some organizations will seek "to escape the donor's terms and perhaps even to remarket the naming privilege." John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375,

388 (2005).

That is what happened here when subsequent donors came along with more money decades after the school had already given perpetual naming rights to Mr. Schwartz. Legally, the amount of donations in 2008-09 is irrelevant to the enforceability of the School's agreement with Mr. Schwartz. Yet, in closing argument to the jury, the School consistently referred to the size of the later donations to suggest that should deny enforceability. (*See, e.g.*, 18 App. 4417;[6] 18 App. 4427.[7])

Refusing to enforce Mr. Schwartz's naming-rights agreement because of a larger donor is wrong. In a similar case where Augsburg College solicited "money in exchange for [the college's] promise to name the wing after" the donor, the court noted:

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[6] "The Adelson's put $3.8 million into that building as part of the refurbishment. They put three times, five times . . . the amount of money that Milton Schwartz put into that building and yet—Jonathan Schwartz says my father's name goes on everything. And it is infinitesimally small."

[7] "They want you to say that the agreement with the Adelson's is a breach of Milton Schwartz' agreement, which means . . . the Adelson agreement would be null and void. Do they—I guess they want the School to pay back the Adelson's a hundred million dollars. That's what that would mean. That's what he is asking you without being obvious about it. Oh, well, forget their deal, because my dad had a deal 30 years ago."

> Nonprofit corporations, for-profit corporations, and individuals, are expected to honor their commitments. Courts of law and equity enforce legal contracts. . . . The keeping of one's promise honors us all.
>
> We suggest it would be startling news to Augsburg's alumni that their college's "charitable and educational mission" includes specifically soliciting contributions for a particular purpose, formalizing that solicitation by a specific vote of the board of regents, and then claiming the power to say, "Oops, we changed our mind. We are not going to give your money back, instead we are going to keep it."

Stock v. Augsburg Coll., No. C1-01-1673, 2002 WL 555944, at *6 (Minn. Ct. App. Apr. 16, 2002) (footnote omitted); *see also Tenn. Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 118 (Tenn. Ct. App. 2005) (requiring university to return money donor paid in 1933 for naming rights, as courts "are not at liberty to relieve parties from contractual obligations simply because these obligations later prove to be burdensome or unwise").

Mr. Schwartz's naming rights agreement must be enforced, not only because it is the right—and legal—thing to do, but also because it will assure donors everywhere that their naming rights will be respected.

III.

THIS COURT SHOULD CLARIFY THAT SEPARATE BREACHES OF THE SAME CONTRACT TRIGGER SEPARATE LIMITATIONS PERIODS

This case is also the perfect opportunity for this Court to clarify the precedential legal issue of when separate contractual breaches give rise to separate limitations periods. As recounted above, the School did not breach the naming rights agreement with Mr. Schwartz all at once. At first, the Adelson Educational Campus and Milton I. Schwartz Hebrew Academy coexisted. (16 App. 3774.) But then the School began a war of attrition, removing Mr. Schwartz' name from the entrance sign, from the letter head, from the corporation's name, from the middle school, and eventually from the elementary school building – but that latter act did not occur until after this lawsuit had commenced. (14 App. 3445, 3452, 3462–63; 15 App. 3623–25; 16 App. 3772, 3774, 3777–80, 3876, 3787; 17 App. 4009–10, 4028; 27 App. 6676–77, 6683.)

"[I]t would be illogical to begin the statute of limitations before the [claimant] even has a justiciable claim for breach of contract." *Grayson v. State Farm Mut. Auto. Ins.*, 114 Nev. 1379, 1381, 971 P.2d 798, 799 (1998); *see also Mullins v. Rockwell Internat. Corp.*, 936 P.2d 1246, 1251 (Cal. 1997). And where "independent acts cause independent injuries,

each act is separately actionable, and the statute of limitations begins to run separately with each alleged breach." *Pritchard v. Regence Bluecross Blueshield of Oregon*, 201 P.3d 290, 292 (Or. App. 2009). So a later, material breach is separately actionable from an earlier one:

> [A]lthough, by delay for the statutory period, the injured party may lose its right to recover damages for the slight breach that has already occurred as a separate injury, if later the breach becomes material, or another and a material breach is committed, the statutory period in an action for the entire breach of the contract should be calculated from the time when the plaintiff was first able to sue for an entire breach of the contract.

31 WILLISTON ON CONTRACTS § 79:16 (4th ed. updated July 2019); *see also Merrill v. DeMott*, 113 Nev. 1390, 1400, 951 P.2d 1040, 1046 (1997) (waiver of right to collect rent in some months "does not relinquish his right to collection of rent for any [other] period"); *Seaboard Sur. Co. v. United States ex rel. C. D. G., Inc.*, 355 F.2d 139, 144–45 (9th Cir. 1966) (waiver of breach from delayed delivery did not preclude action for later breach based on different behavior); *Fred Ezra Co. v. Psychiatric Inst. of Washington, D.C.*, 687 A.2d 587, 589 n.3 (D.C. 1996) (rejecting argument "that if one claim arising out of a contract is barred by the statute of limitations, all must be barred"); *Nix v. Heald*, 203 P.2d 847, 850

(Cal. Ct. App. 1949) (similar).

