IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, vs. THE CENTER FOR INVESTIGATIVE REPORTING, INC., A CALIFORNIA NONPROFIT ORGANIZATION, Respondent,	Case No. 77617/77965 Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding

THE CENTER FOR INVESTIGATIVE REPORTING, INC.'S RESPONSE TO PETITION FOR EN BANC RECONSIDERATION

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I. INTRODUCTION

The petition for en banc reconsideration filed by the Las Vegas Metropolitan Police Department ("LVMPD") largely restates the same specious legal arguments the three-Justice Panel (the "Panel") unanimously rejected in its April 2, 2020 published opinion (the "Opinion"). LVMPD continues to advocate for the application of jurisprudence interpreting the legal term of art "prevailing party" to NRS 239.011(2) even though the statute employs the broader term "prevails." Numerous courts have held that the term "prevails" does not require a judicially-sanctioned change in the parties' relationship and encompasses the catalyst theory adopted by the Panel. Moreover, the catalyst theory as crafted and applied by the Panel in no way conflicts with this Court's prior precedent addressing the fee provision in the Nevada Public Records Act ("NPRA").

LVMPD also attempts to manufacture a public policy basis for reconsideration, but the only "sound policy reasons" that exist here are preventing "government abuse" of the NPRA and advancing the Legislature's goals of increasing public access to information. *Las Vegas Metro. Police Dep't v. Center for Investigative Reporting, Inc.*, 136 Nev. Adv. Op. 15, 460 P.3d 952, 957 (2020) ("*CIR*"). To that end, LVMPD's "policy" arguments consist of strained statutory interpretation and misstatements of the legislative history behind NRS 239.011(2). Neither, obviously, are sufficient to warrant en banc reconsideration under NRAP 40A.

II. ARGUMENT

A. The Opinion Does Not Conflict With Prior Nevada Jurisprudence.

LVMPD contends that the Opinion "ignores Nevada's express adoption" of the United Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). Pet. at 3. But the Panel did not "ignore" *Buckhannon* or the "prevailing party" standard discussed therein. *CIR*, 460 P.3d at 957 n. 4. Rather, the Panel acknowledged the "prevailing party" standard expressed in *Buckhannon* and other Nevada precedent—which requires a judicially-sanctioned change in the relationship of the parties—but determined that it did not apply here because "the Legislature used the broader term 'prevails' in drafting NRS 239.011(2)." *Id.* at 956.

In support of this finding, the Panel looked to multiple other jurisdictions that have adopted the catalyst theory when interpreting fee provisions in state public records acts which, like the NPRA, employ the broader term "prevails" instead of the legal term of art "prevailing party." *Id.* at 956-57 (citing *Mason v. City of Hoboken*, 951 A.2d 1017, 1031-32 (N.J. 2008), *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 104 (Ill. Ct. App. 2014), and *Belth v. Garamendi*, 232 Cal.App.3d 896, 902 (Cal. Ct. App. 1991)). Given that *Buckhannon* addressed a legal term of art that is not utilized in NRS 239.011(2) and the foregoing courts interpreted statutory language mirroring the NPRA's fee provision, the Panel correctly rejected LVMPD's argument that a

state's treatment of *Buckhannon* controls the application of the catalyst theory in this setting.

LVMPD's position that the catalyst theory is only accepted in jurisdictions that have declined to adopt *Buckhannon* is further undercut by the D.C. Court of Appeals' decision in *Frankel v. District of Columbia Office for Planning and Development*, 110 A.3d 553 (2015). There, the D.C. Court of Appeals rejected the exact argument advanced by LVMPD as follows:

> This Court then adopted *Buckhannon* when interpreting "prevailing party" in D.C. Code § 1-606-08 pertaining to suits within the Office of Employee Appeals. *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 907 (D.C. 2006). As a result, in ODMPED's view, *Buckhannon* applies to the D.C. FOIA as well.
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> We disagree. First, *Settlemire* was not a FOIA case, and its holding does not control the interpretation of a different statute containing different language. The provision at issue in *Settlemire*—D.C. Code § 1-606-08—only provides awards to a "prevailing party," whereas the FOIA statute provides awards to a party that "prevails in whole or in part." D.C.Code § 2-537(c). This difference suggests that the D.C. Council intended to authorize attorney's fees in FOIA cases more often than in other types of cases.

