IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. d/b/a GENTLE SPRING CARE HOME; SOKHENA K. HUCH; MIKI N. TON, Appellants, vs. CORINNE R. DILEO, AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF THOMAS DILEO; THOMAS DILEO, JR., AS STATUTORY HEIR TO THOMAS DILEO; AND CINDY DILEO, AS STATUTORY HEIR TO THOMAS DILEO, Respondents.	Case No. 81804

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AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION
(In Support of Respondents)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.l(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

The Nevada Justice Association ("NJA"), an amicus curiae, is a non-profit organization of independent lawyers in the State of Nevada. The amicus curiae is represented in this matter by Micah S. Echols of the Claggett & Sykes Law Firm and A. J. Sharp of Sharp Law Center.

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NJA and its counsel did not appear in the District Court in this matter. NJA submits this brief along with its Motion for Leave, pursuant to an Order of the Nevada Supreme Court filed on April 16, 2021 (Document No. 21-11096).

DATED this 3rd day of May, 2021.

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AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA seeks to ensure that access to the courts by Nevadans is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA files this brief with an accompanying motion pursuant to NRAP 29(c). Through this proposed brief, NJA seeks to provide this Court with the broader context regarding mandatory arbitration provisions, the specific requirements and rationale of NRS 597.995, and the limits on enforcement of contracts against non-signatories.

Amicus intervention is appropriate where "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (indicating that the classic role of an *amicus curiae* is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the Court's attention to law that may have escaped consideration).

This appeal involves the circumstances under which a party may be denied its Constitutional right to a trial by jury (which of course "shall be secured to all and remain inviolate forever; but . . . may be waived by the parties in all civil cases *in the manner to be prescribed by law*[.]" This appeal also involves the circumstances under which a party may be held to a contract to which that party is not a signatory. Each of these issues has implications ranging far beyond the parties and contract at issue here. Accordingly, NJA has respectfully requested leave to appear as *amicus curiae* in this matter.

DATED this 3rd day of May 2021.

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LEGAL ARGUMENT

I. THE REQUIREMENTS OF NRS 597.995 MUST BE STRICTLY CONSTRUED.

A. The Statute "Prescribe[s] By Law" The "Manner" In Which An Otherwise "Secured" And "Inviolate Forever" Constitutional Right May Be Waived.

The Nevada Constitution provides that:

> [t]he right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases *in the manner to be prescribed by law*[.]

See Nev. Const. art. 1, § 3 (emphasis added).

Given the absolute language of this provision ("shall be secured to all and remain inviolate forever") — and its position in the third Section of the Constitution, preceded only by the rights to life, liberty, property, and the pursuit of safety and happiness, and fealty to the United States and the federal system — clearly the "manner to be prescribed by law" by which a person's right to a jury trial is deemed waived is of the utmost importance.

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To that end, the Legislature enacted an extremely specific and unambiguous statute:

> 1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
>
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.
>
> 3. The provisions of this section do not apply to an agreement that is a collective bargaining agreement. As used in this subsection, collective bargaining has the meaning ascribed to it in NRS 288.033.

See Nev. Rev. Stats. § 597.995 (2013).[1]

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[1] Because this dispute arose in 2017, the 2013 version of the statute (prior to the 2019 amendment) governs.

Thus, the "manner prescribed by law" in which a party may waive its right to a trial by jury when entering into a contract is — like the Constitutional provision it reflects — made up of unambiguous, mandatory, and *absolute* language.

- the agreement *must* include *specific authorization for the provision*;
- if the agreement *fails* to include the *specific authorization required*,
- the provision is *void and unenforceable*.

It would be difficult to envision statutory language (or context) in which *actual compliance* with *every provision* of a statute would be more clearly required. In prescribing the manner in which the Constitution permits a party to waive its right to a jury trial, the Legislature included *no language whatsoever* permitting any deviation from this clearly-defined and absolute requirement. "As we have previously explained, 'shall' is a mandatory term indicative of the Legislature's intent that the statutory provision be *compulsory*, thus creating a duty rather than conferring *discretion*." *Leven v. Frey*, 123 Nev. 399, 407, n.29 (2007) (citing *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303 (2006)) (emphases added); *see also Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 207, n.1 (1983) ("'Shall' and 'must' are both imperative terms.") (citing *Thomas v. State*, 88 Nev. 382 (1972)).

