**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| THE LAS VEGAS REVIEW JOURNAL,<br>Appellant,<br><br>vs.<br><br>CITY OF HENDERSON,<br>Respondent. | Electronically Filed<br>May 17 2021 08:18 p.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court<br><br>CASE NO.: 81758<br>DC Case No. A-16-747289-W |

**MOTION FOR LEAVE TO FILE REPLY IN EXCESS OF PAGE/TYPE VOLUME LIMITATION**

Appellant Las Vegas Review-Journal, by and through its counsel, Margaret A. McLetchie, hereby moves this Court, pursuant to Nevada Rule of Appellate Procedure ("NRAP") 32(a)(7)(D), to file Appellant's Reply Brief that exceeds the 7,000 word type-volume limitation imposed by NRAP 32(a)(7)(A)(ii) by 1,167 words. Pursuant to NRAP 32(a)(7)(D)(iii), a copy of the Appellant's proposed Reply Brief is attached to this Motion. This Motion is supported by the attached declaration of counsel.

DATED this 17th day of May, 2021.

*/s/ Margaret A. McLetchie*

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## DECLARATION OF MARGARET A. MCLETCHIE

STATE OF NEVADA )
) ss.
COUNTY OF CLARK )

I, Margaret A. McLetchie, declare, pursuant to Nev. Rev. Stat. § 53.330, as follows:

1. I am counsel for Appellant Las Vegas Review-Journal (the "Review-Journal") in this matter. I have personal knowledge of all matters contained herein and am competent to testify thereto.

2. The Review-Journal is appealing an order entered by a district court for the Eighth Judicial District of Nevada denying a motion for attorney's fees and costs filed pursuant to the Nevada Public Records Act, Nev. Rev. Stat. § 239.011(2).

3. Respondent the City of Henderson ("Henderson") filed its Answering Brief on March 2, 2021. The Answering Brief—which contains 13,491 words according to the accompanying Certificate of Compliance—raises a number of factual issues and several complex arguments that I was required to address.

4. In preparing the Reply, I have endeavored to present the facts and arguments as succinctly as possible.

5. I believe that any reduction to the Review-Journal's Reply would materially detract from its ability to adequately address Henderson's facts and arguments. Given the complexity of the issues and the important public policy issues

presented by the instant appeal, I required the additional pages to adequately present the grounds demonstrating that the Review-Journal is entitled to the relief requested in the instant appeal.

6. I therefore respectfully request this Court grant the Review-Journal permission to file a motion in excess of the normal limitations.

7. Pursuant to NRAP 32(a)(7)(D)(iii), I have attached a copy of the Review-Journal's proposed Reply Brief. The proposed Reply Brief contains 8,167 words, which is 1,167 words in excess of the 7,000-word limit set by NRAP 32(a)(7)(A)(ii).

8. This request for leave to file a response in excess of NRAP 32(a)(7)(A)(ii)'s type-volume limit is not made for the purposes of delay, or any other improper purpose, but only to ensure that I provide competent and effective representation to the Review-Journal. *See* Nev. R. Prof. Conduct 1.1.

I certify under the penalty of perjury that the foregoing is true and correct.

EXECUTED this 17th day of May, 2021.

*/s/ Margaret A. McLetchie*

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION FOR LEAVE TO FILE REPLY IN EXCESS OF PAGE/TYPE VOLUME LIMITATION was filed electronically with the Nevada Supreme Court on the 17th day of May, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| THE LAS VEGAS REVIEW JOURNAL,<br>Appellant,<br><br>vs.<br><br>CITY OF HENDERSON,<br><br>Respondent. | CASE NO.: 81758 |

# APPELLANT'S REPLY BRIEF

Appeal from Eighth Judicial District Court, Clark County
The Honorable Trevor L. Atkin, District Judge
District Court Case No. A-16-747289-W

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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) that must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Appellant Las Vegas Review-Journal, Inc. is a Delaware corporation registered in the State of Nevada as a foreign corporation. Las Vegas Review-Journal, Inc. is a wholly owned subsidiary of News + Media Capital Group, LLC, a Delaware limited liability company. No publicly held corporation owns ten percent or more of the stock of Las Vegas Review-Journal, Inc. or News + Media Capital Group, LLC.

The law firm whose partners or associates have or are expected to appear for the Las Vegas Review-Journal, Inc. is MCLETCHIE LAW.

DATED this 17th day of May, 2021.

*/s/ Margaret A. McLetchie*

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## I. INTRODUCTION

In *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, this Court addressed a question that its prior jurisprudence regarding the NPRA had left unaddressed: "whether a requester prevails under NRS 239.011(2) where the governmental entity voluntarily produces the requested records before the court enters an order on the merits." *Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 460 P.3d 952, 956 (Nev. 2020) ("*CIR*"). The Court answered that question in the affirmative and adopted the "catalyst theory" for awards of fees and costs in NPRA matters.

Under the catalyst theory, the Review-Journal is entitled to compensation for all work its attorneys performed in this case because, even in the absence of a written order granting the relief it sought, the litigation caused Henderson to substantially change its behavior and produce the requested records to the Review-Journal without charge. *See CIR*, 460 P.3d at 957 (holding that "a requester is entitled to attorney fees and costs under NRS 239.011(2) absent a district court order compelling production when the requester can demonstrate a causal nexus between the litigation and the voluntary disclosure or change in position by the Government") (quotation omitted). Months after the Review-Journal first requested records and four months after the Review-Journal filed suit, and after much work and negotiation by the Review-Journal, at the hearing on the merits of the Review-Journal's petition, the

City of Henderson finally agreed to provide the Review-Journal with approximately 70,000 pages of public records without charge, which it had previously stated it would only provide after the Review-Journal paid thousands of dollars for a privilege review. Thus, while the district court did not grant the Review-Journal the specific forms of the relief it requested, the litigation resulted in the Review-Journal getting access to public records without paying onerous "review" fees.

