Case No. 77320
Consolidated with 80508

In the Supreme Court of Nevada

HELIX ELECTRIC OF NEVADA, LLC,

Appellant/Cross-Respondent,

vs.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable MARK R. DENTON, District Judge
District Court Case No. 08A571228

PETITION FOR EN BANC RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. No publicly held company owns ten percent or more of the stock of Appellant/Cross-Respondent, Helix Electric of Nevada, LLC ("Helix").

2. Richard L. Peel and Eric B. Zimbelman of Peel Brimley LLP represent Helix in the district court.

3. Richard L. Peel and Eric B. Zimbelman of Peel Brimley LLP, and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and Chad D. Olsen of Lewis Roca Rothgerber Christie LLP represent Helix in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 7th day of June, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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PETITION FOR EN BANC RECONSIDERATION

Pursuant to NRAP 40A, Appellant/Cross-Respondent, Helix Electric of Nevada, LLC respectfully petitions the Court for en banc reconsideration. The Panel issued its Opinion in this appeal on March 24, 2022,[1] and the Panel denied rehearing on May 24, 2022.

The Panel's Opinion, or its decision to deny rehearing, threatens Nevada precedent, statute, and public policy. In particular, it (1) defies well-settled precedent concerning contractual assignments and novations, inevitably leading to confusion and ambiguity in the law, and (2) undermines subcontractor rights and public policy stated in NRS 624, essentially forming an unwarranted and judicially-created exception to Nevada's important prompt payment statutes, NRS 624.606 to 624.630, inclusive (the "Prompt Payment Statute").

EN BANC RECONSIDERATION STANDARDS

En banc reconsideration is appropriate "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the

[1] *Helix Elec. of Nevada, LLC v. APCO Constr., Inc.*, 138 Nev. Adv. Op. 13, 506 P.3d 1046 (2022).

proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). A petition "to secure and maintain uniformity of the decisions … shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases." NRAP 40A(c). And a petition "based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, … shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." *Id.*

BACKGROUND

This matter concerns a condominium project owned by Gemstone Development West, Inc. For the project, Gemstone retained Respondent/Cross-Appellant APCO Construction, Inc., as the general contractor. In turn, APCO retained Helix as its subcontractor and withheld $505,021 as a retention from Helix. (*See* Opinion at 2–4).

Before the project's completion, the relationship between Gemstone and APCO deteriorated, leading to Gemstone retaining Camco Pacific Construction Company to "act as construction manager

in place of APCO." (*See id.* at 3–4). Thereafter, APCO refused to pay Helix the amount it withheld in retention.

On appeal, the Panel upheld the district court, reasoning in part that certain circumstances implicitly showed that "APCO's obligations under the subcontract were assigned" to Gemstone and/or Camco. (*See* Opinion 10–13). Further—according to the Panel—because of this implied assignment, Helix's right to collect payment from APCO was automatically and permanently terminated. (*See id.*).[2]

This reasoning is clearly faulty. Indeed, the Opinion cites *no* authority[3] to support the novel position that an assignment between an assignor and assignee automatically terminates a *non*-assignor/obligee's

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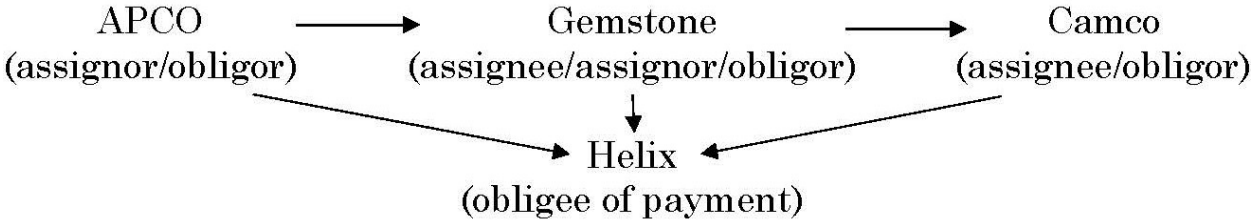
[2] APCO is the original assignor and payment obligor; Gemstone is the original assignee, subsequent payment obligor, and subsequent assignee; Camco is the final assignee and a third payment obligor; and Helix is the obligee of the right to payment, as follows:



[3] The Panel's Opinion cites settled principles relating to assignment of an assignor's "rights," including that "Nevada law favors 'the free assignability' of rights," but it does not cite any authority to support the free assignability of an assignor's obligations or the automatic termination of a non-assigning party's rights. (*See* Opinion at 10–11).

right to payment from the assignor/original obligor. (*See id.*). In Nevada (and elsewhere), a mere assignment does not, without more, automatically terminate a non-assignor/obligee's right to payment from the original obligor. Rather, such a termination requires a novation. Nevertheless, there is no mention of novation anywhere in the Panel's Opinion. (*See id.*).

