IN THE SUPREME COURT, STATE OF NEVADA
Supreme Court No.: 78076

INTERNATIONAL ACADEMY OF STYLE, Petitioner, vs. DIVISION OF INDUSTRIAL RELATIONS, and the NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICER SHEILA MOORE, Respondents.	Electronically Filed Nov 18 2021 11:57 a.m. Elizabeth A. Brown Clerk of Supreme Court

RESPONDENT DIVISION'S ANSWERING BRIEF

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I. ROUTING STATEMENT

Appellant, International Academy of Style ("IAS") mischaracterizes this matter as a matter of first impression. On the contrary, this matter is simple and has been adjudicated countless times since the State of Nevada made workers' compensation mandatory for all employers in Nevada in 1947. The Appellant, a school of cosmetology, is arguing that it is not required to maintain workers' compensation because none of its instructors or other individuals working at the school are "employees." The Division of Industrial Relations ("DIR" or "Division") maintains that the staff, who include both instructors and other administrative personnel, are IAS employees for the purpose of the Nevada Industrial Insurance Act. However, DIR does not oppose IAS's argument that the Nevada Supreme Court retain this case for the purpose of expediency.

II. OVERVIEW

"Nevada's Industrial Insurance Act is uniquely different from the industrial insurance acts of other states in that independent contractors and subcontractors by NRS 616.115[1] and NRS 616.085[2] are accorded the status of employees." *Noland v. Westinghouse Elec. Corp.,* 97 Nev. 268, 270, 628 P.2d 1123, 1125 (1981) (*quoting, Aragonez v. Taylor Steel Co.,* 85 Nev. 718, 462 P.2d 754 (1969)).

[1] NRS 616A.320 has been substituted in revision for NRS 616.115.
[2] NRS 616A.210 has been substituted in revision for NRS 616.085

Respondent DIR is a state regulatory agency. DIR's Workers' Compensation Section ("WCS") is charged with ensuring the timely and accurate delivery of workers' compensation benefits and employer compliance with mandatory coverage provisions. NRS 616A.400. Workers' compensation insurance is compulsory in Nevada whenever an employer employs at least one person:

> **NRS 616B.633 Applicability to all employers who employ at least one employee.**
> Where an employer has in his service any employee under a contract of hire, except as otherwise expressly provided in chapters 616A to 616D, inclusive, of NRS, the terms, conditions and provisions of those chapters are conclusive, compulsory and obligatory upon both employer and employee.

NRS 616D.120 and NRS 616D.200 provide DIR and the Attorney General's Workers' Compensation Fraud Unit ("WCFU") with methods of pursuing employers who fail to insure their worksite and employees. It states in relevant part:

> **NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.**
>
> 1. If the Administrator finds that an employer within the provisions of NRS 616B.633 has failed to provide and secure compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS or that the employer has provided and secured that compensation but has failed to maintain it, he shall make a determination thereon and **may charge the employer an amount equal to the sum of**:
>
> (a) **The premiums that would otherwise have been owed to a private carrier pursuant to the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS**, as determined by the Administrator based upon the manual rates adopted by the Commissioner, for the period that the employer was doing business in this state without providing, securing or maintaining that compensation, but not to exceed 6 years; and

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(b) Interest at a rate determined pursuant to NRS 17.130 computed from the time that the premiums should have been paid.

➥ The money collected pursuant to this subsection must be paid into the Uninsured Employers' Claim Account.

NRS 616D.200(1) (emphasis added).

In 2014, the WCFU conducted an investigation into Petitioner, International Academy of Style ("IAS" or Petitioner). The WCFU filed a criminal complaint against IAS pursuant to NRS 616D.200(3)(a)[3] for a misdemeanor violation of NRS 616D.200(3)(a) for its failure to maintain workers' compensation coverage for its employees for the period of December 21, 2010 through September 2, 2015.

As required by a deferred prosecution agreement, IAS obtained workers' compensation insurance for the business effective December 1, 2015. IAS then completed the terms of a deferred prosecution agreement on March 17, 2016 and the charges were dismissed on October 19, 2016.

However, soon after the charges were dismissed, IAS failed to renew the policy and it lapsed on December 1, 2016. DIR was informed the policy was cancelled and notified IAS by mail to its owners, Loni Casteel and Bonnie Schultz,

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[3] **NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.**

3. Any employer within the provisions of NRS 616B.633 who fails to provide, secure or maintain compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS, shall be punished as follows:

(a) Except as otherwise provided in paragraph (b), if it is a first offense, for a misdemeanor.

of its obligation to maintain workers' compensation coverage and that failure to provide evidence the business was closed or had no employees would result in further action taken by the state including a premium penalty. A new workers' compensation policy was obtained effective on December 31, 2016.

DIR conducted an investigation and issued a determination dated March 14, 2017 to impose a premium penalty in the amount of $16,390.94 for the lapse of coverage from December 21, 2010 through November 30, 2015. IAS appealed the determination to the Appeals Officer.[4] DIR also issued a determination for the period of time from December 1, 2016 through December 30, 2016 on March 14, 2017 in the amount of $251.10. IAS appealed this determination on March 20, 2017. DIR amended the first determination assessing a premium penalty for the period December 31, 2010 through December 1, 2015 for a corrected amount of $16,190.15.

IAS appealed to the Appeals Officer and argued that its staff were all independent contractors and, therefore, IAS was not required to provide any of the personnel with workers' compensation insurance. IAS also argued that the instructors/personnel are engaged in an independent enterprise pursuant to NRS 616B.603. The Division argued the instructors were employees and not independent contractors nor operated in an independent enterprise. The Appeals Officer issued a

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Decision and Order finding that the instructors were not independent contractors and that the premium penalties were calculated and imposed properly. The Appeals Officer found IAS's other arguments to be without merit as well. IAS thereafter filed a petition for judicial review. After briefing and oral argument, the District Court affirmed the Appeals Officer's Decision and Order. IAS thereafter appealed to this Court.