Moreover, the statute does *not* include any language deferring to judicial discretion, such as permitting waiver "in such other manner as the court directs," which is routine statutory language when the Legislature wishes to defer the details of compliance to the discretion of the courts. *See, e.g.*, Nev. Rev. Stats. § 143.050 ("after notice given as provided in NRS 155.010 *or in such other manner as the court directs*") (emphasis added).

Such language is commonplace in statutes — and precisely *because* such language is so common, the *absence* of such language in NRS 597.995 speaks volumes. After all, the fact that the Legislature so often includes such language in statutes shows that — when it so desires — the *Legislature knows exactly how to introduce judicial discretion* into a statute while preserving the Constitutional separation of powers. *Id.* It did not do so here.

Instead — not surprisingly, when prescribing the method by which a party may waive its otherwise "secured" and "inviolate forever" Constitutional right to a jury trial — the Legislature refrained from even a *hint* of deference to any court or other governmental entity, for the obvious reason that the right to waive (or, as here, to *not* waive) *must be absolutely uniform across the State*. It *cannot* be subject to the varied discretion and judgment of dozens of different Judges or other officials — such that a party in one courtroom might be deemed to have waived the

Constitutional right, while another party in the courtroom next door might be deemed *not* to have waived it — *under exactly the same contract language*.

Thus, under the plain language of the statute (and the Constitutional provision), and given the complete absence of any discretionary statutory language, the waiver *must follow precisely the prescribed form* — and, if any deviation from that prescribed form occurs, the waiver is "void and unenforceable." *See* Nev. Rev. Stats. § 597.995(2).

After all, the right may be waived *only* "in the manner to be prescribed by law" — and so, if that "manner" is not followed, the right cannot be waived. *See* Nev. Const. art. 1, § 3.

B. As This Court Demonstrated In *Fat Hat, LLC,* The Absolute Language Of NRS 597.995 Is Extremely Simple To Apply.

As would be expected, three factors — (1) the mandatory, unambiguous, and objective requirements of the statute; (2) the dichotomous/binary nature of the inclusion *vel non* of the "specific authorization"; and (3) the absence of any discretionary language whatsoever — combine to make NRS 597.995 extremely simple to apply to any disputed agreement.

To be blunt, either the "specific authorization" is included in an agreement or it is not. If the "specific authorization" is included, the provision is enforceable. If

the "specific authorization" is not included, the provision is "void and unenforceable." *See* Nev. Rev. Stats. § 587.995(1), (2).

As straightforward as that analysis is, the determination of *whether* the "specific authorization" is included is even more straightforward. Because an *agreement* must be signed by the party against whom it is to be enforced, and because the *provision waiving the jury trial* must have a "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision[,]" any agreement containing (as here) a mandatory arbitration provision and at least one other provision must, *by definition*, include at least *two items of writing* by the person against whom it is to be enforced.

The statute does not expressly require a "signature" for the mandatory arbitration provision, but instead requires a "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." *See* Nev. Rev. Stats. § 597.995; *see also Bailey v. Affinitylifestyles.com, Inc*., 2017 WL 5895131, at *5 (D. Nev. Nov. 29, 2017) (finding that "the statute does not require a standalone agreement, just an *additional*, *more specific* acknowledgment[ ]" of the mandatory arbitration provision) (citing *Fat Hat, LLC v. DiTerlizzi*, 2016 WL 5800335, *2 (Nev. Sept. 21, 2016) (Docket No. 68479; filed in Supreme Court July 27, 2015) (unpublished disposition) (emphases added).

Thus, the party could potentially authorize the mandatory arbitration provision by signature, by written initials or, as in the *Fat Cat, LLC* case, by separately writing the party's name and address *in the mandatory arbitration provision*. *Fat Hat, LLC*, 2016 WL at *2.

However, as this Court noted in *Fat Hat, LLC*, there *must* be some *separate* written item "specific[ally] authoriz[ing]" the provision, *in addition to* the overall signature "indicating consent to all the terms of the contract." *Id*. Thus, unless the mandatory arbitration provision is the *sole* provision of the *entire agreement*, there must be one signature for the overall agreement *and* one signature (or other item of writing) for the mandatory arbitration provision. *Id.*; *see also Bailey*, 2017 WL at *5 (statute requires "an *additional*, *more specific* acknowledgment" of mandatory arbitration provision) (emphases added).

Therefore, if (as here, and as in *Fat Hat, LLC*) an agreement includes more than one provision (*e.g.*, "Grievance" and "Arbitration"), and contains *only* a signature at the end "indicating consent to all the terms of the contract[,]" but contains *no other writing by the party in specific relation to the mandatory arbitration provision*, that provision is by definition "void and unenforceable," as the agreement fails to include a "specific authorization" for that provision. *See* Nev. Rev. Stats. § 597.995; *Fat Hat, LLC*, 2016 WL at *2.