In the Review-Journal's first appeal, this Court agreed with the Review-Journal's contention that the district court had failed to properly assess whether Henderson had properly withheld documents pursuant to the deliberative process privilege (the "DPP Documents") and remanded the matter back to the district court. *City of Henderson v. Las Vegas Review-Journal*, 441 P. 3d 546 (Nev. 2019). Following remand, Henderson changed its position as a result of the litigation and voluntarily disclosed the DPP Documents without further action by the courts. Because the Review-Journal's litigation was the catalyst for Henderson's decisions to finally provide the records without charge, the Review-Journal is entitled to an award of all reasonable attorney's fees and costs it incurred in this case. Thus, the district court's decision to deny the Review-Journal's request for attorney's fees and costs should be vacated.

In the district court, Henderson asserted (and the district court wrongly agreed) that the law of the case doctrine prohibited consideration of whether this

litigation was the catalyst for Henderson's change in position and agreement to provide nearly 70,000 pages of public records free of charge. Henderson's argument is premised on a misapprehension of this Court's prior decision vacating the district court's original attorneys' fees award. In that prior decision, this Court did not hold that the Review-Journal did not prevail for purposes of the catalyst theory. Notably, this Court had not yet recognized the catalyst theory, and so the issue was not considered. This Court simply agreed with the district court's determination that the Review-Journal's claims regarding Henderson's charging policy became moot once Henderson provided the records without charge. (VIII JA1406[1].) It is this provision of the records without charge that now has triggered the applicability of the catalyst theory, which should take into account the provision of those records, as well as the post-remand provision of the additional DPP Documents. Thus, the district court erred by refusing to consider whether the litigation was the catalyst for Henderson's change in behavior with regard to the nearly 70,000 documents it provided.

Henderson also argues that none of the *CIR* factors weigh in favor of awarding the Review-Journal its attorney's fees and costs. Henderson's assessment of each

[1] This matter has been the subject of two unpublished decisions. The first, *Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546 (Nev. 2019) is included in Volume VIII of the Joint Appendices at pages JA1405-1413, and is hereinafter referred to as "*Henderson I*." The second, *City of Henderson v. Las Vegas Review-Journal*, 450 P.3d 387 (Nev. 2019), is included Volume VIII of the Joint Appendices at pages JA1525-1530 and is hereinafter referred to as "*Henderson II*."

factor, however, is factually and legally inaccurate. Each of the factors weighs in favor of awarding the Review-Journal all fees and costs it incurred in this litigation. Therefore, this Court should vacate the district court's order and remand this matter for the Court to reconsider the Review-Journal's request for reasonable costs and attorney's fees.

## II. RESPONSE TO HENDERSON'S STATEMENT OF FACTS

The Review-Journal requested from Henderson public records pertaining to Henderson's retention of Elizabeth Trosper and her public relations firm Trosper Communications. (I JA0001-0023.) In response, Henderson demanded nearly $6,000.00 just to determine what public records it would disclose. After attempting without success to get Henderson to change its position, the Review-Journal petitioned the district court in order to obtain access without paying the exorbitant document review fees.

After the Review-Journal petitioned the court, Henderson agreed to allow a reporter to look at the records at no cost. (II JA241.) This was a change in Henderson's pre-litigation position. However, viewing the records was never a replacement for obtaining copies, but merely an interim opportunity for the Review-Journal to get some idea of what the records showed. After four months of litigation, Henderson finally agreed to produce nearly 70,000 pages of responsive records without charging the fees the precipitated the litigation. (III JA0482.)

Henderson continued to withhold some records, claiming they could be withheld based on the deliberate process privilege. The district court did not force Henderson to produce the DPP Documents, and that issue was part of the prior appeal to this Court. This Court ordered further consideration of the DPP Documents, and on remand, Henderson finally agreed to disclose the DPP Documents, as well. (VIII JA1539.) While the Review-Journal did not obtain an order from the district court granting it relief, the litigation did result in Henderson changing its position and disclosing the records without charge. (III JA0428; JA0444.)

In its Answering Brief, Henderson distorts this history and takes issue with several of the Review-Journal's factual assertions. The record in the court below speaks for itself. However, some of Henderson's characterizations of the facts of this case bear reply.

Henderson disagrees with the Review-Journal's assertion that the Review-Journal "made good faith efforts to resolve its disputes with Henderson" prior to filing suit. (AB, p. 21 (citing OB, p. 38).) Henderson also complains that the Review-Journal did not "attempt to contact Henderson . . . to discuss a resolution" (*id.*; italics omitted), and further complains about the Review-Journal's assertion that Henderson "had no interest prior to the filing of the petition" in resolving the parties' disputes. (AB, p. 23 (citing OB, p. 18).) The record, however, establishes that

Henderson all but invited the Review-Journal to petition the court.

As indicated in the Review-Journal's Opening Brief, before seeking judicial intervention, counsel for the Review-Journal participated in a call with a deputy City attorney regarding the Review-Journal's concerns with Henderson's positions and policies regarding the permissible fees it could charge under the NPRA. (II JA302.) Each side detailed their respective positions, and ultimately agreed that litigation would be necessary to resolve the fee issue. (*Id.*) Indeed, Henderson's deputy City attorney indicated during the call that the Review-Journal should file suit if it wanted clarification about the scope of permissible fees a governmental entity can charge. (*Id.*; *see also* II JA0347 ("As Mr. Reeves indicated I should, I filed suit to address the permissible scope of fees.").)

Additionally, after the call in which the deputy City attorney indicated the Review-Journal should file suit, the deputy City attorney called the offices of the Review-Journal's counsel to engage in further discussions. (II JA0345.) Although the Review-Journal attorney with whom the City attorney had previously spoke with was not in the office, another attorney, Alina Shell, was available. (*Id.*) The City attorney, however, declined to speak with Ms. Shell. (*Id.*) Thus, while Henderson complains about the Review-Journal's lack of engagement regarding a possible resolution—which given Henderson's invitation to file suit was clearly going to be fruitless—Henderson itself declined to engage with the Review-Journal. In any

event, as becomes clear from Henderson's Answering Brief, the "efforts" Henderson claims to have engaged in dealt only with efforts by Henderson to reduce the number of documents the Review-Journal was seeking. Henderson never indicated it would agree not to charge review fees, and, in fact, as discussed above, made clear the only way to resolve the fees issue was through litigation.

