IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KEITH KIEREN, JR.,

Appellant,

vs.

STATE OF NEVADA, ex rel., CHARLES DANIELS, Director of Nevada Department of Corrections; RANDALL GILLMER, Nevada Department of Corrections Division of Public Safety,

Respondents.

Supreme Court Case No. **85442**

(First Judicial District Court Case No. 21 OC 00177 1B)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

Greenberg Traurig, LLP

Dated this 26th day of April, 2024.

GREENBERG TRAURIG, LLP

/s/ Elliot T. Anderson

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of dismissal. NRAP 3A(b)(1). Mr. Kieren is aggrieved by this final judgment.

ROUTING STATEMENT

The Nevada Supreme Court should retain this matter as an issue of statewide public importance. NRAP 17(a)(12). This appeal reflects power imbalances between the Nevada government and Nevada prisoners. Additionally, this appeal raises whether the Nevada Department of Corrections ("NDOC") can deny notary services to prisoners held in its custody on the premise that the NDOC could not identify the prisoners. This case also presents the opportunity to consider the voluntary cessation doctrine exception to mootness. *See* NRAP(a)(11). Finally, this case follows a previous case retained by this Court in *Kieren v. Feil*, 132 Nev. 995, Case No. 68341 (2016) (unpublished). For these reasons, the Court should retain this matter.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED BY DISMISSING THE CASE AS MOOT WHERE (1) RESPONDENTS DID NOT CHANGE THE CHALLENGED NOTARIAL POLICY, (2) RESPONDENTS DID NOT OFFER COMPETENT EVIDENCE OF MOOTNESS, AND (3) RESPONDENTS STRATEGICALLY MOOTED THE CASE?

STATEMENT OF THE CASE

Dennis Kieren, Jr. ("Kieren"), an inmate acting pro se, petitioned the First Judicial District Court for a writ of mandamus. 1 ROA 4. Kieren sought

an order requiring Respondents to "cease their policy" of depriving notary services to inmates, and that Respondents separately abused their discretion in providing notary services to him. 1 ROA 4-6 (citing NRS 240.1655(4)(a)). In particular, Kieren faulted Respondents for creating a "two-tier system." 1 ROA 6. Kieren also pleaded that he had no adequate remedy at law. 1 ROA 11. For relief, Kieren sought a prospective order allowing "any inmate to apply for and receive a notarization . . . ." 1 ROA at 10.

Respondents answered the Petition. 1 ROA 54-113. In their Answer, Respondents argued that Kieren had an adequate legal remedy precluding writ relief, NRS 208.165. 1 ROA 58. Respondents also contended that Kieren did not satisfy NRS 240.1655's identification criteria for notary services. 1 ROA 58. That said, Respondents conceded that NRS 240.1655 allowed Kieren to submit different identification methods, but, without citation, claimed that Kieren could not make these arguments in an extraordinary writ. 1 ROA 59. Respondents identified no other cause of action for Kieren to assert these arguments in. 1 ROA 59. Respondents also contended that their policy complied with Nevada law. 1 ROA 60 (citing NRS 208.165 and NRS 209.1655). Kieren replied to the Answer. 1 ROA 119-127.

From there, Kieren sought evidence to support his Petition. Kieren

moved the district court for an evidentiary hearing, 1 ROA 114-118, which Respondents did not oppose, 1 ROA 128-131. Kieren also issued subpoenas to gather evidence in support of his writ. 1 ROA 140-147. The district court set the evidentiary hearing, 1 ROA 167, and Respondents moved to quash the subpoenas. 1 ROA 169-182. In response, Kieren opposed the motions and counter-moved to compel respondents to produce certain documents. 1 ROA 187-20. Kieren also sought records from the Eleventh Judicial District Court relevant to his long-standing attempts to secure notary services. 1 ROA 205. Ultimately, the district court prevented Kieren from enforcing/serving his subpoenas. 1 ROA 269-280.

But before Kieren could secure evidence, Respondents moved to dismiss his Petition based on mootness. 1 ROA 207-218. To support their dismissal motion, Respondents offered only a declaration from counsel, Kayla D. Dorame. 1 ROA 217-218. Kieren opposed. 1 ROA 241-248. But the district court granted the motion to dismiss. 1 ROA 281-284. In total, its order stated:

> Having reviewed Respondent's Motion to Dismiss, this Court finds that Petitioner's matter is now considered moot. Petitioner was given the opportunity to cure this matter without this Court's intervention and declined . . . [b]ased thereon, this Court GRANTS Respondent's Motion to Dismiss. Respondents shall serve notice of the entry of order within seven days from date [sic] of receipt of this Order.