III. ISSUE PRESENTED FOR REVIEW

Whether the District Court was correct in finding that the Appeals Officer's Decision and Order filed February 20, 2020 affirming DIR's determinations to assess two premium penalties was supported by substantial evidence in the record.

IV. STATEMENT OF FACTS

IAS is a school of cosmetology licensed by the Nevada Board of Cosmetology. Its mission statement is to "reach all students and equip them with the skills they need to be successful in the professional industry of cosmetology to mentor students to have a command of skill so they can make a positive difference in the world." Joint Appendix ("JA")[5] at 1450. In 2014, the Attorney General's

[4] An aggrieved party has the right to file a request for hearing with the Department of Administration, Hearings Division, Appeals Officer ("Appeals Officer"), an administrative law judge. NRS 616C.220(9).

[5] DIR wishes to note that while references are being made to a "joint appendix," DIR was not given ample opportunity to review the joint appendix prior to IAS filing it with the Court. The only notice DIR received was via email on October 5, 2021 at 10:45 am that the appendix would be filed that same day. The undersigned was out of the country at the time and did not see the email until her return on October 8, 2021. Her colleague was able to do a quick review of the documents

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WCFU investigated IAS. JA 1528-1529. A criminal complaint, Case No. RCR2015-083504, was filed by the WCFU for a misdemeanor violation of NRS 616D.200(3)(a) for not maintaining workers' compensation insurance for its employees for the period of December 21, 2010 through September 2, 2015. JA 1597-1598. IAS entered into a deferred prosecution agreement. IAS completed the terms of the deferred prosecution agreement on March 17, 2016 and on October 19, 2016, charges were dismissed. JA 1596.

IAS obtained workers' compensation for the business effective December 1, 2015. JA 1410. However, once the criminal complaint was dismissed based upon IAS's compliance in obtaining the appropriate workers' compensation policy to cover its staff, IAS decided not to renew its workers' compensation insurance policy. Effective December 1, 2016, IAS again had no workers' compensation coverage for its staff. JA 1413. The National Council of Compensation Insurance ("NCCI") notified DIR that IAS's policy lapsed. JA 1631. The Attorney General's office also sent DIR documentation of the prior lapse from 2010 through 2015. JA 1631-1632. On December 14, 2016, the Division notified IAS by mail to its owners Schultz and Casteel that the business was required to maintain workers' compensation insurance. JA 1498. Failure to provide evidence of workers' compensation insurance or evidence the school was out of business or had no

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and notified IAS' attorney that the appendix did not contain the alphabetical index as required by NRAP 30. However, DIR is referencing the appendix because there have been enough documents filed in this case already without adding more.

employees would result in further action taken by the State of Nevada including the imposition of a premium penalty pursuant to NRS 616D.200(1). *Id.*

IAS' attorney called DIR to request a two-week extension to obtain workers' compensation insurance. He also told the investigator that there was a "formal agreement with DIR. Do not need to cover instructors as they all work at other salons." JA 1499. IAS did obtain a new workers' compensation policy which was effective December 31, 2016. JA 1549-1551. IAS has never produced evidence of this "formal agreement."

On December 31, 2016, DIR investigators visited the business at approximately 10:59 a.m. JA 1545-1546. The doors were locked with a sign posted reading that the business was closed through January 1, 2017. Investigators posted a Stop Work Order. JA 1544. A woman inside the building noticed the sign and identified herself as Char and stated she was an "employee." JA 1545. Char contacted one of the owners, Bonnie Schultz, who arrived at the business. Ms. Schultz stated IAS has independent contractors, not employees. Investigators informed Ms. Schultz that the so-called independent contractors did not meet the criteria for an exemption from workers' compensation coverage. For example, the investigators mentioned two individuals, Amber Larosa and Maggie Rosado, who did not have cosmetology licenses. Ms. Schultz stated Ms. Larosa was not a cosmetologist but rather performed admissions and financial aid tasks for the

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school. *Id.* Investigators confirmed IAS obtained a workers' compensation policy that same day and removed the Stop Work Orders. JA 1546.

Upon completion of its investigation, DIR issued a determination dated March 14, 2017, imposing a premium penalty in the amount of $16,390.94 for a lapse in coverage from December 21, 2010 through November 30, 2015. JA 1559-1560. IAS appealed that determination to the Appeals Officer on March 20, 2017. JA 1630. DIR issued a second determination on March 14, 2017 imposing a premium penalty for the lapse in coverage from December 1, 2016 through December 30, 2016. JA 1404-1406. IAS also appealed this determination on March 20, 2017. JA 1556. On June 9, 2017, DIR issued a determination amending the dates of the initial lapse from December 21, 2010 through December 1, 2015 to December 31, 2010 through December 1, 2015 for a corrected premium penalty of $16,190.15. JA 1635.

