IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION, Appellants, vs. DR. NICHOLAS G. COLON, Appellee.	)	**Supreme Court No. 78517** District Court Case No. A782057

On Appeal from the Eighth Judicial District Court

APPELLEE'S (DR. COLON'S) PETITION FOR EN BANC CONSIDERATION

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PETITION

NOW COMES Plaintiff/Appellant, Dr. Nicholas Colon ("Plaintiff"), and herewith petitions pursuant to NRAP 40A for *en banc* reconsideration of the Decision of a panel of this Honorable Court issued July 30, 2020, and published at *Taylor v. Colon*, 468 P.3d 820, 822 (Nev. 2020). This Petition is premised upon both grounds stated in NRAP 40A, to wit: 1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court and 2) the proceeding involves a substantial precedential, constitutional or public policy issue. Regarding uniformity, the Decision in this matter conflicts with *Rosen v. Tarkanian*, 453 P.3d 1220 (Nev. 2019) and other authority. Concerning the constitutional issue of the right to trial by jury, Nev. Const. Art. 1, § 3, presented in this case is an issue of first impression in Nevada and the Decision is at odds with the majority of jurisdictions that have considered the issue. Moreover, as shown below, the application in the Decision presents irreconcilable anomalies between the constitutional provision and its application. Certainly, as a constitutional issue of such gravity it merits consideration of the entire Court with a decision that is internally consistent and consistent with plain meaning.

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POINTS AND AUTHORITIES

A. FACTS AND BACKGROUND

On July 30, 2020, a panel of this Honorable Court filed its Decision in the above matter reversing the District Court's denial of Appellants/Defendants' (collectively "Defendants") Motion to Dismiss under Nevada's anti-slapp statute, NRS 41.635 to 41.670. *Taylor v. Colon*, 468 P.3d 820, 822 (Nev. 2020)("Decision"). The Plaintiff's claim was for defamation. App. 001-005. The undisputed facts include a presentation by Appellant/Defendant James Taylor ("Taylor") at a conference put on by Appellee/Defendant American Gaming Association ("Association") to approximately 300 attendees. It appears that Taylor spoke as a representative of his employer, the Appellant/Defendant Nevada Gaming Control Board ("Board").

Plaintiff premised his action on Taylor allegedly referring to Plaintiff as cheating at gambling. Such a statement, if false, is defamation *per se*.[1] Supporting the fact that Taylor actually made the communication is the Plaintiff's declaration, the fact that Taylor's presentation was on "Scams Cheats, and Black Lists," and the Declaration of a separate attendee at Taylor's presentation who recalled that Taylor identified an alleged cheating device being used by Plaintiff at blackjack. App. 058,

[1] *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993), *receded from in part on unrelated grounds*, *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277, 283 (2005).

¶¶ 53, 55; App. 058, ¶ 4, Taylor Declaration, App. 024, ¶ 5 and App. 078, ¶ 57; and App. 058, ¶¶ 6-8, respectively. Thus, there was overwhelming evidence before the District Court that the Plaintiff was the subject of a communication which, if false, constituted defamation *per se*.

The evidence was also overwhelming that the ascription of criminality to the device held by the Plaintiff was false. The crime at issue was the alleged illegal use of a device under NRS 465.075.[2] The alleged device is identified by the Defendants as an ordinary and ubiquitous crowd counter as depicted at App. 031. Aside from the fact that this device is not "designed, constructed, altered or programmed to obtain an advantage at playing any game in a licensed gaming establishment" as required by the statute, undisputed evidence showed that the crowd counter could not be used in the prohibited manner. *See* Declaration of Elliot Jacobson, App. 061, ¶ 10; Declaration of Michael Aponte, App. 063, ¶ 10;[3] *accord* Plaintiff's Declaration, App. 075; ¶¶ 29-31, 35. Further, Plaintiff presented a reasonable explanation for his

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[2] This statute criminalizes the "possess[ion] . . . with the intent to use any . . . mechanical device, which is designed, constructed, altered or programmed to obtain an advantage at playing any game in a licensed gaming establishment or any game that is offered by a licensee or affiliate, including, without limitation, a device that: **1.** Projects the outcome of the game; **2.** Keeps track of cards played or cards prepared for play in the game; **3.** Analyzes the probability of the occurrence of an event relating to the game; or **4.** Analyzes the strategy for playing or betting to be used in the game . . .."

