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 *EN BANC* RECONSIDERATION

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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

This is an appeal from a district court order preliminarily enjoining Appellants Scott Vinh Duong, M.D., Annie Lynn Penaco Duong, M.D., and Duong Anesthesia, PLLC, (collectively, "Appellants") from soliciting and performing anesthesia services in violation of identical non-competition covenants contained in their respective employment agreements (the "Employment Agreement") that the district court found to be unreasonable, blue penciled, and enforced through its preliminary injunction order.

Appellants argued before the Panel that the district court's order must be reversed because: (1) when Appellants entered into their non-competition agreement on December 2, 2016, this Court's decision in *Golden Road Motor Inn, Inc. v. Islam*, 132 Nev. 476, 376 P.3d 151 (2016) was controlling law, and held that unreasonable non-competition agreements were "wholly unenforceable"; (2) NRS 613.195 was not amended to add subsection (5) which *requires* district courts to blue pencil and enforce unreasonable non-competition agreements, until *after* the parties entered into their non-competition agreement; and (3) the amendment to NRS 613.195 only applies prospectively; thus, the district court lacked authority to blue pencil and enforce the unreasonable non-competition agreement.

The Panel Decision did not address these issues. Instead, the Panel Decision reasoned that, because the parties' agreement contained a provision permitting (but

not requiring) the district court to blue pencil the parties' non-competition agreement and enforce it, the district court did not abuse its direction in doing so.

The Panel Decision must be reconsidered *en banc* because: (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court; and (2) the proceeding involves a substantial precedential, constitutional or public policy issue.

First, reconsideration is necessary because the Panel Decision is directly at odds with the *Golden Road* decision and the decades of precedent that led to it. It is also at odds with the expansive body of Nevada precedent indicating that courts cannot enforce contracts that are against public policy and that parties cannot, by private agreement, vest a district court with such authority that it otherwise lacks.

Second, the substantial precedential and public policy issue in this case should be settled by the Court *en banc*. The basis of the Panel Decision was not within the issues presented for review and was not fully briefed by the parties. By nonetheless holding that *Golden Road* "did not prohibit courts from blue-penciling an unreasonable noncompetition agreement pursuant to the parties' agreement," the Panel set a precedent that stands to usurp the contractual expectations of any party to a noncompete agreement that predates the adoption of NRS 613.195(5).

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ARGUMENT

I. The issue of the blue-penciling provision's enforceability was not before the Panel, despite being the basis for the Panel Decision.

The Panel's decision rested on the premise 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.) But the issue of whether the blue-penciling provision itself was enforceable was not before the Panel and was not fully briefed by the parties. Instead, the two questions before the Court were: (1) whether the non-competition provision at issue in this case was reasonable; and (2) whether NRS 613.195(5) applies retroactively. (AOB at viii; RAB at 1.) The Panel Decision did not address either issue.

The Panel indicated at oral argument that it may be inclined to invite additional briefing regarding the blue-penciling provision because the parties focused their discussion on the retroactivity of NRS 613.195(5). In their Opening Brief, Appellants expressly challenged the enforceability of the agreement's blue-penciling provisions. (AOB at 19 n.8.) But it is apparent that this was not the focal point of this appeal: Appellant's argument on this point was relegated to a footnote, and the discussion focused on the questions presented. (*See generally id.*) In its Answering Brief, Respondent referred to the blue-penciling provision. (*See* RAB at 25–27.) Respondent, however, presented no analysis or discussion of the provision's

enforceability. (*Id.*) Instead, it pointed out—also in a footnote—that the policy supporting NRS 613.195(5) also supports the savings clause. (*Id.* at 27 n.4.) But that argument is painfully circular: the policy behind NRS 613.195(5), which was enacted after the parties executed the Employment Agreement, cannot be said to support the blue-penciling provision unless NRS 613.195(5) was intended to apply retroactively.

No supplemental briefing was ordered. Instead, the Panel issued its Decision, which runs contrary to longstanding precedent and inculpates substantial public policy issues surrounding the enforcement of non-competition agreements entered into after *Golden Road* but before NRS 613.195 was amended to require blue penciling. Under these circumstances, *en banc* reconsideration is necessary. *Cf In re Cay Clubs*, 130 Nev. 920, 924, 340 P.3d 563, 566 (2014) (granting *en banc* reconsideration "to consider an issue that the prior opinion [by the panel] did not directly address" after the panel denied rehearing in a case that presented a substantial precedential and public policy issue).

II. *En banc* review is necessary to secure uniformity of decisions of the Supreme Court because the Panel Decision is contrary to prior precedent.

The Panel materially misapprehended a material question of law in this case when it assumed, without expressly deciding, that the permissive blue-penciling provision in the Employment Agreement is enforceable. That assumption is in direct

contravention of longstanding Nevada precedent and public policy at the time the parties executed the Employment Agreement.

There is a non-rebuttable presumption that everyone who enters into 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)). "Elementary 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." (AOB at 30 (quoting *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting, in turn, *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994))).)