IAS argued to DIR that all personnel are independent contractors for whom IAS was and is not required to insure for workers' compensation protection. On December 20, 2016, IAS' attorney sent DIR copies of Certificates of Liability Insurance for Maggie Rosado aka Maggie Vong, Amber Larosa, Charissa Banks, Mychel Christian, Laura Hartman, Jeannine Achter, Meledie Wolf, and Melissa Wolf. However, those policies appeared to be general liability insurance rather than workers' compensation policies. JA 1602-1609. Moreover, the policies all had

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effective dates ranging from October 19, 2016 through November 1, 2016, well after the first lapse period expired on December 1, 2015. *Id.*

In preparation for the evidentiary hearing at the Appeals Office, IAS produced additional Certificates of Liability Insurance for Ashley Singer, Faustine Flamm, and Cheyanna Wolf. JA 1170, 1187, 1203, 1219, 1237, 1253, 1269. As before, these policies are general liability policies rather than workers' compensation coverage and none of them was in effect during the initial lapse period from 2010 through 2015. In addition, IAS produced "Independent Instructor Agreements ("Agreements"), W-9 forms, Nevada State and Reno business licenses for Charissa Banks, Melissa Wolf, Meledie Wolf, Laura Hartman, Jeannine Achter, Maggie Rosado aka Maggie Vong, Mychel Christian, Ashley Singer, Faustine Flamm, and Cheyanna Wolf. JA 1171-1186, 1188-1202, 1238-1252, 1269-1394.

Said Agreements purported to declare each so-called Instructor named in the Agreements to be an independent contractor. Each Instructor signed an Agreement declaring he or she provided cosmetology services, hair design services, licensed instructor services and aesthetician and/or nail technology services. JA 1384-1392. Each Agreement, however, acknowledged IAS was an educational facility licensed pursuant to NRS 644.380 to conduct a school of cosmetology; the Agreements further claimed to abrogate the legal requirements of a school of cosmetology licensed under NRS 644.395, which requires IAS to maintain a staff of at least two licensed instructors and other requirements. *Id.*

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Many of the Agreements required the Instructor to pay a monthly chair rental agreement to IAS while one did not [Ashley Singer]. JA 1337. Each Agreement contained a Schedule of Services wherein it states, "Instructor must perform services under this Agreement for IAS students during IAS regularly scheduled hours unless Instructor and student(s) agree in writing to hours outside of normal IAS hours." See, e.g., JA 1338. Each Agreement contained a schedule during which the Instructor was to work between Tuesday and Saturday with hours ranging from 8:45 a.m. to 10:30 p.m. In addition, IAS stated in the Agreement that "IAS will not be responsible for cancellations, substitutions or modifications to the above schedule under this Agreement." See, e.g., JA 1339. Moreover, "student complaints regarding an Instructor not fulfilling any promises or requirements under this Agreement may subject Instructor to a breach of this Agreement and any liabilities that arise out of said breach." *Id.*

The Agreements also required that "actual service of instruction provided to students under this Agreement must be performed by Instructor personally, as the services agreed to are specialized in nature based on Instructor's own personal experience, skill and knowledge." JA 1339-1340.

An evidentiary hearing in front of the Appeals Officer was held on November 6, 2018. JA 739-794. At the hearing, Loni Casteel testified that IAS opened in 1998 and started using salon workers in the same year. JA 762, ll. 8-15. She claimed that IAS always had agreements dating back to 1998 but said agreements

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dated prior to 2012 were never produced. She testified that the instructors set their own schedules; that they can teach at other schools but seldom do. Some do product demonstrations. JA 767, ll. 18-24; 770, ll. 6-12. She also testified the instructors perform no other tasks and that a no-show does not have any effect on the instructor. JA 772, ll. 13-16. She herself testified her responsibilities include student aid and instructor for nails. The co-owner, Bonnie Schultz, also instructs in hair, skin and nails. JA 759, ll. 1-3. Ms. Casteel testified that in 1998, IAS had 25 students and from 2010 through 2015 had 50 students. JA 772, ll. 13-16. She testified she changed contracts in 2015-2016 because an unemployment compensation claim was filed by one of the instructors. JA 784, ll. 1-9; 110, ll. 11-25. Of consequence, the Department of Employment, Training and Rehabilitation ("DETR") found the individual who filed the unemployment claim was in fact an employee, not an independent contractor even under its statutes. JA 817.

IAS argued that NRS 616A.110(9)(c) expressly excludes employees who perform services pursuant to a written agreement and that since the instructors had written agreements with IAS about the services they provided, they are not employees. In the Decision and Order dated February 19, 2020, the Appeals Officer issued a finding of fact that "the instructors do not solicit or sell products and do not receive remuneration based on sales, NRS 616A.110(9) does not apply to exclude the instructors as employees of IAS." JA 681.

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IAS next claimed that the instructors were engaged in an independent enterprise and should have been classified as independent contractors and not employees. DIR responded that as a licensed school of cosmetology, IAS was required to have at least two licensed instructors on premises and who are in the same trade or business as IAS, and therefore, do not meet the definition of independent enterprise pursuant to NRS 616B.603. In the Decision and Order, the Appeals Officer found:

> that the substantial, probative and relevant evidence shows that the instructors are clearly furthering the operation of the business of the school by providing the instruction necessary to qualify as a cosmetology school. The instructors are clearly in the same trade business, occupation or profession as Ms. Casteel and Ms. Schultz.

JA 681.

IAS further argued that the instructors are independent contractors pursuant to NRS 616A.255 and the five factor test enunciated in *Clark County v. State Indus. Ins. Sys.*, 102 Nev. 353 (1986). The five factors to be weighed to determine independent contractor status are (1) the degree of supervision; (2) the source of wages; (3) the existence of a right to hire and fire; (4) the right to control the hours and location of employment; and (5) the extent to which the worker's activities further the general business concerns of the alleged employer. JA 681.

The Appeals Officer specifically found the testimony of Ms. Casteel to be "self-serving and appeared scripted and therefore **not found to be credible**." JA 681 (emphasis added). The Appeals Officer also found **the witness statements**

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introduced by IAS to be "nearly verbatim and obviously prepared by the same individual and **therefore were given no weight**." *Id.* (Emphasis added).

