IN THE SUPREME COURT
OF THE STATE OF NEVADA

SCOTT VINH DUONG, M.D., ANNIE LYNN PENACO DUONG, M.D., DUONG ANESTHESIA, PLLC and DOE DEFENDANTS I-X,

Appellants,

vs.

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.,

Respondent.

No.: 79460

Eight Judicial District Court
Case No. A-19-789110-B

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 judges of this court may evaluate possible disqualification or recusal.

Duong Anesthesia, PLLC is a Nevada Professional Liability Company wholly owned by Scott Vinh Duong, M.D. and Annie Lynn Penaco Duong, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF JURISDICTION

NRAP 3A(b)(3) grants jurisdiction over "an order granting or refusing to grant an injunction." This appeal is from the district court's order granting a preliminary injunction in part. Therefore, the Court has jurisdiction over this appeal.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(14) this case is presumptively assigned to the Court of Appeals; however, Appellant requests that the Nevada Supreme Court retain this matter pursuant to NRAP 17(a)(12). This case presents the issue of whether NRS 613.195(5) may be applied retroactively to non-competition agreements executed before the statute's enactment. This issue is of substantial importance to employers and employees alike, and it is likely to recur in subsequent litigation.

Moreover, this case presents fundamental questions regarding retroactive application of statutes and the "procedural vs. substantive statute" distinction which drives that inquiry. The Court must determine whether a statute is substantive when it invokes the judicial process to modify the substantive terms of a private contract. There is, to counsel's knowledge, no Nevada law directly addressing this point.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is a non-competition agreement overbroad when it lacks any geographic limitation that purportedly bars a former physician employee from working at any "facility" with which his former employer has a relationship, and it requires the physician to indefinitely terminate his privileges at those same facilities upon the termination of his employment?

2. Can NRS 613.195(5) retroactively modify the terms of a non-competition agreement that was executed before the statute's enactment?

STATEMENT OF THE CASE

This case arises from a non-competition agreement ("NCA") which lacks any geographic limitation and is not reasonably related to any legitimate business purpose on behalf of Appellants' former employer. Defendant/Appellants Scott and Annie Duong (the "Duongs") had relocated from Pittsburgh, Pennsylvania to Las Vegas, Nevada to accept a position with a local anesthesiology practice called Premier Anesthesiology Consultants ("PAC"). Approximately four months later, PAC was acquired by a national anesthesiology conglomerate called U.S. Anesthesia Partners ("USAP"), of which Plaintiff/Respondent Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Fielden Hanson") is a subsidiary. After the merger, Fielden Hanson compelled the Duongs to execute an employment agreement containing the NCA at issue in order to keep their jobs.

By its plain language, Fielden Hanson's NCA states that if the Duongs had ever covered a surgical case at a hospital or surgical center ("Facility") during their time at USAP, they are barred from accepting *any* surgical cases for *any* surgeon at that *entire facility* for a two-year period, even for surgeons that Fielden Hanson has never worked with, and even if Fielden Hanson later ceases providing any services at that facility. The non-compete's focus on entire *facilities* rather than individual *physicians* is nonsensical because, generally speaking, physicians (and not Facilities) hire anesthesiologists. Moreover, the agreement provides requires the

Duongs to *terminate their privileges at every Facility* at with which USAP has any sort of business relationship, *whether or not the Duongs had ever provided services at those facilities* during their employment. The district court therefore correctly held that the NCA is overbroad and invalid.

Although the district court correctly held that the noncompetition agreement was overbroad as drafted, it erred in retroactively applying NRS 613.195(5) to modify an NCA which predated the statute's enactment. Retroactive application of NRS 613.195(5) substantively modifies the terms of the NCA at issue and thereby violates the Duongs' due process rights. Both Fielden Hansen and the Duongs were presumed to know the state of the law when they executed the NCA at issue in this case. At the time of execution, Nevada's law of public policy required NCAs to be wholly reasonable, and held that reformation (or "blue penciling") was not available to rescue NCAs that were unreasonable. Parties may not contract around Nevada's law of public policy, and those public policy requirements are implicitly included in the terms any contract. Thus, at the time of execution, the NCA implicitly stated that it would be enforced only if it was wholly reasonable, and it implicitly precluded judicial reformation. Applying NRS 613.195(5) retroactively upends the parties' expectations at the time of execution by effectively inserting severability and blue-

lining clauses into the contract, which the parties (by operation of law[1]) knew were impermissible when they agreed to the terms at issue.