Id. at 557-58; *c.f. Buckhannon*, 532 U.S. at 604 (placing importance on the fact that "Congress employed the term 'prevailing party' [in the FHAA and ADA], a legal term of art.").

Thus, the manner in which Nevada and other states have defined "prevailing party" in connection with statutes using that legal term of art does not conflict with the Panel's Opinion because the Legislature intentionally employed the broader term "prevails" in NRS 239.011(2). *C.f.*, *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277,

284, 890 P.2d 769, 773-74 (1995) ("Where the legislature uses words which have received judicial interpretation, they are presumed to be used in that sense unless the contrary intent can be gathered from the statute.").[1]

For that reason, the Panel's decision to adopt the catalyst theory does not conflict with existing Nevada case law addressing NRS 239.011(2) such as *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 343 P.3d 608 (2015). As the Panel correctly recognized, the issue raised by this appeal—*i.e.* whether a requestor "prevails" under NRS 239.011 by initiating litigation that causes the government entity to voluntarily produce records before an order is entered—was neither presented nor addressed by the Court in *Blackjack Bonding*. *CIR*, 460 P.3d at 956. *Stare decisis*, therefore, does not apply. *See First Fin. Bank v. Lane*, 130 Nev. 972, 977, 339 P.3d 1289, 1292-93 (2014) ("Respondents seize on language in *Sandpointe* favoring an interpretation contrary to that above[,] [b]ut the proper interpretation of NRS 40.451 was not squarely presented in *Sandpointe*, and therefore principles of *stare decisis* do not apply with the same force that they might otherwise."). And, as the Panel aptly

[1] With the exception of the *Blackjack Bonding* and *City of Henderson* cases discussed herein, all of the Nevada cases cited by LVMPD involve statutes containing the legal term of art "prevailing party"—primarily, NRS 18.010. *See, e.g.*, *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987) (addressing NRS 18.010); *145 E. Harmon II Tr. v. Residences at MGM Grand – Tower A Owners' Ass'n*, 136 Nev. Adv. Op. 14, 460 P.3d 455, 459 (2020) (same); *N. Nevada Homes, Inc. v. GL Constr.*, 134 Nev. Adv. Op. 60, 422 P.3d 1234 (2018) (same); *Azzarello v. Humboldt River Ranch Assoc.*, 2016 WL 6072420 (Nev. Oct. 14, 2016) (same); *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 373 P.3d 103 (2016) (addressing NRS 18.020).

pointed out, the *Blackjack Bonding* court did not analyze the precise language of NRS 239.011 and instead cited two cases interpreting statutes that use the term "prevailing party," which is understandable given that the requestor in that case had actually obtained a writ of mandamus. 131 Nev. at 90, 343 P.3d at 615 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) and *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)).

The Court's unpublished and non-precedential opinion in *City of Henderson v. Las Vegas Review-Journal*, 2019 WL 5290874 (Nev. Oct. 17, 2019) is distinguishable on the same grounds.[2] Like *Blackjack Bonding*, the application of the catalyst theory was not squarely presented or addressed by the Court in *City of Henderson*. *See First Fin. Bank v. Lane, supra*. Similarly, the *City of Henderson* court did not analyze the specific language of NRS 239.011(2) and again cited cases interpreting statutes using the legal term of art "prevailing party" as opposed to the broader term "prevails." 2019 WL 5290874 at *2 (citing *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) and *Dimick v. Dimick*, 112 Nev. 402, 404, 915 P.2d 254, 256 (1996)).