If "the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct… parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 880 (Cal. 2013). This is why courts "have long settled that separate, recurring invasions of the same right can each trigger their own statute of limitations." *Id.*[8]

Here, the removal of Mr. Schwartz's name from the middle school,

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[8] *See also, e.g.*, *See Carroll v. City & Cty. of San Francisco*, 254 Cal. Rptr. 3d 519, 524 (Cal. App. 2019) (because the duty to refrain from discrimination is ongoing, "an unlawful event occurred each time plaintiff received a discriminatory payment, such that a new limitations period applies to each allegedly discriminatory check"); *Henry v. Bank of Am.*, 147 A.D.3d 599, 601 (N.Y. Sup. Ct. App. Div. 2017) (the continuous wrong "doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party" and there is "a series of independent, distinct wrongs") (quotations and citations omitted); *Dave & Buster's, Inc. v. White Flint Mall, LLLP*, 616 F. App'x 552, 557–58 (4th Cir. 2015) (action not time-barred where breaching party "was subject to an ongoing obligation" because for each breach, "accrual of the statute of limitations began anew"); *Alderson v. State*, 806 P.2d 142, 145 (Or. 1991) ("each deduction [from salaries] was a separate breach, … and the statute began to run separately as to each alleged breach").

from signage, from the school's letterhead, from the school corporation, and ultimately from the elementary school were all separate breaches, separately actionable. As it is undisputed that the Executor did not know about the School's corporate name change until after this lawsuit was filed (14 App. 3428) and that the School did not remove Mr. Schwartz's name from the elementary school until after this litigation was commenced (16 App. 3787), the statute of limitations cannot possibly have run for *those* breaches.

IV.

THIS COURT SHOULD CLARIFY THAT BREACH OF THE IMPLIED COVENANT IS SUBSUMED UNDER BREACH OF CONTRACT

The panel affirmed the district court's refusal to give a jury instruction on the implied covenant of good faith and fair dealing, reasoning "the Estate did not plead a breach of the covenant of good faith and fair dealing claim." (3/30/22 Order at 4.) But where the "pleadings identify [(1)] the contract which is the basis for [plaintiff's] implied covenant claim," (2) the defendant's conduct claimed to constitute the breach of the covenant, and (3) resulting damages, this is sufficient to "present a claim for breach of the implied covenant of good faith and

fair dealing." *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1278–79, 886 P.2d 454, 457 (1994).

Properly analyzed, breach of the implied covenant is not "a free-standing cause of action, as good faith is part of a contract claim and does not stand alone." *Avis Rent A Car Sys., LLC v. City of Dayton*, No. 3:12-CV-399, 2015 WL 5636897, at *7 (S.D. Ohio Sept. 25, 2015) (quotations omitted); *see also, e.g.*, *Krukrubo v. Fifth Third Bank*, 2007 WL 4532689, at *5 (Ohio App. 2007) ("a claim for breach of contract subsumes the accompanying claim for breach of the duty of good faith and fair dealing"). Indeed, a "determination by the jury that the implied covenant was breached will give rise to an award of contract damages," *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1047, 862 P.2d 1207, 1209 (1993) – the same damages the Estate alleged in its contract claim, which subsumed and included a breach of the implied covenant. (28 App. 6808.)

Here, the Estate did not need to raise breach of the implied covenant of good faith as an independent tort claim. Rather, the Estate pled that the school "has breached its agreements and promises" and failed to comply with the promises memorialized in the Sabbath letter (28

App. 6808), which suffices to raise a theory of *contractual* liability under the implied covenant. *See Hilton Hotels Corp. v. Butch Lewis Prods., Inc.,* 107 Nev. 226, 233–34, 808 P.2d 919, 923 & n.5 (1991) (allegation that defendant "breached their obligations to [plaintiff] under the . . . agreement" sufficient to raise implied-covenant theory). It is not a separate cause of action. *Id.*[9]

"Nevada is a notice-pleading state,"[10] and as long as the Estate put the School on notice of the facts comprising its claim, it is immaterial whether the Estate identified the precise legal theory of "breach of the implied covenant of good faith and fair dealing." "'Notice pleading' requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578–79, 908 P.2d 720, 722–23 (1995) (footnote omitted) (while plaintiff

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[9] *See also Montoya v. PNC Bank, N.A.*, 94 F. Supp. 3d 1293, 1325 (S.D. Fla. 2015) ("good faith is part of a contract claim and does not stand alone") (quoting *Lakota Loc. Sch. Dist. Bd. of Edn. v. Brickner,* 671 N.E.2d 578, 584 (Ohio Ct. App. 1996)).

[10] *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) ("thus, our courts liberally construe pleadings to 'place into issue matters which are fairly noticed to the adverse party'" (quoting *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984))).

"did not specifically use the term 'constructive discharge,'" he "repeatedly set forth facts which supported such a legal theory"); *Michoff*, 108 Nev. at 936–37, 840 P.2d at 1223 (rejecting argument that respondent "did not plead any contractual claims" where her pretrial pleadings and trial statement put appellant on notice that she was claiming "an ownership interest … based on an implied" or express agreement "to acquire and hold property as though the parties were married"); *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. Adv. Op. 33, 468 P.3d 862, 878 (Nev. App. 2020) ("'A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading.'" (quoting *Liston*, 111 Nev. at 1578, 908 P.2d at 723)).

The refusal to instruct the jury on breach of the implied covenant was prejudicial because even if the bylaws specified only that the corporation had to bear Mr. Schwartz's name, the school violated the spirit and intent of the agreement by taking Mr. Schwartz's name off the school's letterhead and signage. *Cf. Allegheny Coll.*, 159 N.E. at 175 (where donor gave money with the condition that the gift "should 'be known as the Mary Yates Johnston Memorial Fund,'" the "purpose of

the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial").

This Court should clarify that breach of the implied covenant need not be separately pled from a breach of contract claim where both seek the same contractual damages.

CONCLUSION

For the above reasons, this petition for en banc reconsideration should be granted.

DATED this 22nd day of August, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 40A(d), because it contains 5,844 words.

3. I certify that I have read this brief, 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 22nd day of August, 2022.

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I certify that on August 22, 2022, I submitted the foregoing "Petition for Appellant's Petition for En Banc Reconsideration" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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