STATEMENT OF RELEVANT FACTS

The Duongs Complete Their Medical Training and Begin Their Careers with Premier Anesthesiology Consultants

The Duongs attended medical school at State University of New York at Downstate. (1 App. 195.) They both performed residencies at Montefiore Medical Center, as well as fellowships at the University of Pittsburgh Medical Center. (*Id.*) Scott's fellowship training was in regional anesthesiology, and Annie's was in pediatric anesthesiology at the Children's Hospital of Pittsburgh at UPMC. (*Id.*)

[1] Based upon discovery following the events at issue in this interlocutory appeal, the Duongs anticipate that Fielden Hanson will allege that the Duongs were subjectively unaware of relevant Nevada Supreme Court precedent holding that blue-lining was not permitted at the time that they executed the agreements containing the NCAs. This is irrelevant; everyone is presumed to know the state of the law at the time that they perform an action with potential legal consequence, and this legal fiction is necessary to maintain the rule of law. *See, e.g.*, *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915) (holding that there is a non-rebuttable presumption that everyone who enters into a contract does so knowing the state of the law); *cf. Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) (holding that a party's ignorance of the law is irrelevant to application of those laws in a criminal prosecution); *see also Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, 498 (Cal. App. 2013) ("[W]e are required to presume that parties to a contract both know and have in mind all applicable laws in existence when an agreement is made . . . necessarily enter into the contract and form a part of it without any stipulation to that effect as if they were expressly referred to and incorporated.") (internal quotations omitted).

In August of 2016, and immediately following their fellowships, Scott and Annie relocated from Pittsburgh to Las Vegas to join Premier Anesthesia Consultants ("PAC"), which was a subsidiary of a group called Anesthesiology Consultants, Inc. ("ACI"). (1 App. 195.) At the time the Duongs joined PAC, the group consisted of approximately 16 anesthesiologists. (*Id*.) The Duongs' recruitment process with PAC began in or around January of 2016, and at no point during that process were they ever informed that PAC was considering a buy-out from Fielden Hanson or any other group. (1 App. 181.)

USAP Comes to Town: The Fielden Hanson Merger

In or around December of 2016, USAP came to Las Vegas in a merger deal which involved PAC/ACI and another group called Summit Anesthesia Consultants. (1 App. 196.) Fielden Hanson is a subsidiary of USAP. (1 App. 182).[2] In connection with this acquisition, USAP/Fielden Hanson required the Duongs to execute Physician-Track Employment Agreements ("Agreement[[3]]") if they wished to continue their employment. (*Id.*)

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[2] *See also Anesthesiology Consultants Inc. Teams with U.S. Anesthesia Partners*, https://www.usap.com/news-and-events/news/anesthesiology-consultants-inc-teams-us-anesthesia-partners (last visited February 25, 2019).

[3] Both Agreements are identical USAP forms except for the names of the counterparty involved, and the term "Agreement" is therefore used in the singular for the remainder of this Opposition to refer to the substance of both Scott and Annie's Agreements.

Thus, within a few months of beginning work in Las Vegas, the Duongs found themselves facing an uncomfortable decision: They could either accept the new terms set forth by USAP/Fielden Hanson or immediately leave the practice which they had just moved across the country to join. (1 App. X, Y.) They ultimately chose to execute the Agreement. (*See id.*)

USAP's New Terms: The Post-Merger Non-Competition Language

USAP's Agreement (with exhibits) spans about 23 single-spaced pages. (1 App. 182.) Many of the Agreement's provisions (including the non-competition provisions at issue in this case) cast their scope in terms of "Facilities," which are broadly defined as:

> All facilities with which the Practice has a contract to supply licensed physicians, CRNAs, AAs and other authorized health care providers who provide Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, facilities at which any such providers have provided Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, and facilities with which the Practice has had active negotiations to supply any such providers who provide Anesthesiology and Pain Management Services during the Term or during the preceding twelve (12) months shall be collectively referred to as the "Facilities[.]"

(1 App. 182–83.) The definition of capital-'F' "Facilities" under the Agreement therefore includes the following classes of healthcare facilities:

(1) facilities at which USAP/Fielden Hanson has a contract to supply healthcare providers;

(2) facilities at which USAP/Fielden Hanson *had* a contract to supply healthcare providers at any time during the 12 months preceding the Agreement, even if it does no longer, and even if it did not have such a contract at any time during the term of the Agreement;

(3) facilities at which USAP/Fielden Hanson had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) facilities at which USAP/Fielden Hanson had provided anesthesiology or pain management services during the twelve months preceding the Agreement, even if it never did during the term of the Agreement;

(5) any facilities with which USAP/Fielden Hanson had "active negotiations[4] to supply any [healthcare] providers" during the Term of the Agreement, even if those negotiations never ripened into a contract; and

(6) any facilities with which USAP/Fielden Hanson had "active negotiations" during the twelve months preceding the Agreement, even if those

[4] The Agreement does not define "active negotiations," which leaves ambiguous how "active" negotiations must be before they trigger any obligation under the Agreement. For example, if a healthcare facility contacts USAP/Fielden Hanson expressing potential interest in forming a relationship and entertains a few meetings before concluding that it is not interested, it is entirely unclear under the Agreement whether these "negotiations" were sufficiently "active" to trigger the Agreement's various obligations.

negotiations never ripened into a contract, and even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

