IN THE SUPREME COURT OF THE STATE OF NEVADA

SILVERWING DEVELOPMENT, a Nevada corporation; J CARTER WITT III, an individual,

Appellants,

vs.

NEVADA STATE CONTRACTORS BOARD

Respondents.

Supreme Court No.: 79134

APPEAL FROM JUDICIAL REVIEW OF ADMINISTRATIVE ORDER
SECOND JUDICIAL DISTRICT COURT
IN AND FOR WASHOE COUNTY, NEVADA
HONORABLE ELLIOT SATTLER, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock:

Appellant J Carter Witt III is an individual.

Appellant Silverwing Development is wholly-owned by Appellant J Carter Witt III.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

HUTCHISON & STEFFEN, PLLC
THE ALLISON LAW FIRM CHTD.
MCDONALD CARANO LLP
CHRISTENSEN JAMES & MARTIN
LAXALT & NOMURA, LTD.

3. If litigant is using a pseudonym, the litigant's true name: N/A.

DATED: November 19, 2019.

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Introduction[1]

Nevada contractors are licensed by the Nevada State Contractors Board (NSCB). Some contractors have unlimited licenses, which allow them to work on projects without any monetary limits on their construction contracts. Other contractors, however, have limited licenses. Such a contractor can only work on a project in which the monetary amount of the contractor's construction contract does not exceed the license limit. A general contractor is prohibited from knowingly entering into a contract with a subcontractor for work in excess of the subcontractor's license limit.

NRS 624.220(2), which is the statute requiring the NSCB to establish monetary limits on licenses, provides that the limit on a contractor's license is the maximum that the contractor may undertake "on a single construction site or subdivision site for a single client." There is no statutory definition of the phrases "single construction site" or "subdivision site." Nor has the NSCB ever adopted any administrative regulations defining those terms or providing any guidelines for contractors who are trying to comply with the statute. Instead, those phrases are applied by individual NSCB investigators based upon their own subjective individual predilections and their own individual experiences—applying factors known only to the individual investigators—without any public release of

[1] For ease of reading, this introduction will omit appendix citations, but citations will be provided for all of these facts later in this brief.

information that contractors can rely upon in determining whether they are violating license limitations for single construction sites or subdivision sites.

Appellant J Carter Witt, III (Witt) is a general contractor and developer. His companies are licensed in three states, including Nevada. He has built approximately 100 to 150 construction projects, including thousands of homes and apartments, and more than $1 billion in commercial property developments. One of his companies, appellant Silverwing, has held an unlimited license in Nevada for nearly 20 years. Silverwing has developed approximately 2,000 lots and homes, approximately 1,400 multi-family units, and numerous commercial projects in Nevada. In all this time, Silverwing has never once been accused of violating a statute or NSCB regulation; nor has Silverwing ever been subject to a claim of default on a debt, failure to pay a subcontractor, or failure to comply with any obligations or bonds related to any city or county in Nevada.

In 2017, Silverwing was building four different projects in the Reno-Sparks area, each of which involved buildings that were on separate lots, with separate building permits. NSCB received an anonymous tip and started investigating Silverwing for allegedly hiring a subcontractor to perform work in excess of its license limits. An investigator cited Silverwing for 33 alleged intentional violations of the statute; an administrative law judge (ALJ) found that the

violations occurred, imposing fines for each violation; and the district court affirmed the ALJ's decision.

The relevant statute is unconstitutionally vague, and it was applied in an unconstitutional manner. The district court's decision, if affirmed, will have mischievous implications for the future for the construction industry. Contractors will be at the mercy of the subjective predilections of NSCB investigators and ALJs, with no statutes or regulations providing guidance on when subcontractors are violating monetary limitations on construction projects. And if the NSCB continues to enforce the statute as it did in this case, the availability of subcontractors for construction projects will be drastically curtailed—perhaps even eliminated for some projects—driving up construction costs that will need to be passed on to consumers, and sometimes even prohibiting construction projects from being built altogether. For the reasons established in this brief, the district court's order must be reversed.

Jurisdictional Statement

This is an appeal from a district court order denying a petition for judicial review of an administrative decision. Such an order is appealable under NRS 233B.150.

The appeal was timely because the order denying the petition for judicial review was filed on June 21, 2019 (6 A.App. 1281); there was no written notice of

entry of the order filed by the NSCB; and the notice of appeal was filed on July 3, 2019. 6 A.App. 1289.

Routing Statement

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(11) and (12). This appeal involves the constitutionality of a statute. This is an issue of first impression involving the United States and Nevada Constitutions. Additionally, this is an important issue of statewide significance and public importance.

Statement of Issues

1. Whether NRS 624.220(2) is unconstitutionally vague, violating due process.
2. Whether NRS 624.220(2) violates equal protection, because it treats similarly licensed contractors differently, without a rational basis.
3. Whether the NSCB used its advisory opinion process in violation of a Nevada constitutional provision that precludes a delegation of power to an administrative agency.
4. Whether the decision by the ALJ was supported by substantial evidence on the issues of whether there was a subdivision site and a single construction site in this case.

Statement of the Case

The petition for judicial review was filed on January 17, 2019, challenging an administrative decision of the NSCB. 1 A.App. 1-5. After full briefing, the district court remanded the matter to the ALJ for clarification. 6 A.App. 1233. The ALJ then issued clarification (6 A.App. 1259), and the district court entered its order denying the petition for judicial review on June 21, 2019. 6 A.App. 1289. This appeal followed.

Statement of Facts

The facts in this matter were largely undisputed. Appellant Witt is the President and Qualifying Officer of appellant Silverwing Development (Silverwing). 1 A.App. 40. Silverwing maintains an unlimited monetary license and has developed thousands of homes, thousands of apartments, and over one billion dollars worth of commercial properties. 1 A.App. 40; 4 A.App. 940:10-12. Silverwing acted as the general contractor on the four projects at issue in this case, projects which are owned and were developed by Witt. 4 A.App. 915:22–916:4.

