IN THE SUPREME COURT OF THE STATE OF NEVADA

Nathan Ohm, Petitioner, vs. Eighth Judicial District Court, and the Honorable Kathleen Delaney, District Court Judge, Respondents, and City of Henderson, Real Party in Interest.	Supreme Court Case No.: 81960 Electronically Filed Mar 24 2021 05:46 p.m. Elizabeth A. Brown Clerk of Supreme Court District Court Case: A-20-810452-W Municipal Court Case: 19CR002297; 19CR002298 **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. The Federal Definition of a Misdemeanor Crime of Domestic Violence Applies to the Henderson Municipal Code

Both Petitioner Nathan Ohm and Real Party in Interest City of Henderson ("City") are in agreement that, with a few exceptions, resolution of this matter largely boils down to one key question: does a conviction under the Henderson Municipal Code qualify under the federal definition of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)? Petitioner maintains, for the reasons set forth in his Opening Brief, that it does qualify under the federal definition, and therefore a trial by jury is required as a fundamental right.

The City's first point in opposition relies on a "plain language" argument, despite the fact that the City's analysis does not actually rely on the plain language of the statute. As noted extensively in Petitioner's Opening Brief, the City repeatedly substitutes the word "offense" for "conviction" in order to reach its conclusion in the District Court; the City now repeats the same improper substitution in its analysis before this Court. "Congress delineated three sources from which the predicate misdemeanor *convictions* must qualify: Federal, State, and Tribal" (City's Answering Brief, hereinafter "AB," 6)

(emphasis added). The City's repeated substitutions of this key term – indeed, terms at the very heart of the legal dispute – cannot be overlooked.

The plain language of the federal definition supports Petitioner's argument, because it requires the *offense* to be a misdemeanor under Federal, State or Tribal law, not the conviction. The term "conviction" is used elsewhere in the federal domestic violence statute as requiring a "conviction" in any court (including municipal courts); but the federal definition of a misdemeanor crime of domestic violence has the word *offense*, and the difference must be presumed intentional under the laws of statutory construction. The simplest solution is usually the correct one, and in the simplest of terms, *an offense is not a conviction.*

The City relies on three district-level federal cases to conclude that a municipal offense is not included within the definition of a misdemeanor crime of domestic violence. However, not only are these cases nonbinding authority, they are also premised on an entirely separate legal analysis. In *all three* of these cases, the adverse party argued that the word "State" should be expanded beyond its plain meaning to include "Municipal." These courts then all determined that "State" simply means State, and "Municipal" is not inherently encompassed within the word "State."

That is not what Petitioner is arguing before this Court. Petitioner does not propose to expand the definition of "State" beyond its ordinary meaning, but rather simply to recognize that the Code qualifies under the federal definition because an offense that is a misdemeanor under the Code is also an offense that is a misdemeanor under State law. Petitioner is asking this Court to *apply* the language of the statute, not to change it. The adverse authorities provided by City do not apply to the instant case, both in terms of the source as nonbinding authority and the substance as inapposite to the arguments here.

The City then switches gears to a novel but extremely tenuous argument regarding the intent of Congress, affirming that because Congress did not adopt the 2019 Violence Against Women Reauthorization Act (VAWA), part of which included an amended to the federal statute defining domestic violence, Congress must have intended for municipal convictions to be excluded. This argument is highly attenuated and specious at best; the fact that Congress did not adopt a highly politicized proposed resolution with over 100 pages of amended content is not, by any stretch, an indication that Congress rejected the Act because it also partially amended the domestic violence statute.

City next then makes an argument unrelated to law entirely, claiming that "offense" cannot equate to "conduct" because "[t]hat defies common sense – it

does not matter what law a person's conduct *could* have broken; it matters under what law the conviction was secured" (AB, 10). Yet again, the City substitutes "offense" for "conviction," but the language of the statute permits a "conviction" in any court.

The City's attempts to use such dubious and gossamer arguments to support its conclusion – such as Congress' supposed intent from the VAWA and the City's halfhearted argument of "common sense" – should be construed such that Petitioner's federal case-based arguments have merit.