(1 App. 183–84.) Subject to this broad definition of "Facilities," the Agreement contains the following Non-Competition Clause:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that ***Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion)***, directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) ***provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services*** (1) in the case of each day during the Term, within the twenty-four month period prior to such day and ***(2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination;*** (ii) ***call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof***; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

(1 App. 184, emphases added.) The Agreement also provides that, upon termination, the Duongs must terminate their privileges at any "Facility" as defined by the Agreement, *without regard to whether they had ever provided services* at that Facility:[5]

> 6.3 Effect of Expiration or Termination. Upon the expiration or earlier termination of this Agreement, neither party shall have any further obligation hereunder except for (a) obligations accruing prior to the date of expiration or termination and (b) obligations, promises, or covenants contained herein which are expressly made to extend beyond the Term. ***Immediately upon the effective date of termination, Physician shall*** (i) surrender all keys, identification badges, telephones, pagers, and computers, as well as any and all other property of the Practice in Physician's possession, and (ii) ***withdraw from the medical staff of every Facility in which Physician holds medical staff privileges***. If required by the Practice, Physician shall deliver to each Facility that is served by the Practice Physician's written consent to be personally bound by this Section 6.3. Physician further agrees that failure to comply with this provision shall constitute a material breach of this Agreement upon which Physician's rights to any further benefits under this Agreement shall terminate immediately and automatically.

(1 App. 136, emphases added.) The Agreement also includes a provision requiring a physician to "waive[] due process, notice, hearing, and review in the event his or her membership or privileges at any Facility are terminated under the circumstances described in Section 6.3(ii) [*i.e.* the language quoted above]," which apparently contemplates a waiver of rights if someone *other than* the Duongs seeks to have their

[5] Section 6.3 does not include the "twenty-four month period" limitation contained in the non-competition clause, and the Agreement does not articulate when, if ever, the Duongs may re-establish their privileges at the Facilities.

privileges terminated at any Facility following their departure. (1 App. 56, 81.) The Agreement's non-solicitation provision similarly applies to "any of the Facilities," without regard to whether the Duongs had ever actually practiced or provided services at any given facility. (*Id*.)

The Duongs' Post-Merger Working Conditions Deteriorate

After the merger, various changes were implemented that made the Duongs uncomfortable. (1 App. 185.) For example, they were transitioned from 1099 compensation (for contractors) to a W2 salary (for employees). (*Id.*) A compensation plan was implemented which was less transparent than that of PAC/ACI. (*Id.*) USAP took 20% of the Duongs' salaries on an indefinite basis. (*Id.*) In exchange for this 20% "tax," USAP promised improvement in efficiency/work flow and better negotiations/contracts with hospitals, which would ostensibly result in higher income for the members of the practice net of the tax (a notion which USAP refers to as "income repair"). (*See id.*) USAP/Fielden Hanson did not deliver on any of these promises. (*Id.*)

The quality of the practice suffered as well. (1 App. 185.) The sudden expansion of the group from 16 providers to more than 100 made scheduling disorganized and frustrating for surgeons attempting to schedule procedures. (*Id.*) Some surgeons became dissatisfied with the group and began to take their business elsewhere. (*Id.*) Many providers became unhappy with the new system, and

morale suffered. (*See id.*) Providers working with the group (including the Duongs) began to feel like interchangeable cogs rather than skilled physicians. (*See id.*)

In short, the work experience that USAP/Fielden Hanson provided was not what the Duongs had signed up for when they left Pittsburgh and relocated to Las Vegas to work with PAC, and they decided to part ways with the practice. (*Id.*)

The Duongs Separate from USAP/Fielden Hanson

In or around August of 2018, the Duongs provided 90 days' notice of their intent to terminate their employment with Fielden Hanson, as provided in Section 6.2.9 of the Agreement. (*See* 1 App. 186; 1 App. 204; 1 App. 209). In doing so, they declined a partnership that they were offered, as well as the bonus associated with it. (See 2 App. 186.) The Duongs had no intention of competing with USAP following their departure. (2 App. 187.) However, they also did not conceal their intention to continue working as anesthesiologists in Las Vegas following their departure from Fielden Hanson. (*Id*.)

This Litigation and the Proceedings Below

This litigation was commenced in February of 2019 (1 App. 1–14), and Fielden Hanson sought a preliminary injunction shortly thereafter (1 App. 17–159). On April 9, 2019, the district court issued an order granting Fielden Hanson's motion in part. The district court held that the contract was unenforceable as written, but

invoked NRS 613.195(5) to modify its terms (3 App. 430–441). However, NRS 613.195(5) was nevertheless retroactively to modify the terms of the terms of the parties' agreement, notwithstanding that it had been passed after that agreement had been executed. (*Id.*)

The Duongs moved for reconsideration on April 23, 2019, arguing that the district court could not retroactively apply NRS 613.195(5) to alter the substantive terms of a contract executed before the statute's enactment. (3 App. 446–526.) Fielden Hanson opposed the motion on moved to alter or amend the judgment on May 8, 2019. (4 App. 446–526.) The Duongs replied in support of their motion on May 21, 2019. (4 App. 693–704.) On June 7, 2019, the district court denied Plaintiff's motion for reconsideration. (4 App. 712–717.)

