**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

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**No.: 79460**

From the Eighth Judicial District Court, Case No. A-19-789110-B

# APPELLANTS' PETITION FOR REHEARING

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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.

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## SUMMARY OF THE ARGUMENT

Appellants Scott Vinh Duong, M.D., Annie Lynn Penaco Duong, M.D., and Duong Anesthesia, PLLC, (collectively, "Appellants") respectfully petition this Court to rehear and reconsider its December 31, 2020 Panel Decision in this matter. When issuing its opinion, this Court materially misapprehended a material question of law and overlooked, misapplied, or failed to consider controlling authority. Without reference to any other authority, including the decades of precedent that led to the *Golden Road* decision, this Court held that *Golden Road* "did not prohibit courts from blue-penciling an unreasonable noncompetition agreement pursuant to the parties' agreement."

In so holding, this Court overlooked the fact that the prohibition against blue-penciling was controlling law at the time the parties executed the employment agreement and that the blue-penciling provision ran afoul of public policy. Further, this Court misapprehended whether the parties could, *themselves*, vest a district court with authority to blue pencil that it otherwise lacked under then-existing law. By holding that parties can, by contract, give a district court authority to blue pencil and enforce contracts contrary to then-existing public policy, this Court overlooked, misapplied, or failed to consider controlling authority which holds that a court's authority is limited by substantive law in existence at the time of contract formation.

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## ARGUMENT

### I. This Court overlooked the fact that, at the time Appellants signed the employment agreement, the prohibition against blue-penciling was controlling law.

There is a non-rebuttable presumption that everyone who enters a contract does so knowing the state of the law. (AOB at 26–27 (citing *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915); *Clark County v. Bonanza No. 1*, 96 Nev. 643, 652, 615 P.2d 939, 945 (1980)). And, on that basis, courts assume that the contracting parties intend to comply with controlling law and incorporate it into their agreement. (*Id.* at 27 (citing *Bonanza No. 1*, 96 Nev. at 652, 615 P.2d at 945)). Thus, both Appellants and Respondents are presumed to have known about the controlling authority governing noncompetition agreements at the time they executed the employment agreement, to have intended to comply with that authority, and to incorporate that authority into their agreement.

That authority included precedent explaining that noncompetition agreements are disfavored restraints of trade. (AOB at 11, 22 (quoting *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 486, 376 P.3d 151, 158 (2016) ("A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight.")); *see also* 2 App. 192–93.) 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). 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); (*see also* AOB at 14 (citing same)). Because then-existing Nevada law disfavored noncompetition agreements, the district court was prohibited from blue-penciling the parties' 2016 *Golden Road*-era employment agreement. (*See* ARB at 22–23 n.2 (collecting cases).) This Court overlooked that authority.

## II. This Court failed to consider controlling authority holding contracts contrary to public policy unenforceable, which is what made an amendment to NRS § 613.195 necessary in the first place.

When a contract is found to be contrary to applicable law—including public policy—courts cannot and will not enforce it. (AOB at 27 (citing *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."))). Although "this court will not enforce contracts that violate public policy," this Court failed to consider controlling authority and enforced a blue-penciling provision that violates public policy. *Clark*, 117 Nev. at 480, 25 P.3d at 224 (citing *Nelson v. CSAA*, 114 Nev. 345, 347–48, 956 P.2d 803, 805 (1998)).

The United States Supreme Court has explained that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial

effect." *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995). This Court acknowledged as much nearly 250 years ago. *State ex rel. Truman v. McKenn*ey, 18 Nev. 182, 190, 2 P. 171, 173 (1883) (holding that the legislature is "presumed to know [the law], [and] must have had in mind in enacting the statute"). Thus, the legislature knew that blue-penciling was prohibited as against public policy. That is why it enacted NRS § 613.915(5) to *authorize* blue-penciling by the courts. If this could have been accomplished by private parties' contracts alone, then NRS § 613.915(5) would have been unnecessary. *See Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) ("Statutes should be given their plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.").

## III. This Court materially misapprehended a material question of law by holding that parties can, by contract, allow courts to enforce contracts that violate public policy.

### A. The *Golden Road* court's acknowledgement that "[c]ourts are not empowered to make private agreements" was not dicta.