The only legally substantive argument offered by the City is that Petitioner somehow misinterprets the *Hayes* case. The City writes that "Ohm incorrectly contends that the Hayes Court equated the term 'offense' to 'conduct,' but the Hayes Court never considered whether domestic violence offenses charged under local law are included in TFD or found that the defendant's conduct was sufficient to prove a predicate offense" (AB, 12). To the contrary, the latter was *the exact conclusion* reached in Hayes – the defendant's conviction for a *non-domestic* battery made him a prohibited person so long as the conduct underlying the conviction included the use of force directed at a qualifying domestic relation. It was the conduct that mattered with application of the federal definition, not the final conviction,

which is precisely why a non-domestic battery conviction triggered the federal firearms prohibition.

> Most sensibly read, then, § 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor offense that (1) "has, as an element, the use [of force]," and (2) is committed by a person who has a specified domestic relationship with the victim….
>
> Congress' less-than-meticulous drafting, however, hardly shows that the legislators meant to exclude from § 922(g)(9)'s firearm possession prohibition domestic abusers convicted under generic assault or battery provisions… By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole." *United States v. Hayes*, 555 U.S. 415, 421, 129 S. Ct. 1079, 1084 (2009) (internal citations omitted).

A conviction is not "committed by a person who has a specified domestic relationship with the victim." One commits an offense; one does not commit a conviction.

The City also conspicuously ignores *United States v. Belless*, which reiterates the holding in *Hayes* and further relies on the defendant's conduct, not conviction.

> "The purpose of the statute is to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force. That purpose does not support a limitation of the reach of the

> firearm statute to past misdemeanors where domestic violence is an element of the crime charged as opposed to a proved aspect of the defendant's conduct in committing the predicate offense." *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003) (emphasis added).

The plain language of the statute and *controlling* federal authority unambiguously hold that the conduct underlying the offense is what governs applicability of the definition of a misdemeanor crime of domestic violence, not the ultimate conviction. The City's attempt to distinguish *Hayes's* applicability to the instant case is convoluted and unpersuasive.

Lastly, although the City's argument is entirely premised on substituting the word "offense" for "conviction," notably the City does *not* oppose Appellant's contention that conduct which violates the Code is also a misdemeanor under State law. To briefly reiterate, "conduct in committing the predicate offense" which constitutes a violation of the City code is also a misdemeanor under State law for three reasons: first, the Code and NRS are identical and prohibit identical conduct; second, the City and State maintain concurrent jurisdiction, so a violation of the Municipal Code is also a violation of state statute in the same jurisdiction; third, as a matter of law, the very lawfulness the Code is premised on the prohibited conduct already being a misdemeanor under state law. See, NRS 268.018 (granting charter cities the

authority to establish by ordinance a misdemeanor *that is also a misdemeanor under state law*) (AB, 39).

The Henderson Municipal Code is a misdemeanor offense that (1) has, as an element the use of force and (2) is committed by a person against a qualifying domestic relation. The conduct that is a misdemeanor under the Code is a misdemeanor under State law. Therefore, the Code qualifies as a misdemeanor crime of domestic violence, triggering the firearms prohibition and ultimately requiring a trial by jury pursuant to *Andersen*.

II. Equal Protection Violation from the Denial of a Fundamental Right

Petitioner admits that if jury trials are required for offenses committed under the Municipal Code, no equal protection violation ensues because those similarly situated will be treated similarly, and will have similar rights afforded to them; however, if the City's position is correct that charges brought under the NRS warrant a jury trial, but charges for the same conduct brought under the Code do not, an equal protection violation ensues because unfettered prosecutorial discretion determines whether the accused is entitled to a fundamental right.