1 ROA 281-282. The district court appears to have dismissed the case without oral argument. 1 ROA 281-282.

STATEMENT OF THE FACTS

In 2014, Kieren sought notarial services for a power of attorney while in Lovelock Correction Center ("Lovelock"). 1 ROA 7. NDOC refused. 1 ROA 7. In response, Kieren petitioned for a writ of mandamus before the Eleventh Judicial District Court. 1 ROA 7. The district court declined, Kieren appealed, and this Court reversed in Case No. 68341. 1 ROA 7-8. Kieren alleged that NDOC refused notary services after this reversal. 1 ROA 7. Despite the reversal and a later Eleventh Judicial District Court order, NDOC claimed that the law allowed it to refuse notary services. 1 ROA 8. Kieren apparently never received his notary while at Lovelock. 1 ROA 8. The docket does not appear to reflect resolution. 1 ROA 41-45; 1 ROA 126 ("I attest these instructions were not followed by the Eleventh District; there was never issued a Findings of Fact and Conclusions of Law. . . ."). The Eleventh Judicial District Court did issue an "Order Allowing Notarial Signature," but NDOC filed what it called a "Defendants' Notice of Inability to Comply with Court," and apparently did not comply. 1 ROA 43, 126. This undeveloped record is somewhat unclear on the details. *See id.*

In that case, this Court considered a materially identical issue. *Kieren v. Feil*, 132 Nev. 995, Case No. 68341 (2016) (unpublished). *Id.* There, Kieren

faulted NDOC for misapplying NRS 240.1655's identification provisions. The Court also faulted that district court for not considering other identification methods for notary services including NRS 240.1655(4) and NRS 208.165. *Id.* In reaching this decision, this Court criticized NDOC's practices. *Id.* at n.2. This Court noted that it was "disturbed by the position argued below that every staff member is equally unable to affirm the identity of an inmate housed in the facility given the plethora of documents available to caseworkers and correctional officers regarding an inmate's identity." *Id.* To be sure, it is concerning, to say the least, that NDOC cannot identify those whom it incarcerates. *See also id.*

Later, NDOC transferred Kieren to Northern Nevada Correctional Center ("NNCC") in Carson City. 1 ROA 8. Once there, Kieren again sought notary services. 1 ROA 8. Respondents again refused. 1 ROA 9. Among other reasons, Respondents apparently refused based on NRS 240.1655. 1 ROA 9. Kieren sought notary services in early February 2021. 1 ROA 48. Respondents denied Kieren notary services because Kieren's PI license, which expired in 1998, did "not meet the criteria for valid ID . . . ." 1 ROA 48. Kieren needed notary services to engage banking services in California. 1 ROA 12. That bank would not accept Nevada's alternate notarial act method under NRS 208.165. 1 ROA 12, 262. Kieren also needed a notary to secure his inheritance. 1 ROA 262. Because of Respondents'

notarial policy, Kieren stood to lose about $100,000.00. 1 ROA 263. Respondents did not clearly consider alternate identification methods. *See* 1 ROA 48.

After this litigation began, Respondents claimed, without detail, that they "[were] able to provide" Kieran notary services. 1 ROA 209. Even so, Respondents only offered a declaration from counsel as proof, with no details about how and why, after years upon years of litigation, Respondents had a change of heart. 1 ROA 209. Respondents also declared that "Kieren has declined to accept due to the fact that he would like to be heard before a Judge." 1 ROA 209. But Respondents did not agree to change the underlying policy attacked in the Petition. 1 ROA 209. Dorame's declaration offered no specific facts showing mootness, even about the policy's supposed application to Kieren, not to mention any across-the-board policy change. 1 ROA 217-218. Kieren attacked the dismissal motion, among other grounds, because the Petition sought a declaration of rights. 1 ROA 242. Kieren reiterated that he challenged Respondents' notary policy. 1 ROA 243.