Even after the parties worked out an interim agreement to permit the Review-Journal to inspect the records in person fifteen days after the Review-Journal filed its petition, Henderson declined to provide copies of those records at that time and continued to refuse to do so until the hearing on the petition. (II JA0365.)

Another point Henderson disagrees with is whether the Review-Journal requested copies of the records its reporter inspected. (AB, p. 22.) Henderson is correct that the district court's order indicates the Review-Journal did not make a renewed request for copies of the documents the reporter inspected, However, as noted in the Review-Journal's Opening Brief, the Review-Journal's counsel requested via email that Henderson provide electronic copies of the records the reporter was inspecting. (Opening Brief ("OB"), p. 10; *see also* II JA0365.) Additionally, as counsel indicated during the hearing on the Review-Journal's petition, the Review-Journal always wanted copies of the requested records, and the in-person inspection was an interim offer, explaining that "[w]hat Mr. Reid offered and what I accepted as an interim solution while [the district court] was resolving

issues, was to allow an in-person inspection." (III JA0426.) It was understood the Review-Journal wanted copies. That was the point of the litigation. It of course would not occur to the Review-Journal that it had to repeat this after the review of records, when the review was merely an interim offer for something less than what the Review-Journal sought. The Review-Journal's counsel also confirmed during the hearing that the Review-Journal still wanted copies of the requested records. (*Id.* (". . . we would still like, without the exorbitant charge, a USB drive with the documents requested").)

A final point of disagreement between the parties that bears discussion is *when* Henderson first disclosed the requested records to the Review-Journal. Henderson claims it made its first disclosure of records to the Review-Journal in December 2016 when it permitted in-person inspection. (AB, p. 42.) Allowing for in-person inspection, however, was merely an interim solution, and did not result in the Review-Journal obtaining the records without having to pay review fees. (II JA0365.) Thus, while inspection did allow the Review-Journal to *view* the records at issue, it did not result in provision of actual copies of the records. It was only in response to the district court asking Henderson whether it would provide the records to the Review-Journal that Henderson finally provided the records and, importantly, provided them without charge. (III JA0481-482.)

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## III. RESPONSE TO HENDERSON'S STANDARD OF REVIEW

In its Answering Brief, Henderson argues the instant appeal is subject to review for abuse of discretion. (AB, p. 27.) While in an order granting or denying a motion for attorney's fees and costs is generally reviewed by this Court for abuse of discretion, *see, e.g.*, *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006), de novo review applies if an attorney's fees matter concerns questions of law. *Id.*

The instant appeal implicates questions of law, and thus must be reviewed de novo. As this Court explained in *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, it "review[s] the district court's interpretation of caselaw and statutory language de novo." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015); *see also CIR*, 460 P.3d 952, 956 (reviewing the district court's interpretation of NRS 239.011(2) de novo). The instant appeal implicates the district court's interpretation of NRS 239.011(2) and this Court's recent decision in *CIR.* Thus, the Court should review this matter de novo.

## IV. ARGUMENT

### A. The Law of the Case Doctrine Did Not Prohibit the District Court From Considering that the Litigation Caused Henderson to Disclose the Initial 70,000 Records Without Charge, and the District Court Erred in Refusing to Consider it.

In deciding the Review-Journal's post-remand motion for attorney's fees and costs, the district court limited its analysis of the *CIR* factors to the eleven DPP

Documents Henderson released following remand from this Court. (IX JA1605.) Henderson asserts the district court's decision to confine its analysis to just that disclosure was appropriate in light of the law of the case doctrine and this Court's prior decisions in this matter. (*See generally* AB, pp. 28-33.)

The "[l]aw of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006) (quotation omitted); *see also Emeterio v. Clint Hurt and Assocs.,* 114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998) (stating that "[w]hen an appellate court states a rule of law necessary to a decision, that rule becomes the law of the case and must be followed throughout subsequent proceedings"). The doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *United States v. Real Prop. Located at Incline Vill.*, 976 F. Supp. 1327, 1353 (D. Nev. 1997) (citation omitted). For the law of the case doctrine to apply, a reviewing court "must actually have decided the matter, explicitly or by necessary implication, in [a] previous disposition." *Id.* (citing *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.1990)).

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Henderson asserts the law of the case doctrine correctly informed the district court's limited review of the Review-Journal's success in this case to obtaining the DPP Documents because this Court previously held that the Review-Journal "has not succeeded on any of the issues that it raised in filing the underlying action." (Response, p. 31 (citing *Henderson II*, VIII JA1527).) This is an out-of-context and incorrect reading of this Court's prior decision, and if Henderson's reading were correct, that ruling would no longer be applicable in light of this Court's subsequent adoption of the catalyst theory.

As this Court explained, it found that the Review-Journal was not a prevailing party for the purposes of a fee award under the NPRA because "the sole remaining issue that the LVRJ raised in its underlying action [regarding the DPP Documents] has not yet proceeded to a final judgment." (*Henderson II*, VIII JA1529; *see also id.* (holding that" LVRJ cannot be a 'prevailing party' as to that issue [regarding the DPP Documents] before the action has proceeded to a final judgment") (citation omitted). Citing to footnote 2 of the Court's opinion in *Henderson II*, Henderson asserts over and over that the Court vacated the original fee award because the Review-Journal "was not a prevailing party" on its substantive claims. (AB, pp. 16, 32 (citing *Henderson II*, VIII JA1529 n.2).) Again, however, the observation that the Review-Journal was not a "prevailing party" was predicated on the absence of a final judgment. (*Henderson II*, VIII JA1529.)