This appeal followed on August 16, 2019.[6] (1 App. 746–747.)

SUMMARY OF ARGUMENT

Non-competition agreements are disfavored restraints of trade, and they require definite and narrowly-tailored terms in order to be enforceable. Sufficiently definite non-competition agreements must contain express and reasonable limitations as to time and geographic scope. These criteria (and their

[6] The Duongs filed an Amended Notice of Appeal on the same day to rectify clerical errors in the initial Notice of Appeal.

reasonableness) are clear and easily ascertainable; the extent of the restriction may be reckoned by simple reference to a map and a calendar.

The non-competition agreement at issue here lacks any geographic limitation, and instead casts its scope in terms of medical "Facilities[4]" at which Fielden Hansen provides services (or may provide services) and at which the Duongs have worked. Non-competition agreements cast in these terms present indefinite and moving targets in which departing physicians cannot confidently know where they can or cannot work, and they require courts to conduct fact-specific inquiries in every disputed case. Moreover, there is no reasonable nexus between: (1) the hospitals at which an anesthesiology group provides services; and (2) which surgeons who conduct procedures at those hospitals have a relationship with that anesthesiology group. In Nevada, surgeons may generally conduct procedures at any hospital at which they have privileges, and those surgeons may retain the services of any anesthesiologist that they choose. The mere fact that USAP has provided anesthesiology services for a surgeon at Sunrise Hospital (for example) should not bar a departing anesthesiologist from providing services to any surgeon at that same facility, regardless of whether or not those surgeons have ever worked with USAP. Nevertheless, this is exactly how the non-competition agreement at issue here is constructed.

Because the overbroad non-competition agreement at issue here predated the enactment of NRS 613.195(5), it cannot be "blue-penciled" under that statute. Prior to the enactment of NRS 613.195(5), Nevada law held that an overbroad noncompetition agreement was wholly unenforceable, and that an employee purportedly subject to such an agreement would not be bound. NRS 613.195(5)

ARGUMENT

I. THE NON-COMPETE AT ISSUE HERE IS OVERBROAD AND UNENFORCEABLE

The non-compete at issue here is overbroad and not reasonably related to any legitimate business purpose; therefore, it is wholly unenforceable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016) (holding that a non-compete that extends beyond what is necessary to protect the employer's interest renders the provision wholly unenforceable). The plain language of the provision states that if the Duongs have ever taken a case at a hospital during their time at USAP, they are barred from accepting *any* cases from *any* provider at that *entire facility* for a two-year period, even for providers with whom USAP had never worked, and even if USAP later ceases providing any services at that facility. The non-compete's focus on entire *facilities* rather than individual *physicians* is nonsensical because, generally speaking, physicians (and not hospitals) hire anesthesiologists. The non-compete is therefore overbroad and invalid.

A. Non-Competition Agreements are Strictly Construed

An agreement by an employee not to compete is generally considered an unenforceable restraint of trade unless it is reasonable in scope and breadth. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 404, 632 P.2d 1155, 1158-59 (1981). A restraint of trade is unreasonable if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. *Ellis v. McDaniel*, 95 Nev. 455, 458, 596 P.2d 222, 224 (1979). Nevada courts therefore "strictly construe the language of covenants not to compete; and in the case of an ambiguity, that language is construed against the drafter." *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 489, 117 P.3d 219, 225 (2005).

Post-employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business. *Hotel Riviera*, 97 Nev. at 404, 632 P.2d at 1158–59. Thus, noncompetition agreements are strictly limited to the protection of a legitimate business interest of the employer. *Duneland Emergency Physician Med. Corp. v. Brunk*, 723 N.E. 2d 963 (Ind. Ct. App. 2000). In order for a plaintiff to enjoy a probability of success on the merits of its case to enforce a non-compete clause, the Court must consider whether the provisions of the non-compete would likely be found reasonable at trial. *Hanson v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967).