Kieren also declared that Dorame only offered the notarial act in exchange for dropping his challenge to the case and the entire policy. 1 ROA 263. Kieren also denied that he refused a notary at that time. 1 ROA 361. Likewise, some evidence suggests Respondents would still not notarize Kieren's documents around the time of the Motion to Dismiss. *Compare* 1 ROA 217-218, *with* 1 ROA 448-449. At bottom, Kieren refused to drop the case because NDOC could still exercise

its policy to deny him – and other prisoners – notarial services again. 1 ROA 361. Ultimately, Respondents notarized some documents for Kieren, but there is no evidence that Respondents changed the policy attacked in the Petition. 1 ROA 426-432. Kieren continued to attack the policy after receiving some notarizations. 1 ROA 446-447.

SUMMARY OF THE ARGUMENT

The district court erred by declaring the case moot and dismissing the case. Kieren pleaded two challenges: (1) to the policy and (2) the policy's application. *At best*, NDOC mooted only one challenge, the as-applied challenge. Even still, NDOC offered no mootness evidence. What is more, NDOC triggered the voluntary cessation doctrine exception to mootness. This doctrine applies and requires reversal, even if ostensibly moot: NDOC sought to strategically moot the case, and NDOC cannot meet its burden to show that this conduct will not recur.

LEGAL ARGUMENT

I. THE CASE IS NOT MOOT: KIEREN CHALLENGED THE NOTARY POLICY OVERALL AND AS APPLIED, AND RESPONDENTS OFFERED NO COMPETENT AND ADMISSIBLE EVIDENCE OF MOOTNESS

A. A Live Controversy Remains: Kieren's Challenge to Notary Policies.

"The question of mootness is one of justiciability," because the Court shields itself through the mootness doctrine from "render[ing] advisory opinions . . . ."

Personhood Nevada v. Bristol, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). A claim becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (citation omitted). Put simply, a case is moot if there is no longer any "present controversy as to which effective relief can be granted." *Johnson v. Chavez*, 623 F.3d 1011, 1018 (9th Cir. 2010). The burden of proving mootness is heavy. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *West v. Secretary of the Dept. of Transp.*, 206 F.3d 920, 924-25 (9th Cir. 2000). The Court reviews this question of law de novo. *See Martinez-Hernandez v. State*, 132 Nev. 623, 625, 380 P.3d 861, 863 (2016).

This Court has rejected declaring a case moot where *any* actual controversy exists, even if major case issues have been resolved. *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 335, 302 P.3d 1108, 1113 (2013) ("Despite the apparent removal of the discipline from Bisch's employee file, the alleged political motivation of the reprimand and the potential effect it could have on Bisch's political ambitions demonstrate that an actual controversy still exists. We therefore decline LVMPD's request to dismiss this appeal as moot."); *Valley Health Sys., LLC v. Est. of Doe*, 134 Nev. 634, 638, 427 P.3d 1021, 1026 (2018) ("Because Centennial incurred both a monetary (for which they seek recovery) and reputational sanction, we conclude that the sanction order is justiciable notwithstanding the settlement."). So long as *any*

controversy remains, a case is not moot.

The district court erred by declaring the case moot and ordering dismissal. Although Kieren finally received a notary (*after many years*), Kieren also sought a writ requiring Respondents to "cease their policy" to deprive inmates from receiving notary services. 1 ROA 4. Kieren unmistakably challenged Respondents' policy to deny notarial services to inmates. 1 ROA 5. In addition to this policy challenge, Kieren pleaded that Respondents abused their discretion in providing notary services to him. 1 ROA 6. Kieren sought an order allowing "any inmate to apply for and receive a notarization . . . ." which could be achieved with a successful challenge to the policy on a per se facial basis. 1 ROA at 10.

Admittedly, Kieren's Petition is not a model of clarity, which should be expected given he authored it without legal training. Still, he unambiguously pleaded a challenge to Respondents' notary policies, and Respondents did not move to dismiss for failure to state a claim. 1 ROA 4-5, 10, 209. Thus, Kieren pleaded a per se or facial challenge that survives dismissal on mootness grounds. *See also Al Saud v. Days*, 50 F.4th 705, 709 (9th Cir. 2022) ("We [ ] liberally construe pro se pleadings."). Even if Kieren's challenge to the policy *as applied* to him is moot, *see* 1 ROA 6 (pleading that Respondents abused their discretion in providing notary

services to him), a live controversy remains: the facial challenge to the policy, 1 ROA 4-5.

