IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY DEPARTMENT OF AVIATION, Appellant, VS. SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, AND OFFICE OF THE LABOR COMMISSIONER, Respondent.	NO: 83252 District Court Case No: A-18-781866-J RESPONDENT'S ANSWERING BRIEF APPEAL / ALTERNATE PETITION

The Southern Nevada Labor Management Cooperation Committee ("LMCC") submits its Answering Brief.

Dated: January 19, 2022.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*

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NRAP 26.1 DISCLOSURE

In accordance with NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Respondent LMCC is a federal Taft-Hartley trust fund existing under the authority of 29 U.S.C. §§ 175a(a) and 186(c)(6) and pursuant to a collective bargaining agreement ("CBA") between the International Union of Painters and Allied Trades District Council No. 16, Local Union No. 159 ("Union") and various contractors and construction trade organizations and is not affiliated with any corporation. The names of the current Trustees or alternate Trustees who manage the LMCC are Robert Williams, Daniel Lincoln, Jason Lamberth, Thomas Pfundstein, Terry Mayfield, Albert Carrillo, Harold Daly, and Mike Davis.

2. The only law firm that has appeared or is expected to appear for LMCC in this case is Christensen James & Martin, 7440 W. Sahara Ave., Las Vegas, Nevada 89117.

3. If litigant is using a pseudonym, the litigant's true name: N/A

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JURISDICTIONAL STATEMENT

The Clark County Department of Aviation ("DOA") wants this Court to tell the District Court that the DOA must be allowed to relitigate the maintenance issue before the Labor Commissioner. Because the DOA seeks a command from this Court to the District Court, one source of the Court's jurisdiction is either a writ of certiorari under NRS 34.020(2) or a writ of prohibition under NRS 34.330. Both statutes allow the Court to act where there is no "plain, speedy or adequate remedy" available to the DOA. NRS 34.020(2) also allows the Court to act if the District Court has exceeded its authority.

As to the "appeal" brought by DOA, appellate jurisdiction depends on the finality of the District Court's order pursuant to NRAP 3A(b)(1). A District Court order remanding a decision to an administrative agency is reviewable as final where the substantive issues before the District Court are resolved. *See State, Taxicab Authority v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 424-25 (1993). It is LMCC's view that the District Court properly ruled on the two substantive issues / defenses presented by DOA (the maintenance contract and public money defenses). Although a partial remand to the Labor Commissioner exists, that remand is for the performance of a ministerial act rather than the performance of a discretionary matter.

ROUTING STATEMENT

Retention of the Case by the Supreme Court appears proper under NRAP 17(a)(12). The Court is being asked to define "public money" as used by governmental entities. That definition will have statewide impact on all governmental entities in both financing and expenditure decisions.

ISSUES PRESENTED

1. Is money obtained from governmental operations rather than directly from tax dollars "public money" subject to Nevada's statutory use obligations?

2. Was the DOA's large-scale repair contract, valued at $1,356,600, calling for the replacement of 12,000 square yards of carpeting (which includes subfloor repairs) and the replacement of 5,000 feet of base cove a "normal maintenance" contract exempt from NRS 338, where the contract allows the DOA to separate the work into smaller portions to avoid the requirements of NRS 338?

3. Did the District Court err by stating in its limited order of remand that it retained jurisdiction to enforce the order?

4. Did the District Court err by remanding part of the case to the Labor Commissioner for the ministerial tasks of identifying wage claimants and calculating unpaid wages?

ANSWERS TO QUESTIONS PRESENTED

1. Yes. NRS 356.330(1) and NRS 496.250(2) unambiguously define the money received and used by the DOA as public money, and Nevada caselaw establishes that even "private money" intended for a "public use" by a "public entity" such as the DOA is subject to Nevada regulatory requirements.

2. No. The contract at issue was a repair contract because of its size, scope and costs, and the effort to break the contract into smaller portions was a direct violation of NRS 338.080(3), NRS 338.1385(1)(c) and NRS 338.143(1)(c).

3. No. Courts retain jurisdiction to enforce their own orders, and the District Court clarified that was and is its intent.

4. No. The limited remand directed the performance of ministerial tasks of calculating wages owed.

STATEMENT OF THE CASE

DOA claims that it does not have to follow Nevada's prevailing wage law even though it is a public entity. DOA bases this claim upon the argument that its approximate $556 million dollars in yearly revenue is derived from its operations and is therefore not "public money." In other words, DOA asserts that it can spend money it earns without regard to state statutes or regulations. Based on this misguided thinking, DOA entered into a large flooring contract valued at $1,356,600.00 dollars, which called for the replacement of carpeting that covered an area the size of approximately two football fields and the installation of approximately one mile of base cove between the floors and walls of the airport. Consistent with DOA's attempts to avoid complying with statutory requirements, the contract calls for breaking the work up into smaller portions under the guise of maintenance so as to avoid NRS 338's prevailing wage requirements.

The LMCC filed a complaint with the Office of the Labor Commissioner objecting to the DOA's refusal to follow Nevada's labor laws for the contract. DOA defended the matter before the Labor Commissioner on the following two points: 1) the contract is a maintenance contract not subject to Nevada's prevailing wage laws, and 2) the contract is paid for by the DOA's own money rather than tax dollars. The DOA asserts that those two defenses remove the contract from its obligation to comply with NRS 338 and the payment of prevailing wages. The Labor

Commissioner entered a decision in favor of DOA. Upon judicial review, the District Court rejected both defenses asserted by DOA, ruling that DOA revenues and its flooring contract are both subject to NRS 338.