Moreover, at the time the Court vacated the Review-Journal's fee award, this Court had not yet adopted the catalyst theory. Six months later, this Court did exactly that in *CIR. CIR*, 460 P.3d at 954 Thus, even if this Court had determined the Review-Journal was not a prevailing party in a pre-catalyst theory world, such a determination would have to be give way to the proper analysis of what it means to prevail under the catalyst theory. That theory looks not to whether the requesting party obtained a judgment, but rather looks to the actual behavior of the governmental entity once litigation has commenced. Here, Henderson changed its position and as a result the Review-Journal obtained nearly 70,000 pages of public records without paying the review fees that triggered the litigation. Because the catalyst theory has changed the analysis of what it means to be a prevailing party, any prior ruling on that issue that did not consider Henderson's change in position would not be the law of the case. Therefore, whether this Court addressed the issue or not is irrelevant under the new catalyst theory, and the district court erred when it did not consider the provision without charge of the nearly 70,000 documents.

Further, this Court acknowledged—consistent with its subsequent decision in *CIR*—that a prevailing party in a public records action need not succeed on every issue, or even most of the issues; instead, the requester must "succeed[ ] on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." (*Henderson II*, VIII JA1527 (quotation omitted; emphasis in original). This

Court's prior opinion did not directly address whether the district court's original determination was correct that the Review-Journal had prevailed in this matter; instead, the Court based its reversal on the absence of a final judgment (and further did so without the benefit of *CIR* and the catalyst theory). (*Henderson II*, VIII JA1529.)

The only reason the Review-Journal did not get judgment in its favor regarding Henderson's public records fees policy was because Henderson's change in conduct after months of litigation, at the hearing on the petition, and in response to the district court's questioning, mooted that claim. Accordingly, the district court should have considered the Review-Journal's pre-appellate success in obtaining copies of the records without charge in determining whether the Review-Journal was a prevailing party under this Court's decision in *CIR.*

**B. The Catalyst Theory Applies to This Case.**

Pursuant to *CIR*, courts must consider three factors when assessing whether a requester "prevailed" under the catalyst theory: "(1) when the documents were released, (2) what actually triggered the documents' release, and (3) whether [the requester] was entitled to the documents at an earlier time." *CIR*, 460 P.3d 952, 957 (quotations omitted). Additionally, *CIR* requires district courts to determine (1) whether the litigation was frivolous, unreasonable, or groundless, and (2) whether the requester reasonably attempted to settle the matter short of litigation by notifying

the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. *Id.* (citations omitted).

Henderson's primary argument against the applicability of the catalyst theory is that it "never denied" the Review-Journal's records request or violated the NPRA (AB, p. 34), and, therefore, the Review-Journal was "not authorized" to petition the district court, "and the policy justification for applying the catalyst theory is nonexistent." (AB 36.) However, Henderson's demand for almost $6,000.00 just to search for responsive records and review them for redaction was—despite Henderson's protestations—a denial of the Review-Journal's rights under the NPRA.

For the average requester, or even a large media entity like the Review-Journal, a governmental entity's demand for thousands of dollars just to look at public records and decide what it will disclose operates to discourage requesters from seeking public records, a result that is anathema to the NPRA's purpose of facilitating maximal access to public records. *See* NRS 239.001(1). *See, e.g.*, *Smith v. Hudson Cty. Register*, 422 N.J. Super. 387, 397, 29 A.3d 313, 319 (Super. Ct. App. Div. 2011) (holding that "excessive copying charges can, in practice, thwart a citizen's right to access public records" under New Jersey's Open Public Records Act); *see also Trout v. Bucher*, 205 So. 3d 876, 879 (Fla. Dist. Ct. App. 2016) (holding that "excessive fees" for public records "could well serve to inhibit the

pursuit of rights conferred by [Florida's] Public Records Act"). Thus, the Review-Journal filed its petition to obtain relief regarding Henderson's improper fee schedule so it could get what it was entitled to: the requested records, without having to pay Henderson thousands of dollars for privilege review.

Also buried within Henderson's argument that its response did not operate as a denial is an insinuation that the Review-Journal's petition to the district court was in contravention to the NPRA. (AB, p. 36 ("[i]n the absence of a denial of public records, a requester is not authorized to file an action under the NPRA").) This insinuation—that the Review-Journal's decision to petition the court was somehow improper—stands in sharp contradiction to Henderson's indications to the Review-Journal that the City invited judicial review of its public records fees policies. (II JA0347; *see also* II JA0351 (Henderson's statement to the Review-Journal that it "is interested in having the courts provide clarity to the meaning and application of NRS 239.055, as clear and concise guidance on these provisions would greatly benefit both local governments and the public").) It is therefore difficult to countenance Henderson's suggestion that the Review-Journal's petition was somehow improper. Moreover, this case has been before both the district court and this Court, and neither judicial body has indicated the Review-Journal's petition was not a proper exercise of its remedies under the NPRA.

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It is clear the catalyst theory applies to this case, and that the district court should have considered the entire history of the litigation—not just Henderson's post-remand disclosure of the DPP Documents—in deciding the Review-Journal's post-remand motion for attorney's fees and costs. Both prior to and during litigation of the Review-Journal's petition, Henderson consistently maintained that it was entitled to charge thousands of dollars for privilege review. Then, at the very hearing where the parties were presenting their disputes on that claim, Henderson changed its position and provided the records free of charge. Thus, under the catalyst theory, the Review-Journal is entitled to the attorney's fees and costs it incurred in realizing that success.

### C. The CIR Factors Weigh in Favor of An Award of Attorney's Fees and Costs to the Review-Journal.

Henderson next argues that, assuming the catalyst theory applies here, the district court properly denied the Review-Journal's amended fees motion under *CIR*. (AB, p. 41.) However, as a de novo review of this matter illustrates, each of the *CIR* factors weigh in favor of awarding the Review-Journal all the costs and attorney's fees it incurred in this matter.

