IN THE SUPREME COURT OF NEVADA

LYFT, INC.,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and THE HONORABLE MARK R. DENTON, District Judge,
Respondents,

and

KALENA DAVIS,
Real Party in Interest.

No. 82148

PETITIONER'S AMENDED REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Lyft, Inc. ("Lyft") is a publicly held corporation traded on the Nasdaq Global Select Market with no parent corporation. Based on Lyft's knowledge from publicly available U.S. Securities and Exchange Commission filings, no publicly held corporation or entity owns ten percent or more of Lyft's outstanding common stock.

DATED this 17th day of May, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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I.

REPLY ARGUMENT

In "Real Party in Interest Kalena Davis's Amended Answer to Petition for Writ of Mandamus" (the "Amended Answer"), Davis argues, *for the first time*, that NRCP 35 (the "Rule") and NRS 52.380 (the "Statute") are not in conflict because each provides for its own *separate* observer, one "witness" and one "advocate." This argument was not raised in the proceedings below, and should therefore not be considered. Even if considered, this brand new hypothetical contention, which contemplates a sea change in the way Rule 35 examinations would be conducted in Nevada, has no support in the language of the Rule, the Statute or the legislative record.

Davis next argues that the Statute does not violate the separation of powers doctrine because it is substantive, not procedural. As detailed in the Petition, federal courts, including the United States Supreme Court and the United States District Court for the District of Nevada, have concluded that the regulation of mental and physical examinations as part of civil litigation, whether by rule or statute, is fundamentally procedural in nature, and not substantive. Davis' attempt to distinguish the dispositive authorities cited by Lyft in the Petition is unavailing, as is Davis' attempt to identify support for his contention in the language of the Statute.

Finally, Davis argues that this Court should voluntarily accept the Legislature's alteration of NRCP 35, or that it should construe the Statute as "directory," and not mandatory. This argument is based on inapplicable case law. The hypothetical fix is also entirely impractical, and would almost certainly lead to much unnecessary collateral litigation.

Each of Davis' misplaced contentions in his Amended Answer are addressed below.

A. NRCP 35 and NRS 52.380 cannot be read harmoniously.

Davis first argues in his Amended Answer that the Statute, NRS 52.380, does not violate the separation of powers doctrine because it can be read harmoniously with the Rule, NRCP 35. (Am. Ans. at 5). This new argument, which Davis raises *for the first time* in these writ proceedings, has no support in the language of the Statute, the Rule or the legislative record.

In the proceedings below, the discovery commissioner correctly noted three distinct and irreconcilable conflicts between the Rule and the Statute. (3 App. 556:12-21). These three conflicts are:

> (a) Whether a party's attorney, or a representative of that attorney, may serve as an observer during the examination – this is barred by the Rule but permitted by the Statute. Specifically, under the Rule, "[t]he observer may not be the party's attorney or anyone employed by the party or the party's attorney." NRCP 35(a)(4). Under

the Statute, "[t]he observer attending the examination . . . may be . . . [a]n attorney of an examinee." NRS 52.380(2)(a).

(b) Whether a party may have an observer during a neuropsychological, psychological or psychiatric examination without making a showing of "good cause" -- this good cause showing is required by the Rule but not required by the Statute. Specifically, under the Rule, "[t]he party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown." NRCP 35(a)(4)(B). The Statute, in contrast, makes no provision or exception for these highly specialized examinations.[1]

(c) Whether the observer may record the examination without making a showing of "good cause" – this showing is required by the Rule but not required by the Statute. Specifically, the Rule provides: "On request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded." NRCP 35(a)(3). The Statute provides only that "[t]he observer attending the examination . . . may make an audio or stenographic recording of the examination." NRS 52.380(3).

[1] The concerns regarding observers at neuropsychological exams (and particularly attorney observers) are summarized in the Petition (at 17-19). In his Answer, Davis misleadingly suggests that these are Lyft's concerns. As the Court is aware, the public safety and testing validity concerns that would follow if observers were permitted at neuropsychological examinations were consistently raised by treating neuropsychologists and numerous organizations, including the Nevada Board of Psychological Examiners and the Nevada Psychological Association, during the public comment process. (Petition at 18; 2 App. 260, 271-272).