For example, in evaluating the reasonableness of the non-compete provision at issue in *Golden Road*, the Court looked to its prior decisions in *Jones v. Deeter*, 913 P.2d 1272 (Nev. 1996), wherein it held that a five-year time restriction was unreasonable, and *Camco, Inc. v. Baker*, 113 Nev. 512 (1997), which concluded that a geographic restriction of 50 miles from any area which was the "target of a corporate plan for expansion" was unreasonable. *Id.* The Court reasoned that if such restrictions were unreasonable in those cases, then prohibiting an employee "from employment, affiliation, or service with any gaming business" was also unreasonable. *Id.* Additionally, the Court found that prohibiting an employee from working in any capacity, even as a custodian, did not further any protectable any legitimate business interests on the part of the employer. *Id.* Accordingly, the Court determined that the provision was overbroad and unreasonable. *Id.*

B. USAP's Non-Competition Agreement is Overbroad as Drafted

The plain language of the non-compete at issue here purports to prevent the Duongs from "provid[ing] Anesthesiology and Pain Management Services at any of the Facilities at which [they have] provided any Anesthesiology and Pain Management Services . . . within the twenty-four month period prior to the date of . . . termination" of the Agreement. (1 App. 124.) On its face, this provision prevents the Duongs from accepting cases at any "Facility" at which they had even taken a

case during their time at USAP, even if USAP were to later cease providing anesthesiology services at those "Facilities."

But Appellant's focus on *hospitals* (or "facilities") misses the point because, generally speaking, hospitals do not hire anesthesiologists—*physicians* do. A physician conducting a surgical procedure at a hospital at which she has privileges may, in the overwhelming majority of cases, hire any anesthesiologist she chooses. The only relevant relationship between the anesthesiologist and the hospital is whether the anesthesiologist carries privileges at that facility. Nevertheless, the plain language of the non-compete at issue purports to lock an anesthesiologist out of an entire hospital the moment that he takes a single case for a single provider at that hospital. This is not a reasonable means for USAP to protect its business. *See Golden Rd.*, 376 P.3d at 156.

The Agreement also requires the Duongs to terminate their staff privileges at *every single "Facility"* under the Agreement's broad definition of that term, regardless of whether the Duongs had ever provided services there as USAP employees, and with no indication of when (if ever) they may apply to reinstate their privileges at those Facilities. This means that, under the plain language of the Agreement, the Duongs must terminate their privileges at:

(1) every facility at which USAP/Fielden Hanson has a contract to supply healthcare providers;

(2) every facility at which USAP/Fielden Hanson *had* a contract to supply healthcare providers at any time during the 12 months preceding the Agreement, even if it does no longer, and even if it did not have such a contract at any time during the term of the Agreement;

(3) every facility at which USAP/Fielden Hanson had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) every facility at which USAP/Fielden Hanson had provided anesthesiology or pain management services during the twelve months preceding the Agreement, even if it never did during the term of the Agreement;

(5) every facility with which USAP/Fielden Hanson had "active negotiations to supply any [healthcare] providers" during the Term of the Agreement, even if those negotiations never ripened into a contract; and

(6) every facility with which USAP/Fielden Hanson had "active negotiations" during the twelve months preceding the Agreement, even if those negotiations never ripened into a contract, and even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

This stripping of staff privileges has no set duration in the Agreement; it is therefore apparently indefinite. The Duongs must also waive their due process rights in connection with their staff privileges at any USAP "Facility," again, apparently

indefinitely. This sweeps far more broadly than is necessary to protect any legitimate business purpose of USAP/Fielden Hanson.

II. NRS 613.195(5) CANNOT BE APPLIED RETROACTIVELY

Applying NRS 613.195(5) retroactively would substantively modify the terms of the parties' non-compete, which was entered into prior to its enactment; therefore, doing so would violate the Duongs' due process rights. Both USAP and the Duongs were presumed to know the state of the law when they executed the NCA at issue in this case. At the time of execution, Nevada's law of public policy required non-competes to be wholly reasonable, and held that reformation (or "blue penciling") was not available to rescue non-competes that were unreasonable. *See Golden Rd.*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 158 (2016). The holding in *Golden Rd.* was itself based upon *decades* of Nevada precedent, which struck unreasonable non-competes in their entirety and prohibited judicial contract reformation as a matter of public policy.[7] Parties may not contract around the law of public policy. Thus, at

[7] *See, e.g.*, *Reno Club, Inc. v. Young Inv.* Co., 64 Nev. 312, 323, 182 P.2d 1011, 1016 (**1947**) (holding that blue penciling "would be virtually creating a new contract for the parties, which ... under well-settled rules of construction, the court has no power to do"); *Hansen v. Edwards*, 83 Nev. 189, 191, 426 P.2d 792, 793 (**1967**) ("An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable."). *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (**1996**) (holding that an unreasonable provision renders the noncompete agreement wholly unenforceable); *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (**2001**) ("It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the

the time of execution, both parties reasonably expected that the non-compete would be enforced only if it were wholly reasonable, and that blue penciling would not be available, notwithstanding any contractual provision stating otherwise. Applying AB 276 retroactively upends the parties' reasonable expectations at the time of execution by effectively inserting severability and blue-lining clauses into the contract, which the parties knew was not legally permissible[8] when they agreed to the terms at issue.

