Case No. 82299

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT CANARELLI, Beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE HONORABLE JUDGE BELL, District Judge,

Respondents,

and

LAWRENCE and HEIDI CANARELLI, and FRANK MARTIN, Special Administrator of the Estate of Edward C. Lubbers, Former Trustees,

Real Parties in Interest.

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District Court Case No. P-13-078912-T

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This Court's decisions regarding judicial disqualification are clear, consistent, and supported by strong public policy. Under NCJC 2.11, a judge is subject to disqualification if his or her impartiality might reasonably be questioned. But whether the judge's impartiality may reasonably be questioned is not simply left to the district court's discretion; rather, this Court has set forth guidance for the circumstances that do and do not raise questions of partiality. Generally, as this Court and others have repeatedly held, a judge's impartiality may not reasonably be questioned unless the alleged source of bias is extrajudicial. In other words, information introduced in the course of judicial proceedings cannot typically give rise to disqualification under NCJC 2.11. There is a narrow exception to this extrajudicial-source rule: a judge who is exposed to a judicial source of bias may be disqualified if (and only if) his or her opinions display a deep-seated favoritism or antagonism that would make fair judgment impossible. This heightened test for cases involving judicial sources of alleged bias—requiring a finding of deep-seated favoritism or antagonism—applies even if the judge at issue is the ultimate trier of fact and has reviewed privileged and/or prejudicial material. That is not a deviation from NCJC 2.11. It is the application of that standard in a particular circumstance.

Here, although the district court correctly stated this heightened test and made express findings relevant to the test, it ultimately failed to apply the test in

disqualifying Judge Sturman. In fact, the district court found that, at all relevant times, Judge Sturman was acting in her official judicial capacity and that there was no evidence Judge Sturman had formed any opinion that would make fair judgment impossible. That should have ended the analysis, as this Court has already determined how to apply NCJC 2.11 in this circumstance: Judge Sturman's impartiality could not ***reasonably*** be questioned as a matter of law. Nonetheless, the district court went on to order Judge Sturman's disqualification, holding that her impartiality might reasonably be questioned because she was the ultimate trier of fact. That holding was in error as a matter of law and an abuse of discretion, as described in the writ petition.

The district court also erred and abused its discretion in declining to consider the threshold issue of waiver. That issue was not decided in the prior writ proceedings, and it would have been improper for Petitioner to seek redress of that issue in those proceedings because Judge Sturman had found that the documents in question were *not* privileged (such that any waiver of privilege was moot). After this Court decided in the prior writ proceedings that the documents were, in fact, privileged, it was appropriate for Petitioner to raise the waiver issue, which was intertwined with the disqualification motion and should have been decided by the district court.

In an effort to salvage the district court's erroneous order, the Former Trustees argue that this Court's decisions regarding judicial disqualification are confusing or inconsistent and leave open the possibility of some undefined, multi-factor, case-by-case test for determining when a judge's impartiality might reasonably be questioned. In the alternative, the Former Trustees argue that Judge Sturman should have been disqualified even under the heightened "deep-seated favoritism or antagonism" test despite the chief judge's factual determination to the contrary. They also contend that the waiver issue is barred by the law-of-the-case doctrine and by the parties' ESI Protocol.

These arguments, however, are based on misinterpretations of the applicable case law; they create unnecessary conflicts between the decisions of this Court; and, if adopted, they would produce absurd results. Indeed, if taken to its logical conclusion, the Former Trustees' argument regarding the appropriate test for disqualification would mean that all the Justices of this Court (except Justice Herndon, who was not on the Court at the time) should be disqualified from any eventual merits-based review of this case because they, too, have reviewed the privileged and allegedly prejudicial documents *in camera*. *See Canarelli v. Eighth Judicial District Court*, 136 Nev., Adv. Op. 29, 464 P.3d 114 (2020). That is not and cannot be the rule, and the district court's error in that regard should be corrected.

Accordingly, and for the other reasons set forth below and in the writ petition, this Court should hear the petition and grant the writ of mandamus.

ARGUMENT

I. Standard of Review

The parties agree that, although disqualification decisions are typically reviewed for abuse of discretion, the legal standards for disqualification are reviewed *de novo*, and the application of an incorrect legal standard constitutes a *per se* abuse of discretion. (*Compare* Pet. 7; *with* Ans. 14.) In addition, the Former Trustees concede that, "[b]ecause a judge is presumed to be impartial, the party seeking disqualification bears the burden of proof." (Ans. 14.)