[3] Reference to these declarations evinces that both affiants are qualified experts at gaming.

possession of the device divorced from affecting games played by him. Plaintiff's Declaration, App. ¶¶ 32-35. Also indicative that the crowd counter could not be used for cheating is the fact which, as recognized in the District Court, Taylor did claim could be used in the strategy of card counting and did not offer how it could be so used, although that is what he charged Plaintiff with in his communication. District Court Decision, App. 185: 20-22. Further, as expressly recognized by the District Court, Taylor never represents to the District Court that he was without knowledge of the falsity of the communication, thusly determining that all evidence is supportive of the statement being false. App. 186: 5-6.

Evidence before the District Court also demonstrated that Taylor was the Board's expert on the criminal application of Nevada's gaming laws. He was the Deputy Chief for the Enforcement Division of the Nevada Gaming Control Board. App. 027. That is second in command at the law enforcement arm of the Board. *Accord* "About" Statement, <https://gaming.nv.gov/index.aspx?page=46> (Viewed 10/19/20), *and see* Taylor Declaration, App. 024, ¶ 3. As he was speaking on the subject of Scams Cheats, and Blacklists," this establishes him as an expert on such matters by admission. Taylor has twenty-five years of experience as a law enforcement officer. App. 024, ¶ 2. This was the seventh such presentation he had made. Taylor Declaration, App. 025, ¶ 7, *and see* <https://www.reviewjournal.com/

business/casinos-gaming/basic-casino-cheating-scams-hardest-to-catch-gaming-experts-say/> (viewed 10/19/20) and <https://lasvegassun.com/news/2014/may/22/casino-gaming-cheats-are-increasingly-sophisticate/> (viewed 10/19/20) for other descriptions of these earlier presentations where Taylor was held out as the State's expert on cheating.[4] In short, the evidence showed that Taylor, by position, training, experience, and reputation, was a person who necessarily knew what could and could not be used in violation of NRS 465.075. And the District Court so found. That is, someone in his position would necessarily recognize that the possession of the crowd counter was not criminal, and therefore, he knew his communication was false. *See* District Court Decision, App. 186: 6-8 ("[T]he evidence shows that Mr. Taylor most likely knew that the crowd counter could not be used as a cheating device . . ..").

On *de novo* review on appeal, the panel of this Court issued a decision finding that Appellants demonstrated that Taylor's presentation was made in good faith. *Taylor v. Colon*, 468 P.3d 820, 825 (Nev. 2020). This is the issue upon which this matter turns, and the Decision holds that this is to be made on the evidence presented

[4] As an aside, it is demonstrable that Taylor made false or misleading statements in his Declaration. For example, at App. 25, ¶ 25, Taylor swears to Plaintiff pleading to a crime, and couches such averment in without mentioning that the plea was a submission under a *nolo* plea with no acknowledgement of guilt. App. 069, ¶ last. Certainly, his attorney advisors necessarily knew that this was inadmissible under NRS 48.125(2), but the statement was constructed in a way to disingenuously attempt to avoid this prohibition in violation of the statute.

by the court evaluating, to the exclusion of any jury, whether this is shown by a preponderance of the evidence. This basis for such finding was violative of both the Plaintiff's right to a trial by jury and, in application, it conflicts with other authority mandating the procedure for reaching such a conclusion.