The Appeals Officer issued the following finding of fact:

> ...IAS must ensure that the instructors are providing proper instruction according to the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary. Second, the source of wages come from IAS. Simply designating a specific account does not negate this fact. A certain amount of money is set aside from student tuition to provide for compensation to the instructors similar in fashion to [a] corporation setting aside a certain amount of profit for the compensation of employees. Third, IAS argues that it does not have a right to hire and fire. Clearly, IAS has a right to sever a relationship with an instructor that is not teaching according to the guidelines of the Board of Cosmetology. Fourth, IAS controls the location of employment since the instruction must be done at the school. The instructor is not allowed to provide the instruction at a salon or residence. The hours are controlled by the school as two instructors are required to be present at all times. Lastly, obviously the instructors are furthering the business concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz who also both instruct students. Therefore, the instructors are not independent contractors.

JA 681-682.

The Appeals Officer found that IAS's argument mainly revolved around the fact that it alleged to have agreements in place with its instructors. However, there were additional staff members who were not instructors or licensed cosmetologists. The Appeals Officer noted that "NRS 616B.609 renders void any agreement designed to modify liability under Chapters 616A to 616D of the NRS." JA 682.

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Ultimately, the Appeals Officer found that based upon the totality of the probative, substantial, and relevant evidence, that IAS staff members were employees, and that IAS was required to but failed to maintain workers' compensation coverage for these employees. The Appeals Officer affirmed DIR's determination to impose both premium penalties and the amount of each penalty. JA 687.

After the Appeals Officer issued the Decision and Order, IAS filed a petition for judicial review to the Second Judicial District Court. Following oral argument, the District Court filed its Order to deny the Petition for Judicial Review on March 1, 2020. JA 1-10. The District Court Judge found that the Appeals Officer properly concluded that IAS' staff members are not excluded from the definition of employee pursuant to NRS 616A.110. The Judge further found that the record supports the Appeals Officer's finding that the instructors fail to meet the definition of "independent enterprise" pursuant to NRS 616B.603. Finally, the Judge held that substantial evidence supports the Appeals Officer's finding that the instructors were not independent contractors pursuant to NRS 616A.255. JA 1845-1860.

V. ARGUMENT

A. Standard of Review

Pursuant to the Nevada Administrative Procedure Act, when a party alleges that a final decision of an administrative agency is erroneous, the aggrieved party may file a petition for judicial review. NRS 233B.135. In accordance with NRS

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233B.135(3), the reviewing court may *remand*, affirm, or *set the decision aside in whole, or in part*, if the substantial rights of the petitioner have been prejudiced because the final decision of agency is:

(a) In violation of constitutional or statutory provisions;
(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3)(a)-(f).

When a decision of an administrative body is challenged, the function of the court is to review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously thus abusing its discretion. *Gandy v. State Div. of Investigation and Narcotics*, 96 Nev. 281, 607 P.2d 581 (1980); *State Employment Sec. Dept. v. Holmes*, 112 Nev. 275, 914 P.2d 611 (1996). While in reviewing the decision by an administrative officer, it is true that the court may not substitute its judgment for that of the officer as to the weight of evidence on questions of fact *(SIIS v. Campbell,* 109 Nev. 997, 862 P.2d 1184 (1993)), if such facts as stated are not supported by substantial evidence, which the Nevada Supreme Court has defined as evidence that "a reasonable mind might as accept as adequate to support a conclusion," the agency's decision must be set aside. *See i.e., Yamaha Motor Co. v. Arnoult,* 114 Nev. 233, 238, 955 P.2d 661,

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664 (1998) (internal citations omitted), *Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002).

Moreover, an agency charged with the duty of administering an act is impliedly empowered with the ability to construe, and the agency's interpretation while not controlling must be given great deference. *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918 P2d 697 (1996). This is particularly true where the agency has expertise in a particular area. *Currier v. SIIS*, 114 Nev. 328, 333, 956 P2d 810 (1998). In this case, DIR is responsible for enforcing the Nevada Industrial Insurance Act and it has determined that the staff of IAS were and are employees and therefore, properly assessed the premium penalties in this matter.

In addition, the determination that the staff members are employees of IAS and not an independent enterprise is based upon factual findings. IAS cannot meet its burden to show the Appeals Officer acted capriciously in determining that the staff members were IAS's employees at all relevant times or prove that there was any abuse of discretion. Moreover, the Appeals Officer found that both the testimony of the owner was not credible and that the purported "witness statements" were worthless are both issues that may not be reversed on appeal. Therefore, because the Decision at Order was based upon substantial evidence, this Court should affirm the Second Judicial District Court Judge's Order denying IAS's Petition for Judicial Review.

B. <u>The instructors and staff are not "independent enterprises."</u>

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IAS correctly states Nevada law that a person is not an employer if that person enters into a contract with another person who is an independent enterprise but IAS goes on to entirely misinterpret that same statute. NRS 616B.603(1) provides that a person is not an employer if:

> a. He enters into a contract with another person or business which is an independent enterprise; **and**
> b. He is not in the same trade, business, profession or occupation as the independent enterprise.

(Emphasis added).

NRS 616B.603(2) defines an "independent enterprise:"

> As used in this section, an "independent enterprise means a person who holds himself out as being engaged in a separate business and:
> a. Holds a business or occupational license in his own name; or
> b. Owns, rents or leases property used in furtherance of his business.