II. Judge Sturman Should Not Have Been Disqualified

The correct test for a disqualification motion arising from a *judicial* source of alleged bias is whether an opinion formed by the judge "displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996). That test applies even when a judge reviews privileged documents *in camera* (*see* Pet. 10-12) and even when the judge is the ultimate trier of fact (*see* Pet. 14-15).

Under this correct test, there is no question that Judge Sturman should *not* have been disqualified, as the district court expressly found that "Judge Sturman reviewed Mr. Lubbers's notes in an official judicial capacity, and there is no

evidence that Judge Sturman has formed an opinion that would make fair judgment impossible." (7 App. 001362.)

A. NCJC 2.11, *Towbin Dodge*, and *PETA* provide the underlying basis for a disqualification motion but do not clarify the appropriate test to be applied.

As this Court explained in *Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 121 Nev. 251, 253, 112 P.3d 1063, 1065 (2005), there are two procedural mechanisms by which a party can seek disqualification of a district court judge. First, a party may seek disqualification under NRS 1.235 by filing a disqualification affidavit at least twenty days before trial or at least three days before any contested pretrial matter is heard. *Id.* Second, if new grounds are discovered for disqualification after the statutory time has passed, a party may file a motion for disqualification to enforce the relevant provision of the NCJC (previously Canon 3E, now Rule 2.11). *Id.* at 260-61, 112 P.3d at 1069-70 (citing and overruling, in part, *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 894 P.2d 337 (1995)).

As explained in *Towbin Dodge* and in *PETA*, the relevant provision of the NCJC provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might ***reasonably*** be questioned," citing several examples specifically involving *extrajudicial* sources of bias. NCJC 2.11 (emphasis added); *Towbin Dodge*, 121 Nev. at 257, 112 P.3d at 1067-68 (quoting identical

language from prior Canon 3E); *PETA*, 111 Nev. at 435-36, 894 P.2d at 340 (same). Neither *Towbin Dodge* nor *PETA*, however, explained how this provision of the NCJC is to be applied in cases involving *judicial* sources of bias.

To be clear, *PETA* involved alleged bias arising from an *extrajudicial* source—Judge Lehman's participation on an advisory board for an entity affiliated with PETA. *PETA*, 111 Nev. at 433-35, 894 P.2d at 338-40. Thus, the Court's decision involved a straightforward application of the NCJC canon, employing an "objective" test as to whether a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality. *Id.* at 438, 894 P.2d at 341. In short, the extrajudicial-source rule was not at issue in *PETA*, the Court did not reference that rule in *PETA*, and, as a result, the decision in *PETA* provides no guidance regarding the application of that rule.

Towbin Dodge likewise provides no guidance regarding the extrajudicial-source rule. In fact, despite their almost exclusive reliance on that decision (*see* Ans. 14-20), the Former Trustees expressly admit that the Court "did not reach the merits of the disqualification motion" in *Towbin Dodge* and "never referenced" the extrajudicial-source rule or *Kirksey* (*see id.* at 15, 20). Moreover, not only did the Court "not reach the merits of the disqualification motion," ***there was no disqualification motion*** in *Towbin Dodge*; the Court simply held that a party *could* make such a motion under the NCJC based on facts discovered after the deadlines

of NRS 1.235. *Towbin Dodge*, 121 Nev. at 261, 112 P.3d at 1070 (denying writ relief "because petitioners have an adequate remedy at law in the form of a motion to disqualify based on the Code of Judicial Conduct"). Therefore, and contrary to the Former Trustees' suggestion, there is no inconsistency between *Towbin Dodge* and *Kirksey*. (*Cf.* Ans. 27-28 (describing purported incongruity between cases).)

In sum, although the Former Trustees are correct that Rule 2.11 of the NCJC provides the underlying basis for their disqualification motion, their mere regurgitation of that rule via inapposite quotations from *Towbin Dodge* and *PETA* says nothing about the application of that rule in the context at issue here.

B. *Zolin* and *Lund* do not support the district court's decision.

The out-of-state cases on which the district court relied are similarly inapposite. (*See* 7 App. 001361 (citing *United States v. Zolin*, 491 U.S. 554, 570 (1989); *Lund v. Myers*, 232 Ariz. 309, 310, 312, 305 P.3d 374, 375, 377 (Ariz. 2013)).) Indeed, the Former Trustees have largely abandoned those cases, relegating *Lund* to minor footnotes (*see* Ans. 9, 26) and declining to cite *Zolin* at all (*see generally id.*). That abandonment was for good reason, as neither case provides any guidance regarding the application of NCJC 2.11 or any similar rule or canon. (*See* Pet. 22-24.)

