Case No. 81459

In the Supreme Court of Nevada

DEKKER/PERICH/SABATINI LTD; NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN; MELROY ENGINEERING, INC. d/b/a MSA ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; RICHARDSON CONSTRUCTION, INC.; THE GUARANTEE COMPANY OF NORTH AMERICA USA; and JACKSON FAMILY PARTNERSHIP LLC d/b/a STARGATE PLUMBING,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE TREVOR L. ATKIN, District Judge,

Respondents,

and

CITY OF NORTH LAS VEGAS,

Real Party in Interest.

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF *EN BANC* RECONSIDERATION

Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc. request leave to file an *amicus curiae* brief, pursuant to NRAP 29(c), in support of the petition for *en banc* reconsideration. The proposed brief is attached as Exhibit A.

Proposed *amici* are developers and builders of Panorama Towers, a high-rise condominium complex on the Las Vegas strip that was substantially completed in 2008. Like any builder in Nevada, they have an interest in the outcome of this proceeding because their work is subject to the statute of repose in NRS 11.202, the application of which is the key issue in this proceeding.

More pointedly, proposed *amici* are the respondents in another proceeding pending before this Court, which entails a substantially similar issue regarding the application of the 2019 amendment to the statute of repose period in NRS 11.202. In that case, as here, a central question is whether builders are protected from being retroactively exposed to liability on extinguished construction-defect claims after the builders' repose has already become secure. *See Panorama Towers Condominium Unit Owners' Association v. Hallier*, 137 Nev., Adv. Op. 67, 498 P.3d 222, 223 (2021). *Amici* concurrently seek rehearing of the *en banc* Court's opinion in *Panorama Towers*, which relied heavily on the panel opinion in this case as controlling precedent. *See id.*

As proposed *amici* demonstrate in the attached brief, this Court should grant *en banc* reconsideration because (1) the panel opinion

misconstrues the plain language of NRS 11.202(1), (2) it departs from the majority approach to reliance interests without considering the significant weight of precedent, and (3) it incorrectly holds that—even under rational-basis review—the Legislature can retroactively lengthen a statute of repose under circumstances that would make an analogous truncation of a statute of limitations unconstitutional.

Amicus briefs on rehearing are appropriate to point out aspects of the original opinion that are incorrect or require clarification. *See Powers v. United Services Auto. Ass'n*, 115 Nev. 38, 41 & n.2, 979 P.2d 1286, 1288 & n.2 (1999) (granting appearance of amici on rehearing); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010) (same).

While proposed amici could not have intervened in (and in fact, were unaware of) this writ petition that did not involve their claims, the *en banc* Court's reliance in *Panorama Towers* on the panel opinion from this case makes their appearance as *amici* necessary. *See, e.g.*, *Hairr v. First Judicial Dist. Ct.*, 132 Nev. 180, 188, 368 P.3d 1198, 1203 (2016) ("[A]llowing a proposed intervenor to file an amicus brief is an adequate

alternative to permissive intervention" (quoting *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012))).

CONCLUSION

For these reasons, the Court should grant the motion for leave to file the attached *amicus curiae* brief.

Dated this 28th day of January, 2022.

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CERTIFICATE OF SERVICE

I certify that on January 28, 2022, I submitted the foregoing "Motion for Leave to File *Amicus* Brief in Support of *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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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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EXHIBIT A

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and

CITY OF NORTH LAS VEGAS,

Real Party in Interest.

District Court
No. A798346

AMICUS BRIEF IN SUPPORT OF *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.

Laurent Hallier is an individual.

Panorama Towers I, LLC and Panorama Towers I Mezz, LLC are privately held limited liability companies. No publicly traded company owns more than 10% of their stock.

M.J. Dean Construction, Inc. is a corporation. No publicly traded company owns more than 10% of its stock.

Amici are represented by Peter C. Brown, Jeffrey W. Saab, and Devin R. Gifford of Bremer Whyte Brown & O'Meara LLP and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith of Lewis Roca Rothgerber Christie, LLP.