In the instant case, the District Court noted that NRS 616B.603(1)(a) requires both parties to enter into a contract. However, the District Court also noted IAS had no written agreements in place prior to 2013. Moreover, IAS failed to meet the requirement for independent enterprise in NRS 616B.603(2)(b) during the uninsured periods of time between 2010 and 2015 and December 2016. At the District Court below, IAS admitted that it "provides students with supplies and equipment, which may be used during an Instructor's services." IAS' Opening Brief at 9. Instructors need never use their own personal property to perform their job functions.

IAS argues that these employment agreements "contained a chair rental agreement (except for one)." IAS Opening Brief at p. 16, ll. 10. However, there is no mention of rental chairs or booths in any of the original Agreements. The District Court also noted that IAS argued an instructor could "choose at his or her own discretion to teach other general classes in lieu of the rental fee." JA 1765, ll. 21-25. The court found that this scheme failed to meet the criteria of NRS 616B.603(2)(b) because the original agreements did not mention any rental chairs or booths. Moreover, the "chair rental fee" in the later agreements of $2 per hour, when instructors are simultaneously paid an hourly wage, was clearly instituted for the sole purpose to try to unsuccessfully meet the requirements of NRS 616B.603. Therefore, the instructors do not constitute an "independent enterprise" and therefore, IAS is the statutory employer of these instructors.

Even if IAS met the definition of independent enterprise in NRS 616B.603(2), IAS must still prove that it is not in the same trade or business as its instructors pursuant to NRS 616B.603(1)(b). IAS acknowledges that IAS is a licensed cosmetology school under NRS 644.380. In its opening Brief below. JA 1757. To be a licensed school of cosmetology, IAS is required to fulfill specific statutory and regulatory requirements. IAS must have a licensed staff of instructors, who are subject to specific restrictions. NRS 644.395 and NAC 644.105(4) provide:

> **NRS 644.395 Staff of instructors.** Each school of cosmetology shall maintain a staff of at least two licensed instructors and one additional licensed instructor for each 25 enrolled students, or major portion thereof, over 50 students. A

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> school of cosmetology must have at least two licensed instructors present and teaching at any time while the school is open. Persons instructing pursuant to provisional licenses issued pursuant to NRS 644.193 are considered instructors for the purposes of this section.
>
> **NAC 644.105 Instructors; badges; limitation on practice by certain students.** (NRS 644.110, 644.395, 644.408)
>
> ***
>
> 4. No instructor in a licensed school of cosmetology may, during the hours in which he or she is on duty as an instructor, devote his or her time to the public or to the private practice of cosmetology for compensation. **Each instructor shall devote the instructor's full time during the hours he or she is on duty as an instructor to instructing students.**

(Emphasis added).

These statutory and regulatory restrictions require the instruction staff to be in the "same trade, business or profession" as IAS. To be an instructor, each individual must be a licensed as an instructor with the Cosmetology Board. Each school must have "at least two licensed instructors" teaching and present "at any time the school is open." The IAS instructors are required to be licensed by the same Board that licenses IAS as a cosmetology school. IAS could not operate as a licensed cosmetology school without licensed cosmetology instructors, but somehow, IAS argues, the instructors and the school are not in the same trade or business as the other.

The "control test" that forms the basis for IAS's argument was previously employed by the Nevada Supreme Court to determine whether an individual was an independent contractor or employee and was nullified when the Nevada Legislature

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enacted NRS 616B.603. *See*, *Tucker v. Action Equipment and Scaffold Co.*, 113 Nev. 1349, 951 P.2d 1027 (1997). ("*Tucker* abandoned the 'control test' as the primary standard applicable to determine whether one is immune from suit under the NIIA...*Tucker* also entirely abandoned the use of the "control test" when the workplace accident occurs in the course of a construction project." *Harris v. Rio Hotel & Casino*, 117 Nev. 482, 488-892 P.3d 206 (2001)).

The Nevada Supreme Court held that what the Legislature intended in the adoption of NRS 616B.603 is that the "normal work test" found in *Meers v. Houghton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985), be applied in all cases. Succinctly stated, the Court held that "[i]f a principal contractor is not a licensed contractor, it will be the statutory employer ... if it can show that it is in the same trade under the *Meers* test, i.e., whether the activity is, in that business, normally carried on through employees rather than independent contractors." *Oliver v. Barrick Goldstrike*, 111 Nev. 1338, 1348, 905 P.2d 168 (1995). The Nevada Supreme Court in *Oliver* held that in order for a business to be an independent enterprise, the tasks performed by the ostensible independent enterprise must be "special" and/or "ephemeral." *Id.* at 1349.

More recently, the Court analyzed the *Meers* test *in Hays Home Delivery, Inc. v. EICN*, 117 Nev. 678, 31 P.3d 367 (2001). In *Hays*, the Court considered whether Green, the owner-operator of a local trucking company, was the statutory employee of Hays Home Delivery. The Court examined whether the service

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provided by Green would normally be carried out by an independent contractor or an employee, following the *Meers* test.[6] Hays was a national logistics management company who provided delivery services for national retailers from their retail stores/warehouses to customers. Hays then entered into agreements with owner-operators like Green to deliver merchandise. In discussing "independent enterprise" under NRS 616B.603(2), the Court found that Green held himself out as being engaged in a separate business, maintained a business license, and leased the truck he used to deliver the merchandise in furtherance of his business.