FACTS

DOA receives yearly revenue of approximately $556 million dollars. App. 224. DOA put out a request for bids on a contract to replace 12,000 square yards (an area larger than two football fields)[1] of carpet and 5,000 linear feet (about a mile) of base cove "over the course of (1) year." App. 230. The materials value for the contract was $1,286,600.00. App. 233. The contracted labor costs were $70,000.00. App. 225. Thus, the minimum value of the contract is at least the sum of those two numbers, $1,356,600.00. *Id.*

During the administrative proceedings, the Labor Commissioner held meetings with the parties (App. 228) and requested documents from the DOA. App. 172-73. The DOA partially complied with the document request on September 22, 2017, but failed to provide payroll and wage records, asserting that none existed. App. 174. The DOA's failure to comply with the Labor Commissioner's request was

[1] Prior briefs and filings incorrectly stated 12,000 square feet of carpet. The correct number is 12,000 square yards of carpet. There are 9 square feet in a square yard so the contract calls for the placement of 108,000 square feet of carpet. For a conceptual reference, the Supreme Court's Las Vegas building is 26,132 square feet.

noted in her July 12, 2021 email to DOA's counsel: "A request for records/information from the Labor Commissioner to the Clark County Department of Aviation has been pending for several years." App. 560.

During the administrative proceeding and at the District Court, DOA argued that the work was maintenance. App. 236, 241, 244. DOA sent a February 12, 2018 letter to the Labor Commissioner specifically describing how the contract was structured to avoid Nevada's prevailing wage requirement found in NRS 338 et seq. To wit: "Since each of these areas is separate, the cost of the material and labor is significantly below the $250,000 threshold set forth for determining prevailing wages under NRS Chapter 338." App. 231. DOA also argued that NRS 338 did not apply because its yearly revenue of $556 million dollars is somehow not public money. App. 7, 239, 241. The Labor Commissioner accepted both DOA's positions and found in favor of DOA, stating "DOA asserted carpet maintenance work…is not paid for with public money." App. 007. The LMCC filed a petition for judicial review. App. 1-8. The Court granted the petition on February 4, 2020, and ordered the Labor Commissioner to calculate wages due as a ministerial task. App. 391-399. After a motion to reconsider by DOA, the District Court entered a second order on June 25, 2021, clarifying its February 4, 2020 order. App. 499-501.

STANDARD OF REVIEW

> The standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the District Court. *City of Reno v. Bldg. & Constr. Trades Council of Northern Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011). Like the District Court, we review an administrative appeals officer's determination of questions of law, including statutory interpretation, de novo. *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 509-10 (2006). We review an administrative agency's factual findings "'for clear error or an arbitrary abuse of discretion'" and will only overturn those findings if they are not supported by substantial evidence. *Day v. Washoe County Sch. Dist.*, 121 Nev. 387, 389, 116 P.3d 68, 69 (2005) (*quoting Construction Indus, v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003)). If the agency fails to make a necessary finding of fact, we "may imply the necessary factual finding[]," so long as the agency's "conclusion itself" provides a proper basis for the implied finding. *See State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982). We do not give any deference to the District Court decision when reviewing an order regarding a petition for judicial review. *City of Reno*, 127 Nev. at 119, 251 P.3d at 721.

City of N. Las Vegas v. Warburton, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

ARGUMENT

1. Nevada's statutory definition of public money is controlling.

a. Statutory and regulatory definitions show DOA's money is public money.

The District Court ruled correctly that money received by the DOA is public money, regardless of source.

> "Public money" means all money deposited with a depository by any of the following:
> …
> (b) An official custodian with plenary authority, including control over money belonging to, or held for the benefit of, the State or any of its political subdivisions, public corporations, municipal corporations, courts, or public agencies, boards, commissions or committees.

NRS 356.330(1). "The term includes, without limitation, savings deposits and demand deposits." NAC 356.080. Thus, all money held by or for the benefit of the DOA, which is a public agency, is "public money." The statute does not distinguish between sources of money. In fact, the word "all" in NRS 356.330(1) establishes that the source of the DOA's money is irrelevant. The DOA's argument and the Labor Commissioner's decision that money received from airport operations is not public money were inconsistent with the express and unambiguous statutory and regulatory definitions. The DOA's large-scale flooring contract was and is subject to NRS 338 because it involves public money.

b. Other statutes show that money received from airport operations is public money.

Statutes specific to the airport confirm money received by the airport is public money.

> All land and other property and privileges acquired and used by or on behalf of any municipality or other public agency in the manner and for the purposes enumerated in this chapter shall and are hereby declared to be acquired

> and used for public and governmental purposes and as a matter of public necessity, and, in the case of a county or municipality, for county or municipal purposes, respectively.

NRS 496.250(2). This establishes that all "*other property*" obtained by the DOA is for a public use. '"Property' means: Money…." NRS 205.2195(2); *see also, Hanson v. Estate of Bjerke*, 95 P.3d 704 (Mont., 2004) ("[T]he statutory definition of 'personal property' reflects the widely accepted definition. Black's Law Dictionary states that personal property is, '[i]n [a] broad and general sense, everything that is the subject of ownership, not coming under denomination of real estate.' Black's Law Dictionary, 1217 (6th ed.1990)."); *U.S. v. Baker*, 183 F. 280, 282 (C.C.N.Y. 1910) ("It is, of course, true that money is personal property."). Since money is property, NRS 496.250(2) compels the conclusion that "[money] … acquired and used by or on behalf of [the Clark County DOA] in the manner and for the purposes enumerated in this chapter [governing airports] shall and are hereby declared to be acquired and used for public and governmental purposes…."

To be clear, the Nevada Legislature declared that money collected by the DOA is "acquired and used for public and governmental purposes," which must include the purposes of NRS 338 *et seq*. for work at airport facilities. *See also* NRS 496.250(1) (confirming that all airport operations "are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity….") To conclude that money collected and used by the DOA for airport

construction projects or operations is not public money would require this Court to disregard explicit Nevada statutory authority.

c. Nevada caselaw shows that DOA revenues are public money.