As would be expected when the statutory language is so clear, objective, dichotomous, and bright-line, this Court made quick (and accurate) work of this analysis in *Fat Hat, LLC v. DiTerlizzi*.[2] That case — involving two separate sets of agreements, one set enforceable and one set not enforceable — showcases exactly how straightforward proper application of this statute is:

> The first set of agreements in *Fat Hat, LLC* were *unenforceable* because they
>
> > did not contain the "specific authorization" for the arbitration provision in their respective contracts that NRS 597.995 demands. Though the arbitration provision immediately preceded the signature line on the last page for all the contracts, *that was a general signature line indicating consent to all the terms of the contract. Thus, those signatures do not qualify as specific authorizations for the arbitration provision*. Although Kirtz initialed at the bottom of the page with the arbitration provision, she initialed at the bottom of every page; thus, *her initials fail to demonstrate that she affirmatively agreed to the arbitration provision*. Because Fat Hat's contracts with respondents DiTerlizzi, Klus, Monica, and Kirtz *failed to include the specific authorization NRS 597.995 requires, the arbitration provisions in those four contracts are void and unenforceable*, and we affirm the district court's order denying arbitration as to them.

Fat Hat, LLC, 2016 WL at *2 (emphases added).

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[2] 2016 WL 5800335 (Nev. Sept. 21, 2016) (Docket No. 68479; filed in Supreme Court July 27, 2015) (unpublished disposition).

By contrast, the second set of agreements in *Fat Hat, LLC* were *enforceable* because they

> complied with NRS 597.995. In addition to a signature line at the end of the contracts, both Hebert and Mihaylova were required to *fill in their names and addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was effective*. Thus, the arbitration provisions in Hebert and Mihaylova's arbitration agreements are valid and enforceable.

Fat Hat, LLC, 2016 WL at *2 (emphasis added).

Here, the Addendum at issue mirrors the *unenforceable* agreements in *Fat Hat, LLC.* The Addendum includes one signature by each party at the bottom, which is "a general signature line indicating consent to all the terms of the contract[,]" including both the "Grievances" provision and the "Arbitration" provision. *App., Vol. I, 00093.* There is *no separate writing of any kind* — no signature, no initials, no "names and addresses in the blank portions of the provision" which could "explicitly stat[e] that the agreement to arbitrate was effective." *Id.*; *Fat Hat, LLC*, 2016 WL at *2.

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That determination — as this Court aptly demonstrated in *Fat Hat, LLC* — is simply the end of the inquiry. There is *literally nothing* Defendants[3] can point to that could possibly constitute Plaintiffs' "specific authorization" of the mandatory arbitration provision, and the statute unambiguously provides that the provision is therefore "void and unenforceable." *See* Nev. Rev. Stats. § 597.995(1), (2).[4]

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[3] In compliance with NRAP 28, this amicus brief (like the Answering Brief) "keep[s] to a minimum references to parties by such designations as 'appellant' and 'respondent[,]'" instead using the designations employed in the District Court (*i.e.*, "Defendants" and "Plaintiffs"). *See* Nev. R. App. 28(d).

The Opening Brief inexplicably disregards NRAP 28 and uses solely the discouraged terms "Appellants" and "Appellees," instead of terms that would "promote[ ] clarity[.]" *Id.*

Therefore, in quoting the Opening Brief, this amicus brief substitutes the terms "[Defendants]" and "[Appellees]" (in brackets) for references to "Appellants" and "Appellees."

[4] Defendants attempt to overcome the obvious fatal deficiency in their Addendum by noting that "any [ ]doubts regarding the propriety of arbitration are resolved in favor of requiring arbitration." *Opening Brief*, 9 (citing *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590 (1990)).

However, this principle is inapplicable here because, as the *Fat Hat, LLC* court and the statute itself makes clear, there is absolutely *no* "doubt regarding the propriety [or impropriety] of arbitration" here — the Addendum's mandatory arbitration provision is, as a matter of law, "void and unenforceable[,]" and Plaintiffs are entitled to a jury trial. *See* Nev. Rev. Stats. § 597.995(2); *Fat Hat, LLC*, 2016 WL at *2.

Defendants attempt to evade this obvious conclusion by incorrectly asserting that, in *Fat Hat, LLC*, "[t]e invalid agreements were ***three pages*** in length and contained ***twenty-one separate paragraphs***. Each paragraph was in ***fine print***." *Opening Brief*, 11 (citing App., Vol. II, 00239-47) (emphases added).