Nevertheless, despite the fact that Green met the definition of an independent enterprise under NRS 616B.603(2), the Court concluded that Green was in the same trade as Hays under NRS 616B.603(1(b) and, therefore, Hays was Green's statutory employer. "Green arguably delivered the merchandise, while Hays arguably only acted as an administrator and oversaw the deliveries, both Green and Hays are in the same trade of delivering merchandise from retailers to end-customers. Therefore, notwithstanding any minimal distinction between Green's and Hays's functions, both are in the same trade of delivering merchandise." 117 Nev. at 684. In the instant case, the instructors neither provide "special" services to IAS nor are the instructors' services "ephemeral." These instructors provide the service that IAS sells to students and such service is long-standing. While the owners of the school argue that they could provide instruction to the students alone, the owners choose

[6] The Court removed the distinction between "construction" and "non-construction"

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not to do so and hire instructors and those instructors are in fact employees. Unlike in *Hays*, there is zero distinction between the school and the instructors.

IAS fails to provide any legal basis for its assertion that its staff are independent enterprises but instead relies on a hypothetical. IAS claims that adjunct professors at the Boyd Law School are independent enterprises because the professors may also be practicing lawyers in the community. However, IAS offers no evidence to support these allegations that these adjunct professors are not, in fact, considered employees of Boyd Law School. Without any actual evidence to show that an adjunct professor was denied workers' compensation coverage and that that denial was affirmed by the courts, this is just an incomplete hypothetical at best. DIR can argue just as easily that under the normal work test these adjunct professors would clearly be considered employees for the purposes of workers' compensation coverage. IAS incorrectly focuses on what the instructors do with their time away from instructing students for IAS. The focus of NRS 616B.603 is the relationship between the instructors and IAS while on the job for IAS and while on the job for IAS, they are employees of IAS.

The District Court correctly held that the Appeals Officer did not err in finding that the instructors were not independent enterprises. Moreover, even if they were independent enterprises, they were in the same trade or business as IAS. Therefore, the District Court properly affirmed the Appeals Officer's Decision and

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workplaces and applied the *Meers* test to both.

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Order holding that the evidence showed IAS was at all relevant times the statutory employer of the instructors and staff.

1. Even if the control test applies, IAS is still the instructors' statutory employer.

IAS argues that the five-part control test enunciated by the Nevada Supreme Court in *Clark County, supra,* proves that the instructors are not employees of IAS. Even though, that "control test" was abrogated by the adoption of NRS 616B.603, IAS's instructors still would not meet the requirements to be independent contractors.

a. Degree of supervision exercised by putative employer over details of work.

IAS argues the instructors operate unsupervised. The NSCB maintains standards with which IAS instructors must comply in order to remain an accredited school. Some of the Agreements IAS drafted require "instruction and records shall be in a format that complies with the standards and policies of the accrediting agency for International Academy of Style." JA 867. Moreover, the Agreements require instructors to perform certain tasks. For instance, one of the contracts required the instructor to record students' grades and attendance. Ms. Casteel testified that despite the contract, instructors were "not required to do anything like that." JA776 101, ll. 1-9. However, the Appeals Officer found Ms. Casteel's testimony to be self-serving and not credible.

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Contrast IAS' arguments and Ms. Casteel's testimony with the later Agreements dating from 2014 and later. Those Agreements required instructors to provide instruction in a "competent manner" or be subject to termination of the contract. E.g., JA 975. Those later Agreements also provide the following:

> 19. QUALITY OF SERVICE: Instructor shall perform his or her services with care, skill and diligence in accordance with applicable professional standards currently issued by such profession in similar circumstances, and shall be responsible for the professional quality and completeness of all services performed under this Agreement.

E.g., JA 980. DIR posits it would be impossible for Ms. Casteel and/or Ms. Schultz to determine whether an instructor was providing competent instruction in accordance with professional standards without any supervision. Therefore, IAS fails to meet the first part of the five-part test.

The District Court agreed finding that "the record illustrates multiple instances of supervision." JA 1857. Those instances included requiring the instructor to record grades and attendance and the fact that Ms. Casteel terminated an instructor for requiring her student to bring her food. The Court found that the later agreements included provisions that allowed IAS to terminate the agreement for cause including failing to perform services in a competent manner and failing to perform the terms of the agreement. "The Court notes some degree of supervision is required to determine whether an Instructor was performing pursuant to he terms of the agreement and providing competent instruction in accordance with professional standards." *Id.*

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b. Source of the workers' wages

IAS next argues that the source of payment (wages) to cosmetology professionals is student tuition monies somehow means that the instructors are independent contractors. Opening Brief at 16. Many, but not all the Agreements, provide an hourly rate the instructor is paid for providing services. Some Agreements left the wage blank. Some Agreements provide for a chair rental fee but not before 2016. All businesses take a portion of their revenue and set it aside to compensate employees. IAS is no different in that respect. The fact that the money came from tuition versus sales of merchandise makes no difference in the status of IAC as an employer.

c. Right to hire and fire.

IAS argues that the Agreement dictates the terms of employment as if no human is involved in the decision-making. The earlier Agreements drafted by IAS did not provide termination clauses. However, later Agreements provided that "IAS may terminate this Agreement at any time "for cause," the grounds for which are defined below." Those grounds include "C. Instructor fails to perform his or her services in a competent manner" and "Instructor fails to maintain a safe environment for students while performing services on IAS' premises or instructing IAS students," and "G. Instructor fails to perform the terms and conditions as agreed upon under this Agreement." JA 975.

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Ms. Casteel testified, again not credibly, that terminating an instructor "it never happens…So, for the most part, they're with us until they-- until they decide they don't want to teach anymore." JA 771. In fact, the evidence shows that IAS first came to the attention of the Attorney General's office because IAS did indeed terminate an instructor for misconduct. Ms. Casteel told the Attorney General's investigator about the aforementioned termination of one of the instructors for requiring a student to bring her food, which conduct was unacceptable to Ms. Casteel and possibly in violation of NRS 644.103. JA 1576. The Instructor successfully filed an unemployment claim with DETR against IAS. Therefore, IAS clearly has the right to hire and fire its instructors.

d. Extent to which the workers' activities further 'general business concerns.'