In other words, contrary to the Rule, the Statute permits (1) an examinee's attorney to observe the examination; (2) an observer for neuropsychological or psychological examinations without any showing of good cause; and (3) recording of the examination without any showing of good cause. The discovery commissioner concluded that "[e]ach of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony." (3 App. 556:21-22).

Davis did not argue otherwise in the proceedings below. Instead, he argued that, though the Rule and the Statute are in conflict, the Statute is constitutional because it is substantive. (2 App. 456-460; 5 App. 1046-1051). Because Davis is now asserting the "no conflict" argument for the first time in appellate proceedings, it should be disregarded. *See Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981 (1981) (holding that arguments not raised in the trial court are waived).

Davis argues that his change of position and new argument should be permitted because constitutional issues may be addressed when raised for the first time on appeal. (Am. Ans. at 5 fn. 7 [citing to *Levingston v. Washoe Cty.*, 112 Nev. 479, 482, 916 P.2d 163 (1996)]). This reliance is misplaced. In *Levingston*, it was the party **seeking appellate relief** that raised the constitutional questions. Here, Davis raises no constitutional issues; rather, he maintains that the Statute is

constitutional. Accordingly, this exception to the bedrock general rule that new arguments raised for the first time in appellate proceedings should not be considered does not apply.

Nevertheless, even if considered, Davis' new contention that there is no irreconcilable conflict between the Rule and the Statute is wholly unsupported by the language of the Rule or Statute, or by the legislative record. Indeed, the new chart that Davis added to his Amended Answer demonstrates precisely how stark and irreconcilable the differences are between the Rule and the Statute. (Am. Ans. at 11).

Davis first asserts that "Rule 35 is focused on the collection of evidence through medical examinations and the preservation of evidence through recordings and observers." (Answer at 510). As alleged legal support for this argument, Davis cites only to "NRCP 35" generally. (*Id*.) No such "focus" on "evidence collection," however, is stated in NRCP 35.[2] Moreover, no such characterization of the Rule is stated by the Legislature in NRS 52.380, nor was it articulated by any of the proponents of A.B. 285, or any of the legislators, during the committee hearings.

[2] This is also a curious grounds for attempting to draw a utilitarian distinction between the Rule and the Statute, as the Statute is contained in Chapter 52 of the NRS, which is entitled "Documentary and Other Physical Evidence."

Davis next asserts that NRS 52.380 is focused on protection of the interests and person of the victim by an advocate who is not – and cannot be -- appointed under Rule 35." (Am. Ans. at 5.) Davis, however, identifies no language in NRS 52.380 that supports this characterization. In fact, the statute provides that an examiner may suspend the examination if the observer "disrupts or attempts to participate in the examination." NRS 52.380(5). And, again, Davis' manufactured "advocate" contention is further belied by the fact that the Statute is contained in Chapter 52 of the Nevada Revised Statutes, which applies, not to any safety or protective purpose, but rather to "Documentary and Other Physical Evidence."

Davis next asserts that the "observer" – a term used by both the Rule and the Statute -- "cannot be the same person." (Am. Ans. at 51). Accordingly, Davis' argument continues, the Rule "does not prohibit the existence of the Statute's observer/advocate," and the Statute "does not prohibit the existence of the Rule's observer/witness." (*Id*. at 5-6).

These distinctions and characterizations are ***manufactured out of whole cloth***. Davis' theorization of both a statutory "advocate" ***and*** a rule-based "witness" is contained nowhere in the language of the Statute, the Rule or the legislative record. In fact, this hypothetical multiple observer scenario is plainly contrary to the language of NRCP 35, which specifically provides for "one observer." NRCP 35(a)(4)(A). Even more fundamentally, had the Legislature

(assuming hypothetically that it had the constitutional power) intended to usher in such a sea change in the NRCP 35 examination procedure by creating the concept of multiple "observers," one of whom is actually a "victim advocate," it certainly would have expressed such a radical change in the language of the Statute.