Dated this 28th day of January, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
ABRAHAM G. SMITH (SBN 13,250)

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INTEREST OF AMICI

Amici are developers and builders of Panorama Towers, a 635-unit, high-rise condominium complex on the Las Vegas strip, which was substantially completed in 2008. Like any builder in Nevada, they have an interest in the outcome of this proceeding because their work is subject to the statute of repose in NRS 11.202, the application of which is the key issue in this proceeding.

More specifically, amici have an interest in this proceeding because they are respondents in another pending appeal also involving application of AB 421, the 2019 amendment to the statute of repose period in NRS 11.202. In that case, *Panorama Towers Condominium Unit Owners' Association v. Hallier*, 137 Nev. Adv. Op. 67, 498 P.3d 222 (2021), one of the central questions is whether builders are protected from being retroactively exposed to liability on extinguished construction-defect claims after the builders' repose has already become secure. Amici are currently seeking rehearing of the *en banc* Court's opinion in *Panorama Towers*, which relied heavily on the on the panel opinion in this case as controlling precedent. *See id.* at 223. These two petitions should be heard together.

ARGUMENT SUMMARY

Amici agree with petitioners that *en banc* reconsideration is necessary, particularly because interpreting the retroactivity provision in the amendment to NRS 11.202 to revive time-barred claims that expired before the amendment became effective violates due process principles. In applying NRS 11.202 to revive already-reposed claims, the panel in this case overlooked significant Nevada precedent and the weight of persuasive authority in several regards.

First, the opinion misconstrues the plain language of NRS 11.202(1).

Second, the opinion departs from the majority approach to reliance interests without ever grappling with or distinguishing the overwhelming weight of precedent on this issue.

Third, the opinion incorrectly holds that the Legislature can retroactively shorten a statute of repose, even under rational basis review.

ARGUMENT

I.

RECONSIDERATION IS WARRANTED BECAUSE THE PANEL MISCONSTRUED THE PLAIN TEXT OF NRS 11.202

A. The Statute of Repose Applies Retroactively Only to Defects in the Ten Years Before Its Enactment

"When the Legislature intends retroactive application, it is capable of stating so clearly." *Salloum v. Boyd Gaming Corp.*, 137 Nev., Adv. Op. 56, 495 P.3d 513, 517 (2021) (citation omitted). Likewise, even if a statute is retroactive to *some* degree, this Court should not interpret the retroactivity more broadly than the Legislature has clearly expressed.

Setting aside constitutional concerns, AB 421 does not extend backward into infinity. Rather, it is retroactive specifically for property constructed in the ten years before the statute's enactment:

> The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply [*sic*] retroactively to actions in which the ***substantial completion*** of the improvement to the real property occurred ***before October 1, 2019***.

2019 Nev. Stat 2268, AB 421, § 11(4) (emphasis added).

This is the most natural reading. By including a specific date, the Legislature made clear that it was allowing claimants to sue for defects in construction up to ten years *before* that date—*i.e.*, to October 1, 2009—rather than simply applying to construction completed on or *after* the enactment date. If the Legislature meant the statute to reach back indefinitely, it would have omitted the specific date of October 1, 2019 and instead simply decreed that "[t]he period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively," period. By reading the statute as indefinitely retroactive, the panel failed to give any effect to the Legislature's choice to include a specific date in the statute. *See Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 883, 362 P.3 83, 87-88 (2015) ("[N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage if such consequences can be properly avoided." (citation omitted)).

B. Limitless Retroactivity Would Have Absurd Consequences

Under a contrary reading of limitless retroactivity, there would be no reason why plaintiffs whose claims were reposed years or decades earlier could not revive those claims. Indeed, NRS 11.202's roots reach

to 1965, when the Legislature enacted a six-year statute of repose for all construction-defect claims. 1965 Nev. Stat. 948, SB 113, § 1. So if, say, a claim that accrued in 1962 was brought and dismissed seven years later, in 1969, the plaintiff could rejoice a half-century later: suddenly, her long-since-reposed claim is revived. While this hypothetical is plainly absurd, there is no legal or logical distinction between that scenario (a structure completed in 1962) and the facts here (a fire station completed in July 2009). As the Legislature obviously did not intend to revive 50-year-old claims, it must have drawn some line between claims it was reviving and claims it was not—and the statute's plain language clearly draws that line at ten years before enactment.