Silverwing has held the same unlimited license in Nevada for nearly two decades, and Silverwing never received a single citation from the NSCB prior to this case. 4 A.App. 945:12-18. There have been no claims of default on debts, failure to pay subcontractors, or failure to comply with any city and/or county obligations and bonds, despite the severity of the recent recessions. *Id.* Over the

course of nearly two decades in Nevada alone, Silverwing has developed approximately 2,000 lots and homes, constructed approximately 1,400 multi-family units, and brought numerous commercial projects to completion—all of which have provided a direct benefit to the public and the communities in which the developments were built. 2 A.App. 498-99; 3 A.App. 580-84; 4 A.App. 940:4-12.

Silverwing developed four projects at issue in this case: Edgewater at Virginia Lake Apartments and Edgewater at Virginia Lake Condos (collectively Edgewater); Fountainhouse at Victorian Square (Fountainhouse); and The Bungalows at Sky Vista (Bungalows). 3 A.App. 682-88. Witt was also an owner and managing member of the projects, each of which is comprised of multiple, separate buildings. 3 A.App. 538-41. Each building required its own separate submittal with unique municipal building department fees, plan checks, permits, inspections (city and private), and certificates of occupancy. 3 A.App. 677-80; 4 A.App. 942-45.

Silverwing did as is customary in the industry—it engaged subcontractors to perform work at the projects, and some of these subcontractors performed work on multiple buildings or sites within one project over an extended period of time. Mechanically, Silverwing set up its contracts with a schedule of values that delineated how much work a particular subcontractor would perform on each

building that received its own building permit within a particular project, and no subcontractor was guaranteed a right to perform work on every building. E.g., 4 A.App. 921-22. In doing so, Silverwing believed and understood that each site permitted and inspected separately was to be treated as a separate construction site, for purposes of subcontractor license limitations. 4 A.App. 943:23—945:9. The NSCB has not alleged, and the record does not reflect, that any of the subcontractors exceeded their license limit on a single permitted and inspected building. The alleged violations are premised on the aggregation of work across permitted buildings within the larger project as a whole.

NSCB received an anonymous tip regarding potential license limit violations for a subcontractor (1 A.App. 42), and on July 14, 2017, more than one year after the NSCB initiated its investigation, the NSCB filed its Complaint alleging four causes of action against Silverwing. 1 A.App. 25. The first and second causes of action alleged 30 violations each, premised on the application of NRS 624.220(2). 1 A.App. 26-31. The third and fourth causes of action alleged three violations each, premised on the use of a B-2 residential and small commercial contractor as a framing subcontractor. 1 A.App. 32.

Silverwing answered the Complaint, challenging the constitutionality of NRS 624.220(2). 2 A.App. 483-490. The contested administrative hearing was held on September 28, 2017. 4 A.App. 782. The key witness was Jeff Gore, who

had worked as a compliance investigator for the NSCB for only three years. 4 A.App. 851:18-21. Gore expressly conceded that, for purposes of determining whether a subcontractor is violating a license limitation, there is no statute or administrative regulation defining the phrase "single construction site," and similarly, there is no statute or administrative regulation defining the phrase "subdivision site." 4 A.App. 904-906. Gore conceded that he relies entirely on his own personal experience in determining whether there is a violation of the statute.

> Q. When you go out and make your determination based on your investigation as to whether it is a single construction site or multiple construction sites, you are making that determination just based on your own experience, correct?
> A. That is correct.

4 A.App. 906:5-11.

The ALJ appeared to be surprised by this testimony, and the ALJ asked his own follow-up question, "just to make sure I do understand." 4 A.App. 906:16-17.

> HEARING OFFICER PRO:
> ***
> Are there any other written guidelines you have, manuals, guide books, things that you have that you employ to make those determinations as to construction sites, subdivision site?
> MR. GORE: No.

4 A.App. 906:25—907:4.

In a decision dated December 21, 2017 (ALJ Decision), the ALJ found that Silverwing, although it did not act with the intent to evade the law, had knowingly

violated the law with respect to the allegations in the first and third causes of action. 4 A.App. 767-76. Silverwing was ordered to pay the minimum fine of $1,000, per violation, or a total of $33,000, plus $28,739 for the NSCB's attorney fees and costs. 4 A.App. 775-76. The ALJ also dismissed the second and fourth causes of action. 4 A.App. 776.

Silverwing sought judicial review, alleging, among other things, that the statute forming the basis for the alleged violations was unconstitutionally vague and was applied in an unconstitutional manner. 1 A.App. 1-5. Silverwing demonstrated that the NSCB had previously conceded that one aspect of NRS 624.220(2) is ambiguous (3 A.App. 506), and that even the Legislative Counsel Bureau (LCB) opined that "there is a need for clarification of the law." 3 A.App. 670. The district court remanded the case to the ALJ for clarification. 6 A.App. 1233-41. The ALJ issued the clarification, essentially reaching the same conclusion that he had previously reached. 6 A.App. 1255-57.

By all accounts, NRS 624.220(2) allows the NSCB to find violations based solely on the individual predilections of an investigator; and the statute lacks the specificity and clarity necessary to facilitate compliance with the law by licensees at the point of contract, and to facilitate the NSCB's reasonable application of the law after contract. Nonetheless, the district court affirmed the ALJ decision. 6 A.App. 1281-87.

Summary of Argument

There is no evidence in the record that any court, the Legislature, the Legislative Counsel Bureau, or even the NSCB, has ever published an opinion or legislative history of any kind that supports the application of NRS 624.220(2) in the manner in which it was applied to Silverwing in this case.

It is unfathomable to conclude that a statute can be of sufficient specificity as to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited while concurrently also being so vague that several governmental agencies, multiple attorneys representing a variety of parties, and highly sophisticated developers cannot agree on its meaning. Yet, that is exactly what has happened in this case.