The Court previously rejected the DOA's argument that the money it uses is not public money. *See Bombardier Transportation (Holdings) USA. Inc. v. Nevada Labor Commissioner*, 433 P.3d 248, 251 (Nev., 2019). In *Bombardier*, the DOA's Director testified that work performed at the airport under a "maintenance contract" was not subject to Nevada's prevailing wage laws because the money comes from "normal operating funds" not subject to NRS 338 *et seq*. On page 5 of its answering brief before this Court in the *Bombardier* case, the DOA (acting through the same law firm representing it in this Case) joined in and adopted the entirety of Bombardier's Opening Brief, and then went on to argue that the Labor Commissioner's decision in *Bombardier* requiring the payment of prevailing wages was

> legally improper, but it also has extensive repercussions on how the Clark County Department of Aviation will function within the state. Clark County is the largest local government entity in Nevada, and unlike other Departments within the Clark County government, the Department of Aviation operates without the County's general fund tax revenue.

Respondent Clark County's Answering Brief at 5, *Bombardier*, 433 P.3d 248 (No. 71101).[2] On page 7 of that same brief, the DOA expressly acknowledged (in an apparent reference to this very Case) that the decision in *Bombardier* would be binding in future cases like this one, stating:

> Indeed, other contractors and labor unions are already using the clearly erroneous decisions from the Labor Commissioner and the District Court in the subject case, in an attempt to apply an overly broad definition of "public works" to basic maintenance contracts. If this improper precedent from the Labor Commissioner and the District Court is not overturned, labor unions and contractors will continue to try to apply prevailing wages to more and more maintenance contracts, which is contrary to NRS Chapter 332 and the explicit exception created by NRS 338.011(1).

Id. at 7. From this history, it is clear that this, the Nevada Supreme Court, was fully advised and actually intended that its decision in *Bombardier* be controlling in cases like this present one. It is also evidence that DOA's actions in pressing the same arguments before the Labor Commissioner, the District Court, and now this Court, have no basis in law, having previously been rejected.

In *Bombardier*, this Court specifically held that the money used by the DOA is public money.

> Bombardier also contends that … the "financ[ing]" language in NRS 338.010(15) excludes maintenance contracts from the definition of "project" because such

[2] Pursuant to NRS 47.150(2) and NRS 47.130, the LMCC requests that this Court take judicial notice of the prior DOA briefing. A copy of the DOA's brief is included at App. 349-362.

> contracts are paid for with normal operating funds rather than bonds or long-term debt measures.
>
> We conclude that Bombardier's arguments are belied by the plain language of NRS 338.010(15) … the financing language in the statute does not require a particular type of funding, only that the project be financed by public money, **which the contract was**.

Bombardier at 248 n. 3 (emphasis added). If the DOA's money in *Bombardier* was public money, then its money in this Case is also public money, because there is no evidence in the record showing that DOA's flooring contract in this case was funded differently. Yet here we are with the DOA completely ignoring this Court's ruling against it in *Bombardier,* which compels the conclusion that the DOA is intent on ignoring both Nevada's legislative commands and this Court's holdings.

Additional case law supports the statutory analysis that money collected from airport operations is public money. "To take rent collected from one source and use it to pay obligations would plainly be a payment of public funds...." *McIntosh v. Aubry,* Cal.Rptr.2d 680, 688, 14 Cal.App.4th 1576, 1588 (Cal.App. 1 Dist., 1993) (superseded by statute). The DOA asserts that it collects money from airline rents[3]

[3] An interesting statutory point exists as to the DOA's argument that it is financed through airline rents. '"Public utility' means a person who operates any airline…." NRS 496.020(7). As such, the DOA receives money from a public utility pursuant to the lease agreements with airlines. The money being transferred from the airlines to the DOA is therefore moving from a public utility to a public entity for a public purpose. Holding that such money is not public and subject to public laws would be inconsistent with the money's public nature and purpose.

for the purpose of meeting its public obligations. *McIntosh* makes clear that the DOA's conduct is a plain receipt and expenditure of public money.

This Court has memorialized the well-articulated rule in *MacIntosh* when addressing NRS 338's prevailing wage requirements. "For example, a private project constructed to a public agency's specification as part of an arrangement for the project's eventual purchase by the public agency would be a public work." *Carson-Tahoe Hosp. v. Building & Const. Trades Council of Northern Nevada*, 128 P.3d 1065, 1068, 122 Nev. 218, 222 (2006). That example explains that despite the use of private money to construct a project that is not yet, but will become a public facility, is nonetheless a public-works project.

This case law demonstrates that regardless of source, money used to produce a property intended for use as a public facility is public money. Hence, even private money is subject to the requirements of NRS 338 where it is invested in a public facility. To hold otherwise would invite other public bodies (even those less inclined than the DOA to disregard the rulings of the District Court and this Court) to avoid statutory commands through manipulative contracting efforts intentionally designed to skirt (i.e., ignore) legal requirements. This Court cannot permit the DOA's fanciful and self-serving legal positions to supersede the statutory requirements established by the Nevada Legislature, especially those that have already been acknowledged by this Court in binding caselaw.

d. DOA is contractually bound to perform a public purpose.

At the District Court, DOA asserted that it has a contractual obligation to the Federal Aviation Administration ("FAA") to be self-funded. App. 310:11-19. DOA pointed to 49 U.S.C. § 47101(a) when asserting its right to use money without regard to state law. However, 49 U.S.C. § 47101(a) is not a preemptive statute as there is no peremptory intent declared from the United States Congress and there is no conflict with state law. In fact, 49 U.S.C. § 47101(a) requires that "the airport will be available for public use…." Federal law and DOA's contractual relationship with the FAA parallel state laws that define the DOA's operations as being for public use. The $556 million dollars in annual revenues received by the DOA are therefore contractually intended for public rather than private purposes.