Lund, for example, merely holds that (i) **if** *in camera* review is necessary, "the trial judge should **consider** whether another judicial officer should conduct the

review in light of the **possibility** that a review of privileged materials **may** be so prejudicial as to require the judge's recusal"; and (ii) **if** the trial judge conducts *in camera* review and upholds a claim of privilege, "the judge should **consider** whether recusal is then necessary, and a party who can show actual bias **may**, of course, move for the judge's removal for cause." *Lund*, 232 Ariz. at 312-13, 305 P.3d at 377-78, ¶ 19. In other words, like *Towbin Dodge*, *Lund* merely stands for the proposition that a party ***may*** seek disqualification of a judge under NCJC 2.11 (or its Arizona equivalent); it does not explain the test for determining whether such disqualification is necessary in any particular context (apart from referencing a hypothetical showing of "actual bias"). Moreover, in the years since *Lund* was issued, the Arizona Court of Appeals has continued to apply the extrajudicial-source rule unwaveringly. *See, e.g.*, *State v. Macias*, 249 Ariz. 335, 342, 469 P.3d 472, 479, ¶ 22 (Ariz. Ct. App. 2020); *State v. Granados*, 235 Ariz. 321, 326, 332 P.3d 68, 73, ¶ 13 (Ariz. Ct. App. 2014); *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 232 Ariz. 562, 568, 307 P.3d 989, 995, ¶ 21 (Ariz. Ct. App. 2013).

Zolin, meanwhile, is even less relevant, as that decision makes no mention of recusal or disqualification whatsoever. *See generally Zolin*, 91 U.S. 554. Instead, *Zolin* sets forth the test that federal courts should apply in considering whether to conduct *in camera* review to address a claim under the crime-fraud exception. *See id.* at 573 ("Before engaging in *in camera* review to determine the applicability of

the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person . . . that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.") (internal citation and quotation marks omitted).

Of course, even if *Zolin* and *Lund* were relevant, Judge Sturman actually followed or went beyond the procedural steps identified in those cases. For example, Judge Sturman **did not** hear the privilege issue in the first instance; instead, that job fell to the discovery commissioner, and Judge Sturman's *in camera* review only became necessary when the Former Trustees objected to the discovery commissioner's report and recommendation. (*See* 5 App. 000964.) Thus, "another judicial officer" **did** conduct the first review here, exactly as suggested by *Lund* and by the Former Trustees themselves (*see* 2 App. 270).

Similarly, after conducting her own *in camera* review, Judge Sturman **did** consider whether recusal was necessary, as suggested by *Lund*, and she concluded that it was not. (*See* 6 App. 001185-001190.) That decision should have been given "substantial weight" by the district court, *see Kirksey*, 112 Nev. at 1006, 923 P.2d at 1118; *Goldman*, 104 Nev. at 649, 764 P.2d at 1299 (*see also* 6 App. 001359), but it was given no weight at all (*see* 6 App. 001362).

Simply put, the district court not only applied the wrong legal standard, relying on inapposite out-of-state cases, it also misinterpreted and misapplied those cases. Apparently as a result, the Former Trustees give almost no credence to the district court's actual language or the cases cited therein, instead dedicating almost all of their efforts to alternative theories. (*See* Ans. 18-27.) This Court should reject both those alternative theories and the erroneous decision of the district court from which they arise.

C. *Kirksey* provides the correct test to be applied in cases involving *judicial* sources of alleged bias.

Unlike *PETA*, *Towbin Dodge*, *Zolin*, and *Lund*, this Court's decision in *Kirksey* explains exactly how NCJC 2.11 is to be applied in cases, like this one, involving alleged bias arising from *judicial* sources:

> "The general rule of law is that what a judge learns in his official capacity does not result in disqualification." . . . In other words, the party asserting the challenge must show that the judge learned prejudicial information from an extrajudicial source. . . . However, an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays "a deep-seated favoritism or antagonism that would make fair judgment impossible."