As articulated below, NRS 624.220(2) is unconstitutionally vague on its face because it cannot be applied without using additional criteria or subsidiary rules, neither of which exists in the statute as written, in any regulation, or in case law. As applied to Silverwing, the statute is also unconstitutionally vague because there was know way for Silverwing to know that the NSCB would use a different phrase from a different statute (NRS 278.320(1)) as a means to explain away the vagueness of the licensing statute. The vagueness of NRS 624.220(2) was compounded by the NSCB's attempt to usurp the legislative process through the creation of subsidiary rules.

Additionally, the NSCB's new interpretation and application of NRS 624.220(2) is not rationally related to a legitimate government interest because it aggregates all work performed by a licensee for a single client in a subdivision, in perpetuity. In doing so, the NSCB's interpretation ignores the public policy behind limits and instead permanently punishes licensees for prior work that was performed correctly, on time, and on budget.

Standard of Review

The determination of whether a statute is constitutional is a question of law, which the Nevada Supreme Court reviews de novo. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). Questions of statutory construction are reviewed de novo. *Franks v. State*, 135 Nev. __, 532 P.3d 752, 754 (2019). Even in the context of judicial review of an administrative ruling, where deferential review might otherwise be applied, this court reviews issues of law de novo, including issues of statutory construction. *City of Reno v. Yturbide*, 135 Nev. Adv. Op. 14, 440 P.3d 32, 34-35 (2019).

Argument

I. NRS 624.220(2) violates Silverwing's right to Due Process because it is unconstitutionally vague both facially and as applied to Silverwing.

A facial challenge to a statute only requires the potential for enforcement; an as-applied challenge arises where the government enforces the provisions of a

statute against a party. Even if a facial challenge fails, the law may be challenged as applied once the government attempts to enforce the law. *Flamingo Paradise Gaming, LLC*, 125 Nev. at 519 n. 14, 217 P.3d at 558 n. 14. Silverwing challenges both the facial and as applied constitutionality of NRS 624.220(2).

The Nevada Supreme Court presumes that all statutes are valid, and "the burden is on the challenging party to demonstrate that a statute is unconstitutional." *Cornella v. Justice Court,* 132 Nev. Adv. Op. 58, 377 P.3d 97, 100 (2016); *Flamingo Paradise Gaming,* 125 Nev. at 509, 217 P.3d at 551 (both citing *Silvar v. District Court,* 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). While the challenging party "generally bears the burden of demonstrating that there is no set of circumstances under which the statue would be valid," if a heightened level of scrutiny applies, "the general presumption regarding a statute's constitutionality is reversed, and the State bears the burden of demonstrating the statute's constitutionality." *Deja Vu Showgirls v. State, Dept. of Tax*., 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014).

The Nevada Supreme Court has adopted a two-prong test for examining whether a statute is unconstitutionally vague in violation of the Due Process Clause:

> A law may be struck down as impermissibly vague for either of two independent reasons: (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so

> standardless that it authorizes or encourages seriously discriminatory enforcement.

Carrigan v. Comm'n on Ethics of State, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013) (internal citations and quotations omitted). Under the first prong of the vagueness test, "[A] statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute." *Nelson v. State*, 123 Nev. 534, 540–41, 170 P.3d 517, 522 (2007) (quoting *Williams v. State*, 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002)). When statutory language has ordinarily understood meanings, the court applies those meanings to define the limits of the statute.

Under the second prong of the vagueness test, in order to avoid discriminatory enforcement of a criminal statute, the Legislature must "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). The statute may not be so standardless that it "authorizes or encourages seriously discriminatory enforcement." *Carrigan v. Comm'n on Ethics of State*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013) (internal citations and quotations omitted). This prong is more important than the first prong because otherwise "a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries

to 'pursue their personal predilections.'" Silvar, 122 Nev. at 293, 129 P.3d at 685 (quoting *Kolender*, 461 U.S. at 358, 103 S.Ct. 1855).

While the first prong of the test guides parties who may be subject to potentially vague statutes, the second prong guides the enforcers of the statutes. *Silvar*, 122 Nev. at 293, 129 P.3d at 685.

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Civil laws are held to a less strict vagueness standard than criminal laws because the consequences of imprecision are qualitatively less severe.

Carrigan v. Comm'n on Ethics of State, 129 Nev. at 899, 313 P.3d at 884 (2013) (internal citations and quotations omitted).

Although a violation of NRS 624.220(2) does not itself give rise to criminal charges, a heightened facial analysis is appropriate because violations can result in the deprivation of a licensee's property (monetary penalties) and loss of ability to make a living (loss of the contractor's license).

A. NRS 624.220(2) is vague on its face.

There is a difference between vagueness and ambiguity. Vagueness exists when there is no clear meaning to a word or phrase, thus requiring additional subsidiary rules to provide the specificity necessary for legal application. For example, the word "tall" is vague in the absence of some additional criteria or subsidiary rules. Ambiguity, however, exists when a word or phrase with more

than one clear meaning is used, thus requiring the interpreter to look to the context of use to resolve the ambiguity. For example, the word "cool" is ambiguous because context is required to determine whether the word is used to describe temperature or social attractiveness. Words and phrases can be ambiguous, vague, both, or neither.

While the word cool is ambiguous and vague on its own, when used in the phrase "the temperature of the refrigerator must be cool," the word "cool" is no longer ambiguous because the phrase clarifies the context. But, the word "cool" in the phrase "the temperature of the refrigerator must be cool" is still vague because it requires additional subsidiary rules to provide the specificity necessary for application (for example, whether 40 degrees is "cool" enough in a refrigerator). In the absence of additional subsidiary rules, persons of ordinary intelligence are without a reasonable opportunity to know at what temperature "cool" is achieved because the word does not have a well-settled and ordinarily understood meaning in the context of the example provided. Moreover, if an investigatory body was tasked with determining whether the temperature of refrigerators were cool, the potential for discriminatory enforcement (or inconsistent enforcement by different investigators, based upon their own personal predilections) would be impermissibly high.