Moreover, the Panel's Opinion violated the Prompt Payment Statute. For instance, although NRS 624.628(3)(b)-(c) provides that any agreement that "[r]elieves a higher-tiered contractor of any obligation or liability … or [r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages … is against public policy and is void and unenforceable," the Panel's Opinion now permits such relief, waiver, release, or extinguishment by agreement—so long as the agreement is accomplished through an assignment.

Accordingly, to remedy these substantial errors (each of which would subvert the law and cause confusion), Helix petitioned the Panel on May 11, 2022, to rehear this matter. Nevertheless, on May 24, 2022, the Panel quickly denied the petition, thereby necessitating this en banc reconsideration.

ARGUMENT

I.

THE PANEL'S OPINION DISREGARDS WELL-SETTLED PRINCIPLES OF CONTRACT LAW

Respectfully, the Court should reconsider the Panel's Opinion because it contradicts precedent and creates substantial precedential confusion concerning assignments and novations. *See* NRAP 40A(a) (en banc reconsideration is appropriate when it (1) is necessary to maintain uniformity of decisions or (2) involves a substantial precedential issue).

A. In Conflict with Precedent, the Panel's Opinion does Not Mention or Discuss Novation

The law is clear in that substituting an obligor with another obligor, or terminating an obligee's right to payment from the original obligor, requires a novation, not just an assignment. *Easton Bus. Opp. v. Town Exec. Suites*, 126 Nev. 119, 124, 230 P.3d 827, 830 (2010) (citing Restatement (Second) of Contracts § 318 cmt. d (1981)) ("An obligor is discharged by the substitution of a new obligor *only if* the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. Otherwise, the obligee retains his original right against the obligor.") (emphasis added). Thus, assignments and

novations are distinct concepts, and contrary to what the Panel's Opinion may convey or imply, these concepts are not synonymous.

An assignment focuses on an assignor's intention to transfer *its rights* to an assignee, but it generally does not alter the assignor's contractual burdens or obligations that are owed to a non-assignor/obligee. Nor does an assignment otherwise affect the underlying agreement between the assignor and such obligee. As cited by the Panel, "An assignment *of a right* is a manifestation of the assignor's intention to transfer it by virtue of which the *assignor's right* to performance by the obligor is extinguished in whole or in part and the assignee acquires *a right* to such performance." (Opinion at 10 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)). Further, "[A]n assignment *does not modify the terms of the underlying contract*. It is a *separate agreement between the assignor and assignee* which merely transfers the *assignor's contract rights*, leaving them in full force and effect as to the party charged." (*Id.* (citing *Easton Bus. Opp.*, 126 Nev. at 125, 230 P.3d at 831 (emphasis added)).

On the other hand, terminating an assignor's payment *obligation*, or terminating a non-assignor/obligee's right to collect payment from an

obligor, requires a novation—which is distinct from an assignment in that it constitutes a new contract that has substituted "a new obligation for an existing one."[4] *See Omni Fin., LLC v. Kal-Mor-USA, LLC*, No. 82028, 507 P.3d 571, 2022 WL 986301 *2 (Nev. Mar. 31, 2022) (citing

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[4] A novation also requires more than the evidence of an assignment. It requires a heightened "clear and definite" standard to determine if "all parties" intended the new contract and for the new obligation to extinguish or release the old one. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) ("A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid. … Additionally, the intent of all parties to cause a novation must be clear. … "[T]he party asserting novation has the burden of proving all the essentials of novation by clear and convincing evidence."); 30 Williston on Contracts § 76:12 (4th ed.) ("[I]n order to effect a novation, all of the parties concerned must have the clear and definite intention to do so by their agreement."). Indeed, contrary to the Panel's Opinion,

> The mere acceptance by an obligee of performance by a substituted obligor of a contract is not sufficient to establish a novation, absent words or conduct tending to show the intention or agreement on part of the obligee to release the original obligor and extinguish his or her liability. Thus, the payment of a debt by a third person that is accepted by an obligee does not, without more, establish a novation.
>
> A novation may be inferred by the obligee's acceptance of part performance from a new obligor if the performance is made with the clear understanding that a complete novation is proposed. A novation also occurs where a contracting party accepts performance by an assignee with knowledge that the assignor does not intend to be liable under the original contract as where the creditor deals exclusively with, or pursues only, the assignee for payment.