Davis' theory that the Rule and the Statute are not in conflict is not merely a reconciliation of conflicting language. It is a wholesale change to the NRCP 35 procedure, which would involve multiple observers and multiple recordings. Davis cites no support that this option was contemplated in any way, shape or form by either the Legislature or this Court when either the Statute and the Rule were enacted. This is not surprising, as multiple observers, with one charged as an "advocate," and multiple recordings would inevitably lead to significant collateral disputes and potential litigation involving mental and physical examinations.

B. NRS 52.380 establishes procedures for physical and mental examinations – it does not create substantive rights.

Davis next argues that NRS 52.380 does not violate the separation of powers doctrine because it is substantive, not procedural. Davis, however, cites no language from the Statute stating or suggesting that it somehow confers substantive rights. Instead, Davis relies on policy arguments that might apply to certain "victims" of assault, battery, sexual assault and cyber-bullying. (Am. Ans. at 8). These victims, Davis hypothetically asserts, are subject to "revictimization." (*Id*.) None of these concerns are mentioned in NRS 52.380. This is not surprising, as

Rule 35 examinees most commonly are plaintiffs in personal injury matters, not "victims" of intentional violence.

Moreover, none of these hypothetical concerns apply to the instant case, which involves a vehicle accident. Indeed, Davis is not a "victim" who would require a recording or observer in an NRCP 35 examination, even under the characterizations used in the Amended Answer, as ***he made no attempt to establish any "good cause" for an observer or recording in the proceedings below***. In other words, he never even contended, let alone demonstrated, that we would be "revictimized" during any of the proposed Rule 35 examinations.

Like the discovery commissioner and district court in the proceedings below, Davis identifies no language in NRS 52.380 that provides for a substantive right, and he cites no case law to support his conclusory assertion. Davis attempts to support his arguments by citing to *Seisinger v. Siebel*, 203 P.3d 483 (Ariz. 2009) (cited in *Hefetz v. Beavor*, 133 Nev. 323, 330, fn. 5, 397 P.3d 472 (2017)). (Am. Ans. at 13).

The Arizona court in *Seisinger* confronted the issue of whether an Arizona statute prescribing specific requirements for experts to testify in medical malpractice actions conflicted with the general Arizona rule of evidence relating to the admissibility of expert testimony. The court concluded that the statute, by prescribing minimum requirements for expert qualification in a specific type of

case, was a substantive component of the applicable common law. *Seisinger*, 203 P.3d at 493. This situation is materially distinguishable from the instant case, where the Legislature, through the Statute, has attempted to *directly alter* procedural rules that were specifically enacted for physical and mental examinations in all civil cases.

Davis also relies on this Court's opinion in *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988). (Am. Ans. at 14). In *Whitlock*, the Court confronted an apparent conflict between NRS 16.030(6), which permits the parties to directly conduct *voir dire* at trial, and NRCP 47(a), which arguably provides district courts with discretion to deny parties the ability to directly examine potential jurors. The Court held that the statute was not a "legislative encroachment on judicial prerogatives" because, though it implicated trial procedure, the statute "does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule." *Whitlock*, 104 Nev. at 26 (emphasis added).

Here, in stark contrast, the Statute not only interferes with NRCP 35, it effectively abrogates the Rule by eliminating the good cause requirements for observers and recordings, permitting an observer at neuropsychological examinations and by permitting an examinee's attorney to attend the examination.

Finally, Davis argues that the existence of another statute, NRS 178A.170, provides support for the argument that NRS 52.380 is substantive. (Am. Ans. at 20). NRS 178A.170, which is contained within the "Sexual Assault Survivors' Bill of Rights,"[3] provides that a "survivor" has the right to "designate an attendant to provide support" during any "forensic medical examination." This provision applies only to sexual assault victims, and only in criminal cases. It has no effect on, and is not in conflict with, NRCP 35, which governs physical and mental examinations in civil litigation, not "forensic medical examination[s]" for criminal investigations. Accordingly, NRS 178A.170 is entirely immaterial.