Kirksey, 112 Nev. at 1006, 923 P.2d at 1118 (citation omitted) (quoting *Goldman v. Bryan*, 104 Nev. 644, 653, 764 P.2d 1296, 1301 (1988) and *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Contrary to the Former Trustees' assertions, Petitioner does not contend that *Kirksey* "supplants" NCJC 2.11, *PETA*, or *Towbin Dodge*. (*Cf.* Ans. 18.) Instead, *Kirksey* interprets NCJC 2.11 by clarifying when a judge's impartiality can ***reasonably*** be questioned under NCJC 2.11 after exposure to a *judicial* source of bias: only when a judge's opinion displays deep-seated antagonism or favoritism. Without such evidence, any charge of partiality is *per se* unreasonable pursuant to the extrajudicial-source doctrine.

This proper understanding of the relationship between *Kirksey*, *Towbin*, and *PETA* is evidenced and supported by the fact that *Kirksey* was decided *after PETA* and by this Court's continued application of the *Kirksey* test to cases involving judicial sources of bias well after *Towbin* was decided in 2005. In addition, the *Kirksey* test is supported by public policy considerations weighing strongly in favor of a heightened evidentiary standard to prove impartiality when a judge is exposed to a *judicial* source of bias.

1. *Kirksey* remains good law.

Kirksey's statement of the law is consistent with decades of jurisprudence in Nevada, *see, e.g., Goldman*, 104 Nev. at 653, 764 P.2d at 1301, and a majority of other jurisdictions, *see Liteky*, 510 U.S. at 544 (explaining that most Courts of Appeals have recognized that the "extrajudicial source" doctrine applies to 28 U.S.C.

§ 455, the federal equivalent to NCJC 2.11(A)). Indeed, since *Kirksey*, this Court has repeatedly adhered to the extrajudicial-source rule:

> [R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification. The personal bias necessary to disqualify must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court.

In re Pet. to Recall Dunleavy, 104 Nev. 784, 788-89, 769 P.2d 1271, 1274 (1998) (internal citation omitted); *see also Sean K. Claggett & Associates, LLC v. Eighth Judicial Dist. Court*, No. 79032, 451 P.3d 80 (Nev. Oct. 30, 2019) (unpublished) (citing *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009)) ("Petitioner's bias allegations do not stem from an extrajudicial source and fail on that basis."); *Walker v. Eighth Judicial Dist. Court*, No. 70766, 383 P.3d 754 (Nev. Sept. 16, 2016) (unpublished) ("[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.").

The cases cited by the Former Trustees to supposedly undercut *Kirksey* do no such thing. Take the unpublished, uncitable Nevada Court of Appeals decision in *In re A.M.*, 476 P.3d 927, 2020 WL 6955396 (Nev. App. Nov. 25, 2020). Although the

Former Trustees conceal this from the Court, *In re A.M.* expressly cites to and applies the standard from *Kirksey*:

> If the judge forms an opinion based on facts introduced at the proceedings, there may be a showing of bias if the judge displays "a deep seated favoritism or antagonism that would make fair judgment impossible."

Id. at *4 (quoting *Kirksey*, 112 Nev. at 1007, 923 P.2d at 1119). That case involved the extraordinary circumstance of a termination of parental rights, a consequence so serious that this Court has likened it to "imposition of a civil death penalty." *Drury v. Lang*, 105 Nev. 430, 433, 776 P.2d 843, 845 (1989). And the majority in that case acknowledged that their decision on disqualification was in light of "the serious implications of an order terminating parental rights on both the child and the parent." 476 P.3d 927, 2020 WL 6955396, at *6. Critically, in applying what the Former Trustees call the "objective standard" of reasonable doubt, the majority made express findings under the antagonism and favoritism rubric of *Kirksey*: "the district court made statements over the next 19 months that showed *antagonism* toward [the father] and *favoritism* towards [the mother]." *Id.* at *5 (emphasis added). In contrast to the record and the findings of Chief Judge Bell here, the majority relied on a record replete with comments proving the district judge's bias against the father:

- "Why does it matter? You're giving up your rights, Mr. Amado."
- "At this point you wanna cut bait and you just wanna sign away your rights, you do what you need to do."

- "[The father] knows this system. He's been playing it since 2012."