Defendants' description is ***factually*** incorrect, as Defendants' own citation to their Appendix ("239-247," *i.e.*, 8 pages) shows — the invalid agreements were 8 pages in length (rather than 3), contained 38 separate paragraphs (rather than 21), and contained no "fine print," but instead were printed entirely in standard 12-point type. *App., Vol. II, 00239-47*; *see also* BLACK'S LAW DICTIONARY 777 (11th ed. 2019) (defining "fine print" as "small, light print that is not easily noticeable").

More importantly, Defendants' description of the agreements in *Fat Hat, LLC*, — even if it were accurate — is ***irrelevant***. In determining whether the mandatory arbitration provisions at issue were enforceable or not, *Fat Hat, LLC* made no mention of the length of the agreement, the number of paragraphs, or the presence *vel non* of "fine print." *Fat Hat, LLC*, 2016 WL at *2. Instead, this Court mentioned only the ***sole*** fact that mattered — that one set of agreements failed to include the "specific authorization" and therefore were "void and unenforceable," while the

other set of agreements included the "specific authorization" and therefore were "valid and enforceable." *Id.*

II. DEFENDANTS' ARGUMENTS THAT THE ADDENDUM COMPLIES WITH THE STATUTE AND THAT "SUBSTANTIAL COMPLIANCE" IS SUFFICIENT ARE INCORRECT AS A MATTER OF LAW.

A. Contrary To Defendants' Assertions, The Addendum At Issue Does Not Comply With The Statute.

Defendants inauspiciously begin their "LEGAL ARGUMENT" with the assertion that "[t]he Agreement Complies with NRS 597.995(1)[.]" *Opening Brief*, 9. This assertion is obviously incorrect — on its face, the contract provision fails to comply with the requirements of NRS 597.995. Defendants attempt to pretend otherwise by simply misrepresenting the contents of the Addendum at issue, and also by misrepresenting the *actual* requirements of the statute while inventing "requirements" not found therein:

> This Addendum contained its own signature line, and, just like the two valid arbitration clauses in *Fat Hat*, [Plaintiff Corinne R.] Dileo was required to fill in her name, date, and her signature. The Addendum contained a bolded heading that reads "Grievance and Arbitration." [ ] While the invalid agreements in *Fat Hat* were several pages in length in all fine print [sic], the Addendum here is on a single page, lacks any fine print, and contains its own signature block. No reasonable person could review the Addendum and conclude that the arbitration provision is buried in the annals of fine print or difficult to read and understand.

Opening Brief, 11 (internal citations to Appendix omitted).[5]

Defendants (while acknowledging that Addendum is headed "Grievance and Arbitration") assert that the Addendum "contained its own signature line," but simply *omit* the obvious and crucial fact that the Addendum contains *two separate provisions*. As the heading suggests, the first provision deals with "Grievances[,]" while the second provision deals with "Arbitration[.]" *App., Vol. I, 00093*.

Defendants acknowledge that the Addendum was "separate" from the Resident Agreement. *Opening Brief*, 11. Thus, contrary to Defendants' misleading presentation — which inaccurately portrays the Addendum as including only the one provision mentioned by simply omitting mention of the other provision — the document clearly is "an agreement which includes a *provision* which requires a person to submit to arbitration any dispute arising between the parties to the agreement[,]" as well as a provision regarding "Grievances." *App., Vol. 1, 00093*; *cf.* Nev. Rev. Stats. § 597.995(1) (emphasis added). Thus, the Addendum falls under the absolute and mandatory language of the statute.

[5] As noted elsewhere herein, the agreements in *Fat Hat, LLC* contained no "fine print," but instead were printed in standard 12-point type. *See* Page 11, *supra*; *see also App., Vol. II, 00239-47*; *see also* BLACK'S LAW DICTIONARY 777 (11th ed. 2019) (defining "fine print" as "small, light print that is not easily noticeable").

Moreover, Defendants attempt to substitute *discretionary* and *subjective* considerations for the mandatory and objective requirements of the statute, asserting that "[n]o reasonable person could review the Addendum and conclude that the arbitration provision is buried in the annals of fine print or difficult to read and understand." *Opening Brief*, 11-12.[6]

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[6] Defendants later assert that:

> [Plaintiffs] argued that [Plaintiff Corinne R.] Dileo did not specifically authorize the Agreement because the Addendum contained a 54-word sentence about her right to submit grievances to the group home staff but would ultimately be required to arbitrate any grievances.

and that

> [Plaintiffs] lack any tenable basis to say that [Plaintiff Corinne R.] Dileo was not aware of the arbitration agreement and did not specifically authorize it. She did not offer any testimony that she was unaware of the arbitration clause or that she was confused because the Addendum contained two clauses.