IAS argues that it can be operated exclusively by the two owners and that the instructors provide a "unique benefit" to IAS students.[7] IAS's Opening Brief at p. 20. This part of the test does not require the services of employees to be necessary but that they further the general business concern. Ms. Casteel testified IAS uses instructors to provide a "well-rounded education. They're [the students] going to learn more if they have several people showing them the same thing" rather than just Ms. Schultz or Ms. Casteel instructing the students. JA 760. However, instructors are required for the school to be properly licensed:

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NAC 644.115 Curriculum for cosmetologists; exemption for barbers in certain circumstances. (NRS 644.110, 644.400)

1. Each school of cosmetology must offer the following subjects for training barbers and students to be cosmetologists:

(a) Aesthetic services.

(b) Chemical hair services.

(c) Cosmetology theory, with a minimum of 3 percent of the total hours of training mandatory for students who are barbers and 10 percent of the total hours of training mandatory for all other students.

(d) Field trips and modeling, with a maximum of 5 percent of the total hours of training optional for all students.

The instructors are invited to IAS for the benefit of the students and the success of IAS's students are surely of concern to the business if the school wants to remain open. Once again, without instructors, there exists no IAS.

e. Right to control hours and location of work.

IAS argues that IAS does not control the hours the instructors teach. However, while ostensibly the instructor chooses his or her schedule, he or she still must teach during the hours IAS is open unless he or she specifically gets permission to work after hours. IAS controls the hours within which the instructor may work. Moreover, the instructors must teach on IAS's premises. As for the right to control the location of work, NRS 644.380(1)(a) requires a school of cosmetology to submit a detailed floor plan of the school for approval. NRS 644.380(2)(b) requires that a school "contains adequate floor space and adequate

[7] Of course, this would require both owners to be on site from approximately 8:45 in the morning to 10:30 at night five days a week. This may be physically possible but unlikely.

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equipment." It stands to reason that instructors must teach on IAS's premises to work for IAS.

D. The faculty and staff of IAS are employees, not independent contractors pursuant to the requirements of the NIIA.

IAS argues that NRS 616A.110(9) excludes IAS instructors because they operate pursuant to a written agreement which acknowledges the instructors are not employees. NRS 616A.110(9) is written in the conjunctive meaning that each of the three conditions must be met for the instructor/staff member to be excluded from the definition of "employee" under the Nevada Industrial Insurance Act ("NIIA"), Chapters 616A through 616D and 617 of the NRS.

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NRS 616A.110 "Employee": Persons excluded. "Employee" excludes:

9. Any person who:

(a) Directly sells or solicits the sale of products, in person or by telephone:

(1) On the basis of a deposit, commission, purchase for resale or similar arrangement specified by the Administrator by regulation, if the products are to be resold to another person in his or her home or place other than a retail store; or

(2) To another person from his or her home or place other than a retail store;

(b) Receives compensation or remuneration based on sales to customers rather than for the number of hours that the person works; **and**

(c) Performs pursuant to a written agreement with the person for whom the services are performed which provides that the person who performs the services is not an employee for the purposes of this chapter.

There is no evidence that IAS instructors or staff members sell or solicit the sale of products let alone sell those products from their home or place other than a retail location; therefore, NRS 616A.110(9)(a) does not apply. In addition, IAS instructors per the terms of their Agreements are paid per hour and not by commission based upon sales. Therefore, NRS 616A.110(9)(b) does not apply. Consequently, IAS teachers and staff do not meet the requirements of the statute regardless of the existence of a written agreement that they are employees.

The District Court agreed that the Appeals Officer properly determined this section to be inapplicable based upon substantial evidence and that the Appeals Officer did not err as a matter of law.

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E. IAS is still required to maintain workers' compensation coverage regardless of the instructors and staff's employment status.

IAS next argues that its faculty are independent contractors pursuant to NRS 616A.255:

> **NRS 616A.255 "Independent contractor" defined.** "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the person's work only and not as to the means by which such result is accomplished.

Regardless of whether IAS instructors or staff are independent contractors is irrelevant because under the NIIA, independent contractors are considered

employees of the principal contractor for the purposes of workers' compensation coverage.

> **NRS 616A.210 "Employee": Subcontractors and employees.**
>
> 1. Except as otherwise provided in NRS 616B.603, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS.
>
> 2. If the subcontractor is a sole proprietor or partnership licensed pursuant to chapter 624 of NRS, the sole proprietor or partner shall be deemed to receive a wage of $500 per month for the purposes of chapters 616A to 616D, inclusive, of NRS.
>
> 3. This section does not affect the relationship between a principal contractor and a subcontractor or independent contractor for any purpose outside the scope of chapters 616A to 616D, inclusive, of NRS.

"Principal contractor" is defined by NRS 616A.285:

> **NRS 616A.285 "Principal contractor" defined.**
> "Principal contractor" means a person who:
> 1. Coordinates all the work on an entire project;
> 2. Contracts to complete an entire project;
> 3. Contracts for the services of any subcontractor or independent contractor; or
> 4. Is responsible for payment to any contracted subcontractors or independent contractors.