2. The Court must reject DOA's effort to relitigate the Case.

The DOA's appeal presents a *new* argument not presented to the Labor Commissioner nor properly presented to the District Court. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). DOA asserted, for the first time, in its motion to reconsider before the trial court, that it should be allowed to present evidence to the Labor Commissioner that separate and individual units of the contract – the contract that arose from the DOA's single request for bids covering the entire project – were

in fact separate maintenance units. App. 403:9-12. However, the DOA chose to defend on the argument that the "contract was a maintenance contract" rather than looking at the separate project units. The District Court then correctly ruled, "The Motion must be denied as one for reconsideration under EDCR 2.24 because it fails to present new evidence or identify misapprehension of law." App. 500:4-5.

a. The whole administrative record indicates that the Labor Commissioner considered the contract to be one of maintenance, as argued by the DOA.

The entire administrative record shows that the DOA's contract is not a maintenance contract. "The court may remand or affirm the final decision or set it aside in whole or in part if … the agency is: Clearly erroneous in view of the reliable, probative and substantial evidence **on the whole record**." NRS 233B.135(3)(e) (emphasis added), *see also Department of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296, (1995), overruled in part, *O'Keefe v. State DMV*, 134 Nev. 752, 431 P.3d 350, (2018); *Dubray v. Coeur Rochester, Inc.*, 112 Nev. 332, 913 P.2d 1289 (1996) (cases indicating that courts may evaluate and rule based upon the whole record and are not bound to a strict review of an agency's determination).

DOA argued the maintenance issue extensively before the Labor Commissioner. Here are some examples of its arguments: "As an initial matter, NRS Chapter 338 (including the prevailing wage requirement) is explicitly excluded from contracts issued under NRS Chapter 332 related to the normal maintenance of

property. Specifically, NRS 338.011 provides [contracts relating to normal maintenance are excluded.]" (App. 236); "Here the contract at issue is for carpet maintenance" (App. 239); "The DOA uses airline revenues to finance its operations, including the carpet maintenance that is presently at issue before the Labor Commissioner" (App. 244); "More specifically with regard the carpet work in question, all of the work performed as part of that bid was budgeted for as a part of the CCDOA operations and maintenance budget." (App. 241) The Labor Commissioner's determination specifically accepts the DOA's arguments that the contract is for "maintenance." To wit, "DOA asserted carpet maintenance work…." App. 007.

Moreover, the DOA's own words in its February 12, 2018 letter to the Labor Commissioner specifically describe a large scale contract with a scope of work involving 12,000 square yards of carpet and 5,000 linear feet of base cove. App. 230. That letter describes how the DOA sought to separate the project into smaller units to avoid NRS 338 *et seq.* The DOA declared, "Since each of these areas is separate, the cost of the material and labor is significantly below the $250,000 threshold set forth for determining prevailing wages under NRS Chapter 338." App. 231. DOA's contracting practices are illegal under NRS 338.080(3), NRS 338.1385(1)(c) and NRS 338.143(1)(c), which read respectively as follows: "A unit of the project must not be separated from the total project, even if that unit is to be completed at a later

time, in order to lower the estimated cost of the project below $100,000" (NRS 338.080(3)); "Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b)" (NRS 338.1385(1)(c)); and "Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b)" (NRS 338.143(1)(c)). The District Court was not fooled by DOA's effort to disguise a repair contract as a "maintenance" contract and neither should this Court be.

Consistent with its manifest belief that it is above the law, the DOA has now unabashedly asked this Court to sanction a violation of NRS 338.080(3), 338.1385(1)(c) and 338.143(1)(c) by declaring that the Labor Commissioner must look at the discrete individual project units to determine if that unit constitutes maintenance. This Court does not accept piecemeal litigation. So why should it allow the avoidance of NRS 338's express commands by way of the DOA's piecemeal contract calling for "a little carpet here and a little carpet there" until the whole airport is re-carpeted? It should not do so because statutory provisions declare such efforts to be illegal and the Court has previously addressed the impropriety of doing so (see additional argument below).

b. <u>The District Court record confirms that DOA argued the maintenance issue extensively at the administrative level and before the court.</u>

DOA argued extensively to the District Court, while citing to the Administrative Record, that the contract was a maintenance contract and was

therefore not subject to Nevada's prevailing wage laws. *See* generally App. 308:11-309:8; 311:5-313-20. Here are a few of the DOA's revealing arguments to the District Court: "Should the Labor Commissioner's determination be affirmed because the carpet maintenance contract pertains to the normal maintenance of the DOA's property?" App. 308:6-8; "Because the contract pertains to the ongoing maintenance of worn carpet tiles in various areas throughout the McCarran International Airport, the DOA properly bid the contract as a maintenance contract under NRS Chapter 332." *Id*. 308:20-22;

> In its Opening Memorandum of Points and Authorities, the LMCC argues that the DOA "abandoned its normal maintenance defense" in favor of the public money argument that is primarily at issue. *See* LMCC Memo at p. 1, ln. 20-26. Nothing could be further from the truth, and the DOA objects to this mischaracterization of the administrative record. During the course of the Labor Commissioner's review of the complaint, the DOA raised numerous arguments to dispute LMCC's alleged violations of NRS Chapter 338, including the point that the carpet maintenance contract is not subject to prevailing wages because it pertains to the normal maintenance of the DOA's property. At no time did the DOA abandon or waive this argument, which may be found, in its entirety, in the administrative record. See AAR 0221-0225. The DOA reiterates this argument here and summarizes below.

Id. 311:8-18 (emphasis added).

Despite DOA's exhaustive ipse dixit argument (it is so because I say so), the contract is plainly not a maintenance contract as shown by its size, scope, and costs. The work performed pursuant to the contract cannot be normal maintenance work

and to hold otherwise would require the Court to ignore NRS 338.080(3), which prohibits dividing contracts into smaller portions to avoid statutory requirements.

c. DOA did not apply for leave to submit additional evidence.