The phrases "single construction site" and "subdivision site," as used in NRS 624.220(2), are vague. The NSCB's December 14, 2015 Advisory Opinion (the Tesla Opinion) analyzed, in part, NRS 624.220(2). 3 A.App. 504-508. The NSCB's own Tesla Opinion found: **"The Board deems the language of phrase 2, 'single construction site,' as ambiguous because the phrase is subject to more than one reasonable meaning."** *Id*. (emphasis added). However, if the phrase single construction site were only ambiguous, the context of the statute might help resolve the ambiguity. Because the phrase is also vague (there is no well-settled and ordinarily understood meaning of the phrase single construction site when viewed in the context of the entire statute), the Tesla Opinion devised a set of subsidiary criteria or rules to articulate when the NSCB would apply the rules. The Tesla Opinion's own conclusion confirmed that at least one part of NRS 624.220(2) fails for vagueness.

After the NSCB issued its Complaint against Silverwing, but before the administrative hearing, the NSCB changed its position and alleged, for the first time, that all of Silverwing's condominium projects were statutory subdivision sites instead of single construction sites. 4 A.App. 800-801. The NSCB obviously did so because it recognized the implications of the Tesla Opinion and its prior admission that the phrase "single construction site" **is** vague and ambiguous. *Id.*

However, the phrase "subdivision site" is no less vague and ambiguous than the phrase "single construction site."

Because there is no statutory or judicially created definition of "subdivision site" in NRS Chapter 624 or NAC Chapter 624, the NSCB asked the ALJ to rely on the definition of "subdivision" found in NRS 278.320(1), which is in a completely different and inapplicable chapter of the Nevada Revised Statutes. But, NRS Chapter 278 is a planning and zoning chapter, not a contractor licensing law chapter.[2] Specifically, NRS 278.320(1) is a general provision addressing the subdivision of land, and it defines a statutory "subdivision" as:

> [A]ny land, vacant or improved, which is divided or proposed to be divided into five or more lots, parcels, sites, units or plots, for the purpose of any transfer or development, unless exempted by law.

Therefore, because an NRS 278.320(1) statutory subdivision is composed of land divided into five or more lots, parcels, **sites**, units or plots, an individual NRS 624.220(2) subdivision **site** must necessarily be something less than an actual subdivision; a subdivision **site** must be a smaller piece of the entire subdivision. Yet, there is no statutory definition for what constitutes that piece. Neither NRS Chapter 624 nor NAC Chapter 624 defines what is, or is not, a site.

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[2] The Court may take judicial notice of the fact that the Nevada State Contractors Board's own website omits any reference to NRS 278.320 in its provision of Rules, Regulations, and Statutes to licensees and the general public. www.nvcontractorsboard.com/rules/html.

By concluding that "subdivision site" and "subdivision" are synonymous, the NSCB and the ALJ necessarily rendered superfluous the word "site" as it is used both in NRS 624.220(2) and NRS 278.320(1). Rules of statutory construction mandate that "every word, phrase and provision in the enactment has meaning." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366–67, 184 P.3d 378, 386–87 (2008) (internal citations and quotations omitted). Had the Legislature intended aggregation of license limits across an entire statutory subdivision, the word "site" would have been completely unnecessary and superfluous, and the Legislature would have omitted the word "site" from the phrase "subdivision site" in NRS 624.220(2). Had the Legislature not intended a "site" to be a smaller piece of an NRS 278.320(1) statutory subdivision, it would have omitted the word "site" from the definition of types of pieces of land, five or more of which are required to create a statutory subdivision. The plain language of NRS 624.220(2) clearly does not contemplate the aggregation of work across an entire statutory subdivision, or across multiple sites (plural) within the same statutory subdivision; aggregation is only contemplated on a subdivision site (singular).

B. NRS 624.220(2) is vague as applied to Silverwing.

Even where a statute is not unconstitutionally vague on its face, it can be unconstitutionally vague as applied to a particular party. *Flamingo Paradise*

Gaming, LLC, 125 Nev. at 519 n. 14, 217 P.3d at 558 n. 14. If a statute is admittedly vague and ambiguous, there is no basis upon which to determine that someone violated the statute based on a specific set of facts. Here, those facts are not hypothetical.

Silverwing was charged with multiple purported violations of NRS 624.3015(3)[3] based on the license limits of numerous subcontractors, and the effect of aggregating the work of those subcontractors on separate projects that had separate building permits, because all work was performed for one client, Silverwing. Simply, the purported violations turned first on whether the work was performed on one construction site, a phrase that the NSCB agreed required subsidiary criteria or rules for application, and then on the NSCB's conflation of an NRS 278.320(1) subdivision with an NRS 624.220(2) subdivision site. It was both rational and reasonable for Silverwing to conclude, at the point of bid and contract, that separate buildings requiring separate submittals, separate building permits, separate fees, separate inspections, and separate certificates of occupancy, constituted separate sites for purposes of determining subcontractor license limitations, regardless of whether one or multiple written contracts exist.

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[3] "Knowingly bidding to contract or entering into a contract with a contractor for work in excess of his or her limit or beyond the scope of his or her license."

NSCB Compliance Investigator Jeff Gore testified about NRS 624.220(2) at the NSCB hearing. Mr. Gore could not, did not, and never even attempted to, articulate any well settled and ordinarily understood meanings of either the phrase "subdivision site" or "single construction site." 4 A.App. 904-906. Unequivocally and without any hesitation, Mr. Gore testified that (1) the phrase "single construction site" is not defined anywhere in Nevada Revised Statutes or the Nevada Administrative Code; (2) the phrase "subdivision site" is not defined anywhere in Nevada Revised Statutes or the Nevada Administrative Code; and, (3) that there are absolutely no internal written guidelines, manuals, or guide books that he uses (or that contractors and subcontractors can reference) to determine whether something is a "single construction site" or "subdivision site." *Id.* The record is devoid of any indication that Mr. Gore's investigation included an analysis, on any level, of whether the projects at issue were single construction sites, subdivision sites, statutory subdivisions, or even whether the subcontractors were concurrently performing work on multiple sites.