Id. at *4.[1] In addition, at one telephonic hearing where the father tried to argue that the mother had abandoned their child with a babysitter, the district judge "attempted to mute" the father and then thereafter ignored the father, "continu[ing] to speak to opposing counsel, and then end[ing] the call without addressing" the father. *Id.* The district judge also repeatedly suggested that he had prejudged the outcome, even discounting or ignoring admissions by the mother that undercut the case for termination. *Id.* at *5 (citing examples).[2]

The federal decision—supposedly representative of the federal approach "in the wake of *Liteky*" (Ans. 21)—is similar. The district judge in *Arkansas Teacher Ret. Sys. v. State St. Bank & Tr. Co.* recognized that "a judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair minded person could not put aside when judging the dispute"—the same standard as *Kirksey*. 404 F. Supp. 3d 486, 515–16 (D. Mass. 2018) (quoting *Liteky*, 510 U.S. at 557-58). In that case, the judge was accused of inappropriate *ex parte* contact with a special master and had questioned the adequacy of a class

[1] Notably, even an ill-considered comment encouraging the mother to quickly file a petition to terminate the father's parental rights "while he's in the mood to do it" did not, in itself, "create a reasonable doubt or weigh in favor of disqualification." *Id.* at *4 n.8.

[2] Judge Tao dissented, apparently believing that even these statements did not meet the high standard for disqualification.

representative based on pressure from "political leaders" and press reports. *Id.* at 492-93. Not only did the judge decline to recuse himself because "[a] reasonable person could not believe" that his statements met this antagonism standard, but he further warned that his "unjustified recusal" "could encourage the perception that litigants can manipulate the system to veto an unwanted judge." *Id.* at 519–20. "[R]ecusal would be an abdication of professional responsibility, which judges have been urged to avoid." *Id.*

These authorities, regardless of whether they are citable or persuasive, are primarily interesting for the contrast they strike with this case, where Chief Judge Bell correctly found that no evidence met the standard applied in those cases.

2. The Former Trustees cite no authority for abandoning *Kirksey* or relegating it to a "factor" in an undefined "calculus."

Nonetheless, the Former Trustees advocate that this Court abandon the extrajudicial-source doctrine entirely. (*See* Ans. 24 ("The former trustees submit that NCJC 2.11(A) and the objective standard that applies thereto is the proper test for determining the judicial disqualification motions regardless of whether they are premised on extrajudicial or intrajudicial sources.")). In addition, they propose that the test set forth in *Kirksey* for cases involving judicial sources of alleged bias—requiring proof of an opinion that "displays a deep-seated favoritism or antagonism that would make fair judgment impossible"—should be relegated to a mere "factor"

in connection with a largely undefined "disqualification calculus." (*Id.* at 25.) This proposed "calculus," however, is inconsistent with *Kirksey* and finds no support in Nevada law.

Further, to the extent that the Former Trustees attempt to identify some parameters for this proposed "calculus," they fail to cite any authority for their primary suggestions. (*See id.*) And the limited, out-of-state authority that they cite with regard to certain specific scenarios does not support their positions. For example, *Downs v. Downs*, 440 P.3d 294, 299-300 (Alaska 2019), like *Lund*, merely holds that judicial bias ***may*** arise from a judicial source and ***may*** be "so prejudicial that further participation would be unfair." *Downs*, however, does not explain the test for determining when alleged judicial bias is, in fact, "so prejudicial." *See generally id.* Moreover, the Alaska Supreme Court in that case expressly found that "the superior court judge was ***not biased***" against the party seeking disqualification precisely because that party did not "offer evidence of anything that occurred during the proceedings aside from the judge's adverse rulings." *Id.* (emphasis added).

Accordingly, the Former Trustees' proposed abandonment of the extrajudicial-source rule should be rejected, as it unsupported even by their own out-of-state authorities, and it is inconsistent with *Kirksey*, which remains good law.

3. Public policy favors the *Kirksey* test.

As explained in the writ petition, several public policies weigh strongly in favor of applying the extrajudicial-source rule and the narrow exception to that rule under *Kirksey*. (*See* Pet. 11, 17-22, 24-27 (citing well over a dozen cases explaining public policies, including numerous Nevada state and federal decisions).) The Former Trustees attempt to dispute those public policies, but they again offer almost no authority in support of their assertions. (*See* Ans. 22-24.)

(i) Judge Shopping

The Former Trustees agree with Petitioner that "[d]issatisfied litigants should ***obviously*** not be permitted to manipulate the judicial system through baseless disqualification motions or other acts (e.g., threats, formal complaints) to rid themselves of judges they dislike." (Ans. 22 (emphasis added) (citing Pet. 17-20).) They contend, of course, that "nothing of the sort happened here." (*Id.*) But that is exactly what abandoning the extrajudicial-source rule would allow, and the Former Trustees do not even attempt to refute the arguments and authorities raised in the writ petition regarding this issue. (*Compare* Ans. 22; with Pet. 17-22.)