LVMPD's contention that the requestor in *City of Henderson* would have prevailed under the catalyst theory is likewise misplaced. There, the requestor moved

[2] LVMPD provided the Panel with notice of *City of Henderson* pursuant to NRAP 31(e) before the Panel issued the Opinion. The Panel members were, of course, already familiar with the facts and holding of *City of Henderson* as that proceeding was heard by the entire Court sitting en banc.

to compel the production of documents that were withheld or redacted as privileged, and further sought to invalidate the City of Henderson's fee structure governing public records requests. 2019 WL 5290874 at *2. This Court expressly determined that the requestor in *City of Henderson* had "failed" in each of its objectives other than one discrete issue that had yet to be decided by the district court. *Id.* The requestor did not obtain the withheld or redacted documents and the City of Henderson did not invalidate its fee policies as a direct result of the requestor's lawsuit. In other words, while the requestor may have obtained the non-privileged records free of charge, the requestor's lawsuit did not cause the City of Henderson to voluntarily provide any of the substantive relief sought in the lawsuit. Thus, even if *City of Henderson* was binding precedent (and it is not), this fact-specific ruling does not conflict with the Panel's Opinion or undermine precedential uniformity of this State.[3]

[3] LVMPD's overly simplistic depiction of the catalyst theory also misstates the Panel's Opinion. Pet. at 7 ("[U]nder the Panel's newly-adopted catalyst theory, the Las Vegas Review-Journal would have prevailed, as it obtained the records without being charged after a petition had been filed, but prior to the Court ruling on the merits of the case."). Indeed, the Panel plainly stated that "the mere fact that information sought [is] not released until after the lawsuit was instituted is insufficient to establish that the requestor prevailed." *CIR*, 460 P.3d at 957. The Panel further advised there must be a "causal nexus" between the litigation and the voluntary disclosure, and identified 5 factors that district courts should consider when applying the catalyst theory. *Id.* at 957-58. Thus, even if the requestor had accomplished its goal by forcing the City of Henderson to produce the records free of charge, that alone is insufficient to invoke the catalyst theory.

B. LVMPD Has Failed To Identify A Public Policy Issue That Would Warrant En Banc Reconsideration Of The Opinion.

1. The Panel's Statutory Interpretation Of NRS 239.011 Is Correct.

"En banc reconsideration is disfavored, and this court will only order reconsideration when necessary to preserve precedential uniformity or when the case implicates important precedential, public policy, or constitutional issues." *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 201, 322 P.3d 429, 433 (2014). Under the guise of raising a "substantial public policy" issue, LVMPD advances the same tortured interpretations of NRS 239.011(2) already rejected by the Panel. LVMPD's disagreement with the Panel's reading of NRS 239.011(2) not only fails to raise an "important public policy issue," its proffered statutory interpretation would require the Court to interpolate words and terms in NRS 239.011(2) that are simply not there.

In short, LVMPD's statutory arguments are all derivative from the same overriding contention that the Court should interpret the undefined term "prevails" in the same manner as the legal term of art "prevailing party." To that end, LVMPD highlights various clauses in different sections of NRS 239.011 and asks the Court to find the Legislature only intended to award attorney's fees to a requestor who obtains a court order compelling the production of public records. While courts obviously construe statutes as a whole, NRS 239.011(2) does not contain any specific language requiring the requestor to obtain a court order to "prevail" for the purpose of a fee

award—*e.g.* "if the requestor prevails ***by obtaining a court order***…"[4] Nor did the Legislature employ the legal term of art "prevailing party," which it could have easily been done with language like "[i]f the requestor ***is the prevailing party***…"

As such, the Court should decline LVMPD's invitation to add language to NRS 239.011(2) that is not contained in the statutory text. *See* Pet. at 11 ("this Court is not at liberty to [ ] rewrite the explicit language of the NPRA.") (citing *Clark Cnty. Office of Coroner/Medical Exam'r v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5, 458 P.3d 1048, 1060 (2020)).[5] LVMPD's stubborn insistence that "prevails" actually means "prevailing party" is not a basis for en banc reconsideration on public policy grounds.