B. ANALYSIS

1. THE DECISION'S DETERMINATION THAT NEVADA'S ONSTITUTIONAL RIGHT TO TRIAL BY JURY WAS NOT INFRINGED BY THE APPLICATION OF ITS ANTI-SLAPP STATUTE RUNS CONTRARY TO THE MAJORITY RULE AND IGNORES SUBSTANTIVE AND IMPORTANT RIGHTS AND PROTECTIONS HELD BY LITIGANTS

The right to trial by jury is ingrained in our civilization. Sir William Blackstone called it the "best preservative of English liberty." 3 William Blackstone, *Commentaries*. Infringing on this right was one of the foundational complaints of the American Founders when they declared independence from King George III. *The Declaration of Independence* ¶ 20. Our founding fathers included the right to trial by jury in The Bill of Rights. U.S. Const. Amd. 7. Clearly, the protections afforded in the Nevada Constitution are of the highest order, and protection of them is the charge of every branch of Nevada government. And here, we are dealing with the infringement of a fundamental and sacred constitutional right. *See Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007).

In Nevada, our original constitutional convention found this right so sacrosanct as to include it in Nevada's founding document. It is construed as the very same right found in the United States Constitution. *Andersen v. Eighth Judicial Dist. Court*, 448 P.3d 1120, 1123 (Nev. 2019)("[T]he right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution."). This right continues today, and since Nevada's founding in 1864 it has constrained the legislature and the courts from infringing upon a right to a jury.

In the Decision at issue a litany of cases purport to address the question posed in this case, but they do not. The premise in the Decision is that anti-slapp statutes have been found constitutional in a number of states. There is, nonetheless, a discrepancy between the anti-slapp statutes found not to infringe on the right to trial by jury, and those that find that the statutes do infringe upon the right to a trial by jury. None of the decisions cited in the Decision uphold the constitutionality of a state's anti-slapp statute where a court is to determine an issue of fact by a preponderance of the evidence, and all the cases cited in the Decision or by the Plaintiff indicate that such an anti-slapp statute is unconstitutional.

For example, the Decision cites to *Landry's, Inc. & Hous. Aquarium, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018), for the proposition that "a movant's burden to establish a valid defense by a preponderance of the evidence under Texas' equivalent anti-SLAPP statutes does not violate a plaintiffs

right to a jury trial." *Taylor v. Colon*, 468 P.3d 820, 825 (Nev. 2020). It does not. Rather, the *Landry* court expressly finds that the alleged question of fact is immaterial to the disposition of the case, and there is no constitutional analysis appended to the decision. Simply, the alleged factual issue raised was non-justiciable and irrelevant, and the constitutional issue was never reached. In context, avoiding the constitutional analysis is essentially an admission that the analysis would prove problematic, or even determinative, regarding the constitutionality of Texas' anti-slapp statute, and in this sense the decision supports Plaintiff's assertion.

The Decision relies on other cases of similar import, to wit: . *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 481, 969 P.2d 564, 574 (1999); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016); and *Handy v. Lane Cty.*, 360 Or. 605, 607, 385 P.3d 1016, 1017 (2016). In *Handy* the Oregon Supreme Court went into the legislative history of Oregon's anti-slapp legislation, and determined that the standard applicable on a plaintiff was functionally identical to the standard on a summary judgment motion. That is, if a reasonable trier of fact could find the issue in favor of the proponent, then the anti-slapp statutes would not bar suit. This was critical in the Court finding the statute constitutional, and the Court expressly noted that this was an addition to the statute at variance with California's statute in order to uphold the constitutionality of the anti-slapp legislation. Nevada did not make this addition, Nevada's statute requires

proof by a preponderance, and the *Handy* decision, too, supports the analysis that the Nevada anti-slapp legislation is unconstitutional as a violation of the right to trial by jury.

Looking to *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), the Court was addressing an anti-slapp statute which required that the Plaintiff "demonstrate[] that the claim is likely to succeed on the merits." *Id* at 1227. Despite this clear language, in order to save the constitutionality of the statute, the Court of Appeal literally rewrote this language (calling it a construction) requiring only that the Plaintiff demonstrate, "whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id* at 1232. That is, the burden to defeat an anti-slapp motion is not "likely to succeed on the merits" as the statute states, but whether the plaintiff has presented evidence sufficient to defeat a classic summary judgment motion. This is a materially different standard than that applied in the Decision here, the current decision only requires that the Defendant show by a preponderance that his statement was made in good faith. Simply, Nevada's anti-slapp statute would be constitutionally infirm under the analysis applied by the Court in *Mann*, and the Decision's reliance upon *Mann* is misplaced.