Despite being asked to do so by the Labor Commissioner, DOA provided no evidence to the Labor Commissioner of separate carpeting events it now desires to litigate as normal maintenance. DOA later told the District Court that it never waived the argument, but two facts remain: 1) DOA never submitted discreet and separate work area evidence to the Labor Commissioner for consideration, and 2) DOA failed to submit an application to the District Court for an opportunity to submit such evidence before the Labor Commissioner.

> (2) If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.
>
> (3) After receipt of any additional evidence, the agency:
> (a) May modify its findings and decision; and
> (b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

NRS 233B.131(2)-(3). The DOA never applied to the District Court as required by NRS 233.131(2) for the submission of additional evidence on the maintenance issue. See App. 304-322. DOA's motion to reconsider cannot suffice for NRS 233B.131(2)

because that motion was not made until after the matter had been submitted to and ruled upon by the District Court.

DOA's failure to submit the application constitutes a waiver.

> NRS 233B.131(2) requires that before a court may consider evidence beyond what was presented to the agency, there must be a showing that the "additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." The court "may then order that the additional evidence ... be taken before the agency." *Id*. None of these procedures were followed in this case, and it was error for the District Court to admit the additional evidence.

Consol. Municipality of Carson City v. Lepire, 112 Nev. 363, 365, 914 P.2d 631, 633 (1996). DOA cannot now claim error where it refused to follow the provisions of NRS 233B.131(2) and rested upon the Administrative Record as developed.

Even if the DOA had properly applied for the presentation of additional evidence and argument to the Labor Commissioner, the application would have failed because the DOA refused to submit appropriate evidence despite being asked to do so during the original administrative proceedings. "[T]he two principal inquiries under NRS 233B.131(2) are whether the evidence sought to be added is material and whether 'good reasons' exist for the failure to present the evidence to the administrative agency." *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 53, 200 P.3d 514, 517-18 (2009). Parties cannot submit *additional* evidence unless they

submitted evidence in the first instance and refusing to submit information and argument is not a "good reason" for failing to do so.

The Labor Commissioner specifically requested information and evidence regarding DOA's maintenance argument on August 18, 2017. App. 172-173. The DOA had yet to fully respond to that request as of July 12, 2021, well after the filing of this Appeal. App. At 560 ("A request for records/information from the Labor Commissioner to the Clark County Department of Aviation has been pending for several years.") The LMCC is entitled to finality rather than suffer because of DOA's quest for perpetual litigation. '"There must be finality in the law so that people may plan their everyday lives to conform to the requirements of the law.'" *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 750 F.2d 731, 748 (9th Cir. 1984) *quoting Crawford v. Board of Education*, 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980), *aff'd*, 458 U.S. 527, 102 S. Ct. 3211 (1982).

Furthermore, granting a request to submit additional evidence that a specific flooring repair event completed pursuant to the repair contract would be fruitless as legally prohibited. As shown above, NRS 338 does not allow the DOA to break up a 12,000 square yard and 5,000 linear feet flooring project into segments. If the District Court or this Court allowed that to happen, they would be sanctioning an express violation of a statutory command.

d. DOA should be judicially estopped from arguing that the maintenance issue was not considered by the Labor Commissioner.

As shown by the administrative record, DOA did assert and argue that the contract work constituted maintenance. This Court applies judicial estoppel when

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position ...; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Delgado v. Am. Family Ins. Grp., 125 Nev. 564, 570, 217 P.3d 563, 567 (2009) (quoting *Marcuse v. Del Webb Communities*, 123 Nev. 278, 287, 163 P.3d 462, 46827869 (2007) (*quoting NOiLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)). Each judicial estoppel factor is present in this Case. (1) DOA has now taken two positions, its former argument that the Labor Commissioner considered the maintenance matter, and its present position that the Labor Commissioner did not consider the maintenance matter. (2) DOA's first position was asserted in a judicial proceeding before the District Court and a quasi-judicial proceeding before the Labor Commissioner. (3) DOA was successful by having the District Court rule on its contract maintenance work argument and by having the Labor Commissioner include the contract maintenance in her determination. (4) DOA's arguments to this Court that the contract maintenance work was not at issue and constitutes an extra-judicial finding of fact by the District Court is *completely*

inconsistent with its prior positions. (5) DOA's prior positions are express, direct, and clearly asserted in the Administrative Record and the District Court Record. Allowing the DOA to now assert that the Labor Commissioner never considered the maintenance work issue should not be allowed because it is the proverbial second bite at the apple. *See Whitehead v. Nev. Comm'n on Judicial Discipline,* 110 Nev. 380, 873 P.2d 946, 951-52 (1994) ("[I]t has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing." (*quoting Trench v Strong*, 4 Nev. 87, 89 (1868)) "The obvious reason for this rule is that successive motions for rehearing 'tend to unduly prolong litigation.'" (*quoting Brandon v. West*, 29 Nev. 135, 1412, 88 P. 140.)[4]

[4] DOA argues that the LMCC's assertions to the District Court that the Labor Commissioner never made factual findings about the specific project work show the District Court erred. DOA Opening Brief at 27 n. 5. DOA is wrong. It is true, as stated by the LMCC to the District Court, that the Labor Commissioner did not consider individual separate carpeting events for the project. How could she when the DOA failed to submit such evidence? The DOA's assertion about the LMCC is irrelevant because the Labor Commissioner's decision involves the DOA's argument on the contract as maintenance and the DOA's argument that its money is not "public money." The LMCC's assertions to the District Court therefore do not support the DOA's error arguments. Rather, the LMCC's arguments are consistent with the Labor Commissioner's treatment of the contract and the District Court's ruling on the matter. Moreover, even if the DOA was right about the LMCC's arguments, the District Court clearly decided against the LMCC on the matter because it accepted the DOA's argument that the maintenance issue was in fact before the Labor Commissioner. No matter how the LMCC's argument is viewed, the DOA's effort to characterize that argument as supportive of a District Court error fails.