(ii) The Duty to Sit

The Former Trustees also fail to refute Petitioner's arguments regarding the duty to sit. As explained in the writ petition, the rule proposed by the Former Trustees and the rule adopted by the district court would effectively preclude judges

from *in camera* review of allegedly privileged materials in any matter that involves or *could* involve a bench trial. (*See* Pet. 19-20.) This includes *every* civil action, where the right to a jury may always be waived. *See* NRCP 38(d). Indeed, in such cases, judges would know (as the Former Trustee's expressly and repeatedly "forewarned" Judge Sturman), that any review of privileged material could lead to disqualification. (*See* Ans. 24.)

The Former Trustees contend that their rule would only create a "small degree of flexibility" and would "not open the floodgates to endless disqualifications[,] as most motions can still be disposed of by the objective standard and, where necessary, additional consideration of the *Kirksey* standard." (*Id.* at 27.) They fail to explain, though, how a judge could determine, in advance, whether an allegedly privileged document is "uniquely problematic." (*See id.* at 25.) In other words, the Former Trustees do not dispute that almost all *in camera* reviews of allegedly privileged documents would need to be sent to other judges or the chief judge, nor do they address the practical implications of that rule. (*Cf.* Pet. 20.) Instead, the Former Trustees simply wave these issues away because courts (i) have inherent authority to manage their day-to-day activities and (ii) are free to establish procedures to avoid prejudicial situations. (*See id.* at 22.)

Notwithstanding courts' inherent authority to manage their activities and their general freedom to establish appropriate procedures, they cannot exercise that

authority or freedom to abdicate or avoid their duty to sit. (*See* Pet. 20.) Accordingly, any rule (like the rule proposed by the Former Trustees and the rule adopted by the district court here) that forces judges to abdicate or avoid that duty cannot stand.

(iii) Controlled Exposure

The Former Trustees pose a rhetorical question in response to Petitioner's argument that one distinction between judicial and extrajudicial sources of bias is the differing amounts of control parties have over those sources. (*Compare* Ans. 23; *with* Pet. 18.) In answer to that rhetorical question, yes, *really*, parties generally have much greater control over judicial sources of bias than extrajudicial sources.

Indeed, even in this case, the Former Trustees (not Judge Sturman) produced the documents in question to Petitioner without conducting an adequate pre-production review, repeatedly failed to identify those documents as privileged (despite multiple opportunities), waited six months to seek to claw them back, and thereafter produced the documents a second time. (*See* 6 App. 000970-000977.) The Former Trustees (not Judge Sturman) objected to the discovery commissioner's report and recommendation regarding the documents, which necessitated Judge Sturman's review. (*See* 5 App. 000964.) And the Former Trustees (not Judge Sturman) sought writ relief from this Court, thus necessitating its review of the

documents, as well. *See Canarelli v. Eighth Judicial District Court,* 136 Nev. Adv. Op. 29, 464 P.3d 114 (2020).

As a result, and contrary to their suggestion (*see* Ans. 23), it is the Former Trustees (not Judge Sturman) who should be subject to "consequences" for such conduct, over which they have had ample control.

(iv) Judicial Training

Finally, the Former Trustees "do not quarrel" with Petitioner's argument that "trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it." (*Compare* Ans. 23-24; *with* Pet. 24-26.) However, the Former Trustees contend that (i) Petitioner's authorities for this argument are distinguishable because they involved "mistaken evidentiary calls during the heat of trial," as compared to Judge Sturman's conduct here, and (ii) "general deference owed to judicial training cannot control the outcome in all cases." (*See* Ans. 23-24.)

As to the first contention, the Former Trustees have the analysis exactly backward. Here, Judge Sturman reviewed the allegedly prejudicial documents *in camera* more than a year before the Former Trustees sought her disqualification and well before any possible trial date, and she destroyed those documents upon this Court's prior writ. (6 App. 001190.) In such circumstances, the documents were extremely unlikely to affect any factual determination Judge Sturman might have

made at a distant future trial. (*See id.* (Sturman, J.: "Nor do I believe my prior review of the documents, which have now been excluded, have or hereafter would, influence my impartiality in these proceedings. Finally, I know of no bias or prejudice for or against any party or attorney in this matter.") By contrast, a review of "highly prejudicial" material "during the heat of trial" would presumably pose a much greater risk of influencing a judge's factual determinations during or shortly after that very same trial. In short, the Former Trustees' characterization of the cases cited by Petitioner actually negates their own argument.