Finally, looking to *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 481, 969 P.2d 564, 574 (1999), there the Court took language similar to Nevada's anti-slapp language and noted a, "potential deprivation of jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to *prove* the specified claim to the trial court . . .." To address this recognized unconstitutionality, like the cases above, the Court rewrote the statute and held that it reads "the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim." Thus, in order to be constitutional the *Briggs* court reconfigured California's anti-slapp standard to differentiate it from the standard applied in the Decision. That is, the Court in the Decision is relying upon an analysis which confirms that the standard it applied is violative of Nevada's right to trial by jury.

In contrast to these cases relied upon in the current Decision, the Decision holds that upon a showing "by a **preponderance** of the evidence that the plaintiff's claim is based upon a 'good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern,'" the Defendant is entitled to dismissal of the Plaintiff's Complaint. (Emphasis added). That is, the court, not a jury, determines whether or not a preponderance of evidence supports the claim. This is the embodiment of the jury's role in determining cases and this is what the analysis here requires in contrast to the

Decision issue. All the cases cited in the Decision to support the constitutionality of Nevada's anti-slapp statute effectively rejected this standard applied in this case as a necessary prerequisite to upholding the constitutionality of their anti-slapp statute, and here, too, such a standard must be rejected if Nev. Const. Art. 1, § 3 is to retain any validity.

Against the inapplicable authority in the Decision discussed above, other courts addressing this issue where the court must make a factual finding regarding likely success based on a preponderance of the evidence have no issue with finding such statutes unconstitutional as an infringement on the right to trial by jury. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017); *Davis v. Cox*, 183 Wash. 2d 269, 295, 351 P.3d 862 (2015); and *Op. of Justices*, 138 N.H. 445, 451, 641 A.2d 1012, 1015 (1994): *Hi-Tech Pharm., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 (D. Mass. 2016)(Finding that judicially determining a preponderance in an anti-slapp suit infringes on the right to trial by jury as it involves "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."); *accord In re Gawker Media LLC*, 571 B.R. 612, 633 (Bankr. S.D.N.Y. 2017).[5] Certainly, this split of authority on

[5]There the court noted:

> [T]he special motion requires the Court to evaluate the facts and make factual findings in determining whether the plaintiff has shown a probability of success. Thus, the court must decide disputed factual issues without the benefit of a trial and its attendant protections not the

the general question merits review by the full Court on this critical constitutional issue. And considering the fact that Nevada is currently the only state apparently recognizing that court can make a specific and critical factual determination based on a preponderance of the evidence without violating the claimant's right to a trial by jury, the need for such full review is even more compelling.

2. THE DECISION APPLIES A STANDARD CONTRARY TO APPLICABLE NEVADA AND NATIONAL PRECIDENT IN DETERMINING THAT APPELLANT'S SHOWED THAT THEY HAD A LIKLIHOOD OF SUCCESS ON THE MERITS

Even if the test from the anti-slapp statutes passes constitutional muster, the panel decision runs afoul of Nevada precedent in its application of that test. Nevada precedent expressly provides that a determination of whether or not Plaintiff survives an anti-slapp motion turns on a preponderance of the evidence as to whether a communication is made in good faith. *Rosen v. Tarkanian*, 453 P.3d 1220, 1223 (Nev. 2019) The Decision, admittedly, tips its hat to this standard, but fails to apply it. *Id*, at 824.