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[4] Ironically, in discussing the old version of New Jersey's public records act, LVMPD highlighted another example of how the Legislature could have conditioned the right to recover fees on first obtaining a court order. Pet. at 12. Specifically, New Jersey's former Right to Know Law provided that a court may allow reasonable attorney's fees to "a plaintiff in whose favor an order requiring access to public records issues." *Id.* Again, the Legislature could have employed similar language in NRS 239.011(2) but instead chose to use the general term "prevails."

[5] *See also Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 330, 849 P.2d 267, 269 (1993) ("Where the language of the statute is plain and unambiguous[,] … a court should not add to or alter [the language] to accomplish a purpose not on the face of the statute."); *Douglas v. State*, 130 Nev. 285, 293, 327 P.3d 432 (2014) ("If the Legislature wanted to make mutual consent an element of incest, it would have been easy to do but it did not; courts should not add things to what a statutory text states or reasonably implies."); *Berkson v. LePome*, 126 Nev. 492, 502, 245 P.3d 560, 567 (2010) (rejecting interpretation that "violates the plain reading of that statute by reading in language that is not there and fundamentally altering the text[.]").

2. LVMPD's Citation To Legislative History Is Misplaced And Misleading.

LVMPD bizarrely claims the Panel found the Legislature's use of "prevails" in NRS 239.011(2) to be ambiguous even though the Opinion contains no such finding. Pet. at 12. To the contrary, the Panel properly construed the undefined term "prevails" according to its plain and ordinary meaning, and reached the same result as multiple other courts interpreting identical language in state public records acts. *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006) ("If a statutory phrase is left undefined, this court will construe the phrase according to its plain and ordinary meaning."). NRS 239.011(2) is not rendered ambiguous simply because LVMPD wishes the Legislature had used the legal term of art "prevailing party" instead of the broad term "prevails." *Miller v. Burk*, 124 Nev. 579, 591, 188 P.3d 1112, 1120-21 (2008) ("a provision is ambiguous only when a reasonable alternative interpretation exists," and a party may not "resort to ingenuity to create ambiguity that does not exist in the [statute] and that cannot serve to defeat the [statute's] clear language.").[6]

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[6] LVMPD's contention that the difference between "prevails" and "prevailing party" is simply a matter of grammar is belied by the undisputed fact that multiple courts including the Panel have emphasized the clear distinctions between the terms. *See* Section II.A., *supra* (discussing *Mason*, *Uptown*, *Belth*, *Frankel* and *Buckhannon*).

Because the plain language of NRS 239.011(2) is facially clear, this Court may not consider legislative history or other extraneous sources of information.[7] Nevertheless, CIR must point out that the legislative history does not stand for the proposition for which it is cited by LVMPD. *See* Pet. at 14 ("the Legislature did not intend for a different standard [than the 'prevailing party' standard] to apply."). Indeed, the cited excerpt merely references the current language of NRS 239.011(2) and states that "there had been some discussion regarding whether the agency should also be able to recover the costs and attorneys' fees associated with the action." 4 JA 733-34. That's it. The Legislature never debated the use of the term "prevails" or in any suggested that it should be synonymous with the term "prevailing party." *Id.*

Thus, LVMPD's claim that the Panel's decision "ignores" the legislative history of NRS 239.011(2) is false, and the best evidence of the Legislature's intent remains the plain language in the statute. *See Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) ("To ascertain the Legislature's intent, we look to the statute's plain language.").

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[7] *See, e.g.*, *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010) ("To determine legislative intent, this court will not go beyond a statute's plain language if the statute is facially clear."); *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.").

3. The Actual Public Policy Issues In This Case Firmly Support The Panel's Decision.

The facts underlying this appeal demonstrate why the catalyst theory is necessary to advance the goals of the NPRA. As the Panel recounted in its Opinion, LVMPD committed serial violations of the NPRA by (i) refusing to respond to CIR's public records request for months until CIR retained litigation counsel, (ii) maintaining an improper blanket objection to confidentiality based on the manufactured claim that its 22-year-old murder investigation was open and active, and (iii) failing to provide a *Vaughn* index identifying responsive records that were withheld. *CIR*, 460 P.3d at 958.