The City argues that prosecutorial discretion controls because absent selective prosecution based on a protected class, "the decision whether or not to prosecute, and what charge to file… generally rests entirely in his discretion" (AB, 19). However, the City repeatedly returns to this same argument, despite Petitioner clarifying numerous times that issues concerning whether or not to prosecute, or what charges to file, are not relevant or raised here. From the very first oral argument in the Municipal Court, Petitioner made this distinction: "This is not that they're choosing to prosecute some people but not others, you know even the example that I gave where it's two people who commit the same conduct one is going to justice court, one is going to municipal they're still both being prosecuted. So, this is not an instance of selective prosecution and truthfully, I don't believe that, that analysis has any place in our argument. This is not a selective prosecution claim" (Transcripts, December 16, 61: 21).

This is not an instance of charging one offense versus the other (as both the Code and NRS charges at issue are domestic battery), nor is there an issue of a protected class. The City's multi-page analysis of selective prosecution does little more than confuse the issues presented, but is simply irrelevant and inapposite to the arguments here.

However, as Petitioner set forth in his Opening Brief, the availability of a jury trial to those prosecuted under county authority, but not under city authority, creates a classification of the fundamental right to a trial by jury.

The City claims this does not implicate equal protection because "different prosecutorial decisions by different prosecutorial agencies occur all the time," noting the overlapping jurisdiction between federal, state and municipal courts (AB, 23). The existence of concurrent jurisdiction does not categorically preclude an equal protection claim, particularly when a fundamental right hangs in the balance based on the *source* of the charge. The federal court cannot charge a defendant under state statute or municipal code; the state cannot charge under federal law or the municipal code; and the municipalities cannot charge under federal law or state statute. Geographic overlap between the jurisdictions is not relevant when the source of law is what creates the distinction.

The City next relies on *Hudson* to hold that no equal protection violation occurred when charged under a municipal code versus a state statute. The City incorrectly writes the Supreme Court "noted that the defendant *did* have a statutory right to a jury trial for this particular misdemeanor, when charged under the NRS, but since municipal violations were never considered serious

cases under the common law, no jury trial was required for the ordinance violation" (AB, 25) (emphasis in original). The City not only misrepresents the case law, but affirmatively writes as its holding the *opposite* of what the Supreme Court actually concluded. The Court concluded that Hudson was *not* entitled to a jury trial because *all* petty offenses – whether under state statute or municipal code – are not entitled to a trial by jury:

> Petitioner makes a valiant attempt to distinguish our statutory "misdemeanors" from what the cases refer to as "petty offenses" under the common law, summarily tried without a jury. In *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904), the majority opinion of the court finds much significance in the fact that in the original draft of the United States Constitution as reported by the committee the language was "the trial of all criminal offenses shall be by jury," but by unanimous vote it was amended to read, "the trial of all crimes." It was then said: "The significance of this change cannot be misunderstood." It held that "it was obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." …
>
> By statute in Nevada all offenses recognized by the common law as crimes, and not enumerated in NRS shall be punished: In the case of felonies by imprisonment in the state prison for not less than one year and in cases of misdemeanors by imprisonment in the county jail for not more than six months nor less than one month or by a fine not exceeding $ 500 or both. If committed to the state prison the party upon whom the fine is imposed shall be imprisoned at the rate of one day for each $ 2 until the fine is paid. When not sentenced to the state prison he is committed to the county jail on the same basis. NRS 193.180. Every crime which may be punished by

> death or imprisonment in a state prison is a felony. Every crime punishable by a fine of not more than $ 500 or by imprisonment in a county jail for not more than six months is a misdemeanor. Every other crime is a gross misdemeanor. NRS 193.120. Our statutes do not use the term "petty offense." The majority rule appears to equate "petty offense" with "misdemeanor." Therefore, petitioner's contention in this regard is without merit. *Hudson v. Las Vegas*, 81 Nev. 677, 682-83, 409 P.2d 245, 248 (1965) (emphasis added).

Nowhere in *Hudson* did the Court rule, as the City asserts, that "the defendant *did* have a statutory right to a jury trial for this particular misdemeanor, when charged under the NRS." To the contrary, the Court held that a "petty offense" under common law *and* a "misdemeanor" under state statute are categorically *not* entitled to a trial by jury – a ruling that remained unchanged until the *Andersen* decision.