The Decision's analysis approaches the determination on Taylor's word with no analysis of the evidence on the basis of a preponderance. Instead, its analysis evaluates Taylor's evidence to the exclusion of the Plaintiff's evidence. This is

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least of which is the ability to cross-examine witnesses. It is not surprising that the highest courts of two states have concluded that comparable anti-SLAPP statutes violate the right to a jury trial under that particular state's constitution.

clear when the Decision states, “We do not weigh the evidence, but instead accept the plaintiffs (sic) submissions as true and consider only "whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." The decision essentially says that the Plaintiff’s evidence is irrelevant.

Curiously, a determination of a preponderance is impossible at law without weighing the evidence as the Decision states the Court will not do (“We do not weigh the evidence.”). But in deciding by a preponderance, as the Decision purports to do, weighing the evidence is its very charge. The meaning of a “preponderance of the evidence” in Nevada and universally provides that a “[p]reponderance of the evidence means such evidence as, **when weighed with that opposed to it,** has more convincing force and the greater probability of truth." *Bonacci v. State*, 96 Nev. 894, 898 n.6, 620 P.2d 1244, 1247 (1980)(emphasis added); *State v. Johnson*, 2019 MT 277N, ¶ 1, 398 Mont. 447, 455 P.3d 456 (Mont. 2019); *Thornton v. State*, 139 Ga. App. 483, 487, 228 S.E.2d 919, 922 (1976); *State v. Stockett*, 278 Or. 637, 640 n.3, 565 P.2d 739, 741 (1977). Here, as mentioned at the onset, questions are always determined on “all the evidence,” but even despite the express direction in the statute to the contrary, the Court here has determined the question solely on the basis of one side’s evidence. That is not determining whether there was a good faith communication, but instead,

determining that the communicator has the unilateral authority to declare himself immune, even with a lie.

In making this statement the Decision relies upon *Coker v. Sassone*, 432 P.3d 746, 750 (Nev. 2019), which was a denial of an anti-slapp motion to dismiss. The context in *Coker* was that the Defendant had failed to come forward with any evidence that the statement was in good faith, and the language relied upon in the decision was pointing out that that was a burden on the Defendant. Curiously, the District Court found the current circumstances to parrot the facts in *Coker*. *Compare Coker* with District Court Decision, App. pp 194-195. It did not suggest, as the panel adopted, that the decision be made solely on the basis of whether the Defendant's evidence demonstrates, to the exclusion of the Plaintiff's evidence, that the statement was made in good faith, but included Plaintiff's evidence in the evaluation as the law requires.[6]

In this respect, how can a preponderance, as Nevada's jurisprudence requires, be made by only looking at the evidence on one side of the equation. Simply, it cannot, and the Decision contradicts the test in *Rosen*, *supra.*

On this, the Decision states,

[6] Note that the Decision suggests that it is irrelevant that the most qualified person in Nevada concerning what is and is not illegal concerning gaming crimes does not have an opinion as to whether that which he called cheating is in fact cheating. This omission is the Plaintiff's evidence of knowledge and it is not irrelevant.

> Taylor's declaration states that he acquired all of the information, videos, and photographs used in his presentation through GCB investigations, and that the information contained in his presentation was true and accurate. This declaration shows that the gist of Taylor's presentation was either truthful or made without knowledge of its falsehood.

Thus, Defendants escape liability on the mere affidavit of the Defendant without any analysis of the countervailing evidence the District Court used to determine a preponderance. *Accord* District Court Decision, App. 185-186.

If, as the Court stated, it accept[s] the plaintiffs (sic) submissions as true," then it is true that the crowd counter cannot be used criminally, and it is true that it cannot be used in counting cards. Against this, the Decision accepts an averment from Taylor providing that based on the record in the Gaming Control Board's files, the statements were true. But Taylor conspicuously avoided stating that he, personally, believed they were true, and the "accepted" evidence of the Plaintiff shows that those records were necessarily false. Moreover, Taylor played a game with his affidavit stating that his presentation was a true and accurate presentation of the information maintained by the Nevada Gaming Control Board. App. 25: 2-3. This is no different than Taylor stating that he found misinformation in the information maintained by the Nevada Gaming Control Board, and published the misinformation while knowing the information was false. Nothing indicates, one way or another, whether he believed the information was true. In this sense, his

affidavit parrots the *Coker* defendant's assertions, and like the Court in *Coker*, the District Court correctly denied the anti-slapp motion. District Court Decision, App. 173: 6-7. Simply, when all the evidence is considered and a preponderance of the evidence standard is applied, the District Court's determination that "Mr. Taylor most likely knew that the crowd counter could not be used as a cheating device" is foursquare an appropriate conclusion. District Court Decision, App. 173:7-8.