Respondents did not claim otherwise before the district court. Despite Kieren pleading a challenge to the policy, Respondents moved to dismiss for mootness on the as-applied challenge only. 1 ROA 209, 217-218. Respondents, through counsel, declared they offered Kieran notary services, and he declined. 1 ROA 209. But it is undisputed that Respondents did not offer any evidence that they changed the underlying policy facially attacked in the Petition. 1 ROA 207-218. Kieren pointed out these issues before the district court: He opposed dismissal, among other grounds, because the Petition seeks a declaration of rights related to the notary policy. 1 ROA 242-243.

At any rate, the district court ignored Kieren's argument. By doing so, it erred. Although Respondents allegedly offered some relief to Kieren, this relief, even accepted as true, did not moot the entire controversy. *See Bisch*, 129 Nev. at 335, 302 P.3d at 1113.

B. Respondents Offered No Competent Evidence of Mootness.

Setting this point aside, Respondents also offered no competent evidence to show mootness at all. To prove mootness before the district court, Respondents offered only a declaration from counsel. 1 ROA 217-218. This declaration was bare and conclusory:

> 4. I contacted Mr. Kieren on April 12, 2022 and informed him that NDOC is able to provide him with a notary of the documents he seeks to have notarized;
>
> 5. Mr. Kieren informed me that he declined to accept due to the fact that he would like to be heard before a judge.

It is unclear how counsel, who is not an NDOC administrator, NDOC notary, or even an NDOC employee, could competently testify about NDOC notary policies/services with personal knowledge. *See Harris v. Diamond Dolls of Nevada, LLC*, 2021 WL 5862741, at *4 (D. Nev. Nov. 24, 2021) (finding that attorneys "did not have any involvement . . . before the litigation, [and thus did] not have sufficient personal knowledge . . . .") (quoting *Garcia v. Fannie Mae*, 794 F. Supp. 2d 1155, 1162 (D. Or. 2011) (" . . . [A]n attorney cannot acquire personal knowledge based on [the client's] hearsay . . .")). Counsel also did not explain why NDOC could *finally* do so after years of stonewalling, and NDOC arguing to the Eleventh Judicial District Court that no staff member could identify Kieren to notarize his documents.

Besides this declaration, Respondents offered no competent evidence of mootness as applied to Kieren. For this additional reason, the district court erred dismissing the case, and this Court should reverse.

II. RESPONDENTS CANNOT STRATEGICALLY MOOT THE CASE

It is undisputed that Respondents voluntarily ceased obstructing notary services after Kieren sued. *See* 1 ROA 207-218. Thus, Respondents must overcome the "voluntary cessation" doctrine. The district court plainly erred by not

considering this doctrine, and so reversal is required.

Under the "voluntary cessation" exception to mootness, "the mere cessation of illegal activity in response to pending litigation does not moot a case." *Rosemere Neighborhood Assoc. v. U.S. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009). Rather, a party claiming that its voluntary compliance moots a case "bears the *formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphases added); *see also Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) ("But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (internal alterations, citations, and quotation marks omitted)). This burden may not be shifted to Kieren, Respondents must show that it is "absolutely clear" that it is not reasonably likely that they will subject Kieren to the same challenged behavior. *See Rosemere*, 581 F.3d at 1174.

The Tenth Circuit applied this exception where a prisoner challenged a prison's policy, like Kieren does here. *Longstreth v. Maynard*, 961 F.2d 895 (10th Cir. 1992). In *Longstreth,* prisoners challenged a prison policy, and in response, the prison vacated the policy. *Id.* at 900. Under these circumstances, the Tenth Circuit

held that the prison's alleged wrongful behavior could reasonably recur, rejecting mootness, applying the long-standing principle that "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* at 901 (quoting *Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982)). In sum, the court concluded that the prison could change the policy again and affect the prisoners in the same way they were affected before. *Id.*

The *Longstreth* rationale applies with force here. Respondents did not change their underlying challenged notary policy. 1 ROA 217-218. In contrast, the Tenth Circuit refused to declare the case moot even with a more permanent policy change. *See* 1 ROA 4-5 (pleading a policy challenge). Respondents instead offered non-competent evidence that they offered Kieren a notary, but he refused. 1 ROA 218. Respondents did not demonstrate mootness, *supra*, at I, let alone that the challenged conduct could not recur. Respondents did not change their policy, and thus the challenged conduct as applied to Kieren, not offering a notary, could recur in short order if Kieren needs another notary. *Longstreth* supports reversal. Aside from *Longstreth*, Respondents offered no evidence that Respondents will offer Kieren a notary on reasonable demand. Respondents cannot show the conduct will not recur.