3. The District Court clarified that it retained jurisdiction only to enforce its own order and not to meddle in the Labor Commissioner's activities.

As a matter of law, courts retain jurisdiction to enforce their own orders. *See Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2205, 557 U.S. 137, 151 (2009) (holding that a court had jurisdiction to interpret and enforce its own orders); *See also, Las Vegas Metropolitan Police Department v. Eighth Judicial District Court in and for County of Clark*, 2018 WL 6264749, at *3 (Nev., 2018) ("the District Court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order."). In this case, the District Court explained,

> The Court clarifies that paragraph 7 on page 8 of the February Order was intended to allow the Court to enforce and interpret the February Order, *See Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2205, 557 U.S. 137, 151 (2009), and not to interfere with the Labor Commissioner in the performance of her duties. The Labor Commissioner is free to perform her duties, but the Labor Commissioner and the Parties are not free to disobey this Court's Order.

App. 478:9-14. DOA's post-judgment efforts to thwart the identification of workers and prevent calculation of unpaid wages proves the propriety of the District Court's order explaining that it was only retaining jurisdiction to ensure compliance with its orders. Indeed, the DOA has willfully ignored this Court's holding in *Bombardier* regarding its public money argument, and the DOA has, for years, ignored the Labor Commissioner's request for worker and wage records. The issue raised by the DOA on appeal regarding the District Court's order recognizing the true state of the law –

that courts retain jurisdiction to enforce their own orders – is not sustainable because it is premised upon a complete mischaracterization and misstatement of the District Court's order. The DOA is seeing to reverse engineering its case to include evidence of separate carpeting events after having its original contract theory and argument defeated at the District Court level.

Further, the Labor Commissioner's calculation of wages during remand is a ministerial act that cannot contradict the District Court's order on the legal interpretation of the contract, which is that the contract is one for repair rather than for maintenance. The District Court noted, "In remanding the matter to the Labor Commissioner, the Court intends for the Labor Commissioner to use applicable prevailing wage rates to determine the value of wages due and ensure the unpaid wages are properly paid. The Court considers these tasks to be ministerial in nature." App. 500:25-501:2.

> A ministerial act is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by a law prescribing and defining the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with compulsory result.

Foster v. Washoe Cty., 114 Nev. 936, 942, 964 P.2d 788, 792 (1998) (*quoting* 57 Am. Jur. 2d Municipal, County, School and State Tort Liability § 120 (1988)) (emphasis in opinion). The obligation to pay prevailing wages is established by law.

> If the contract for a public work:
>
> (a) Is to be awarded pursuant to a competitive bidding process, the prevailing wages in effect at the time of the opening of the bids for a contract for a public work must be paid until the completion or termination of the contract or for the 36 months immediately following the date on which the bids were opened, whichever is earlier.

NRS 338.030(9). The Labor Commissioner is tasked with setting and posting prevailing wage rates. NRS 338.030. The prevailing wage rate is known, so the Labor Commissioner need only multiply the hours worked by the difference between wages paid and the higher prevailing wage rate to calculate the wages that remain to be paid. This calculation requires no discretion and qualifies as "ministerial" because it is a simple math function involving known values. Of course, that is assuming there is no interference from the DOA.

However, DOA has claimed an inability to produce wage information. *See* Emergency Motion Under NRAP 27(e) to Stay filed with the Court on July 23, 2021, at 7:10-14. But that is false as a matter of law. The DOA retains the obligation to investigate the matter pursuant to NRS 338.070(1), which states: "Any public body awarding a contract shall: (a) investigate possible violations of the provisions of NRS 338.010 to 338.090, inclusive, committed in the execution of the contract…."

(emphasis added). That duty was triggered in 2017 when the Administrative Complaint was filed. App. 14-19. From that time forward, the employment records of the contractors used by DOA was "open at all reasonable hours to the inspection of the public body awarding the contract." NRS 338.070(6). Those required records include "[t]he actual per diem, wages and benefits paid to the worker." NRS 338.070(5)(a)(6).

Indeed, wage records must be kept pursuant to 29 U.S.C. § 211(c), 29 C.F.R. Part 516, and NRS 608.115. Also, contractors on public works projects must provide certified payroll reports for work performed on the project. See NAC 338.096 – 100. The legal fact exists that the information should be available to the Labor Commissioner for her to perform the ministerial duty of calculating unpaid wages.

4. The District Court clarified provisions of its order that DOA claims to be contradictory.

DOA complains that the District Court improperly directs the Labor Commissioner to determine work that constitutes maintenance but then disallows such findings. DOA Opening Brief at 26:12-28. In addressing the DOA's complaint, the District Court clarified as follows:

> In response to the concern raised by the Labor Commissioner regarding the possible discovery of additional work, the Court recognized that the Labor Commissioner could encounter a situation where work was performed on the project that fell outside the flooring contract. To be clear, if wages were earned for work

> performed on the project pursuant to the flooring contract and its scope of work, those wages are to be paid at the applicable prevailing wage rate because they were earned pursuant to a public works construction contract. However, if the Labor Commissioner discovers that certain work performed on the project fell outside the scope of work described in the flooring contract, the Labor Commissioner may evaluate that work as she sees fit because it is not subject to the contract at issue or these proceedings.

App. 501:3-12. The District Court did not attempt to improperly retain jurisdiction. The District Court's order actually acknowledges the Labor Commissioner's right to address matters that are not subject to the order. That is not error.