Opening Brief, 12, 13.

The relevant point, however, is not whether Mrs. Dileo did or "did not specifically authorize the mandatory arbitration provision because the Addendum contained a 54-word sentence about her right to submit grievances to the group home staff[,]" but instead is that the provision was not "specifically authorized" because there is no "specific authorization" for the it, as NRS 597.995 provides.

Likewise, the statute makes no provision for whether a party was "aware" or "unaware" of the arbitration provision or was or was not "confused" by the two provisions. Defendants introduce these three red herrings in a transparent attempt to distract this Court from the obvious fact — the statute sets up a dichotomous

Of course, to comply with the statute, the Addendum is not required merely to be *not* "buried in the annals of fine print" and *not* "difficult to read and understand." To the contrary, the statute is clear that (1) in order to constitute a waiver of the right to a jury trial as otherwise secured "inviolate forever" by the Nevada Constitution, the Addendum "*must* include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision"; and that (2) failure to include such a "specific authorization" renders the mandatory arbitration provision "void and unenforceable." *See* Nev. Rev. Stats. § 597.995(1), (2) (emphasis added).

Defendants assert that insisting that the statute be enforced *as written* — as does the language of both the Constitution and the statute, along with Plaintiffs — would somehow turn the statue into "a semantic nightmare." *Opening Brief*, 12.

However, it is *Defendants'* self-serving attempt to evade and modify the plain language of the statute that, if accepted, would create a "semantic nightmare." The

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condition: if an agreement contains a jury-trial waiver, it *must* include a "specific authorization" of that waiver by the person against whom the waiver is to be enforced. If the agreement (as here) fails to include such a "specific authorization," the waiver is void and unenforceable. *See* Nev. Rev. Stats. § 597.995; *see also Fat Hat, LLC*, 2016 WL at *2.

actual language of the statute — like Plaintiffs' reliance upon that actual language —readily *eliminates* semantics.

The statute creates a crystal-clear bright-line rule — if an agreement contains a jury-trial waiver, it *must* include a specific authorization of that provision by the person against whom the waiver is to be enforced. If the agreement fails to include such a specific authorization, the waiver is void and unenforceable. *See* Nev. Rev. Stats. § 597.995; *see also Fat Hat, LLC,* 2016 WL at *2. This plain statutory language admits of no other possible meaning, and therefore avoids any potential descent into "semantics."

Defendants, having indisputably failed to include that "specific authorization" in their Addendum, now attempt to push this Court *into* the type of "semantic nightmare" the statute itself effectively avoids. Defendants seek to have this Court rule that NRS 597.995 somehow does *not* say what it unambiguously *does* say — that is, Defendants ask this Court to rule — in direct contradiction of the statute — that there is *some* way for an agreement to *fail to include* the "specific authorization" and yet *not* have its mandatory arbitration provision be "void and unenforceable." *Opening Brief*, *passim*; *contra* Nev. Rev. Stats. § 597.995(2). Obviously, ignoring the plain language of the statute in favor of some contrived meaning that would render Defendants' mandatory arbitration provision enforceable would create

precisely the "semantic nightmare" Defendants wrongly attribute to a plain-language reading. *Opening Brief*, 12.

Unfortunately for Defendants, their Opening Brief *explicitly* (albeit presumably unintentionally) admits that their Addendum fails to pass statutory muster. Defendants correctly assert that:

> [t]he Addendum here was one single page in standard font and contained two short paragraphs. *The signature blocked applied to two paragraphs on a single page*, not over 20 paragraphs of fine print [sic] spread across several pages.

Opening Brief, 12 (emphasis added).

Thus, Defendants admit without reservation that the *single signature block* in the Addendum "applied to two paragraphs[,]" *i.e.*, the "Grievances" paragraph and the "Arbitration" paragraph. *Id.*; *see also App., Vol. I, 00093.*[7] Because the statute is written in terms of "provision[s]," the Addendum itself shows that those two "paragraphs" are in fact two different "provisions" — one (labeled "Arbitration") "a

[7] Defendants mention the "two paragraphs on a single page[ ]" in contrast to the agreements at issue in *Fat Hat, LLC*, which Defendants assert contained "over 20 paragraphs of fine print [sic] spread across several pages." *Opening Brief*, 12.