C. The Panel Inadequately Considered Petitioners' Argument that the Claims Were Void Ab Initio

Petitioners argued to the panel that the retroactive amendment to NRS 11.202 could not revive the claims in this case because when those claims were brought, they were already time-barred under then-applicable law, and were thus "void ab initio." (Opinion 9.) The panel rejected that argument. The panel opinion recognized, however, that a complaint *is* "void ab initio" when it is "defective" such that "the courts are without authority to act upon it"—for example, when a statutory

bar on actions is mandatory or jurisdictional. (*Id.* (citing *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1303-04, 148 P.3d 790, 793-94 (2006) (concluding that NRS 41A.071's requirement that courts "shall dismiss" medical malpractice complaints filed without an expert affidavit gave courts "no discretion with respect to dismissal and that a complaint filed without an expert affidavit would be void")).)

But the panel opinion overlooked that the language in NRS 11.202(1) *is* mandatory. The statute states that "*[n]o action may be commenced* . . . more than 10 years after [substantial completion]." NRS 11.202(1) (emphasis added). As in *Washoe Medical Center*, this leaves courts "no discretion with respect to dismissal." 122 Nev. at 1303, 148 P.3d at 793. This Court has held that similar "may not" constructions are mandatory, not permissive. *See Culinary & Hotel Serv. Workers Union, Local No. 226 v. Haugen*, 76 Nev. 424, 428, 357 P.2d 113, 115 (1960) ("It does not logically follow [ ] that the requirement [in NRCP 6(b)] that the court 'may not' extend the time is anything but prohibitive."). Likewise, other courts consistently deem such language mandatory. *See Patchak v. Zinke*, 138 S. Ct. 897, 905-06 (2018) (collecting cases); *Roe v. Wert*, 706 F. Supp. 788 (W.D. Okla. 1989) (treating as

mandatory CERCLA provisions stating "[n]o action may be commenced" without following notice procedures).

The panel opinion did not address the statute's mandatory language or any of this case law. Instead, it simply based its holding on the fact that "Dekker fail[ed] to point to any authority concluding that claims filed after expiration of the repose period renders the complaint void ab initio." (Opinion 10.) Because this holding is contrary to the plain language of NRS 11.202 and significant authority, the *en banc* Court should grant reconsideration.

II.

THE PANEL OPINION OVERLOOKED THE SIGNIFICANCE OF PETITIONERS' "VESTED RIGHTS" ANALYSIS

The panel opinion rejected petitioners' due process arguments, concluding that "[a]lthough several jurisdictions appear to recognize substantive rights under statutes of repose, Dekker does not point to any Nevada law characterizing statutes of repose as awarding an entitlement to be free from a state claim." (Opinion 10-11.) While it is true that no Nevada authority is precisely on point, the mere lack of binding

authority compelling one conclusion is not a reason to adopt the opposite position. And substantial persuasive authority holds that a final judgment constitutes a vested right on which a party is entitled to rely. *See, e.g.*, *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *United States v. McGlory*, 968 F.2d 309, 350 (3d Cir. 1992).

Similarly, expiration of a repose period "create[s] vested rights to a timebar defense in the defendant." *Ripley v. Tolbert*, 921 P.2d 1210, 1225 (Kan. 1996); *see, e.g.*, *City & County of San Francisco v. Workmen's Comp. Appeals Bd.*, 74 Cal. Rptr. 810, 816 (Ct. App. 1969).

So once a claim is properly reposed—that is, once the "effective laws at the time . . . inform[] [a] defendant[] that [a] plaintiff's claims were completely and totally extinguished"—that repose becomes a weighty reliance interest. *Ripley*, 921 P.2d at 1224. This interest affects a host of considerations, including decisions about liability insurance, evidence-preservation duties, accounting protocols, and public-reporting obligations. Accordingly, a statute of repose "give[s] a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories

faded." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (citations omitted).