Some courts have rejected this doctrine's application under similar, but distinguishable circumstances. *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009) (rejecting this mootness exception where prison official, *rather*

than counsel, declared under oath that *he revised challenged policies* across the board to all prisoners *after* the prison prevailed on the merits). These Courts generally reject this voluntary cessation exception where prison officials change policies, unlike here, where NDOC kept its notary policy. *See Hanrahan v. Mohr*, 905 F.3d 947, 962 (6th Cir. 2018). The rationale is self-evident: Policies are relatively permanent. In contrast, a declaration, from an attorney with no decision-making authority in NDOC, before Respondents prevailed, with no details or evidence of policy changes, does not meet the "*formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189 (emphasis added); see 1 ROA 217-218 (attorney declaration).

This case calls for this doctrine's application. For years, NDOC strung Kieren along. Kieren first sought notary services in 2014. 1 ROA 7. NDOC refused. 1 ROA 7. In response, Kieren petitioned for a writ of mandamus from the Eleventh Judicial District Court. 1 ROA 7. That district court declined to issue a writ, Kieren appealed, and this Court reversed in Case No. 68341. 1 ROA 7-8. NDOC apparently refused to comply with the district court after this reversal (although it is unclear from the record), 1 ROA 7, and apparently argued that the law allowed NDOC to refuse notary services, 1 ROA 8. Kieren never received his notary while at Lovelock. 1 ROA 8, 41-45, 126. The Eleventh Judicial District Court issued an

"Order Allowing Notarial Signature,"[1] and NDOC filed what it called a "Defendants' Notice of Inability to Comply with Court." 1 ROA 43, 126.

NDOC refused – for years – to provide Kieren a notary even after being criticized by this Court. *See Kieren v. Feil*, 132 Nev. 995, Case No. 68341 (2016) (unpublished). *Id.* It is unclear if the Eleventh Judicial District Court implemented this Court's judgment. In ruling for Kieren, this Court authored a remarkable footnote faulting NDOC's practices. *Id.* at n.2. The Court noted it was "disturbed by the position argued below that every staff member is equally unable to affirm the identity of an inmate housed in the facility given the plethora of documents available to caseworkers and correctional officers regarding an inmate's identity." *Id.*[2] To be sure, it is concerning, to say the least, that NDOC cannot verify those whom it incarcerates. *See also id.* After all, if NDOC cannot identify inmates, the State of Nevada may be imprisoning the wrong people. Likewise, if NDOC cannot identify whom it incarcerates, NDOC may have a security problem.

Given NDOC's illogical gymnastics to deny Kieren notary services for years, it is evident that NDOC is strategically seeking to moot the case by offering a bare and conclusory attorney declaration. The Court should reject this attempt to

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[1]Kieren made clear that an out-of-state bank would not accept this notarial order before the district court. 1 ROA 12, 262.

[2]Notaries must be able to identify a person before performing a notarial act. *See generally, e.g.*, NRS 240.120(1)(e), (5); NRS 240.155(1)(b).

frustrate Kieren's challenge NDOC's notary policies. The mootness doctrine is not designed to be NDOC's litigation sword, rather, it is meant to be the judiciary's separation of powers shield.

CONCLUSION

The district court erred by declaring the case moot and dismissing the case. Kieren pleaded two notary challenges: (1) to the policy and (2) the policy as applied to him. NDOC did not change its notary policy and instead, sought to strategically moot the case by offering to notarize a few documents for Kieren, but did not even offer competent evidence that it would do so. Under these circumstances, the case is not entirely moot, at the very least, and the voluntary cessation doctrine applies to prevent a mootness holding. For this reason, the Court should reverse the district court, and allow Kieren to continue his challenge to the notary policies.

Respectfully submitted this 26th day of April, 2024.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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 in Word for Microsoft 365 in 14 Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,710 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 this 26th day of April, 2024.

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CERTIFICATE OF SERVICE

Under NRAP 25(c)(1), I certify that on April 26, 2024, I caused the above ***Appellant's Opening Brief*** to be filed and served via the Supreme Court's e-filing system, and by mailing a copy via first class mail with sufficient postage prepaid, to the following address:

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