However, as noted above, the *Fat Hat, LLC* court made no mention of the length of the agreement, the number of paragraphs, or the presence *vel non* of "fine print." *Fat Hat, LLC*, 2016 WL at *2. Instead, this Court mentioned only the *sole* fact that mattered — the presence or absence of the required "specific authorization." *Id.*

provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement[,]" and one ("Grievances") making no mention of arbitration at all. *App., Vol. I, 00093.*

Thus, Defendants openly concede that the signature block at the bottom of the Addendum "applied to two [provisions] on a single page." *Opening Brief*, 12. Because one of those two provisions contains a mandatory arbitration provision, and because the signatures at the bottom of the Addendum, by Defendants' own admission, "applied" to that provision *and to another provision not addressing arbitration,* those signatures are by definition

> a general signature line indicating consent to all the terms of the contract. Thus, those signatures do not qualify as specific authorizations for the arbitration provision.

Fat Hat, LLC, 2016 WL at *2; *see also Bailey*, 2017 WL at *5 (statute requires "an *additional*, *more specific* acknowledgment" of mandatory arbitration provision).

Defendants attempt to escape the obvious consequences of this admission by asserting that "[Plaintiffs'] argument assumes that the 'Grievances' clause is a separate 'provision' for purposes of NRS 597.995(1). It is not. It is an introductory clause to the Addendum." *Opening Brief*, 12.

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This assertion is of course incorrect, as the Addendum itself shows in three different ways:

- The Addendum is headed "Grievance and Arbitration," thereby putting these two separate topics on equal footing.

- The paragraph Defendants claim is "introductory" is numbered "1" while the "Arbitration" paragraph is numbered "2," again making them separate provisions, rather than an introduction and subsequent provision.

- The "Grievances" paragraph contains no language "introducing" the "Arbitration" paragraph, and the "Arbitration" paragraph contains no language referring back to the "Grievances" paragraph (*e.g.*, "If the procedures defined in the foregoing paragraph titled 'Grievances' does not resolve a grievance, then . . . .").

App., Vol. I, 00093.

Contrary to Defendants' assertion, these two paragraphs are included separately in the heading of the document, are numbered consecutively, cover completely different topics, and make no reference to each other. *Id.* They are indisputably separate provisions. *Id.*

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B. Contrary To Defendants' Assertions, Nothing In NRS 597.995 Permits Substitution Of "Substantial Compliance" For ***Literal Compliance*** With The Statutory Requirement.

In a misguided last-ditch effort to save its defective Addendum, Defendants attempt to argue that the "specific authorization" provision of the statute may somehow be read as "directory" rather than "mandatory," such that "substantial compliance" would suffice. *Opening Brief*, 14-18.[8]

This argument completely ignores the required basis for consideration of questions of "substantial compliance." The starting point (and here, the ending point) for such analysis is examination of "the statute's provisions[.]" *Leven v. Frey*, 123 Nev. 399, 407 (2007) (citing 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 57:19, at 58 (6th ed. 2001)).

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[8] Defendants assert that applying the statute's mandatory language as mandatory "attempt[s] to use NRS 597.995(1) as a technical trapdoor, rather than an important protection." *Opening Brief*, 17. Of course, Plaintiffs' entire argument is premised upon the statute as "an important protection," which essentially goes without saying because the statute defines the process by which a party may waive a fundamental Constitutional right.

To the contrary, it is Defendants' Opening Brief that attempts to portray the statute as "a technical trapdoor," *i.e.*, a technical requirement that may simply be disregarded (thus eviscerating Plaintiffs' Constitutional right to a jury trial) simply because Defendants failed to include the mandatory provision in their Addendum.

Where (as here) that language is "explicit," there is no room for "judicial construction or 'substantial compliance' analysis." *Id.* In fact, the ***very case repeatedly cited by Defendants*** explicitly reiterates the hornbook law that soundly defeats Defendants' argument: "As we have previously explained, 'shall' is a mandatory term indicative of the Legislature's intent that the statutory provision be compulsory, thus creating a duty rather than conferring discretion." *Leven v. Frey*, 123 Nev. 399, 407, n.29 (2007) (citing *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303 (2006)).

Moreover, in construing statutes, this Court has explicitly equated "must" (as used in the statute here) with "shall," in that both terms are ***mandatory***. *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 207, n.1 (1983) ("'Shall' and 'must' are both imperative terms.") (citing *Thomas v. State*, 88 Nev. 382 (1972)).