A court's statement is dicta when "it is unnecessary to a determination of the questions involved." (Opinion at 5 (citing *St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009))). But the portion of the *Golden Road* holding that states, "[c]ourts are not empowered to make private agreements," was central to the holding and was the foundation of the Court's reasoning. Consequently, this Court misapplied *Golden Road* when it held that an integral part

of the *Golden Road* decision was dicta.

The *Golden Road* court stated that it "ha[d] not overturned or abrogated [its] caselaw establishing [its] refusal to reform parties' contracts where they are unambiguous." *Golden Rd.*, 132 Nev. at 483, 376 P.3d at 156. The *Golden Road* court went on to note that "restraint is consistent with basic principles of contract law that hold the drafter to a higher standard" and that "leniency must favor the employee and the terms of the contract must be construed in the employee's favor." *Golden Rd. Motor*, 132 Nev. at 485, 376 P.3d at 158 (citing *Williams v. Waldman*, 108 Nev. 466, 473, 836 P.2d 614, 619 (1992)). "Conversely, blue penciling favors the employer by presuming the employer's good faith." *Id.* at 486, 376 P.3d at 158. And, the *Golden Road* court acknowledged the disparity in bargaining power that justified construing restrictive covenants against the employer as follows:

> However, it is plain that the scales are most imbalanced when the party who holds a superior bargaining position, and who is the contract drafter, drafts a contract that is greater than required for its protection and is thereafter rewarded with the court's legal drafting aid, as the other party faces economic impairment, restrained in his trade. In the context of an agreement that is in restraint of trade, a good-faith presumption benefiting the employer is unwarranted.

*Id.*

This Court disregarded this portion of the *Golden Road* decision and the longstanding precedent upon which it relied. This Court further misapprehended

and misapplied the central reasoning in the *Golden Road* decision, which was based on decades of controlling authority. In doing so, this Court provided Respondents with precisely the sort of "free ride" that the *Golden Road* court cautioned against:

> Under a blue pencil doctrine, the employer then receives what amounts to a free ride on the provision, perhaps knowing full well that it would never be enforced. Consequently, the practice encourages employers with superior bargaining power to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full.

*Id.* at 487, 376 P.3d at 158.

After *Golden Road*, employers had an incentive to include blue-penciling provisions in employment agreements. Employers hoped, as Respondents do now, that they could grant district courts the power to give them just such a free ride through blue penciling. Respondents' attempt to hand the district court the blue pencil runs contrary to controlling authority that courts are not empowered to make private agreements and give employers a "free ride" at their employees' expense.

By invoking without expressly approving Respondents' blue-penciling provision, this Court misapprehended this material and controlling question of law and misapplied controlling authority. The law at the time Appellants executed their employment agreements in 2016 prohibited blue-penciling and the parties were not free to give the district court a power to blue pencil that it did not otherwise lawfully possess.

### B. This Court misapprehended controlling authority that prohibits parties from vesting courts with authority not authorized by and, indeed, contrary to law.

This Court held that "[b]ecause the noncompetition agreement here had a blue-penciling provision, . . . the district court did not abuse its discretion by blue-penciling the noncompetition agreement and enforcing the revised agreement." (Opinion at 5–6.) This Court misapprehended or overlooked the issue upon which that holding turns—whether the parties may, by contract, allow a district court to engage in precisely the judicial action prohibited by law. Put another way, this Court assumed, but did not address, whether the blue-penciling provision itself was valid. That threshold question, which was—and is—before this Court, was not before the court in *Golden Road*.[1]

As this Court acknowledged, the *Golden Road* court adopted the Arkansas Supreme Court's reasoning: , which is on-point when considering a blue-penciling provision when blue-penciling is contrary to public policy: "We are firmly convinced that parties *are not entitled to make an agreement,* as these litigants have tried to do, *that they will be bound by whatever contracts the court may make for them at some time in the future*." (Opinion at 5 (quoting *Golden Road*, 132 Nev. at 488, 376 P.3d at 159 (quoting in turn *Rector-Phillips-Morse, Inc. v. Vronman*, 489

[1] Because the noncompetition agreement in *Golden Road* did not authorize blue-penciling, (Opinion at 5 (citing *Golden Road*, 132 Nev. at 479, 379 P.3d at 153)), it would have been dicta for the *Golden Road* court to opine on the question of whether such a clause would have been enforceable.