IAS is licensed as a cosmetology school pursuant to NRS 644.380[8] which statute requires sufficient staff, two licensed instructors present at all times. IAS

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[8]

> **NRS 644.380 Application for license; determinations by Board; fee; new license required for operation after change in ownership or location; approval of changes in physical structure of school by Board; regulations.**
>
> 1. Any person desiring to conduct a school of cosmetology in which any one or any combination of the

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contracts with its students to provide them with accredited instruction pursuant to both NRS Chapter 644 and the National Accreditation Commission of Career Arts such that when their training is complete, the students meet the requirements to obtain a license as a cosmetologist by the Nevada State Board of Cosmetology. IAS contracts for the services of its instructors and staff and is responsible for paying them pursuant to the terms of the Agreements IAS alleges it requires every instructor and staff member to sign. Therefore, it was appropriate for the Appeals

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> occupations of cosmetology are taught must apply to the Board for a license, through the owner, manager or person in charge, upon forms prepared and furnished by the Board. Each application must contain proof of the particular requisites for a license provided for in this chapter, and must be verified by the oath of the maker. The forms must be accompanied by:
>
> (a) A detailed floor plan of the proposed school;
>
> ***
>
> 2. Upon receipt by the Board of the application, the Board shall, before issuing a license, determine whether the proposed school:
>
> (a) Is suitably located.
>
> (b) Contains adequate floor space and adequate equipment.
>
> (c) Has a contract for the enrollment of a student in a program at the school of cosmetology that is approved by the Board.
>
> (d) Admits as regular students only persons who have received a certificate of graduation from high school, or the recognized equivalent of such a certificate, or who are beyond the age of compulsory school attendance.
>
> (e) Meets all requirements established by regulations of the Board.
>
> ***
>
> 7. After a license has been issued for the operation of a school of cosmetology, the licensee must obtain the approval of the Board before making any changes in the physical structure of the school.

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Officer to conclude that IAS is the principal contractor and that all the instructors, as well as the staff that handles financial aid and other bookkeeping, are employees for the purposes of workers' compensation coverage.[9]

F. Nevada law prohibits IAS from requiring staff to waive their right to workers' compensation.

In addition to all the preceding reasons why IAS' staff are employees for the purpose of workers' compensation, Nevada statutes specifically preclude an employer from modifying its liability in a contract of employment. Any such modification is void. NRS 61B.609 states, in part:

> **NRS 616B.609 Devices modifying liability void; exception.**
>
> 1. Except as otherwise provided in subsection 2:
>
> (a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by chapters 616A to 616D, inclusive, of NRS.
>
> (b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by chapters 616A to 616D, inclusive, of NRS is void.
>
> 2. Nothing in this section prevents an owner or lessor of real property from requiring an employer who is leasing the real property from agreeing to insure the owner or lessor of the property against any liability for repair or maintenance of the premises.

[9] IAS appears to have abandoned its arguments that the doctrines of laches, *res judicata,* and equitable estoppel bar the imposition of the premium penalties at issue in this appeal. The District Court found the Appeals Officer to have correctly determined neither doctrine applies in this instance. DIR respectfully requests the right to file a supplemental brief if IAS raises these issues in any reply brief.

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The facts and law establish IAS's instructors and staff, including Char who admitted to DIR investigators she provided financial aid and other services to the school rather than instruction, are employees. IAS cannot legally negotiate its way out of providing mandatory workers' compensation coverage for its employees.

VI. CONCLUSION

The District Court said it best. The Appeals Officer adequately analyzed the law and the factual allegations lodged against IAS and while IAS "contends that the Appeals Officer's decision was 'clearly erroneous,' this Court finds quite the contrary. Instead, this Court determines that there was virtually overwhelming evidence from which the Appeals Officer concluded the instructors did not meet the independent contractor classification." JA 1842. Despite the District Court's rejection of every argument IAS devised, IAS still appealed to this Supreme Court.

It may be helpful to note that the premium penalties paid by uninsured employers under NRS 616D.200 are deposited into the Uninsured Employer's Claim Account (the "UECA"). The UECA is used to provide compensation, including medical benefits and disability payments, to employees of uninsured employers who are injured on the job, the exact benefits a workers' compensation carrier would have provided if the employer had complied with Nevada law. The penalty should therefore be considered a disgorgement of an unjust enrichment, to level the playing field among Nevada employers.

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Because substantial evidence supports that factual determination and the Appeals Officer did not commit an error of law, the Decision and Order rendered below should be affirmed.

Dated this 16 day of November, 2021 and respectfully submitted by:

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(1)(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 14 point font. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points and contains 8,303 words.

Finally, I 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 N.R.A.P. 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 relief 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 16 day of November, 2021.

Jennifer J. Leonescu, Division Counsel

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

Document Served: **Respondent Division of Industrial Relations' Answering Brief in Supreme Case No. 82864**

Person(s) Served: International Academy of Style Bonnie Schultz & Loni Casteel 2295 Market St. Reno, NV 89502	**U.S. Mail** __X__ **via State Mail room** (regular or certified) circle one _____ **deposited directly with U.S. Mail Service** _____ **Overnight Mail** _____ **Interdepartmental Mail** _____ **Messenger Service** _____ **Facsimile** fax number: _____
Person(s) Served: Jason Guinasso, Esq. Hutchison & Steffen 5371 Kietzke Lane Reno, NV 89511	**U.S. Mail** __X__ **via State Mail room** (regular or certified) circle one _____ **deposited directly with U.S. Mail Service** _____ **Overnight Mail** _____ **Interdepartmental Mail** _____ **Messenger Service** _____ **Facsimile** fax number: _____

DATED this 17th day of November, 2021.

_____
State of Nevada Employee

AFFIRMATION

PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Respondent Division of Industrial Relations' Answering Brief filed in or submitted for Supreme Court Case number **82864.**

✓ Does not contain the social security number of any person

or

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____

or

B. For the Administration of a public program or for an application for a federal or state grant.

Dated this 16 day of November, 2021.

Jennifer J. Leonescu, Esq.
Division of Industrial Relations

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