As fully detailed in the Petition, the issue of whether laws relating to observers and the recording of Rule 35 exams are procedural or substantive has already been decided by federal courts in the context of construing FRCP 35. (Petition at 27-31). Specifically, **the United States Supreme Court has held that FRCP 35 is a rule of procedure**. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 11, 61 S. Ct. 422 (1941).

In *Sibbach*, the injured plaintiff refused defendant's request for a medical examination pursuant to FRCP 35, arguing that the rule implicates substantive rights, and was therefore not within the Supreme Court's rulemaking authority.

[3] Again, this placement within the NRS starkly contrasts with NRS 52.380, which is contained in Chapter 52 (for "Documentary and Other Physical Evidence").

The Court explained that "[t]he test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id*. at 14. Based on this standard, the Court concluded that FRCP 35 was procedural, and therefore enforceable pursuant to the Court's rulemaking authority. *Id*.

In his Answer, Davis argues that Lyft's reliance on *Sibbach* is misplaced because the U.S. Supreme Court did not address the precise interplay at issue here. (Am. Ans. at 25). This distinction does not provide any meaningful difference. The core holding of *Sibbach*, which remains good law (as demonstrated by the federal district court decisions cited below), is that **rules governing physical and mental examinations in civil litigation are fundamentally procedural, and not substantive**. *Sibbach*, 312 U.S. at 11-16 (discussing other authorities demonstrating that rules governing examinations are procedural).

Similarly, as fully detailed in the Petition, the Nevada federal court has squarely held that NRS 52.380 is procedural, not substantive. *See Freteluco v. Smith's Food & Drug Ctrs*., 336 F.R.D. 198, 201-204, 2020 U.S. Dist. LEXIS 113217 at *7-*12 (D. Nev. June 29, 2020). In *Freteluco*, the defendants filed a motion to obtain a neuropsychological examination of the injured plaintiff pursuant to Rule 35. The parties disputed whether the plaintiff was entitled to an observer

pursuant to NRS 52.380. In adjudicating **the precise same dispute as the instant case**, the court concluded that "whether an observer is present in the neuropsychological examination of Plaintiff **is not substantive, but is procedural**. That is, NRS 52.380 **sets forth procedures** applicable to observers who may attend independent medical examinations." *Id*. at 204 (emphasis added).

The court in *Freteluco* continued: "[b]y specifying that the court may determine 'the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it," . . . Rule 35 **consigns the procedures to be used in conducting these examinations to the sound discretion of the court**, an approach that is consistent with the general guidance of the rules which provide that issues relating to the scope of discovery rest in the sound discretion of the [c]ourt." *Id*. at 204 (quoting *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 61 (M.D. Penn. 2018)) (emphasis added).[4]

With respect to the statute, the court in *Freteluco* explained that "NRS 52.380 **sets forth process** allowed under Nevada Rules of Evidence applicable to

[4] The Pennsylvania federal court in *Smolko* similarly rejected the plaintiff's argument that he was entitled to an observer during his Rule 35 exam. The court first noted the majority rule adopted by the federal courts, which is that courts may, and often should, exclude third-party observers, including counsel. *Smolko*, 327 F.R.D. at 61-62. The court also rejected the plaintiff's argument that Pennsylvania state law, which permits counsel to attend examinations, should apply. The court reasoned, pursuant to *Erie*, that the state law "is not an outcome-determinative rule of substance which binds this court. Rather, it is simply a procedural preference." *Id*. at 63.

an examination under Nev. R. Civ. P. 35, **and is not a substantive law** the application of which overrides existing federal law found in Fed. R. Civ. P. 35(a)(2) that grants this Court the authority to enter an order specifying the 'time, place, manner, conditions, and scope of the examination ... .'" *Id*. at *12 (emphasis added).