58 Am. Jur. 2d Novation § 15.

Lazovich & Lazovich, Inc. v. Harding, 86 Nev. 434, 470 P.2d 125 (1970)).

To illustrate, in *Easton Bus. Opp.*, the Court held that an agreement allowed Century 21 to assign its contractual "rights." 126 Nev. at 125, 230 P.3d at 831. In doing so, the Court noted that this assignment would not discharge Century 21's contractual "duties [i.e., obligations] … absent a novation …." *Id.* n. 3. The Court then cited the following well-settled principle explained in the Restatement (Second) of Contracts § 318 cmt. d (1981): "An obligor is discharged by the substitution of a new obligor *only if* the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. *Otherwise, the obligee retains his original right against the obligor*." (*Id.* (emphasis added)).

Nevertheless, despite the clear precedent and applicability of novation law rather than assignment law, the Panel's Opinion does not mention the term novation, cite to the principles or elements of novation, or analyze whether a novation occurred.[5] Instead, the Panel

[5] Novation was raised in the parties' briefs. (*See* Appellant's Opening Brief at 50–53; Respondent's Answering Brief at 45–48; and Appellant's Reply Brief at 19–24).

merely upholds an implied assignment between APCO and "Gemstone/Camco" and, then—confusingly—reasons that, based only on this implied assignment, APCO's contractual obligations were discharged and Helix's right to payment from APCO was terminated. (*See* Opinion at 10–13).

Accordingly, the Panel's Opinion violates basic precedent concerning assignments and novations, on top of blurring the distinctions between them. If this Opinion is allowed to stand, it would both (1) set an erroneous and bad precedent by inevitably leading to confusion and ambiguity in the law, and (2) set Nevada apart as the only jurisdiction to discard the foundational contract concept of novations, essentially abandoning it in favor of "the free assignability" of contractual *obligations* and allowing assignment law to now govern if an non-assignor/obligee's rights can be automatically and permanently terminated by an assignment between an assignor and assignee. Persons and entities would now be able to terminate their own obligations through a mere assignment to some assignee, thus potentially denying the obligee of its bargain and the right to choose with whom to contract, without any analysis of whether "all parties"

"clearly and definitely" intended a substitution, release, and new contract—*i.e., a novation*. In short, the importance and purposes of novation as a distinct legal concept would be lost.

B. The Panel Disregarded Settled Principles of Assignment Law

Even if there were an assignment (which there was not[6]), and even if the Panel were correct in that assignment law applies and novation law is inapplicable (which, again, is not the case), the Panel's

[6] The Panel upheld an implied assignment based on certain factors, but the Opinion failed to address many material facts that show Helix never consented to terminating its right to collect payment from APCO. (*See* Opinion at 10–13). Instead, among other facts and circumstances, the following shows that Helix, just as any subcontractor would do under the circumstance, never released APCO and remained open to collecting payment from any potential obligor, APCO or Camco:

- Even while APCO stopped work and was threatening to terminate its prime contract with Gemstone, APCO explicitly and repeatedly informed Helix that it remained under contract with APCO.
- APCO admits it never gave Helix written notice of termination of the Helix-APCO subcontract.
- Helix testified that (1) during its negotiations with Camco, Helix believed "we're still under contract with APCO"; (2) Helix's belief was that, "until APCO does something contractually to inform me our relationship is different, it's not changed"; and (3) Helix did not believe it could stop work on the project after APCO did so, even worrying that if it had stopped work, it "would have been at full risk of [APCO] pursuing us for abandoning the contract."
- Helix has attempted to collect from Camco for work after APCO stopped work, and is also "seeking to hold APCO responsible for

Opinion still conflicts with well-settled principles of assignment law. Thus, reconsideration is necessary to maintain uniformity and prevent substantial precedential problems. *See* NRAP 40A(a).

As quoted in the Opinion, "[a]n assignment of a *right* is a manifestation of the assignor's intention to transfer it by virtue of which the *assignor's right* to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." (Opinion at 10 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)). Further, "an assignment *does not modify the terms of the underlying contract*. It is a *separate agreement between the assignor and assignee* which merely transfers the *assignor's contract rights*, leaving them in full force and effect as to the party charged." (*Id.* (citing *Easton Bus. Opp.*, 126 Nev. at 125, 230 P.3d at 831 (emphasis added)). And finally, "a contract *right* is assignable unless the assignment '*would materially change the duty of the obligor*.'" (*Id.* at 11 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)).