The four projects at issue in this case were each comprised of multiple, separate buildings on separate sites. 3 A.App. 538-541. Each building required its own separate submittal with separate and unique municipal building department fees, separate plan checks, separate permits, separate inspections (city and private), and separate certificates of occupancy. 4 A.App. 942-945; 3 A.App. 677-680.

Mechanically, Silverwing set up its contracts with a schedule of values that delineated how much work a particular subcontractor would perform on each permitted building (site) within a particular project, and no subcontractor was guaranteed a right to perform work on every building (site). 4 A.App. 921-922; 2 A.App 250-426. In doing so, Silverwing reasonably believed and understood that each site, permitted and inspected separately, was a separate site. 4 A.App. 943-945. There was NO contrary evidence in the record before the ALJ or District Court.

By his own admission, Mr. Gore was (and is in all cases involving NRS 624.220(2)) left with nothing more than his own personal subjective experience or predilections as the guiding factor to determine whether the work at issue involved a single construction site, a subdivision site, or neither. Legally, a statute may not be so devoid of adequate guidelines as to permit the enforcers of the statute to pursue their personal predilections. *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (the second prong of the vagueness test). Moreover, when a statute is without ordinarily understood meanings, there is no way for a court to define the limits of the statute. *Id.* (the first prong of the vagueness test).

C. The NSCB's issuance of the Tesla Opinion as an attempt to cure the vagueness of NRS 624.220(2) was an unconstitutional delegation of Legislative authority.

Because NRS 624.220(2) could not be applied based on its own language, the NSCB attempted to deal with the constitutional dilemma by issuing the informal Tesla Opinion, instead of adopting administrative regulations through statutory procedures for such regulations. That opinion improperly established internal criteria through which license limit issues would sometimes be examined.

> When a license limit issue turns on the meaning of "single construction site" -- for example when a licensee facing potential discipline for bidding or performing work under multiple contracts for a single client in excess of its limit, asserts that its bids or work for a single client relate to separate construction sites -- the Board considers various criteria in deciding the question in harmony with the Legislature's intent for creating license limits.

3 A.App. 506. Nonetheless, the NSCB's own investigator testified that he was not aware of any internal criteria or test and did not even apply the Tesla Opinion to Silverwing. 4 A.App. 904-906.

There is a profound difference between an agency interpreting NRS 624.220(2), and an agency creating a test that will be applied after the fact (using admittedly subjective factors that will vary in weight at the whim of the agency or its individual investigators). According to the NSCB, the Tesla Opinion is nothing more than a declaratory order disposing of a petition and elaborating how NSCB

staff interprets and applies the statute for the benefit of the public. 3 A.App. 648-649. The Legislative Counsel Bureau disagreed:

> Accordingly, we regard the Tesla opinion as an example of "ad hoc rulemaking," or an ineffectual attempt to adopt a regulation without complying with the notice, hearing and approval process set forth in chapter 233B of NRS. While we mention the opinion at various points in this letter where we think it is instructive, we do not believe that it has any legal force or effect.

3 A.App. 666.

The public is entitled to protection against discriminatory and arbitrary actions of public officials. 16A Am. Jur. 2d Constitutional Law § 312. That public protection is at the heart of the nondelegation doctrine and it is exactly why the NSCB may not informally create interpretive orders enumerating factors to be used in the enforcement of a statute against contractors, instead of adopting an administrative regulation under the Nevada Administrative Procedure Act, NRS Chapter 233B. If the statute, either on its face or as applied to Silverwing, lacks the specificity to determine if/when it should be applied, then it fails as a matter of law. The NSCB cannot cure the statute's deficiencies through the use of an informal and internal test that is not published and is not readily available to contractors (such as Silverwing) against whom the NSCB attempts to enforce the statute and impose fines and license-threatening penalties.

> The purpose of the doctrine that legislative power cannot be delegated is to assure that truly fundamental issues will be resolved by the

> legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse. The nondelegation doctrine insures the protection of citizens against discriminatory and arbitrary actions of public officials, and it provides the assurance that duly authorized, politically accountable officials make fundamental policy decisions.

16A Am. Jur. 2d Constitutional Law § 312. The Legislature may only vest an agency with "mere fact finding authority and not the authority to legislate." *McNeill v. State*, 132 Nev. Adv. Op. 54, 375 P.3d 1022, 1025–26 (2016)(internal citations and quotations omitted). In the *McNeill* case, the Nevada Supreme Court recognized that "Because the Board has no authority to impose conditions not enumerated in NRS 213.1243, the nonenumerated conditions the Board imposed on McNeill were unlawful, and McNeill did not violate the law when he failed to comply." *Id.*

Here, the NSCB not only created previously nonenumerated conditions or criteria for analyzing a potential violation long after private citizens have entered into a contract, it created criteria the weight and importance of which will vary from situation to situation. That is exactly what the nondelegation doctrine seeks to prevent.

D. The *Chevron Doctrine* does not save NRS 624.220(2) from its unconstitutional vagueness.

At the district court, the NSCB argued that the *Chevron Doctrine*[4] and its Nevada counterparts precluded independent review of NRS 624.220(2). 5 A.App. 1030. The *Chevron Doctrine* requires courts to give deference to statutory interpretations made by those government agencies charged with enforcing the statutes, unless such interpretations are unreasonable. However, the *Chevron Doctrine* is far from absolute. A court must determine if the agency's position is based on a permissible construction of the statute. If, for example, the agency's position is unconstitutionally vague, the *Chevron Doctrine* is of no effect. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 819 (9th Cir. 2016). A court is not bound to accept and apply an unconstitutional interpretation of a statute simply because the agency, to justify its own actions, has chosen to do so. *See, generally, F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). Nor is a court bound to accept and apply an interpretation that "is nothing more than a convenient litigating position" or a "post hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012) (internal citations and quotations omitted).