As to the second contention, Petitioner agrees that "general deference owed to judicial training cannot control the outcome in all cases." But the test for determining when that deference **does** control is the test set forth in *Kirksey*—i.e., the deference afforded to judges in this context controls unless an opinion formed by the judge "displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Kirksey*, 112 Nev. at 1006, 923 P.2d at 1118.

Therefore, like the other public policies described above and in the writ petition, the deference afforded to judicial training is consistent with and weighs heavily in favor of the *Kirksey* test.

Ultimately, when determining whether judicial disqualification is proper, distinct policy concerns arise in the judicial source of bias context that are simply not present when the source of bias is extra-judicial. A "**reasonable** person,

knowing all the facts" must be assumed to understand such policy implications and practical realities inherent to judicial sources of bias when questioning a judge's impartiality, otherwise such person could not be truly objective. *PETA*, 111 Nev. at 435-36, 894 P.2d at 340. When such knowledge is imputed, the majority of courts, including this one, have indirectly held that no reasonable person could ever question a judge's impartiality due to exposure to a judicial source of bias via the application the extrajudicial source doctrine *unless* evidence is presented that a judge has formed an opinion demonstrating "favoritism or antagonism that would render fair judgment impossible." *Kirksey*, 112 Nev. at 1006, 923 P.2d at 1118.

D. The Former Trustees have not met and cannot meet the *Kirksey* test.

As noted above, the Former Trustees spend almost all of their answer arguing against the extrajudicial-source rule and the *Kirksey* test. (*See generally* Ans.) Of course, as a fallback position, they also claim that, even if that test were to apply, they have "met the impossibility-of-fair-judgment standard, which this Court reviews independently, given the unique facts here." (*Id.* at 4, 28, n.13.)

The Former Trustees, however, provide no substantive argument or authority whatsoever in support of that position. (*See generally id.*) Indeed, their only references to this claim appear in a single paragraph in the introduction and a footnote on page 28 of their Answer. (*Id.*) As a result, the claim should be rejected out of hand. *See Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330 n.38,

130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument and citation to relevant authority). Given the age of this case and the many proceedings before Judge Sturman, evidence of Judge Sturman's "deep-seated antagonism" ought to be readily available if it existed.

The claim should also be rejected because it flies in the face of the district court's factual findings. Again, the district court expressly found that "Judge Sturman reviewed Mr. Lubbers's notes in an official judicial capacity, and there is no evidence that Judge Sturman has formed an opinion that would make fair judgment impossible." (7 App. 001362.) Based on those findings, the Former Trustees cannot possibly meet the *Kirksey* test.

Accordingly, because this Court should confirm that the *Kirksey* test applies, and because the Former Trustees have not met and cannot meet that test, the writ petition should be heard and granted, and Judge Sturman should be reinstated.

III. The District Court Abused Its Discretion By Not Addressing The Waiver Issue.

Even if the district court had correctly applied the correct legal standard, the district court still abused its discretion by declining to address Petitioner's countermotion for waiver of attorney-client privilege due to reckless disclosure on the **sole** basis that such countermotion was "outside the scope of the disqualification proceedings." (7 App. 13557-65.) In so doing, the district court abused its discretion

because the underlying factual basis for the disqualification – i.e., Judge Sturman's *in camera* review of privileged documents – would have been mooted if the Court affirmed the waiver of the privilege. Indeed, whether the Former Trustees waived the privilege was a threshold, contested issue that was dispositive to whether the test for judicial disqualification was met.

The Former Trustees do not dispute the district court erred by finding that the waiver issue was outside the scope of the proceedings; rather, they implicitly contend such error was harmless because the district court *could have* (but did not) determine that Petitioner was barred from seeking a waiver of the privilege under the law of the case doctrine and the parties' ESI Protocol. (*See* Ans. 28-30.). Both contentions lack merit.

A. The law-of-the-case doctrine does not apply.[3]

As acknowledged by the Former Trustees, the law-of-the-case doctrine requires both: (1) the trial court to have expressly or impliedly ruled on a question; and (2) an opportunity to challenge such ruling on a prior appeal. (*See* Ans. 28); *see also Recontrust Co. v. Zhang*, 130 Nev. 1, 9, 317 P.3d 814, 819 (2014). Here, neither requirement is met.