A. Golden Road, its Antecedents Under Nevada Law, and AB 276

Golden Rd. was not some radical departure from Nevada law that was swiftly "corrected" by the legislature. Rather, it was a straightforward application of long-established legal principles that produced a result of which the newly-elected 2017 legislature did not approve. The legislature therefore statutorily changed Nevada's

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written language and enforced as written." (internal quotation omitted)); *All Star Bonding v. State*, 119 Nev. 47, 51, 62 P.3d 1124, 1126 (**2003**) ("We are not free to modify or vary the terms of an unambiguous agreement." All of these cases were cited with approval in *Golden Rd. See* 376 P.3d at 156–158.

[8] USAP's form contract included a severability clause and blue-lining clause at the time of execution, which is not surprising in a form adhesion contract used in a multiple states, at least some of which may have allowed reformation and blue penciling. However, at the time of execution, neither USAP nor the Duongs could have reasonably expected that provisions directly contrary to decades of Nevada law would have been enforced in a Nevada court. Indeed, ***if USAP had had intended to impose terms on the Duongs against then-existing public policy, the entire contract would be void.*** *Columbia/HCA Info. Services, Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001) ("[T]his court will not enforce contracts that violate public policy.").

law of contracts to produce results more to its liking, as it is empowered to do. However, it was the *legislature* that departed from long-established Nevada law, and there is no indication either in the legislative history or the text of the enactment itself that it intended to do so retrospectively. The Court may therefore not apply AB 276 retroactively. *See Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) (reversing and remanding district court's finding of retroactivity because "[t]he legislative history of [the statute] does not support the conclusion that [it] was meant to be applied retroactively"); *see also* Miller *v. Burk*, 124 Nev. 579, 589, 188 P.3d 1112, 1119 (2008) (holding enactments must have only "prospective application, unless the [enactment] specifically provides otherwise").

1. Golden Rd. was Supported by Decades of Nevada Public Policy Precedent

On July 21, 2016, this Court held in *Golden Rd.* that Nevada's established law of public policy precluded blue penciling an unreasonable non-compete. 376 P.3d at 158. The case involved a non-compete which prohibited the defendant (a casino host) from "employment, affiliation, or service" with any gaming operation within 150 miles of her former employer for a period of one year. *Id.* at 153. The district court held that the non-compete was overbroad because it precluded the defendant from working for any casino in *any* capacity for its term, and the Nevada Supreme Court affirmed that ruling. *Id.*

The plaintiff employer urged the Court to "blue pencil" the agreement by narrowing its scope to render it enforceable. *See id.* at 156. This Court declined to do so, noting that, under long-standing Nevada precedent, "an unreasonable provision renders [a] noncompete agreement wholly unenforceable." *Id.* (citing *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996)). Nevada's law of contracts had also long prohibited reformation or "blue penciling" of a contract where the terms were unambiguous. *Id.* (citing *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947)). ("This would be virtually creating a new contract for the parties, which . . . under well-settled rules of construction, the court has no power to do.").

The Court's ruling in *Golden Rd.* was based on an application of Nevada's law of public policy as articulated in the Court's prior precedents:

> Our exercise of judicial restraint when confronted with the urge to pick up the pencil is sound public policy. Restraint avoids the possibility of trampling the parties' contractual intent. *See* Pivateau, supra, at 674 ("[T]he blue pencil doctrine ... creates an agreement that the parties did not actually agree to."); *Reno Club*, 64 Nev. at 323, 182 P.2d at 1016 (concluding that creating a contractual term operates beyond the parties' intent and the court's power). Even assuming only minimal infringement on the parties' intent, as the dissent suggests, a trespass at all is indefensible, as our use of the pencil should not lead us to the place of drafting. Our place is in interpreting. Moreover, although the transgression may be minimal here, ***setting a precedent that establishes the judiciary's willingness to partake in drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench***, irrespective of some jurisdictions' willingness to overreach.

[* * *]

> ***We have been especially cognizant of the care that must be taken in drafting contracts that are in restraint of trade.*** *Hansen [v. Edwards]*, 83 Nev. [189], 191, 426 P.2d [792,] 793 [(1967)] ("An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable."). ***A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight.*** [Citation.] "One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." [Citation.]

Golden Rd., 376 P.3d at 158 (emphases added). The Court concluded by stating "***[i]n light of Nevada's caselaw and stated public policy concerns, we will not reform the contract*** to change the type of employment from which [the plaintiff] is prohibited." *Id.* at 159. The Court therefore struck the entire non-competition agreement. *Id.*

2. AB 276 Substantively Changed Nevada Law

On March 10, 2017 (and shortly following the 2016 elections), the newly-seated Nevada legislature introduced AB 276. The Bill proposed various amendments to NRS Chapter 613 (entitled "Employment Practices"). Notably, the text of the Bill as introduced said *nothing* about blue penciling – instead, it merely prohibited employers from discriminating against any person because the person inquired about, discussed, or disclosed his or her wages or the wages of another

person.[9] (*See generally* 3 App. 583–588) Nor was blue-penciling mentioned in the first reprint of the Bill, which made only minor wording changes to the initial draft without changing the substance. (*See generally* 3 App. 590–593.) It was only in the second reprint of the Bill, published on May 19, 2017 that the legislature proposed revising NRS 613.195(5) to state as follows:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