Thus, Defendants' "substantial compliance" argument collapses before it even gets out of the starting blocks. This Court's precedents are clear that "substantial compliance" analysis is permissible ***only*** where the statutory language at issue is not ***mandatory***. The statute provides that an agreement containing a mandatory arbitration provision "***must*** include specific authorization" for that provision. *See* Nev. Rev. Stats. § 597.995(1) (emphasis added). There is, therefore, no discretion for the courts in enforcing that provision, as "must" is "a mandatory term indicative

of the Legislature's intent that the statutory provision be compulsory, thus creating a duty rather than conferring discretion." *Leven*, 123 Nev. at 407, n.29.

Moreover, Defendants' argument is nonsensical from a practical standpoint. Although Nevada law clearly provides that "substantial compliance" is not sufficient under the statute, even if it *were* somehow sufficient, "substantial compliance" means that "a party's literal noncompliance with a rule is excused provided that the party complies with 'respect to the *substance essential to every reasonable objective*' of the rule." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665 (2013) (emphasis added).[9]

Here, the "substance essential to every reasonable objective" of the statute is to ensure that the non-drafting signatory to the agreement is specifically aware that, by signing, she is waiving her Constitutional right to a jury trial. *See* Nev. Rev. Stats. § 597.995(1). Thus, even if "substantial compliance" were sufficient here

[9] Similarly, BLACK'S LAW DICTIONARY equates "substantial compliance" with "substantial performance," which it defines as "[t]he rule that if a *good-faith effort to perform* does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete *if the essential purpose is accomplished*[.]" *See* BLACK'S LAW DICTIONARY 1729 (11th ed. 2019) (emphases added).

Thus, as with the *Markowitz* definition of "substantial compliance, a "good-faith effort to perform" and the accomplishment of the "essential purpose" are required. *Id.*

(which it is not, as explained above), Defendants would be required to point to some action they took, or some specific content of the Addendum, that ensured that the non-drafting signatory was specifically aware of the mandatory arbitration provision. *Markowitz*, 129 Nev. at 665.

Instead, in contradiction of the meaning of the word "substantial," Defendants appear to ask this Court to accept complete "non-compliance" as "substantial compliance." That is, the statute mandates inclusion of a "specific authorization" of the mandatory arbitration provision. Defendants' Addendum contains ***nothing*** even remotely resembling such a "specific authorization." Yet Defendants claim that their Addendum somehow "substantially complied" with the statute's requirement.

This claim contradicts the definition of "substantial compliance," which substitutes compliance with the *substance* of the rule for literal compliance with its express terms. *Markowitz*, 129 Nev. at 665.

If, as Defendants' request, the *complete absence* of a "specific authorization" were deemed to constitute "substantial compliance" with the statute, the statute would by definition be entirely mooted, as all agreements containing a "specific authorization" would be enforceable . . . and all agreements ***not*** containing a "specific authorization" (like Defendants' Addendum) would ***also*** be enforceable.

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Contrary to Defendants' argument, even if "substantial compliance" were sufficient under the statute (which it is not), certainly "complete and utter failure to make any effort whatsoever at compliance" could not somehow constitute "substantial compliance."

III. EVEN IF THE MANDATORY ARBITRATION PROVISION WERE *GENERALLY* ENFORCEABLE, IT COULD NOT BE ENFORCED AGAINST THE DECEDENT'S STATUTORY HEIRS.

As established above, the mandatory arbitration provision at issue here is, as a matter of law, "void and unenforceable." On that basis, this Court should affirm the District Court's Order regarding Plaintiffs' Motion to Reconsider and allow each of Plaintiffs' claims to proceed before the District Court.

However, this Appeal potentially presents a separate issue equally of vital public importance in Nevada — namely, whether heirs in a wrongful death (or medical malpractice or nursing home) case may be bound to arbitrate by the signature of the decedent on an *enforceable* mandatory arbitration provision.

Here, there is no dispute that Plaintiffs and statutory heirs Thomas DiLeo, Jr., and Cindy DiLeo (collectively, the "Heirs") are not signatories to the Addendum that includes a provision regarding grievances and a provision regarding arbitration. *App., Vol. I, 00093.* That Addendum carries signatures of Corinne R. DiLeo, decedent Thomas DiLeo, and no one else. *Id.*

Generally, Nevada law requires nonsignatories to arbitrate based upon mandatory arbitration agreements only under theories of incorporation by reference, assumption, agency, alter ego, and estoppel. *Truck Ins. Exch. v. Palmer J. Swanson, Inc*., 124 Nev. 629, 631 (2008).