Next, the City reiterates Petitioner's purportedly "incorrect assumption" that prosecutorial discretion governs where charges are filed (whether under county or municipal jurisdiction), yet fails to articulate why this is incorrect or what other factors govern the decision; the City has had no less than five opportunities to explain why this assumption is "incorrect" (three in briefing in twice in oral argument), yet has failed to do so. Instead, the City claims that "virtually all" and "most" misdemeanor battery domestic violence cases are heard in the Henderson Municipal Court. However, the City has provided no

alternative to explain why anything other than prosecutorial discretion governs this decision.

Given that the same charges brought in one court require trial by jury and charges brought in the other court do not, prosecutorial discretion remains the basis on which criminal defendants are granted or denied this fundamental right. As applied here, given that the City has provided no alternative explanation or offered what "guiding principles" govern the decision despite multiple opportunities to do so, Petitioner must continue to presume that there is no standard at all to determine whether a person who commits the same conduct is charged under the NRS or the Code. "'Arbitrary' is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International Dictionary, 2d Ed. (1945), as '2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . .' *United States v. Carmack*, 329 U.S. 230, 243 n.14, 67 S. Ct. 252, 258 (1946)

In this instance, "most" criminal charges for the same conduct are brought in one jurisdiction and some in the other, but there is no governing

standard or "adequate determining principle" to govern when similarly situated people in the same jurisdiction are, or are not, constitutionally entitled to a trial by jury. This distinction, made without guidance or reason, violates established Equal Protection principles under the state and federal constitution.

Lastly, the City does not dispute the existence of this classification – it is the City's own argument that those charged under the NRS get a jury trial as a fundamental right, but those charged under the Code do not. Instead, the City argues the classification withstands strict scrutiny by justifying the distinction on the overarching principle of victim protection. The proffered justification is unpersuasive and falls far short of a strict scrutiny analysis.

The City first argues that "[Ohm] alleges the purpose of enacting HMCBDV [Code] was solely to strip away a domestic abuser's right to a jury trial. Nothing court be further from the truth. The express purpose of enacting the HMCBDV [Code] was always well-defined by the Henderson City Council – the City has an unwavering interest in the protection of victims of violent crime" (AB, 21-22). Respectfully, if the City's interest was protecting victims, then why in the Code's preamble are the *first three out of four reasons* for passage referencing the *Andersen* decision, with only the last reason being related to safety?

> WHEREAS, in *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019), the Nevada Supreme Court held… the offense of misdemeanor battery domestic violence under NRS 200.485(1)(a), as a "serious" offense, for the purpose of having the right to a jury trial under the Sixth Amendment; and
>
> WHEREAS, 18 U.S.C. § 921(a)(33)(A), as referenced in NRS 202.360(1), in turn defines the term "misdemeanor crime of domestic violence" as an offense that is a misdemeanor only under Federal, State or Tribal law; and
>
> WHEREAS, there will be anticipated legal challenges to the Municipal Court's jurisdiction to entertain and hold jury trials as a result of the recent Nevada Supreme Court decision and there are current practical challenges of holding jury trials in the Henderson Municipal Court, enacting a city ordinance is important to protect the general health, safety and welfare of the citizens of Henderson; and
>
> WHEREAS, battery constituting domestic violence is a widespread offense and the City of Henderson has a significant interest in protective its citizens from this offense; and
>
> NOW, THEREFORE, the City Council of the City of Henderson, Nevada, does ordain:

The first reason for passage directly references *Andersen*. The second reason for passage references the federal definition of domestic violence, which triggers the firearms prohibition analyzed in *Andersen*. The third reason for passage is "anticipated legal challenges" as a result of *Andersen*. The fourth and last reason for passage is the first mention of citizen protection.

With no disrespect intended, Petitioner feels the City's attempt to refute the equal protection violation under the guise of "victim protection" is superficially disingenuous.[1] How is it narrowly tailored for the City to protect victims of domestic violence by allowing convicted domestic abusers to *keep* guns? How does the City protect victims of domestic violence by trying to take advantage of the "dangerous loophole" that was closed by the Ninth Circuit in *Hayes* and *Belless*, which the City refuses to acknowledge and opposes at every turn?