5. The District Court did not make extrajudicial findings of fact.

It is noteworthy that the DOA distorts the District Court's order and the record to support its arguments. As an example of the problem, the DOA states that "the District Court erroneously found that the Labor Commissioner **previously** found that 'the contract at issue was a maintenance contract' (APP 478:20, Vol. 2) — a finding the Labor Commissioner NEVER made." DOA's Opening Brief at 26:2-7 (emphasis in original.) Here is how the District Court order actually reads: "The administrative record and argument presented to the Court by the DOA indicated that the Labor Commissioner **treated** the contract at issue as a maintenance contract…." App. 478:16-18 (emphasis added). The District Court's order is consistent with the administrative record and the proceedings before it where the DOA extensively asserted that the **contract is a maintenance contract** (see citations supra). The

Labor Commissioner obviously accepted that premise when she referred to the matter as "carpet maintenance work" in her determination. See App 7. The District Court never made an erroneous finding as asserted by the DOA. Rather, the District Court acknowledged how the Labor Commissioner treated the contract.

Regardless, the District Court was allowed, as is this Court, to make such a finding. "If the agency fails to make a necessary finding of fact, we 'may imply the necessary factual finding[],' so long as the agency's 'conclusion itself' provides a proper basis for the implied finding." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, *citing State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982). Thus, even if the District Court's ruling is properly characterized as a finding, the District Court and this Court are allowed to make such a finding based upon their statutory and contractual interpretations of the maintenance exemption and "maintenance contract" on which the DOA has based its arguments.

The District Court relied on facts present in the record, engaged in statutory interpretation of NRS Chapter 338 guided by this Court's *Bombardier* opinion, and ultimately made a conclusion of law while interpreting the flooring contract. "Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, Ltd. Liab. Co. v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011), *citing Lehrer*

McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032, 1042, 197 P.3d 1032, 1042 (2008); *see also May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005); *Harrah's Operating Co. v. State, Dep't of Taxation*, 130 Nev. 129, 131, 321 P.3d 850, 852 (2014) (reviewing an agency's legal determination de novo); *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 459-61, 254 P.3d 641, 647-48 (2011) (reviewing issues of contract interpretation de novo); *Key Bank of Alaska v. Donnels,* 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) (applying principles of contract interpretation to promissory notes). "Like the District Court, we review an administrative appeals officer's determination of questions of law, including statutory interpretation, de novo." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 263 P.3d 715 (2011), *citing Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 509-10 (2006).

DOA bragged in the administrative record that its "maintenance contract" was designed to avoid NRS 338 *et seq*. by separating work in to smaller units. There are no disputes of fact on that matter. This Court addressed such behavior in its *Bombardier* opinion, upon which the District Court correctly relied when finding that the DOA's contractual efforts were improper. Maintenance involves the occasional broken and worn-out item: it does not involve the wholesale opportunity to refloor the airport through separate units, which again violates Nevada law.

DOA defended the matter before the Labor Commissioner, in part, on the argument that the large flooring contract is a maintenance contract. This Court rejected that same defense in *Bombardier* and described the maintenance exemption as follows:

> And the Legislature distinguished tasks that are not repairs by characterizing them as normal maintenance, including such activities like window washing, janitorial and housekeeping services, and fixing broken windows, see Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981). "**Accordingly, we agree with the Labor Commissioner that the *contract provisions* that are for major repair tasks constitute the type of repairs the Legislature intended to subject to NRS 338.010(15)**.

Bombardier at 255 (emphasis added). The "contract provisions" at issue in this Case are of that same type, "major repair tasks." *Id*. DOA's contract involves the replacement of 12,000 square yards of carpet and 5,000 linear feet of base cove at an expected cost of $1,356,600.00. Nevada law does not sanction an "approach [that] would allow employers to circumvent prevailing wage laws by including *some* maintenance work in contracts, which would be inconsistent with the Legislature's intent in enacting NRS Chapter 338." (emphasis added)). Normal maintenance contracts subject to the exemption are for "day-to-day upkeep." *Id*. at 257. Here, the contract provisions call for replacement of decayed, worn-out carpet. While carpet cleaning might qualify as upkeep, for example, DOA sought to replace large areas of carpet to restore those areas "to a sound or good condition after decay, waste,

injury, partial destruction, dilapidation," (*Bombardier* at 255) which according to this Court means the contract was for "major repair tasks." DOA's contract cannot be for "normal maintenance." *Id.* at 253.

Moreover, the carpet replacement work called for in the contract is not performed "with some degree of frequency" as required to qualify for the maintenance exemption. *Id*. at 256. Nor is the work similar to "janitorial services" that can be performed with little or no training. *See Bombardier* at 257. Rather, workers tasked with replacing 12,000 square yards of carpet and a mile of base cove must receive "training" to perform the work effectively. App. 178 ("Bidder to supply OWNER proof that its employees are certified installers….") Because the work "exceed[s] day-to-day upkeep" it cannot qualify as "normal maintenance" for purposes of the exemption. *Id*.

The above paragraphs show the many parallels between this Case and the *Bombardier* case. DOA is acutely aware of this Court's holding in *Bombardier*, which it previously argued was "legally improper." In support of its continued above-the-law posturing, DOA has anointed itself and its contracts as being exempt from the requirements of NRS 338 despite this Court's order to the contrary. This Court has previously rejected these same arguments from the DOA, it should do so again, and it is entirely appropriate for the Court to hold the DOA accountable for

the obvious disregard of legislative commands and this Court's holdings. If this Court is not going to hold the DOA accountable, who is?

The relevant facts are not in dispute and are clearly part of the "whole administrative record." If, on these facts, this Court feels comfortable reinterpreting the relevant contract provisions as being for "normal maintenance" rather than "repair", it will be signaling a major departure from *Bombardier* while at the same time creating an exception to NRS 338.080(3) that is so significant it nullifies that statute by allowing large scale repair contracts to be broken in to smaller units for completion as maintenance.

Although this court is not required to give deference to the District Court's decision, the District Court's reasoning is sound because it recognized the legal ramifications of DOA's flooring contract, involving a major repair project rather than the day to day maintenance described in *Bombardier*.