Here, the Addendum on its face does not include any language that could be construed to *incorporate the Heirs by reference*. *App., Vol. I, 00093.*

In addition, no evidence indicates that either Heir or both Heirs *assumed the duty* to arbitrate or that principles of *agency* law could serve to bind either Heir or both Heirs to arbitrate. *Truck Ins. Exch..*, 124 Nev. at 638, n.12 (citing *Interbras Cayman Co. v. Orient Victory Shipping, Etc*., 663 F.2d 4, 6-7 (2d Cir. 1981)).

Likewise, no evidence indicates that either Heir (or both Heirs collectively) could be deemed an "alter ego" of decedent, such that the nonsignatory Heirs "may be held legally accountable for the actions of" the decedent. *Id*. (citing C*arte Blanche (Singapore) v. Diners Club Intern*., 2 F.3d 24, 26 (2d Cir. 1993)).

Thus, the sole theory upon which the Heirs could potentially be compelled to arbitrate based upon the Addendum is a theory of estoppel. *Truck Ins. Exch..*, 124 Nev. at 631. Under this theory in general contract law, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct

benefit" from a contract containing an arbitration clause.'" *Id.* (quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000)).

Here, as in *Truck Insurance Exchange*, estoppel does not apply. The "contract containing an arbitration clause" here is the Addendum, which provides exactly two potential benefits: (1) the ability to submit a grievance about services at Bella Estate Care Home to the Home; and (2) the requirement that disputes arising out of this Agreement be "settled exclusively by binding arbitration[.]" *App., Vol. I, 00093.*

There is no evidence that the Heirs have submitted (or sought to submit) any grievance about "services rendered by the staff or other personnel" to the Home, nor that the Heirs seek or have sought to submit any dispute related to the Agreement to binding arbitration.

"Accordingly, since [the Heirs were] not a signatory to [ ] the written agreement[ ] to arbitrate and [the Heirs] did not directly benefit from th[at] agreement[ ] in initiating [their] cause[s] of action against [Defendants], equitable estoppel [does] not apply to bind [the Heirs] to the arbitration agreement." *Cf. Truck Ins. Exch..*, 124 Nev. at 637.

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Moreover, the Heirs' claims are based in statute, rather than in the Addendum. *See* Nev. Rev. Stats. § 41.085(2) (creating right of wrongful death action in heirs). While no Nevada case directly addresses this point, courts in other jurisdictions have recognized this distinction and have declined to permit a ***statutory*** claim to be treated as though it belonged to the decedent or the estate. *See, e.g., Finney v. Nat'l Healthcare Corp*., 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) ("A wrongful death action is not a transmitted right nor a survival right but is created and vested in the statutorily designated survivors at the moment of death."); *see also Goliger v. AMS Properties, Inc*., 19 Cal. Rptr. 3d 819, 821 (2004) (daughter was not acting in personal capacity when she signed arbitration agreement, but instead in representative capacity as mother's responsible party, and therefore no waiver of daughter's personal right to jury trial for wrongful death claim could be inferred).

Here, as in *Finney* and *Goliger*, the claims of the Heirs arise from statute, NRS 41.085(2). Those claims did not exist during the lifetime of decedent Thomas DiLeo, but instead accrued upon his death. *Finney*, 193 S.W.3d at 395. The claims are not reliant upon the Addendum or any other contract with Defendants, and therefore the theory of estoppel cannot be invoked to compel the Heirs to arbitrate their personal claims. *Truck Ins. Exch..*, 124 Nev. at 631.

Because none of the theories under which Nevada law may require nonsignatories to arbitrate based upon mandatory arbitration agreements signed by a decedent — incorporation by reference, assumption, agency, alter ego, and estoppel — applies here, the Heirs cannot be compelled to arbitration based upon an Addendum or other contract they did not personally sign. *Id.*

DATED this 3rd day of May 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Amicus Curiae 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word VERSION 16.43 (2020) in 14-point font and Times New Roman type.

2. I further certify that this Amicus Curiae Brief complies with the page or type-volume limitations of NRAP 29 and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,228 words.

3. Finally, I hereby certify that I have read this Amicus Curiae 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.

4. 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 3rd day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing, ***AMICUS CURIAE*** **BRIEF OF THE NEVADA JUSTICE ASSOCIATION (IN SUPPORT OF RESPONDENTS)** was filed electronically with the Supreme Court of Nevada on the 3rd 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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I further certify that the foregoing document was emailed to the following:

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