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As discussed at length above, the ALJ's use of the singular word "subdivision" as defined in NRS 278.320(1) as a substitute for phrase "subdivision site" in NRS 624.220(2) is not reasonable. The terms in the statutes are not the same. A statutory subdivision is composed of land divided into five or more lots, parcels, **sites**, units or plots, and therefore a subdivision **site** must be something less than an actual subdivision; a subdivision **site** is a part of a subdivision and must be a smaller piece of the entire subdivision. The NSCB cannot legitimately claim that subdivision lot, subdivision parcel, subdivision unit, and subdivision plot are synonymous with the subdivision as a whole because each is a smaller piece of the subdivision, five or more of which are required to constitute a subdivision. There is no principle of grammar, legal precedent, or generally accepted method of statutory interpretation upon which it is reasonable to treat the word "site" differently than the rest of the series of divisions of land contained in NRS 278.320(1).

The word "subdivision," on its own, already encompasses the entirety and location of the subdivision, **inclusive of the subdivision sites**. The only reasonable interpretation is that the phrase "subdivision site" provides a reference to a specific site within the subdivision.

Additionally, the statutory interpretation proffered by the NSCB and utilized by the ALJ only adds to the constitutional problems with the statute. Without any

rational basis for doing so, the NSCB's interpretation would treat licensees who perform work in planned groups of homes with less than five sites differently than licensees who perform work in statutory subdivisions with five or more sites. The former would not be a subdivision site as contemplated by the NSCB while the latter would meet the NSCB's strained definition.

E. The Severability Doctrine does not save NRS 624.220(2) from its unconstitutional vagueness.

Silverwing challenges both the facial and as-applied constitutionality of NRS 624.220(2) in its entirety. The challenge is not limited to either the phrase "subdivision site" or the phrase "single construction site." At the administrative hearing, the NSCB suggested that the hearing be reconvened so the NSCB could present evidence on the issue of the application of the facts to the phrase "single construction site." 4 A.App. 845-846. Although the ALJ did not continue the hearing, he did provide the NSCB with a short recess to gather its evidence and prepare its presentation on the topic. Both parties introduced evidence and testimony related to the facts as applied to the vague term "single construction site." On the one hand, the NSCB contended that all of that evidence and testimony was irrelevant (5 A.App. 1024, FN 1) while at the same time arguing that any constitutional defects in the phrases "single construction site" or

"subdivision site" should be cured with the *Severability Doctrine*. The NSCB has not, however, explained how the statute could be judicially rewritten.

The *Severability Doctrine* contemplates the removal of provisions from an otherwise valid statute, not the removal of specific words within a sentence. NRS 0.020(1). Moreover, the Nevada Supreme Court has recognized that severability clauses are "entitled to little weight" and should not be paid "undue homage". *Clark Cty. v. City of Las Vegas*, 92 Nev. 323, 336, 550 P.2d 779, 788 (1976). Notably, however, there is no severability clause in NRS 624.220. Severability requires a determination that legal effect can be given to a statute standing alone and that the Legislature intended the provision to stand alone if other provisions failed. Neither test is satisfied in this case. The removal of the vague phrase "subdivision site" from NRS 624.220(2) does not cure the vagueness of the phrase "single construction site" (a phrase the NSCB admitted is subject to multiple reasonable interpretations), and vice versa.

If any part of NRS 624.220(2) is unconstitutional on its face, then the entire subsection of the statute fails. Neither the NSCB nor the court may simply blue pencil out or ignore the relevant context of the statute in an attempt to render the statute constitutional. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316 (9th Cir. 1988)(articulating that creative interpretation of a statute is the same as an impermissible judicial change to statutory language, and that courts must "look to

policy in interpreting statutes...not rewrite language to conform to the policy"). Therefore, if the phrase "single construction site" is unconstitutionally vague on its face, then NRS 624.220(2) is unconstitutional.

II. NRS 624.220(2) violates Silverwing's right to Equal Protection because it unconstitutionally aggregates work for some, but not all, licensees of the same monetary class.

Licensees of the same monetary limit must be treated the same, regardless of whether their work is performed for one client or for multiple clients. It is improper to aggregate work for one client, in perpetuity across an entire subdivision, while at the same time permitting a similarly situated licensee to concurrently enter into an infinite amount of agreements for separate clients.

Because Silverwing is not a "suspect class," NRS 624.220(2) must bear a rational relationship to a legitimate governmental interest. *In re Candelaria*, 126 Nev. 408, 416–17, 245 P.3d 518, 523 (2010). Even under the lower standard, it is clear that NRS 624.220(2) is an unconstitutional violation of due process.

NRS 624.005 provides the Legislature's declaration with respect to the provisions of the chapter relating to discipline of licensees.

> The Legislature declares that the provisions of this chapter relating to the discipline of licensees are intended to promote public confidence and trust in the competence and integrity of licensees and to protect the health, safety and welfare of the public.

That declaration is mirrored in NRS 624.220(2), which also provides that the "limit must be determined after consideration of the factors set forth in NRS 624.260 to NRS 624.265, inclusive." Those statutes include a series of financial metrics to be considered by the NSCB when determining financial responsibility. NRS 624.263(2)(a)-(f). These metrics include net worth, liquid assets, current liabilities, working capital, and ratio of current assets to current liabilities. The last metric, the ratio of current assets to current liabilities, is known in accounting terms as the "current ratio."[5] The current ratio, sometimes also called the "working capital ratio," is a liquidity ratio because it measures a company's ability to pay short-term and long-term obligations. The current ratio is also one of several ratios often used to determine solvency. Black's Law Dictionary defines solvency as "the ability to pay debts as they come due." Black's Law Dictionary 1400 (7th ed. 1999). Therefore, a rational relationship between NRS 624.220(2) and solvency requires a nexus between the definition of a license limit and the ratio of current assets to current liabilities. No such nexus exists.

By way of analogy, a non-discriminatory licensing law would act like an open line of credit. When the credit is used, the available remaining credit decreases until money is paid back thereby freeing up additional credit again. It

[5] https://www.investopedia.com/terms/c/currentratio.asp#what-is-the-current-ratio

would not matter where the credit is used; once it is paid back, additional credit up to the total credit balance (monetary limit) is freed up.