The current decision is also ambiguous and unworkable. The Decision states that "the prima facie evidence standard requires the court to decide whether the plaintiff met his or her burden of production to show that a **reasonable trier of fact** could find that he or she would prevail." (Emphasis added**).** Taylor v. Colon, 468 P.3d 820, 824 (Nev. 2020). That is the summary judgment standard. This is clearly at odds with the applied holding in the very same paragraph of the decision requiring "the court must only decide whether the plaintiff demonstrated with prima facie evidence a probability of prevailing on the claim." To be consistent, even in these statements, the latter statement would have to read, '"the court must only decide whether the plaintiff demonstrated with prima facie evidence that a reasonable fact finder **could** find a probability of prevailing on the claim." (Emphasis added). And then the Decision adds a third possible test, the test applied, mandating that the case be dismissed if the Defendant shows the belief in the truth regardless of the evidence to the contrary. These are three vastly different

standards, all are found in the decision, and absent full court review, the bar and citizens of Nevada are left without meaningful guidance.

Here the Plaintiff maintained that, by a preponderance of the evidence, the communication by James Taylor can neither be truthful nor made without knowledge of its falsehood. As the Opinion acknowledges, if this can be shown at that level by the Plaintiff, then the anti-slapp motion must be denied.

The mandated preponderance of the evidence standard required that all the evidence be weighed against Taylor's claim that he believed the truth of his assertion. It was not, and indeed, none of it even entered into the calculation within the Decision. Thus, the Opinion misapprehended the standard, applied the wrong standard, and reached an improper result. It should be subjected to *en banc* consideration to address these published issues and inconsistencies.

C. CONCLUSION

Certainly, few cases merit full court consideration under Nevada's appellate procedures. Nonetheless, this is one of those cases. There is a jury question here, but a jury has been denied, but the Nevada Constitution requires that a jury not be denied. No less than eight other jurisdictions have weighed in on the constitutional import of this precise question. While the Decision claims mixed results, careful review of the foreign precedent discloses a consistent rule which would mandate a finding of unconstitutionality of Nevada's anti-slapp legislation as applied in the

Decision. Something this weighty and so clearly subject to differing analysis requires full court consideration.

Further, we have a situation where a District Court and the Supreme Court panel reached diametrically opposed conclusions on the very same issues applying what appears to be the same law. It is a question of fact that both determined, clearly implying a right to a jury trial, but neither find such right. This has resulted in no less than three voiced and different rules of decision in the same ruling. This must be cleared up, and again, *en banc* review appears appropriate.

Wherefore, Plaintiff request that *en banc* review be authorized, that supplemental briefing occur, and that matters at this level of importance be scheduled for full hearing and oral argument.

DATED this 29th day of October, 2020.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 40A

1. I hereby certify that the Petition for En Banc Reconsideration and supporting points and authorities complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

_X_ It has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14 pt.

____ It has been prepared in a monospaced typeface using ___ with ___.

2. I further certify that this brief complies with the page- or type volume limitations of 40A because it is either:

_X_ Proportionately spaced, has a typeface of 14 points or more, and contains 4395 words; or

___ Monospaced, has 10.5 or fewer characters per inch, and contains____ words or lines of text; or

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__ Does not exceed 10 pages.

DATED this 29th day of October, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Nersesian & Sankiewicz, and on the 29th day of October, 2020, a true and correct copy of the foregoing APPELLEE'S (DR. COLON'S) PETITION FOR EN BANC CONSIDERATION was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

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