Unlike a statute of limitations, a statute of repose is not subject to a plaintiff's reasonable discovery or equitable tolling, so a defendant can easily calculate the repose period and be sure it has run. *Somersett Owners Ass'n v. Somersett Dev. Co., Ltd.*, 137 Nev., Adv. Op. 35, 492 P.3d 534, 539 (2021) (collecting authorities). In this vein, the property right created after a repose period runs is constitutionally distinct from the property right in a statute of limitations:

> The legislature has the power to revive actions barred by a statute of limitations if it specifically expresses its intent to do so through retroactive application of a new law. The legislature *cannot* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process.

Ripley, 921 P.2d at 1220 (citation omitted); *accord Colony Hill Condo. I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984), *cited with approval in G & H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997).

The panel failed to consider any of these arguments or authorities. This omission alone justifies reconsideration so the Court can clarify the

effect of statutes of repose on due process and vested rights under Nevada law, with full consideration of persuasive authority that this issue deserves.

III.

REOPENING REPOSED CLAIMS LACKS A RATIONAL BASIS

Even setting aside the weight of persuasive authority on statutes of repose, the panel never addressed the correct constitutional question. It defended only the ten-year repose period itself: "the Legislature extended the repose period to reflect the timeframe in which these types of defects most often materialize and thus more fairly allow the pursuit of claims based on such defects." (Opinion 11.) The panel provides no rational basis for applying that extended repose period *retroactively* to claims that had already reached repose. This oversight is critical, because "a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-67 (1994) (citation omitted). It is not enough to consider not just the merits of the legislation itself; the Court must also take into account

"the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.*

But the panel considered none of this. And there is no evidence that the Legislature considered the effects on defendants who stop insuring against reposed defects claims, or how due process requirements of notice would be satisfied for defendants suddenly exposed to such claims. Indeed, as cases such as *Ripley v. Tolbert* illustrate, there is no rational basis for reviving such claims.

Retroactivity is particularly irrational in light of the constitutional requirement that a grace period accompany any retroactive truncation of a statute of limitation on a claim that has accrued. *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. 1117, 1123, 843 P.2d 834, 838 (1992) (absence of grace period unconstitutional). The Legislature was aware of this authority and that a defendant's repose rights are *more* secure than a plaintiff's contingent right to sue. Perforce, retroactive application of a lengthened repose period after the prior repose had accrued lacks a rational basis.

At a minimum, the panel's reading of the statute raises serious constitutional doubts. Those doubts counsel in favor of the narrower reading of the Legislature's retroactive intent as discussed in part I.[1]

[1] The plain-text reading and constitutional doubt alone merit *en banc* reconsideration here and rehearing in *Panorama Towers Condominium Unit Owners' Association*, Docket No. 80615. But the opinions also undermine the principles announced in *Byrne v. Sunridge Builders, Inc.*, 136 Nev. 604, 475 P.3d 38 (2020) and *Somersett Owners Ass'n v. Somersett Dev. Co., Ltd.*, 137 Nev., Adv. Op. 35, 492 P.3d 534 (2021), which confirmed that repose rights are even more secure than a plaintiff's constitutionally-protected reliance on a statute of limitations, and that "a preclusion on tolling is generally the hallmark of statutes of repose," *Somersett*, 492 P.3d at 539 (citation omitted). While the Court left the issue open, the plaintiffs in those cases notably did not even argue that retroactivity applied. *Byrne*, 136 Nev. at 607 n.4, 475 P.3d at 41 n.4; *Somersett*, 492 P.3d at 536 n.3, 539-40.

CONCLUSION

For these reasons, this Court should grant *en banc* reconsideration.

Dated this 28th day of January, 2022.

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1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 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 29(e) because, except as exempted by NRAP 29(e), it contains 2,229 words.

3. I certify that I have read this brief, 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 28th day of January, 2022.

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