Just five years ago, this Court was "firmly convinced that parties <u>are not entitled to make an agreement</u>, as these litigants have tried to do, <u>that they will be bound by whatever contracts the court may make for them at some time in the future</u>." (Opinion at 5 (quoting *Golden Rd.*, 132 Nev. at 488, 376 P.3d at 159)) (emphasis added)). But the Panel Decision did an about-face on this point by holding, without any cogent analysis, that blue-penciling provisions requiring parties to be bound by whatever contract a court may construct for them in the future are enforceable. This decision is directly at odds with the notion that litigants <u>are not entitled to make such agreements</u>. And, to be sure, that statement was not dicta. As

the Panel acknowledges, this Court held "that courts should not be in the business of making private agreements for parties, as that is not within the 'judicial province.'" (Opinion at 5 n.2 (citing *Golden Road*, 132 Nev. at 488, 376 P.3d at 159).) This Court's holding in *Golden Road* was the culmination of clear, binding precedent that courts cannot create private agreements, even if the parties purportedly give them the authority to do so. *See 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" (emphasis added)); *Hansen v. Edwards*, 83 Nev. 189, 191, 426 P.2d 792, 793 (1967); *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 written language and enforced as written." (internal quotation omitted and emphasis added)); *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.").

En banc reconsideration is necessary to secure and maintain the uniformity of decisions of the Supreme Court. The Panel Decision is contrary to controlling law unless and until this Court expressly overturns *Golden Road*.

III. The Panel Decision involves a substantial precedential and public policy issue that the Court should address *en banc*.

Nevada clearly has a public policy interest in ensuring its citizens can make a living. For that reason, Nevada precedent consistently holds that noncompetition agreements are disfavored restraints of trade. (AOB at 11, 22 (quoting *Golden Road*, 132 Nev. at 486, 376 P.3d at 158 ("A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight.").) Thus, noncompetition agreements are generally considered unenforceable restraints of trade unless they are reasonable in scope and breadth, *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 404, 632 P.2d 1155, 1158-59 (1981), meaning their restrictions must be no greater than required for the protection of the person for whose benefit the restraint is imposed, *Ellis v. McDaniel*, 95 Nev. 455, 458, 596 P.2d 222, 224 (1979). Nevada courts "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)).

Similarly, courts cannot and "will not enforce contracts that violate public policy." (AOB at 27 (citing *Clark v. Columbia/HCA Info. Services, Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001)).) And, as set forth above, parties "are not entitled to make an agreement . . . 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).)

Here, the Panel tacitly held that parties may, by contract, vest district courts with the authority to do what this Court has expressly forbidden: provide by private agreement for the enforcement of contracts that violate public policy. The Panel further endorsed a district court's ability to rewrite and enforce private agreements that were executed when controlling law indicated that courts could not do so. But the courts' lack of authority to do so is precisely why NRS 613.195(5) was amended in the first place. The Legislature knew about the *Golden Road* holding when it amended the statute. *See 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"). If the Panel Decision is correct, the Legislature did not need to spend the time or ink drafting, debating, and passing a wholly superfluous amendment to NRS 613.195.

As a matter of public policy, this Court should hear this case *en banc* to determine whether parties may execute and enforce contractual provisions authorizing courts to rewrite private agreements despite the substantial body of precedent that would otherwise prohibit parties from doing so.

IV. This proceeding involves a substantial precedential and public policy issue, which the Panel Decision did not address.

"Retroactivity is not favored in the law." (AOB at 29 (quoting *Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 912, 315 P.3d 294, 296 (2013) (quoting, in turn,

Bowen v. Georgetown Univ. Hosp., 488. U.S. 204, 208 (1988))).) Thus, enactments must have only "prospective application, unless the [enactment] specifically provides otherwise." (*Id.* at 30 (citing *Miller v. Burk*, 124 Nev. 579, 589, 188 P.3d 1112, 1119 (2008)).)

If blue-penciling provisions are unenforceable—or even just to the extent employers did not include a blue-penciling provision in their *Golden Road*-era noncompetition agreements—then the retroactivity of NRS 613.195(5) is a substantial precedential and public policy issue. Indeed, the parties' sharp disagreement about the statute's retroactivity in this case evinces the contractual expectations of other former-employer-former-employee relationships across the state. (*Compare* AOB at 18–31 *with* RAB at 15–24.) This case presents the Court with the opportunity to settle the question of whether NRS 613.195(5) applies retroactively or prospectively only. The *en banc* Court should seize that opportunity.

CONCLUSION

The Panel materially misapprehended a material question of law and overlooked, misapplied, or failed to consider controlling authority. It did so by predicating its entire holding on the assumption that the permissive blue-penciling provision contained in the Employment Agreement was valid and enforceable—an issue that was not included in the issues presented and was not fully briefed by the parties. Without any discussion or analysis, the Panel assumed, but did not expressly

hold, that such provisions are enforceable. In doing so, the Panel issued a Decision that runs contrary to longstanding Nevada precedent.

En banc reconsideration is necessary to secure and maintain uniformity of decisions of the Supreme Court and because the proceeding involves a substantial precedential, constitutional or public policy issue. This Court should clarify the parties' contractual expectations—and the expectations of parties to other *Golden Road*-era noncompetition agreements—at the time of contract execution. This Court should also delineate the rights and responsibilities of contracting parties and their ability to vest district courts with authority the courts otherwise lack under the law. But such holdings require a meaningful briefing and discussion of the enforceability of blue-penciling provisions, the retroactivity of NRS 613.195(5), and the ongoing validity of the *Golden Road* opinion. And that requires *en banc* reconsideration.

Dated: this 12th day of March, 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 fewer than 10 pages, and contains 3,291 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 in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated: this 12th day of March 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 *EN BANC* RECONSIDERATION** 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 12, 2021 at Las Vegas, Nevada.

/s/ Jonathan. W. Fountain
An Employee of
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