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### 1. Henderson Produced Public Records After the Review-Journal Filed Its Petition.

Henderson asserts the first *CIR* factor—which requires courts to determine *when* the governmental entity released the disputed records—does not favor the Review-Journal because "there had been no denial of the records" prior to the filing of the Review-Journal's petition. (AB, p. 44.) As discussed above, however, Henderson's insistence on payment of nearly $6,000.00 just to determine what records it would disclose, if any, operated as a denial, and whether it did or did not, the money demand was the reason for the litigation. It was only after the Review-Journal filed suit to vindicate its rights under the NPRA that Henderson retreated from its fees demand.

The facts regarding when the documents were provided are not, themselves, in dispute. The Review-Journal initially requested public records from Henderson pertaining to Trosper Communications and Elizabeth Trosper on October 4, 2016. (I JA0012-0015.) When Henderson refused to disclose the records unless the Review-Journal paid an exorbitant review fee (and also suggested the Review-Journal file suit (II JA0347)), the Review-Journal filed its Petition on November 26, 2016. (I JA0001-0023.) Fifteen days after the Review-Journal filed suit, Henderson agreed to allow a Review-Journal reporter to inspect the records in person—without charge. (III JA0241.) Pursuant to the NPRA, a requester has the right to either receive copies of public records or to inspect the records in person or both. *See* NRS 239.010(1).

At a minimum, the Review-Journal's litigation against Henderson was the catalyst for Henderson to change its position and allow the Review-Journal to *see* the records Henderson was holding ransom.

The Review-Journal subsequently amended its Petition on February 8, 2017.[2] When the matter came before the district court for a hearing on March 30, 2017, Henderson finally agreed to provide the Review-Journal the requested documents free of charge. (III JA0428.) Once again, the Review-Journal's litigation was the catalyst for Henderson's decision to provide the records without charge. Finally, after this Court issued its opinion affirming in part the district court's denial of the Review-Journal's petition, Henderson voluntarily provided the withheld DPP Documents without charging the Review-Journal any fee. The first *CIR* factor, the timing of the records being provided, weighs in the Review-Journal's favor.

**2. The Litigation Triggered Henderson to Release the Records.**

Under the second factor of the *CIR* analysis, courts must consider "what actually triggered" the release of the records. *CIR*, 460 P.3d at 957 (quotation omitted). A requester is entitled to attorney fees and costs under the NPRA even absent a district court order compelling production "when the requester can demonstrate "a causal nexus between the litigation and the voluntary disclosure or change in position by the Government.'" *CIR*, 460 P.3d at 957 (quoting *First Amendment Coal. v. United States*

[2] (I JA0030-0168.)

*DOJ*, 878 F.3d 1119, 1128 (9th Cir. 2017); emphasis added).

Henderson argues again that it "never denied" the Review-Journal's request, and that the "triggering event" which caused Henderson to allow for inspection was its receipt of notice via a news article that the Review-Journal had filed suit. (AB, p. 46.) In other words, Henderson admits the triggering event was the litigation, itself. Nevertheless, Henderson argues the Review-Journal's suit was unnecessary because the Review-Journal could have obtained access to the records by engaging in additional communications with Henderson. (*Id.*) This does not really address the triggering event factor, but rather whether the requester attempted to resolve the matter, but it is a distorted version of the history of this matter, in any event.

As noted above, when the Review-Journal's counsel attempted to resolve the parties' dispute through communication with Henderson's city attorneys, Henderson made plain it would not budge from its demand for fees and told counsel the Review-Journal should file suit. (II JA0347.) The only issue Henderson was willing to discuss was how to limit the effort Henderson had to engage in, not whether it was going to stick by its fee structure. As illustrated in Mr. Reid's December 5, 2016, letter, Henderson allegedly "looked at various ways to reduce the time and expense" of producing the requested records, but Henderson remained steadfast that it was entitled to fees for its search and privilege review. (II JA0351.)

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Then, during the March 30, 2017, hearing on the Review-Journal's Amended Petition, Henderson agreed to provide the Review-Journal with copies of the requested documents at no charge. (III JA0428.) Had the Review-Journal not filed suit, there is no indication Henderson would have changed its position and released the records to the Review-Journal free of charge.

As to the second disclosure following remand of the Petition Appeal, Henderson's own explanation of why it chose to disclose the DPP Documents can be boiled down to a single concept: Henderson did not want to litigate this matter anymore. In its Answering Brief, Henderson enumerates the factors it considered in deciding to disclose the DPP Documents. (AB, pp. 48-49.) The factors Henderson considered coalesced on a central question: did it want to continue fighting the litigation the Review-Journal filed to obtain access to the records? When Henderson answered that question in the negative, it changed its prior position and produced the records to the Review-Journal. This is the *sine qua non* of the catalyst theory: the Review-Journal's "public records suit cause[d] the governmental agency to substantially change its behavior in the manner sought by the requester." *CIR*, 460 P.3d 952, 957.

**3. The Review-Journal Was Entitled to the Records at the Time of Its Records Request.**

The third *CIR* factor requires consideration of whether the requested "was entitled to the documents at an earlier time." *CIR*, 460 P.3d at 957.

With respect to its mid-litigation disclosure of nearly 70,000 pages of records, Henderson cites to this Court's prior decision regarding the Review-Journal's substantive claims and asserts that the Review-Journal was not entitled to those records at an earlier time "because Henderson needed more time to review" the records for confidentiality. (AB, p. 50.) This fundamentally misses the point. One of the Review-Journal's claims below was that Henderson had failed to comply with the NPRA by not timely providing it with the specific statutory and legal bases for asserting that certain records were privileged or confidential. (I JA0037-38; I JA0180-181; II JA0307-0308.) This claim, however, was and is separate from the Review-Journal's assertion that Henderson's "review" fee violated the NPRA. Thus, while this Court ultimately determined that Henderson's response complied with the NPRA, that finding is not relevant to whether the Review-Journal was entitled to records it sought in 2016 earlier than the March 2017 hearing.