> The intent of the bid and Project execution was clearly an effort to manage costs. The DOA's assertion that it may or may not have replaced 12,000 [square yards] of carpet and 5,000 linear feet of base cove is inconsequential because the intent of the bid and the Project allowed for a large volume of repair work. Accepting an argument allowing the DOA to incrementally finish the Project's scope of work 'would run afoul of NRS Chapter 338's purpose and would allow parties to insulate themselves from the statutes' applicability by simply including repair work in a maintenance contract.' *See Bombardier* at 254. The law does not allow the DOA to bid large repair projects to be completed through smaller projects purported to qualify as 'maintenance.'

App. 433:13-22. This Court should adopt that same reasoning and reject DOA's effort to violate NRS 338.080(3) by relitigating specific contract units under the guise that it was prevented from doing so. Even if such evidence (which DOA failed to supply) were eventually submitted, the undeniable reality remains that contracts like the flooring contract here require the payment of prevailing wages as shown in the *Bombardier* opinion.

6. The District Court did not make errors of law.

DOA asserts that the District Court made an error of law by declaring that the Labor Commissioner may not separate a project into smaller units of work because doing so violates Nevada law. DOA Opening Brief at 32:13-23. DOA declared that was an intent and purpose of the contract, to break the project into smaller portions to avoid NRS 338. That is illegal, so it would be impermissible to treat portions of the contract as maintenance when calculating the value of wages. There was nothing hypothetical about the DOA's express assertion that that contract was to be divided into smaller portions. It would be improper for the Labor Commissioner, the District Court, or this Court to consider the contract in "separate portions" and then permit DOA to avoid paying prevailing wages, because that is precisely what NRS 338.1385(1)(c), NRS 338.143(1)(c), and NRS 338.080(3) expressly prohibit.

7. DOA was not denied due process.

DOA points to no deprived right. "Procedural due process rules protect persons from deprivations of life, liberty, or property that are mistaken or unjustified." *Eggleston v. Stuart*, 495 P.3d 482, 489 (Nev. 2021). First, DOA points to no rule that has been broken. It had full and fair opportunity to establish before the District Court that its maintenance contract is in fact exempted by 338.011(1) from the standard requirements of NRS 338. The District Court reviewed the facts, considered the parties' legal arguments, and disagreed with DOA. Second, DOA points to no deprivation of life, liberty, or property. Third, DOA incorrectly asserts that the District Court erred by not letting it relitigate the maintenance issue. Contract interpretation and statutory construction are judicial functions for de novo review, unimpeded by an agency's views of the matter. The District Court, as should this Court, properly interpreted the DOA's contract as a repair contract and not a maintenance contract. Fourth, the District Court, by operation of law, retains jurisdiction to enforce its own orders. That would have been true even if the District Court had not expressly said so. Accordingly, the DOA's claimed error of improper jurisdiction retention is meritless.

DOA also argues that it was improperly denied a hearing before the Labor Commissioner. But the law does not require what DOA requests. "When an enforcement question is presented under any labor law of the State of Nevada, the

determination of which is not exclusively vested in another officer, board or commission, the Labor Commissioner or a person designated by the Labor Commissioner *may* conduct a hearing in any place convenient to the parties, if practicable, and otherwise in a place chosen by the Labor Commissioner." NRS 607.207(1) (emphasis added). The word "may" is permissive, so the Labor Commissioner was not required to hold a hearing. Nevertheless, the Labor Commissioner did have investigatory meetings with the parties, so DOA was not deprived of any ability to plead its case to the Labor Commissioner.

8. DOA's appeal of the District Court's order denying a stay is moot because this Court also denied the stay and the request was based on speculation.

This Court denied the DOA's motion to stay. *See* Order Denying Stay entered in this Court's docket on August 23, 2021, at 3 ("[I]t does not appear that the object of the appeal will be defeated or that appellant is likely to suffer irreparable injury absent a stay or injunction.") Nothing has changed, and the District Court cannot have committed any error if its decision was the same as this Court's decision.

Further and as explained by the District Court,

> The Court finds that under the particular circumstances of this case judicial economy will be served by allowing the Labor Commissioner to collect wage records, calculate the value of unpaid wages, and identify potential wage claimants. Under the facts of this case, the parties will be able to use the time during the pendency of the appeal to

> prepare for the Supreme Court's decision. The Court finds that no prejudice will come to any party by having wage records produced, potential wage claims calculated, and potential wage claimants identified.

App. 598:10-16. No error was committed.

In addition, DOA's entire argument regarding a stay is based on pure speculation about what the Labor Commissioner might do. "[T]his court need not address issues that are not cogently argued and supported by relevant authority." *Sierra Pac. Indus. v. Wilson*, 440 P.3d 37, 43 n. 3 (Nev. 2019). The undersigned attorney for the LMCC has great respect for the Labor Commissioner and rejects DOA's suggestion that the Labor Commissioner may somehow move to harm the DOA's interests. Further, the undersigned has stated on the record that the Labor Commissioner's ministerial calculation of wages will have no preclusive effect. This Court has previously accepted that representation, so the DOA should as well.

CONCLUSION

This Case is very simple. The DOA's contract was for repair work not maintenance because it involved large areas of repair. It was also illegal because it sought to break repairs into small sections under the guise of maintenance to avoid NRS 338. It would therefore be error for this Court to allow the DOA to argue before the Labor Commissioner that individual and discrete events of repair performed

pursuant to the contract actually constitute maintenance. As to the public money issue, statutes and caselaw show that the DOA's money is public money.

Dated January 19, 202. CHRISTENSEN JAMES & MARTIN

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ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word, fourteen size font, and Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of fourteen points or more, and contains 8,921 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: January 19, 2022. CHRISTENSEN JAMES & MARTIN

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CERTIFICATE OF SERVICE

I hereby certify that on the date the above document was filed with the Court, it was served in accordance with NRAP 25(c)(1)(E) upon the following individuals:

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