(*See* 3 App. 590–600.) The second reprint of the Bill also protected employees subject to non-competition agreements if clients of their former employers seek them out without being solicited, and protected employees subject to a NCA who are laid

[9] The Bill as introduced was entitled "AN ACT relating to employment; prohibiting an employer, employment agency or labor organization from discriminating against certain persons for inquiring about, discussing or voluntarily disclosing information about wages under certain circumstances; and providing other matters properly relating thereto," which illustrates that the Legislature's focus was on that issue rather than blue penciling when it introduced the bill. (*See* Ex. A at 1.)

off by providing that they are bound only as long as they are receiving severance pay. (*See generally id.*)

Discussion of the newly-added blue penciling provision was sparse during the May 24, 2017 meeting of the Senate Committee on Commerce, Labor, and Energy. (3 App. 602–48.) Assemblywoman Ellen B. Spiegel introduced the Bill, and she spoke at length about the Bill's primary purpose of protecting employees who share wage information from retaliation by their employers. (3 App. 613–15.) She then spoke briefly about the protections for laid off employees and ex-employees who are sought out by clients of their former employer.[10] (3 App. 616–17.) She mentioned the blue penciling provision last, and the entirety of her remarks on the subject were as follows:

> Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid.

(3 App. 616.) And that was all—no mention of the *Golden Rd.* decision, no fulminating about any "absurd result" or misapplication of the law, no expression of any intent to retroactively upend *Golden Rd.* or the decades of legal authority upon

[10] Assemblywoman Spiegel referred to this latter protection as the "hairdresser clause," so-named because clients of hairdressers will often follow that hairdresser wherever they go after a departure, even without being solicited.

which it was based. Just a dry, two-sentence statement that the Bill, if enacted, would allow blue penciling (or "bluelining"). (*See id.*)

The only mention of the blue-penciling provision during the public comment period came from Misty Grimmer, a lobbyist for the Nevada Resort Association. (3 App. 616) She thanked Assemblywoman Speigel for the addition of the blue penciling provision, which she said was "add[ed] on our [*i.e.* the Resort Association's] behalf." (*Id.*) She characterized the addition as "clarify[ing] in statute something that had been the practice of the courts for decades," apparently referring blue penciling, which had in fact been prohibited by Nevada law for over 40 years.[11] (*Id.*) She then inaccurately characterized *Golden Rd.* as a departure from established law, and expressed her enthusiasm for the Bill's "clarifications." (*Id.*) After three perfunctory statements of support by other lobbyists, Chair Atkinson called the Bill to a vote, and it was passed. (3 App. 616–17.)

AB 276 was read a third time on May 26, 2017, and passed once again. Governor Sandoval signed the Bill into law on June 3, 2017.

B. AB 276 Cannot be Applied Retrospectively

When the Duongs executed USAP's form employment agreement in December of 2016, they did so relying upon the law is it then existed. At that time, both USAP and the Duongs had knowledge (whether actual or constructive) that: (1)

[11] *See* cases cited in note 1, *supra*.

an NCA is wholly void under Nevada law if any of its provisions are unreasonable; and (2) a Nevada court may not blue pencil an unreasonable NCA to render it enforceable. *Golden Rd.*, 376 P.3d at 158; *accord Deeter*, 112 Nev. at 296, 913 P.2d at 1275. USAP therefore presented its terms to the Duongs knowing that its form blue-lining and severability provisions were not enforceable, and the Duongs agreed to the NCA knowing that they would be bound only if a court found all of the terms to be reasonable. Applying AB 276 retroactively would upend those mutual expectations and substantively change the parties' agreement; therefore, retroactive application would violate the Duongs' due process rights. Even if due process were not an issue, Nevada law will only apply a statute retrospectively where the legislature manifests a clear intent that it do so. Here, neither the text of AB 276 nor its legislative history provide *any* indication that the legislature intended it to be retroactive. Thus, AB 276 does not apply retroactively.

1. Both USAP and the Duongs were Bound by the State of Nevada Law at the Time of Executing the Non-Compete, Which Means they were Bound by Golden Rd.

There is a non-rebuttable presumption that everyone who enters into a contract does so knowing the state of the law. *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915). Thus, it is a "well-established principle of contract law that statutes and laws in existence at the time a contract is executed are considered part of the contract. *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 549 (1997); *see*

also Williams v. Stone, 109 F.3d 890, 896 (3d Cir. 1997) ("[P]arties to a contract are presumed to contract mindful of the existing law and . . . all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them."). This is sensible and necessary because construing a contract as being formed *contrary* to applicable law (including the law of public policy) would render the entire contract unenforceable. *See Clark v. Columbia/HCA Info. Services, Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001) ("[T]his court will not enforce contracts that violate public policy."). Courts therefore assume that the parties intended to comply with the law and incorporate it into their agreement. *Clark County v. Bonanza No. 1*, 96 Nev. 643, 652, 615 P.2d 939, 945 (1980) ("To the extent the county's obligation is ambiguous, we must construe it to avoid conflict with public policy.").