The Review-Journal was in fact entitled to that first batch of thousands of pages of records at an earlier time. Pursuant to the NPRA, the public is entitled to inspect or receive copies of any public records pertaining to the provision of a public service. *See, e.g.*, *Blackjack Bonding*, 131 Nev. at 86, 343 P.3d at 613. The communications sought by the Review-Journal pertained to Trosper Communications' provision of services to Henderson, and thus are public records of which the Review-Journal was entitled to receive copies. The only real debate with

respect to those records was whether Henderson was entitled to charge the Review-Journal thousands of dollars to review the records for privilege—a debate which was cut short by Henderson's mid-hearing agreement to provide the records at no charge.

Switching from the main batch of documents, in arguing the Review-Journal was "***never entitled***" to the DPP Documents Henderson disclosed after remand, Henderson asserts the DPP Documents "were properly withheld under the deliberative process privilege." (AB, p. 50.) However, in the same breath, Henderson acknowledges that no court has ever made a determination as to the propriety of Henderson's privilege assertions. (*Id.*, pp. 50-51.) Notably, this Court found the district court was required to consider whether Henderson proved its interest in nondisclosure clearly outweighed the public's right of access, but "did not make this consideration, or consider the difference between documents redacted or withheld pursuant to the statute-based attorney-client privilege and those redacted or withheld pursuant to the common-law-based deliberative process privilege." (*Henderson I*, VIII JA1412.) Thus, no court has ever determined Henderson "properly withheld" any of the DPP Documents. Instead, following this Court's remand, Henderson produced the DPP Documents to the Review-Journal without pursuing its claim that they were privileged.

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**4. The Litigation Was Reasonable.**

In addition to the three factors set forth above, courts must also consider "whether the litigation was frivolous, unreasonable, or groundless." *CIR*, 460 P.3d at 957 (citation omitted). Henderson asserts the litigation was unreasonable because it was unnecessary, the Review-Journal did not succeed on any issue, and the Review-Journal sought declaratory relief. (*See generally* AB, pp. 52-55.) None of these contentions is availing.

First, the litigation was necessary because Henderson refused to accede to the Review-Journal's requests prior to litigation. In addition, the litigation was reasonable. Henderson asserts the Review-Journal's suit was "unreasonable and groundless" because Henderson did not deny the request. (AB, p. 52.) However, Henderson's insistence on holding the requested records for a $6,000.00 ransom was, in effect, a denial of the Review-Journal's request, and whether it was a denial or not, the litigation was necessary to determine whether such a large fee could be charged. Had the Review-Journal not filed suit, Henderson would not have dropped its demand for thousands of dollars just to decide what records it would disclose. Thus, far from being frivolous or unreasonable, the Review-Journal's suit was a reasonable effort to get access to the records and to get them without paying an exorbitant fee.

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Second, Henderson asserts the instant litigation was unreasonable because Henderson believes the Review-Journal "included claims for relief and remedies that are not available under the NPRA." (AB, p. 52.) Henderson conveniently ignores that courts have discretion to grant declaratory relief pursuant to Nevada's Uniform Declaratory Judgment Act, NRS 30.010 to 30.060. Specifically, NRS 30.040(1) provides that a "[a]ny person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance, . . . and obtain a declaration of rights, status or other legal relations thereunder."[3]

Finally, Henderson's assertion that the Review-Journal "did not succeed on ***any*** issue" decided by the district court or this Court is incorrect. (AB, p. 55 (emphasis in original).) In its decision on the Petition Appeal, this Court found that—as the Review-Journal had argued—the district court failed to consider

[3] Thus, although Nev. Rev. Stat. § 239.011 as was in effect at the time the Review-Journal filed its Petition outlined the remedies a requestor ***may*** seek for a governmental entity's refusal to produce public records, it does not limit this Court's discretion to grant supplemental declaratory relief. This contention is supported by the fact that, in amending the NPRA in 2019, the Nevada Legislature amended Nev. Rev. Stat. § 239.011 to clarify that "[t]he rights and remedies recognized by [Nev. Rev. Stat. § 239.011] are in addition to any other rights or remedies that may exist in law or in equity." Nev. Rev. Stat. § 239.011(4). *See Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157, 179 P.3d 542, 554–55 (2008) ("when a statute's doubtful interpretation is made clear through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended")) (citations omitted).

whether Henderson proved by a preponderance of the evidence that Henderson's interest in nondisclosure of the DPP Documents clearly outweighed the public's right of access. (*Henderson I*, VIII JA1412.) This Court's finding in favor of the Review-Journal led directly to Henderson's subsequent disclosure of the DPP Documents. (*See. e.g.*, AB p. 16 (stating that Henderson decided to turn over the DPP Documents after issuance of this Court's opinion).)

Moreover, this argument ignores an important the point of the catalyst theory, under which a party is a prevailing party if it obtains any significant goal of the litigation as a result of a change in position by the governmental entity. The only reason the Review-Journal did not obtain judgments ordering Henderson to produce the records is because Henderson changed its position, ceased demanding payment for the records and provided them free of charge. Since Henderson's change in position was a result of the litigation, the catalyst theory requires the award of attorney's fees.

In a related vein, Henderson also asserts that the litigation was unreasonable because the Review-Journal asserted Henderson had waived its right to assert any of the records were confidential because Henderson "did not provide its privilege log to LVRJ within five business days of receiving the Request." (AB, p. 54.) When the Review-Journal pursued this claim before both the district court and on appeal, this Court had not yet ruled on the waiver issue under the then-extant version of the

NPRA. This Court did not make a definitive ruling on waiver until 2020. *See Republicans Attys. Gen. Assoc. v. Las Vegas Metro. Police Dep't.*, 163 Nev. Adv. Rep. 3, 458 P.3d 328 (2020). The mere fact that the Review-Journal did not prevail on this open issue does not render the litigation "unreasonable."