> retention" earned before APCO stopped work. Thus, Helix has never agreed to stop seeking or not seek payment from APCO.

(*See* Helix's Pet. For Rehearing at 6–8, n. 3).

Nevertheless, despite quoting this clear, established precedent, the Panel neglected this precedent in its reasoning. First, the Panel's Opinion confuses the assignment of an assignor's rights versus obligations. As shown above, the Opinion cites to the law supporting the assignment of "rights," including that "Nevada law favors 'the free assignability' of rights," but then—without any supporting authority or citation—the Panel's Opinion switches gears and reasons that by virtue of the implied assignment between APCO and "Gemstone/Camco," "APCO's *obligations* under the subcontract were assigned after APCO left the project and Camco became the general contractor," meaning that APCO no longer had any obligation to pay Helix. (*See* Opinion at 10–13 (emphasis added)). This neglect of the differences between assigning "rights" versus "obligations" is both a clear error and confusing.

Second, the law is clear in that a mere assignment, without more, does not affect a non-assignor/obligee's right to collect payment from the assignor/original obligor. Instead, as stated, an assignment creates a "separate agreement" between the "assignor and assignee" but "does not modify the terms of the underlying contract"—which, in this case, is the

underlying subcontract between APCO and Helix. *See Easton Bus. Opp.*, 126 Nev. at 125, 230 P.3d at 831.[7]

Here, however, after citing to the law relating to the assignment of rights (Opinion at 10–11) and discussing certain facts (*id.* at 11–13), the Panel straightway concluded that APCO's obligations were assigned, meaning that "APCO owes [no] further payment for retention or other amounts" (*id.* at 12–13). This is erroneous because the mere assignment does not, without more, automatically terminate the non-assignor/obligee's right to collect payment from the original obligor.

Third, there can be no assignment of Helix's subcontract right to payment from APCO because such an assignment would materially alter APCO's obligation, in violation of contract law. As cited by the Panel, "a contract right is assignable unless the assignment '*would materially change the duty of the obligor*.'" (*Id.* at 11 (citing Restatement (Second) of Contracts § 317 (1981) (emphasis added)); *see also Reynolds v. Tufenkjian*, 136 Nev. 145, 154, 461 P.3d 147, 154 (2020) (citing 6 Am.

[7] *Mt. Wheeler Power, Inc. v. Gallagher,* 98 Nev. 479, 483, 653 P.2d 1212, 1214 (1982) ("Under generally accepted contract law, the assumption of a contract by one party [of a contracting party's obligations and duties] does not vitiate the continuing liability of the party from whom the contract rights and obligations are assumed.").

Jur. 2d Assignments § 15 (2018)) (explaining the general rule that "unless an assignment would add to or *materially alter the obligor's duty of risk*," the contract itself restricts assignability, or the assignment would violate a statute, "most rights under contracts are freely assignable") (emphasis added).[8]

Here, according to the Panel, the purported assignment completely discharged APCO of its obligation to pay the retention that Helix earned before APCO stopped work.[9] This, however, violates the above-cited (and well-settled) precedent because being *completely discharged* of an obligation certainly qualifies as a "material change" of APCO's obligation.

In sum, these oversights and neglect of clear precedent relating to assignments must not be allowed to stand. It would lead to confusion

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[8] *See also HD Supply Facilities Maint., Ltd. v. Bymoen*, 125 Nev. 200, 210, 210 P.3d 183, 189 (2009) (Pickering, J., concurring) ("[C]ontract law normally allows assignment of contract rights unless assignment is prohibited by express contract term, statute, or public policy, or the particular circumstances of the case are such that allowing substitution materially *varies the burden* ….") (emphasis added).

[9] As described by APCO in its Answering Brief on page 35, a retention is "money that *has been earned* but has been held back until the project is completed." (emphasis added).

and ambiguity in the law. Thus, en banc reconsideration is necessary. *See* NRAP 40A(a).

II.