In his Amended Answer, Davis maintains that Lyft's reliance on *Freteluco* is misplaced because the *Erie* doctrine analysis used in *Freteluco* is distinct from Nevada's separation of powers analysis. (Am. Ans. at 22). Again, however, this is an academic distinction without a difference. Regardless of whether it is for *Erie* purposes, or for the purpose of determining whether a statute is procedural for resolving a separation of powers dispute, the essential analysis is the same – i.e., whether the statute is substantive (in which case it may be enforceable under the separation of powers doctrine or may be applicable in federal court proceedings) or procedural (in which case the statute is unconstitutional and/or not applicable in federal court proceedings).

In addition to *Freteluco* and *Smolko*, still another federal court has recognized that Rule 35 is "**unquestionably** a rule of procedure." *Durmishi v. Nat'l Cas. Co*., 720 F. Supp. 2d 862, 876 (E.D. Mich. 2010) (emphasis added). The Rule's "purpose is to regulate access to proof through different modes of discovery during the course of litigation. **It does not prescribe rights or remedies. Instead,**

it merely sets forth a process for obtaining information that might bear on a matter in controversy." *Id*. (emphasis added). Davis notably does not address *Smolko* or *Durmishi* in his Amended Answer.

This body of case law conclusively resolves the issue of whether the regulation of physical and mental examinations is substantive or procedural. Courts have uniformly held that this regulation, whether done by rule or statute, is fundamentally procedural.

C. NRS 52.380 is not salvageable through voluntary adoption by the Court or by treating its language as merely directory.

Davis lastly argues that, even if NRS 52.380 violates the separation of powers doctrine, the Court may still voluntarily adopt the unconstitutional portion of the Statute, or it may deem the unconstitutional portions of the Statute as directory only, and not mandatory. (Am. Ans. at 28). As detailed below, the cases on which Davis relies for these contentions are inapposite for numerous reasons, not the least of which is that none of the cited cases address the situation presented here, where a statute and rule stand in irreconcilable conflict. When such a conflict exists, voluntary adoption of the statute or recharacterization of mandatory statutory language as directory are neither lawful nor practically workable.

For example, Davis relies on *List v. Whisler*, 99 Nev. 133, 660 P.2d 104 (1983). (Am. Ans. at 28). This case is inapplicable, as it did not involve a conflict between a statute and civil procedure rule. Moreover, the Court ultimately concluded that the tax statute at issue did not conflict with Nevada Constitution based on the particular statutory language.

Davis also relies on *Blackjack Bonding v. City of Las Vegas Mun. Ct*., 116 Nev. 1213, 14 P.3d 1275 (2000). (Am. Answer at 29). In this case, the Court concluded that the imposition of fees for bail bonds fell within the inherent judicial powers of municipal courts. *Id*. at 1217-18. In *dicta*, the Court noted: "When the Legislature, by statute, authorizes the exercise of an inherent judicial power, the courts may acquiesce out of comity or courtesy; however, such statutes are merely legislative authorizations of independent rights already belonging to the judiciary." *Id*. at 1220 fn. 4.

The scenario presented in *Blackjack Bonding* cannot apply here, as NRS 52.380 directly conflicts with NRCP 35, so any acquiescence would effectively allow the Legislature to invade judicial functions (here, the drafting of the rules of civil procedure). In this regard, the Court in *Blackjack Bonding* notably clarified that "[a] statute that attempts to limit or destroy an inherent judicial power is unconstitutional." *Id*. at 1220, fn. 4. Here, the Statute does precisely this – it attempts to limit the power of this Court to enact rules of civil procedure by

purporting to authorize observers and recordings that are incompatible with the Rule.

In another case relied upon by Davis, *Mendoza-Lobos v. State*, 125 Nev. 634, 218 P.3d 501 (2009), the Court assessed whether a statute that requires district courts to consider certain factors in criminal sentencing proceedings constituted a judicial function. The Court elected to abide by the legislative mandate because the statute was a proper legislative function. *Id*. at 640-41. This conclusion was based on a well-established body of federal law recognizing that it was within the federal legislative power to impose mandatory sentencing in criminal cases. *Id*. at 640. Accordingly, the statute at issue, by in large, fell within the legislature's power. *Id*.