III. The City Must be Divested of Jurisdiction over Misdemeanor Battery Domestic Violence Cases

While NRS 266.550 grants municipal courts power and jurisdiction similar to those of justice courts, it also explicitly precludes jury trials in municipal courts. See also, *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 623, 627 (1987) Under any recognized canon of statutory interpretation, the

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[1] The City also claims, as it did in the District Court, that "no guarantee of victim safety could be made if these cases were sent to the Clark County District Attorney's Office – an extraordinary, yet horribly overburdened agency" (AB, 22). This is the first case in which Undersigned Counsel has ever seen one prosecuting agency openly disparage another by claiming the other agency is unable to adequately ensure safety of victims in its cases.

plain language of NRS 266.550 prohibits municipal courts from presiding over jury trial cases. Although the City argues the statute is "contradictory on its face," that is not accurate; the statute sets forth a general rule, and then subsequent exceptions to that rule. Having a specific exception to a general principle is neither ambiguous or contradictory.

City also continues to argue that the prohibition of NRS 266.550 did not apply to Henderson because the municipality was incorporated by special charter. However, the jury trial prohibition in NRS 266 also contains a caveat that it *will* apply to cities incorporated under a special charter *if the special charter explicitly recognizes the applicability of the NRS*. See, NRS 266.005

In this case, the Henderson Municipal Court expressly concluded that the Henderson City Charter did in fact incorporate NRS 266, and therefore incorporated the jury trial prohibition in NRS 266.550. The City tries to refute this incorporation by arguing that the jury trial prohibition would be inconsistent with the Charter's purpose to provide for the public health, safety and general welfare of citizens (AB, 33). However, if that is the case, Henderson's Charter is internally inconsistent; there is a provision which explicitly adopts the NRS, and then a generalized "purpose" of citizen welfare, which the City argues effectively nullifies the incorporation provision.

The City's argument to raise the Charter's "general purpose" above a specific statutory inclusion must fail. "Under the general- specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, 'the two provisions are not in conflict, but can exist in harmony.'" *Williams* , 402 P.3d at 1265 (citing *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). Since the City argues that its own Charter is internally contradictory, the specific statutory inclusion of the jury trial prohibition must prevail over the general purpose of citizen welfare, which can also be satisfied by prosecuting cases in Henderson county as *equally* as when prosecuted in Henderson city.

The City lastly argues that it would be absurd for this Court to constitutionally mandate a jury trial in domestic violence cases, but otherwise preclude Municipal Courts from entertaining jury trials (the irony is not lost in the City's recognition that *Andersen* is a constitutional mandate as it attempts to circumvent it). However, that is no more a constitutional absurdity than laws preventing Municipal Courts from trying charges of gross misdemeanors or felonies.

The *Andersen* decision raised the charge of battery domestic violence to a serious offense, elevating it to a level more akin to a gross misdemeanor or

felony (even though it remains classified as a misdemeanor due to the maximum period of incarceration and fine). There is no dispute that Municipal Courts lack jurisdiction to charge gross misdemeanors or felonies; there is further no reason not to extend this jurisdictional prohibition to the "serious" offense of domestic battery, given that it constitutionally requires a trial by jury and both state statute and the Henderson City Charter preclude municipal jurisdiction for jury trial cases. Cases that presently exist can be adequately transferred to the Henderson Justice Court (as a decision the Municipal Court lacks jurisdiction is a "final disposition" permitting transfer), and charges of domestic battery can continue to be prosecuted under the fullest extent of the law in the Justice Court without violating this constitutional mandate.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Dated this 24 day of March, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein

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VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Petitioner.
3. The factual contentions contained within the Petition are true and correct to the best of my knowledge.

Dated this 24 day of March, 2021.

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CERTIFICATE OF COMPLIANCE

1. I 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 4,440 words.

3. 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(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24 day of March, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 24 day of March, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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