At the time of entering into the NCA, both USAP and the Duongs knew that the holding in *Golden Rd.* precluded blue penciling of the non-competition clause or severability of unenforceable provisions. 376 P.3d at 159. Any provisions of the NCA which purport to allow blue penciling or severability[12] were therefore legally

[12] *See, e.g.*, Section 2.8.3 of the non-compete ("Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to

irrelevant because they *must* be—otherwise, USAP would have entered into a contract with a term expressly violating Nevada's public policy, which would render the entire contract void. *Columbia/HCA*, 117 Nev. at 480, 25 P.3d at 224; *accord Johnson v. PPI Tech. Services, L.P.*, 3 F. Supp. 3d 553, 560 (E.D. La. 2014) ("[A] contract against public policy [is void and] cannot be made valid by ratification."); *see also Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217 (1997) ("[W]e recognize that a construction of a contract which renders the agreement enforceable rather than void is preferred.").

In short, at the time of execution, both of the parties knew that Nevada law required the non-competition agreement to be reasonable as a whole and that blue penciling would not be available to rescue the agreement if it overreached, and they implicitly agreed to abide by those rules. *Bonanza No. 1*, 96 Nev. at 652, 615 P.2d at 945.

2. Applying AB 276 Retroactively Would Materially Alter the Parties' Rights and Obligations Under the NCA, Which Would Violate Due Process and the Federal Contracts Clause

"[T]he protection afforded by the due process clause of the Fourteenth Amendment to the United States Constitution extends to prevent retrospective laws from divesting vested rights." *Ettor v. Tacoma*, 228 U.S. 148, 155–56, 33 S.Ct. 428,

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prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.")

430–31 (1913); *accord Public Emp. Ret. v. Washoe Co.*, 96 Nev. 718, 721–23, 615 P.2d 972, 974 (1980). Moreover, Article I, § 10, of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." If applied retrospectively, AB 276 would materially affect the Duongs' rights and obligations under the NCA. At the time of execution, the Duongs reasonably relied upon Nevada's law of public policy as articulated in *Golden Rd.* and its antecedents, and were secure in the knowledge that: (1) the NCA would not be enforced against him if a court held it unreasonable; and (2) a reviewing court would not rewrite the contract. Retroactively applying AB 276 would upend these bedrock assumptions and place the Duongs in a contractual relationship fundamentally different than the one he had executed This is not permissible under the Constitution, and AB 276 cannot be applied retroactively.

3. Applying AB 276 Retroactively Would Materially Alter the Parties' Rights and Obligations Under the NCA, Which Would Violate Due Process and the Federal Contracts Clause

Even if Due Process or the Contracts Clause were not an issue, AB 276 could nevertheless not be applied retrospectively because Nevada law requires a clear manifestation of intent by the legislature that an enactment work retroactively for a court to give it retroactive operation. There is no such expression of intent here. "Retroactivity is not favored in the law." *Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 912, 315 P.3d 294, 296 (2013) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488

U.S. 204, 208 (1988)). This is so because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Thus, absent clear legislative intent to make a statute retroactive, courts must interpret statutes as having only a prospective effect. *Nev. Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) (reversing and remanding district court's finding of retroactivity because "[t]he legislative history of [the statute] does not support the conclusion that [it] was meant to be applied retroactively"); *see also Miller v. Burk*, 124 Nev. 579, 589, 188 P.3d 1112, 1119 (2008) (holding enactments must have only "prospective application, unless the [enactment] specifically provides otherwise").

Here, there is absolutely nothing in either the legislative history or the text of revised NRS 613.195(5) indicating that the legislature intended that the statute operate retroactively. The statutory text says nothing about retroactivity. The legislative history says nothing about retroactivity, nor does it state that the legislature believed that Golden Rd. was a departure from then-existing Nevada law. Indeed, the legislative history supports a conclusion that the "blue penciling" provision was thrown into AB 276 as a near-afterthought, as the first two drafts of

the Bill included no reference to blue penciling whatsoever. In any case, there is simply no basis for concluding that the legislature intended AB 276 to apply retroactively; therefore, it must apply only prospectively.

CONCLUSION

The Court should affirm the ruling below.

Dated this 11th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

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 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 8978 words.

3. 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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

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Dated this 11th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is that of Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada, 89169.

I served the foregoing **APPELLANTS' OPENING BRIEF** in this action or proceeding electronically with the Clerk of the Court via the E-Flex system, which will cause this document to be served upon the following counsel of record:

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I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on March 11, 2020 at Las Vegas, Nevada.

/s/ Ryan O'Malley

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