To the extent the statute at issue in *Mendoza-Lobos* required district courts to state on the record that they have considered the enumerated statutory factors, the statute did intrude on a judicial function. *Id*. at 641. The Court nevertheless elected to abide by the statute because it served the "laudable goal" of ensuring that district courts fully considered the statutory factors. *Id*. at 641-42. The Court explained, however that "such acquiescence should not be construed as an acknowledgment of the Legislature's authority to enact legislation that impinges on the judicial branch's authority to dictate how it accomplishes its core functions." *Id*. at 642. Because the enactment and enforcement of the rules of civil procedure are core judicial functions (Petition at 22-23), this voluntary

acquiescence concept cannot, and does not, apply here.

Finally, Davis cites no actual example of this Court effectively re-writing a mandatory statute and deciding to construe it as merely "directory' or voluntary. Indeed, this Court has rejected this unorthodox workaround for unconstitutional legislation. *See State v. American Bankers Ins. Co*., 106 Nev. 880, 882, 802 P.2d 1276 (1990) (construing statute mandating notice to bail bond surety within specified time frame of defendant's failure to appear as mandatory, not merely directory).

Davis also fails to articulate how these proposed ad-hoc remedies would apply, as a practical matter, to the irreconcilable conflicts between the subject Statute and Rule. Davis essentially argues that the Statute's language permitting attorney observers, and/or observers during neuropsychological examinations without a showing of good cause, would itself constitute good cause to permit district courts to enforce the Statute and disregard the Rule, or would somehow shift the burden of rebutting this newly invented standard of "good cause" to the party seeking to enforce the plain language of the Rule. (Am. Ans. 32).

As with Davis' primary argument - the hypothetical multiple observer scheme – this re-writing of the Statute as voluntary instead of mandatory is entirely manufactured out of whole cloth, and is asserted for the first time in these appellate proceedings. (Davis made no such argument about the Statute and Rule co-existing

in the proceedings below). There is no support whatsoever in the language of the Statute or Rule, the legislative record or Nevada case law to support this proposed reconciliation of the Statute and Rule. Stated simply, it is unprecedented and unworkable.

In sum, this case is far more akin to *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969), *State v. Connery*, 99 Nev. 342, 661 P.2d 1298 (1983) and *Berkson v. Lepome*, 126 Nev. 492, 245 P.3d 560 (2010), where the Court struck down statutes that conflicted with the Court's procedural rules (Petition at 22-27), than the authorities proffered by Davis. Stated simply, NRS 52.380 is an unconstitutional infringement on the Court's plenary rulemaking authority and power.

II.

CONCLUSION

This Court and its rules committee reasonably resolved the competing interests surrounding mental and physical examinations in civil litigation by authorizing district courts to determine whether examinations may be recorded or attended by observers based on an individualized showing of good cause. This Court and its committee also decided, based on its constitutionally conferred authority to enact rules of civil procedure, that an examinees' attorney should not be permitted to attend the examination.

NRS 52.380 is an unconstitutional rule of procedure which violates the separation of powers doctrine, and is therefore of no effect. NRCP 35 occupies the field and governs physical and mental examinations in Nevada. The Rule cannot be read or applied harmoniously with the Statute. The Court should therefore grant this Petition and issue a writ of mandamus compelling the district court to (1) sustain Lyft's objections to the discovery commissioner's report and recommendation, dated August 18, 2020 (3 App. 555); and (2) order that the Rule 35 examinations permitted by the discovery commissioner proceed without any recording, and without any observers, as Davis undisputedly never presented any good cause for either the recording or the presence of any observers.

The Court should also take the opportunity to clarify that NRS 52.380 is procedural, and that it therefore constitutes an unconstitutional violation of the separation of powers doctrine. The statute therefore has no force and effect with respect to medical and physical examinations in civil litigation, which are

controlled entirely by NRCP 35.

DATED this 17th day of May, 2021.

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

1. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of 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 **4,411** 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(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 certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 17th day of May, 2021, I did cause a true copy of the foregoing **PETITIONER'S AMENDED REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

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