As a result of LVMPD's brazen refusal to comply with its obligations under the NPRA, CIR was forced to file suit to compel LVMPD's production of the responsive public records. *Id.* LVMPD first opposed CIR's Petition in its entirety but subsequently changed its position and belatedly complied with the NPRA after the district court indicated LVMPD had failed to meet its burden of proving confidentiality. *Id.* LVMPD, in turn, voluntarily produced thousands of pages of records and other types of media related to the murder of Tupac Shakur along with the required *Vaughn* index. *Id.*

LVMPD's brazen violations of the NPRA exemplify the type of behavior by a government agency that the catalyst theory is designed to prevent. In point of fact, the catalyst theory guards against the "potential for government abuse in that an agency otherwise could deny access, vigorously defend against a lawsuit, and then unilaterally

disclose the documents sought at the eleventh hour to avoid the entry of a court order and the resulting award of fees." *Id.* at 956 (citing *Mason*). In addition to that "sound policy reason," the catalyst theory "promotes the Legislature's intent behind the NPRA—public access to information." *Id.*; *see also Frankel*, 110 A.3d at 557 (the catalyst theory "advances [the] goals [of D.C. FOIA] by allowing more litigants to recover attorney's fees and creating an incentive for the D.C. government to disclose more documents in the first place.").

In light of these recognized policy interests, LVMPD's claim that the Panel's Opinion somehow *contravenes* public policy rings especially hollow. This is particularly true when government agencies in Nevada—whose general compliance with the NPRA is questionable at best—would view reconsideration of the Panel's Opinion as free license to trample the NPRA as LVMPD did here. The invalidation of the catalyst theory would likewise deter requestors from entering into agreements with government bodies to resolve public records litigation at an early stage as any settlement would eviscerate the requestor's ability to recover its attorney's fees and costs.

In that regard, LVMPD's contention that NRS 18.010(2)(b) is an adequate replacement for the catalyst theory is baseless. First, it is questionable whether NRS 18.010(2)(b) even applies to public records litigation under the NPRA. Second, "NRS 18.010(2)(b) targets only how the litigation itself is conducted, not what the parties did before the litigation commenced." *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 803, 435 P.3d 672, 676 (2018). Thus, unlike the catalyst theory,

NRS 18.010(2)(b) would not address a government body's failure to comply with its obligations under the NPRA prior to litigation. In that same vein, this Court has also recognized that a prompt concession to the merits in the early stages of litigation does not satisfy the requirements for a fee award under NRS 18.010(2)(b). *Id.* at 804, 435 P.3d at 676-77 ("it's difficult to see" how the findings required by NRS 18.010(2)(b) could ever be made where a defendant promptly concedes to the merits).

LVMPD's claim that a requestor is somehow permitted to seek undefined monetary damages from a government body under the NPRA is similarly misguided. Under the NPRA, a requestor may seek the production of public records and, if successful (either by obtaining a court order or satisfying the requirements of the catalyst theory), recover its reasonable attorney's fees and costs. The mere fact that NRS 239.012 immunizes government bodies from damages for refusing to disclose records in good faith does not confer a statutory entitlement to damages, and, as LVMPD recognized, "courts should be cautious in reading other remedies into the statute." Pet. at 8 (citing *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013)).

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III. CONCLUSION

Based on the foregoing, CIR respectfully submits that reconsideration should be denied.

DATED this 21st day of September, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 40A as it contains 3,530 words.

DATED this 21st day of September, 2020

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 21st day of September, 2020, serve upon the following in this action a copy of the foregoing **The Center for Investigative Reporting, Inc.'s Response to Petition for En Banc Reconsideration** through the Court's e-filing system:

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