Henderson also points to the fact that the Review-Journal challenged—and ultimately lost—Henderson's designations of attorney-client privilege documents as an indication that the litigation was unreasonable. (AB, p. 54.) But, again, the mere fact that the Review-Journal did not prevail on this claim does not render the litigation unreasonable; instead, it merely shows the Review-Journal pursued viable legal claims which it did not prevail on—something common in any legal action.

**5. The Review-Journal Sufficiently Tried to Resolve Its Dispute with Henderson Before Filing Its Petition.**

The final *CIR* factor is "whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time." *CIR*, 460 P.3d at 957–58 (citation omitted). Henderson's argument on this point is that the Review-Journal did not confer with Henderson about the dispute over the fees and production of the records as much as Henderson believes it should have. (AB, pp. 56-57.) However, it was not until it became apparent Henderson would not agree to produce the records without charging an exorbitant fee that the Review-Journal filed suit.

The Review-Journal's decision is consistent with the NPRA and the First Amendment and was not hasty in light of the need for prompt access to public records. The NPRA is intended to ensure swift access to governmental records to foster democratic principles. NRS 239.001(1). And as the United States Supreme Court has explained, quick access to public records is required by the First Amendment. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (holding that "each passing day may constitute a separate and cognizable infringement of the First Amendment" and that "any First Amendment infringement that occurs with each passing day is irreparable"). Thus, the Review-Journal's decision to file suit after the parties could not reconcile their main disagreements was reasonable.

Henderson dedicates a substantial portion of its argument regarding this factor to discussing the facts surrounding the records request at issue in *CIR*. (AB, pp. 58-59.) The actions of an unrelated media entity in an unrelated records request, however, are irrelevant to considering whether the Review-Journal's actions here were reasonable. As described in *CIR*, CIR waited one month after submitting a records request to the Las Vegas Metropolitan Police Department to follow up with the Department about the request, and then waited twelve days to follow up a second time, and another three months to follow up a third time. *CIR*, 460 P.3d at 954. Nothing in the *CIR* opinion states that requesters should, like CIR, wait for long periods of time for a governmental entity to respond to a request. Indeed, to suggest

so would conflict with the NPRA's principal goal of assuring prompt access to public records. Thus, the actions of CIR are irrelevant to determining whether the Review-Journal properly attempted to negotiate with Henderson before seeking the Court's intervention.

Finally, Henderson takes issue with the Review-Journal's argument that this final factor is of the least probative value in NPRA matters, asserting that the Review-Journal has provided "no legal authority supporting its proposition." (AB, p. 55.) First, since this factor and each of the others weighs in favor of the Review-Journal, their relative weight does not matter. However, the Review-Journal's Opening Brief provides ample legal authority for the differences between the NPRA and the cases this Court reviewed in adopting the catalyst theory in *CIR* and why those differences must inform the Court's assessment of this final factor. (*See generally* OB, pp. 35-37.)

As discussed in the Review-Journal's Opening Brief and by the New Jersey Supreme Court in *Mason v. City of Hoboken*—a case which this Court cited to in adopting the catalyst theory[4]—New Jersey's Open Public Records Act ("OPRA") requires requesters and governmental entities to cooperate in certain instances in a manner not required by the NPRA. For example, the OPRA mandates that if a request "would substantially disrupt agency operations," a custodian may deny it

[4] *See CIR*., 460 P.3d at 956-57 (discussing *Mason*).

"after attempting to reach a reasonable solution with the requestor." *Mason v. City of Hoboken*, 196 N.J. 51, 66, 951 A.2d 1017, 1026 (2008) (quotation omitted). Additionally, the New Jersey OPRA created the Government Records Counsel, which provides informal pre-litigation mediation to resolve disputes over access. *Id.* (citation omitted); *see also id.* at 1033. The NPRA does not contain similar provisions.

As also discussed in the Review-Journal's Opening Brief, the Court's weighing of this factor must also be tempered by the differences between the NPRA and the statutory scheme that informed the California Supreme Court's decision in *Graham v. DaimlerChrysler Corp.*, another case this Court cited to in *CIR.*[5] The decision in *Graham* was predicated on a provision of the California Code of Civil Procedure which permits fees awards in actions which "result[] in the enforcement of an important right affecting the public interest" only after the party seeking fees establishes, *inter alia*, "the necessity and financial burden of private enforcement." *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565, 21 Cal. Rptr. 3d 331, 339, 101 P.3d 140, 147 (2004) (citing Cal. Civ. Proc. Code § 1021.5). The NPRA's fees provision, NRS 239.011(2), does not similarly require a requester to establish "the necessity and financial burden of private enforcement" to obtain an award of attorney's fees and costs. Instead, NRS 239.011(2) provides that a requester who

[5] *See CIR*, 460 P.3d at 957-58.

prevails in an action under the NPRA "is entitled to recover from the governmental entity that has legal custody or control of the record his or her costs and reasonable attorney's fees in the proceeding." Thus, unlike in California, under the NPRA a requester need only establish that their costs and fees were reasonably incurred in the course of the proceeding—not that the proceeding itself was necessary to vindicate their rights under the NPRA.

Given these differences between the NPRA and the cases this Court reviewed in *CIR*, any weighing of this final factor must necessarily take these critical differences into account to ensure NRS 239.011(2) is interpreted and applied in a manner which is consistent with the NPRA's purpose of increasing governmental transparency through maximal access to public records. *See, e.g.*, *Allstate Insurance Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 577 (2009) ("We read statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.") (citation omitted).

### D. Any Award of Fees and Costs to the Review-Journal Should Not Be Predicated on the Number of Documents Obtained as a Result of the Litigation.