S.W.2d 1, 4 (Ark. 1973)) (emphasis added)). To the extent this Court believes the *Rector-Phillips-Morse* analysis in *Golden Road* is dicta, it is nonetheless instructive. Considering the *Golden Road* holding (including the *Rector-Phillips-Morse* analysis), Appellants reasonably relied on the law that held unreasonable noncompetition agreements to be wholly unenforceable as against public policy at the time of contracting.

Appellants squarely addressed this threshold question in their briefing. (*See* ARB at 22–25.) Decades of Nevada authority, culminating in the *Golden Road* decision, clearly required employers to draft noncompetition agreements that were reasonable. If they did not, then the unreasonable noncompetition agreement would be wholly unenforceable. In this case, Respondents failed to draft a reasonable noncompetition agreement and that provision is wholly unenforceable.

This Court misapprehended a material question of law and overlooked controlling authority when it neglected to address the question of whether the parties in were entitled to make an agreement binding them to whatever contract the court may make for them at some time in the future through blue-penciling. Simply agreeing that a court could blue pencil when blue-penciling was prohibited by law was a null act. There is no authority or reasoning in the Court's opinion to suggest that parties may, through their agreement, create *authority* for blue-penciling that does not otherwise exist. Summarily holding that "[b]ecause the noncompetition

agreement here had a blue-penciling provision, . . . the district court did not abuse its discretion by blue-penciling the noncompetition agreement" (Opinion at 5) puts the cart before the horse. It assumes, without answering, that a blue-penciling provision that contravened then-existing public policy was valid and vested the district court with authority it otherwise lacked. Thus, the instant petition should be granted, and this Court should take the opportunity to clarify whether the blue-penciling provision is enforceable even though it was contrary to established public policy at the time of execution.

## IV. This Court should entertain additional briefing to settle the legal questions in this case that are of public interest.

As set forth above, this Court assumed, without expressly deciding, that the blue-penciling provision is enforceable despite being contrary to public policy at the time of execution. But this issue was not fully briefed before this Court. Instead, the parties focused their discussion on the retroactivity of NRS § 613.195(5). Indeed, the Court indicated at oral argument that it may be inclined to invite additional briefing. To be sure, the retroactivity of NRS § 613.195(5)—an issue this Court did not decide (Opinion at 5 n.2)—is an important matter of public interest. This Court should grant the instant petition and invite further briefing on the whether the blue-penciling provision is enforceable. And, when this Court properly finds that it is unenforceable, this Court can and should take the opportunity to clarify the law pertaining to NRS § 613.195(5) for other litigants that find themselves in the

parties' positions.

## CONCLUSION

When the employment agreement was executed in 2016, *Golden Road* was controlling authority and *prohibited* courts from blue-penciling unreasonable noncompetition agreements. If a court lacked authority to blue pencil a noncompetition covenant, how could the parties *authorize* a court to do so by mere agreement? They could not have vested the court with authority it lacks. The employment agreement's blue penciling clause does not meaningfully distinguish this case from *Golden Road*. It is a distinction without a difference.

This Court faces a threshold question: whether, contrary to *Golden Road* and public policy, parties may nevertheless vest such authority in a district court by private contract. By failing to address this issue in its Opinion, this Court misapprehended this material question of law and overlooked, failed to consider, and misapplied controlling authority. Appellants' Petition for Rehearing should be granted, and this Court should take the opportunity to settle these important issues.

Dated: this 2nd day of February 2021.

Respectfully submitted,

**HOWARD & HOWARD ATTORNEYS, PLLC**

By: /s/ Jonathan. W. Fountain

*Attorney for Appellants*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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.

I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) and NRAP 40(b)(3) because it is proportionately spaced, has a typeface of 14 points or more, contains 10 or fewer pages, and contains 3,321 words.

I hereby certify that I have read this petition for rehearing, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(3), which requires every assertion in the petition regarding matters the Court materially misapprehended to be supported by a reference to the page of the record where the matter is to be found or where petitioner has raised the issue.

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I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated: this 2nd day of February 2021.

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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' PETITION FOR REHEARING** 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 February 2, 2021, at Las Vegas, Nevada.

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