The contractor's license limit is a form of an open line of credit; it is a cap on the amount of work the contractor may perform. How and when that credit is considered used or freed up is what drives this appeal. A plumber with a $50,000 monetary limit should not be precluded from performing two $26,000 jobs on two separate houses, years apart, for the same developer in the same subdivision--while another plumber with the same $50,000 monetary limit is allowed to concurrently perform five $50,000 contracts for different clients, on different "subdivision sites," or on different "construction sites." The relative risk to the public of the first plumber failing (or defaulting on the credit line provided by the license) is nowhere near the much higher relative risk related to the second plumber. Yet the NSCB would allow the second plumber to work on all five $50,000 contracts. If solvency and financial responsibility are the guiding principles of the statute, NRS 624.220(2) would aggregate work across all open projects for all licensees since those contracts represent current liabilities (NRS 624.263(2)(d)).

But, NRS 624.220(2) requires no such analysis. More broadly, if NRS 624.220(2) was rationally related to the "financial responsibility" of a contractor (as defined by the factors stated by the Legislature in NRS 624.263(2)), it would never aggregate in perpetuity properly completed, accepted, and paid for work.

Prior satisfied liabilities bear absolutely no relationship to the ratio of current assets to current liabilities (solvency), and they certainly do not reflect negatively on the financial responsibility of a licensee.

The NSCB's interpretation of NRS 624.220(2) confuses the constitutionality of the concept of license limits, which if properly drafted might be rationally related to financial responsibility and solvency, with the actual language of NRS 624.220(2). As interpreted by the NSCB, NRS 624.220(2) is not rationally related to financial responsibility and solvency.

Under the NSCB's interpretation, NRS 624.220(2) only aggregates work performed for the same client on a single construction site or subdivision site. If a subdivision site is actually the entire subdivision, then work is aggregated in that subdivision forever. That result ignores the Legislature's declaration and the goal of financial responsibility and solvency.

The following example is illustrative:

Contract Date	Plumber A w/ $50,000 Limit	Plumber B w/ $50,000 Limit
January 2018	$50k contract for client 1[6]	$50k contract for client 1
January 2018	$50k contract for client 2	
January 2018	$50k contract for client 3	
January 2018	$50k contract for client 4	
January 2025		$50k contract for client 1

[6] In this example, the "client" could be a property owner, developer, or general contractor; it is whoever hires the licensee.

According to the NSCB's interpretation of the statute, Plumber A has acted within its license limit because, even though it has concurrently contracted to perform $200,000 in work at the same time, it has done so for four separate clients. Plumber B, however, has violated the law if the work it contracts to perform for the same client, under contracts entered into seven years apart for work to be performed years apart, will be performed anywhere within an entire subdivision. As argued by the NSCB's own counsel at the administrative hearing:

> This is a legislative concern. I have no problem if somebody wants to go back to the legislature next session and maybe make some changes there, but unfortunately, what that means, Your Honor, is if you are in a subdivision and you're working for a single client in 2001, and you go back into that same subdivision 10 years later for the same client, it is going to aggregate your license limit.

4 A.App. 823:4-12.

There is no evidence in this case even remotely establishing how prior, completed work negatively impacts financial responsibility for purposes of current work. There is no evidence even remotely establishing that it is more risky for a contractor to perform a series of projects for one client than it is for a contractor to perform multiple, simultaneous projects for multiple owners. There is no evidence that the public was in any way put at risk by the facts of this case. The only party that could possibly be at risk under the facts of this case is Silverwing. The only evidence is that Silverwing was both the unlimited licensee and the

owner/developer of the projects at issue in this case. Those two uncontroverted facts obviate any possible argument that the NSCB could make regarding the rational relationship of the legislative purpose (to protect the public as stated in NRS 624.005) to NRS 624.220(2) as applied to this case.

A contrary conclusion leads to the absurd and problematic result that a licensee could be precluded, in perpetuity, from performing work for the same client in a subdivision once a license limit had been reached, regardless of whether the new work was performed decades later under a completely separate permit on a completely separate building. The law does not favor such absurd statutory interpretation. *S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). A statutory subdivision under NRS 278.320(1) cannot be synonymous with an NRS 624.220(2) subdivision site.

III. There is not substantial evidence supporting the legal conclusion that the projects at issue are subdivisions under NRS 278.320(1).

Even if rules of statutory construction are ignored and "subdivision site" is deemed synonymous with "subdivision," the projects in this contested case do not meet the definition of an NRS 278.320(1) subdivision. By Legislative mandate, there cannot be a statutory subdivision without the actual or proposed division of land into five or more pieces. Here, the uncontested facts are that the recorded maps prove the land in each project was not divided (or proposed to be divided)

into five or more pieces. 3 A.App. 682-688. The ALJ, however, decided that the projects **did** constitute statutory subdivisions. 4 A.App. 773-774.

The NSCB would like the fact that the recorded maps contain the words "condominium" and "subdivision" to be dispositive of the issue. 4 A.App. 815-816. However, there is no circumstance contemplated by the recorded maps in which an individual piece of land can be aggregated with four other individual pieces of land, which then in their sum, can become a statutory subdivision pursuant to NRS 278.320(1). In the absence of such a division of land, there can be no statutory subdivision. Here, the maps divide airspace and nothing more.

The first Note on the Edgewater project map provides that: "The building structures themselves and the ground beneath said buildings are to be owned and maintained by the homeowners association being a part of the common element." 3 A.App. 684. There are only three common elements on the actual map. *Id.* There is only one legal parcel, and there is no division of land into five or more pieces.