[3] Petitioner addressed this issue in significant detail below. (*See* 6 APP001331-001339.)

First, Judge Sturman never ruled on the reckless-disclosure waiver question as it relates to the relevant portion of the Group 1 Documents (i.e., the middle section of Bates Labeled RESP13285 containing the discussion harmful to the Former Trustees' case) because she found that it was **not privileged** in the first place. (*See* 5 App. 000893-00094.) Moreover, Petitioner's objection to the discovery commissioner's report and recommendation specifically requested that Judge Sturman analyze the reckless-disclosure argument **only** if she first found the Group 1 Documents were protected by attorney-client privilege. (*See* 3 App. 000434-000435.) Thus, when Judge Sturman ruled that "Petitioner's Objections to the DCRR are DENIED," she could not have been ruling on the merits of the reckless-disclosure issue because the relevant Group 1 Documents were determined not to be privileged. (*See id.*) Accordingly, any discussion of the waiver of a privilege that was ruled not to exist would have been improper dicta. *See Fergason v. LVMPD*, 131 Nev. 939, 947 (2015) ("[a] significant corollary to the [law of the case] doctrine is that dicta have no preclusive effect.").

Second, Petitioner had no opportunity to challenge any purported reckless-disclosure ruling because the Nevada Supreme Court lacked jurisdiction over that issue. Indeed, that issue was not ripe because Petitioner would have been harmed *only* if the Supreme Court had hypothetically overturned Judge Sturman's ruling that the relevant portion of the Group 1 Documents was privileged. *Herbst Gaming, Inc.*

v. Heller, 122 Nev. 877, 887 (2006) (citing *In re TR.*, 119 Nev. 646, 651 (2003)) (a particular issue is only ripe where "the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical . . . ."). In addition, Petitioner lacked standing to assert the issue because he was not an "aggrieved party" that could benefit from appealing the reckless-disclosure waiver issue, as Judge Sturman had ruled in his favor. *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460-61 (2004) ("To establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief… 'Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.'") (citations omitted); NRAP 3A(a) ("[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order…'); *Ford v. Showboat Op. Co.*, 110 Nev. 752, 756, 877 P.2d 546, 549 (1994) ("[a] party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved by the judgment.").

Accordingly, the law-of-the-case doctrine does not apply here, and the district court should have ruled on the waiver issue.

B. The ESI Protocol does not bar a privilege being waived due to reckless disclosure.[4]

The ESI Protocol's clawback provision allows a party to contest an asserted privilege on any grounds except the "inadvertent disclosure" of documents. (1 App. 000001-000013, at ¶ 21.) The Former Trustees argue that this language bars a challenge to their clawback demand because their disclosure of privileged documents was inadvertent. (*See* Ans. 30.) A reckless disclosure, however, is not an "inadvertent disclosure."

Black's Law Dictionary defines "inadvertent disclosure" as "[t]he *accidental* revelation of confidential information, as by sending it to a wrong email address …." Disclosure, BLACK'S LAW DICTIONARY (11th ed. 2019). In contrast, Petitioner submits that the Former Trustees have waived the privileged here by making disclosures that were so grossly negligent or reckless that they should be deemed *intentional*. (*See* 6 App. 000970-000977); *see also Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F.Supp. 404, 411 (D.N.J. 1995) ("While an inadvertent disclosure is, by definition, an unintentional act, if such a disclosure results from gross negligence, courts following the [approach adopted by the court] will deem the disclosure to be intentional"); *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp*., 138 F.R.D. 479, 482 (E.D.Va. 1991) ("Inadvertent disclosures are, by definition,

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[4] Petitioner addressed this issue in significant detail below (6 APP001342-1349).

unintentional acts, but disclosures may occur under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional.").

Because Petitioner does not assert waiver based on an *inadvertent* disclosure, the ESI Protocol should not and does not bar consideration of the waiver issue. In turn, the district court's failure to rule on that issue was an abuse of discretion.

CONCLUSION

For these reasons, this Court should grant the petition.

Dated this 28th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7). 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 6,467 words.

I further 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), 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 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 28th day of April, 2021.

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CERTIFICATE OF SERVICE

I certify that on April 28, 2021, I submitted the foregoing "Reply in Support of Petition for Writ of Mandamus" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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