THE PANEL'S OPINION UNDERMINES NRS 624, INCLUDING THE IMPORTANT PUBLIC POLICIES BEHIND IT

A. The Panel's Opinion Violates NRS 624.628

While "Nevada law favors 'the free assignability' of rights" (*see* Opinion at 10), an assignment cannot violate statute or public policy. *See Reynolds v. Tufenkjian*, 136 Nev. 145, 154, 461 P.3d 147, 154 (2020) (citing 6 Am. Jur. 2d Assignments § 15 (2018)) (explaining that "unless an assignment … would violate a statute, "most rights under contracts are freely assignable"); *Ruiz v. City of N. Las Vegas*, 127 Nev. 254, 261, 255 P.3d 216, 221 (2011) (upholding the district court's conclusion that "rights were not assignable, because to permit such assignments would violate public policy"); *HD Supply Facilities Maint., Ltd. v. Bymoen*, 125 Nev. 200, 210, 210 P.3d 183, 189 (2009) (Pickering, J., concurring) ("[C]ontract law normally allows assignment of contract rights unless assignment is prohibited by express contract term, statute, or public policy ….") (emphasis added).

Nor may the Court enforce agreements or assignments that are illegal. *See St. Mary v. Damon*, 129 Nev. 647, 658, 309 P.3d 1027, 1035 (2013) ("Parties are free to contract, and the courts will enforce their contracts if they are not … illegal, or in violation of public policy.")

Here, however, the Panel upheld an implied assignment that violates public policy and the Prompt Payment Statute. Specifically, in Nevada, any agreement—such as the implied assignment upheld by the Panel—that "[r]elieves a higher-tiered contractor of any obligation or liability" for payment of, for example, an agreed-upon retention, or "[r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages … is against public policy and is void and unenforceable."[10] NRS 624.628(3)(b)-(c); *APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. 569, 574, 473 P.3d 1021, 1027 (2020) (contract provisions that "require any subcontractor to waive or limit its rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require

[10] *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation*, Inc., 124 Nev. 1102, 1117–18, 197 P.3d 1032, 1042 (2008) ("Nevada's public policy favors securing payment for labor and material contractors.").

subcontractors to waive their rights to damages or time extensions" are not permissible).[11]

Nevertheless, the Opinion relieved APCO of its obligation to pay, and it also waived, released, or extinguished Helix's right to payment through an implied assignment (or implied agreement). This was wrong. Such an agreement clearly violates the statute and public policy, meaning that the Opinion sets a bad precedent of now allowing higher-tiered contractors to circumvent NRS 624 through an assignment. In other words, the Panel's Opinion enforces an illegal assignment, making en banc reconsideration necessary to "secure or maintain uniformity of decisions" and to avoid a "substantial precedential, constitutional or public policy" problem. *See* NRAP 40A(a)

Nor should the Court sanction this judicially-created exception to, or violation of, NRS 624.628. The language in NRS 624.628 is clear on this point, and nowhere in NRS 624 (or its history) did the Legislature indicate that it intended such an exception or violation by virtue of an implied assignment. *See Williams v. United Parcel Servs.*, 129 Nev. 386,

[11] This issue was raised and demonstrated in Helix's briefs. (Reply Brief at 2 (note that Helix inadvertently switched the citations to NRS 624 and NRS 108 in sub-points (i) and (ii)), 5, 13; Opening Brief at 41, 52).

391–92, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.").

B. The Opinion Sets a Dangerous Precedent of Showing that Statutes and Public Policy do not Impact Consent

Because NRS 624.628 affects the general "free assignability" of contracts by rendering agreements that relieve, waive, release, or extinguish payment obligations/rights void and against public policy, it was incongruous (and confusing) for the Panel to reason that Helix could have the necessary intent or capacity to consent to such an illegal agreement. Indeed, because of Nevada's statutory scheme and public policy, such a relief, waiver, release, or extinguishment was never even considered by Helix, let alone intended or consented to.

The Panel, however, did not address this circumstance in its Opinion[12]—thereby creating a new and dangerous precedent of showing that statutory schemes, rights, obligations, and public policy have no

[12] As discussed above, the Panel's Opinion also failed to mention other material facts the showed Helix never consented to such an illegal termination or assignment of obligations. (*See supra* note 7).

impact when determining a party's understanding or whether the circumstances prove that such party provided implied consent or assent to an agreement. *Cf. Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855 (9th Cir. 2022) (citing Restatement (Second) of Contracts § 19(2) (1981)) ("[T]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). This new and dangerous precedent established by the Opinion should not be allowed to stand.

CONCLUSION

Based on the foregoing, Helix requests en banc reconsideration of the Panel's Opinion and decision to deny rehearing.

DATED this 7th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this petition complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2019 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3), because it contains 3,837 words.

3. I certify that I have read this petition, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 7th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that on June 7, 2022, I submitted the foregoing "Petition for En Banc Reconsideration" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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