Finally, Henderson asserts that if this Court were to determine the Review-Journal was a prevailing party under the catalyst theory, any award of fees and costs should be limited to only the fees and costs it incurred in obtaining the DPP Documents. (AB, pp. 60-64.) Henderson argues the "propriety of the City's policy

concerning fees, the mootness issues, the adequacy of the City's Initial Response, the timeliness of the City's privilege log and the contents of the privilege log with respect to documents withheld under the attorney-client privilege are entirely separate from the issue of whether 'the threat of victory' posed by LVRJ's lawsuit caused Henderson to disclose the DPP Documents." (AB, p. 63.)

The Review-Journal's petition may not have ended with a judgment entered in its favor, but the record of this case nevertheless shows that the Review-Journal achieved significant goals with its litigation, and thus is entitled to fees and costs for all the work performed by counsel—not just the work performed in obtaining the DPP Documents. But for the litigation, Henderson would only have disclosed the tens of thousands of requested records after the Review-Journal paid thousands of dollars. But for the litigation, Henderson would not have disclosed the DPP Documents at all. Thus, although the Review-Journal did not prevail on its claims for injunctive relief, the Review-Journal obtained the most important goals it sought in the litigation—it received copies of the public records and it received them free of charge.

Henderson's suggestion that the issues in this matter were not "overly complex or intricate requiring special knowledge or skill" (AB, p. 63) is likewise meritless. Interpretation of the NPRA is a complex and time-consuming process requiring large amounts of research, review, and nuanced advocacy. Even without

conducting discovery or engaging in complex multi-party litigation, NPRA matters require specialized practice. That is why the NPRA contains a fee-shifting provision: to incentivize attorneys to fight for public records that an ordinary citizen lacks the skills to be able to access on his or her own.

Henderson's next suggestion—that the Review-Journal's fees be reduced by almost 99.9%—is an affront. Henderson argues that because the Review-Journal "only succeeded with respect to 0.12% of the total number of documents requested, it should only be awarded 0.12% of its fees and costs, *i.e.*, 0.12% x $125,327.50 = $150.39." (AB, p. 64.) Henderson cites no authority for the proposition that attorney's fees should be reduced in line with the ratio of documents produced, because there is none.

This Court should decline to engage in Henderson's suggested calculus for multiple reasons. First and most obviously, the Review-Journal did not just get a handful of records as a result of this litigation—it got over 70,000 pages of public records. Thus, if the Review-Journal were entitled to fees and costs "commensurate with the level of success" it achieved here, the Review-Journal would be (and is) entitled to ***all*** its fees and costs.

Second, Henderson's proposed analysis must fail because success in a public records case is not measured by the number of documents obtained. If a requester only obtains some sought-after documents, but those documents are high value and

extremely important to the public interest, the requester should not be punished for successfully navigating a haystack of irrelevant documents to find the proverbial "golden needle." Doing so would be severe departure from the statutory mandate that the provisions of the NPRA "be construed liberally" to carry out the purpose of fostering democratic principles via access to public records. NRS 239.001(1)-(2).

Third, lowering attorney's fees awards based on the ratio of documents obtained from a governmental entity to the number of responsive documents in the governmental entity's possession would create a perverse incentive for governmental entities to artificially inflate the number of documents responsive to a request which would, in turn, artificially reduce the fees awarded under the NPRA. This, of course, would simply make obtaining public records more difficult, time-consuming, and expensive for requesters and the courts. This Court should not read into the NPRA a fee-reducing mechanism that could be so easily abused to subvert the NPRA's overarching purpose of government transparency.

Finally, Henderson's pro-rated approach to awarding attorney's fees is contrary to the catalyst theory and this Court's decision in *CIR*. There, this Court made clear that a requester unqualifiedly "prevails" for the purposes of a fees award under NRS 239.011(2) when the requester's suit causes a governmental entity to "substantially change its behavior in the manner sought by the requester, ***even when the litigation does not result in a judicial decision on the merits.***" *CIR*, 460 P.3d at

957 (emphasis added).

Nothing in this Court's adoption of the catalyst theory indicates a court can or should reduce an award of fees and costs based on the number of documents a requester obtains. Indeed, allowing a court to lower an award based on the number of documents obtained is contrary to one of the specific policy reasons this Court cited in adopting the catalyst theory: "the potential for government abuse in that an agency otherwise could 'deny access, vigorously defend against a lawsuit, and then unilaterally disclose the documents sought at the eleventh hour to avoid the entry of a court order and the resulting award of attorney's fees.'" *CIR*, 460 P.3d at 957 (quoting *Mason v. City of Hoboken*, 196 N.J. 51, 951 A.2d 1017, 1031 (2008)). Here, Henderson is trying a variation of this scenario: it vigorously defended against the Review-Journal's lawsuit, then unilaterally disclosed previously withheld records, and is now attempting to evade payment of attorney's fees and costs by asserting that the Review-Journal may have "prevailed," but that it did not prevail "enough" for a full award of its fees. This is contrary to the intent of the catalyst theory, and the Court should therefore decline Henderson's invitation to pro-rate any award of fees and costs to the Review-Journal.

## V. CONCLUSION

For these reasons, and for the reasons set forth in the Review-Journal's Opening Brief, this Court should review this matter de novo and find that the

Review-Journal is a prevailing party in this matter for the purposes of an award of costs and attorney's fees under the NPRA, vacate the district court's order denying the Review-Journal's motion for attorney's fees and costs, and remand this matter for the Court to reconsider the Review-Journal's request for reasonable costs and attorney's fees.

DATED this 17th day of May, 2021.

*/s/ Margaret A. McLetchie*

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## CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2:

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 the APPELLANT'S REPLY BRIEF has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I acknowledge that this APPELLANT'S REPLY BRIEF is in excess of the type-volume limitation of NRAP 32(a)(7)(ii) because it contains 8,167 words. I have filed a motion with this Court contemporaneously with the submission of this appellate brief requesting leave to exceed the type-volume limitation of NRAP 32(a)(7)(ii).

Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of May, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 17th day of May, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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