The last sentence of the third Note on the Bungalows project map provides that: "The balance of the building structures and the ground beneath the buildings are to be owned and maintained by the owners of the common elements." 3 A.App. 686. There is only one common element on the actual map. *Id.* There are only two legal parcels, and there is no division of land into five or more pieces. *Id.*

The last sentence of the third Note on the Fountainhouse project map provides that: "The balance of the building structures and the ground beneath the buildings are to be owned and maintained by the owners of the common elements." 3 A.App. 688. There are only two common elements on the actual map. *Id.* There is only one legal parcel, and there is no division of land into five or more pieces. *Id.*

Since there is no evidence of the division of land into five or more pieces on any of the projects at issue, there was not substantial evidence supporting the ALJ's conclusion that these projects were NRS 278.320(1) statutory subdivisions.

IV. Public policy and reason mandate a narrower interpretation of an NRS 624.220(2) subdivision site.

Public policy and reason mandate that any ambiguity in NRS 624.220(2) be resolved in favor of temporal and geographic limitations to the word "site."

> When a statute is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application. In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended.

Tam v. Eighth Jud. Dist. Ct., 131 Nev. 792, 799–800, 358 P.3d 234, 240 (2015) (internal citations and quotations omitted). Unfortunately, there is no clear legislative history clarifying NRS 624.220(2) or its current version.

As recognized by the Legislative Counsel Bureau, there is no legislative history explaining either the intent of the addition of the phrase "single construction site or subdivision site for a single client" to NRS 624.220(2), or how that phrase is to be applied. 3 A.App. 668. As a result, the Legislative Counsel Bureau opined that "the more reasonable interpretation [than the interpretation advanced by the NSCB] of the statute is that some temporal and geographic limitations were implied by the Legislature...." 3 A.App. 666.

> Indeed, about the only thing that is clear from the legislative history of the Nevada statutes is that the reference in NRS 624.220(2) to one or more construction contracts was intended to encompass the aggregate total of **all the work being performed concurrently by a contractor for a single client at a single location**.

3 A.App. 668 (emphasis added).

Notably, there is no reference anywhere in any legislative history of the Legislature's intent to expand the temporal and geographic limitations implied by the Legislature by using NRS 278.320(1) as a surrogate for the term "subdivision site" in NRS 624.220(2). The version of NRS 278.320(1) that existed when NRS 624.220(2) was amended in 1967 is much different than the version of NRS 278.320(1) that exists today. In 1967, NRS 278.320(1) defined a "Subdivision" as:

> [A]ny land or portion thereof, shown on the last preceding tax roll as a unit or as contiguous units, which is divided for the purpose of sale or lease, whether immediate or future, by and subdivider into 5 or more parcels within any 1 calendar year.

Under that definition, homes and buildings separated by a common area or even a public right-of-way would never be contiguous, and therefore could never constitute a statutory "subdivision," Moreover, there would be a temporal limitation of one calendar year on the finding that any divided property constituted a statutory subdivision.

A reasonable interpretation of NRS 624.220(2) requires the word "site" to be used in a way that includes geographic and temporal limitations. But, the NSCB's new statutory interpretation (and the ruling of the ALJ) does the exact opposite. It nullifies and ignores the word "site" and exponentially expands the application of NRS 624.220(2) to an entire statutory NRS 278.320(1) "Subdivision."

The implications of the ALJ's ruling and the NSCB's new interpretation of NRS 624.220(2) to the housing industry in Nevada are profound. As interpreted and applied by the NSCB, NRS 624.220(2) prevents Silverwing (and any other general contractor) from reusing a subcontractor in a subdivision, in perpetuity, once the subcontractor has performed work in the aggregate to the level of its license limit. For example, some housing subdivision developments are huge, encompassing many square miles in geographical size, and with hundreds of homes to be built in multiple phases over many years or even decades. The NSCB's interpretation of the license limit statute would prevent a subcontractor who has completed work on one home in one year from working on another home

miles away, and years later, merely because the two homes are in the same subdivision.

The NSCB's interpretation would therefore require subcontractors to have unlimited licenses. However, there simply are not enough unlimited license limit trade contractors and subcontractors in Nevada to perform the amount of subdivision work being performed in Nevada, and in particular, northern Nevada, where the housing market is extremely limited and demand for new housing construction is high. Moreover, the NSCB's interpretation prevents individual homeowners from rehiring small contractors to perform additional work at their homes at different times during homeownership. It prevents individual homeowners from hiring small landscape contractors to perform work in their yards each year, or to provide painting services at their homes over time. Public policy and reason does not support such a result.

Conclusion and Relief Requested

No amount of creative lawyering can change the fact that NRS 624.220(2) is so vague that nobody, not the NSCB, not its investigator, not contractors, and not the public at large, can articulate with any reasonable certainty when the statute will apply. That is a violation of due process. Moreover, there is no rational basis for the statute's disparate treatment of licensees with the same monetary limit through the aggregation of work performed for the same client on a single

construction site or subdivision site. Similarly, the aggregation of work previously performed for the same client on a "single construction site or subdivision site" is not rationally related to the solvency of a licensee, or to the Legislature's stated goal to protect the health, safety and general welfare of the public. The NSCB attempts to cure the deficiencies in NRS 624.220(2) by inserting a different statutory definition (NRS 278.320(1)) was improper, as was its attempt to usurp the Legislature's role by creating clarifying criteria.

Based on the foregoing, Silverwing respectfully requests the Court to reverse the decision of the district court and set aside the decision of the Administrative Law Judge.

Dated: November 19, 2019

/s/ *Michael S. Kimmel*
Michael S. Kimmel
Hoy Chrissinger Kimmel Vallas

/s/ *Robert L. Eisenberg*
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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 9,086 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 22, 2019

/s/ *Michael S. Kimmel*____
Michael S. Kimmel

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Hoy Chrissinger Kimmel Vallas and that on this date the foregoing ***Appellants' Opening brief (Appeal from Judicial Review of Administrative Order, Second Judicial District Court In and For Washoe County, Nevada, Honorable Elliot Sattler, District Judge***) and ***Appendix Volumes 1 through 6*** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 22nd of November, 2019.

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An employee of Hoy Chrissinger Kimmel Vallas