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Clerk of Supreme Court

11 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

12 SAMUEL JOSIAH CARUSO,

Case No.: _____

14 Petitioner,

District Court Case No:
C-19-345393-1

16 vs.

**PETITION FOR WRIT OF
PROHIBITION OR
MANDAMUS**

17 EIGHTH JUDICIAL DISTRICT
18 COURT, HONORABLE JUDGE
19 MARY KAY HOLTHUS,

21 Respondents,

22 STATE OF NEVADA,

24 Real Party in Interest.

26 Comes now, Petitioner Samuel Josiah Caruso, by and through his
27 attorneys, Ryan A. Hamilton, Esq. and Sarah I. Perez, Esq., of
28

1 Hamilton Law, LLC, who files the following petition for writ of
2 prohibition, or, in the alternative, writ of mandamus.
3

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Routing Statement

Pursuant to NRAP 17(a)(11)-(12), this case falls in one or more categories of cases retained by the Supreme Court in that this case raises as a principal issue a question of first impression involving the Nevada Constitution and a question of statewide public importance.

Relief Sought

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1. An Order directing the District Court to dismiss the State’s prosecution of Samuel because the prosecution violates the separation of powers under the Nevada Constitution.

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2. To stay further proceedings in the District Court until the Writ is addressed.

Issue Presented

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Did the State violate the separation of powers under Article 3, section 1 of the Nevada Constitution where the prosecutor in the case is also a state senator in the Nevada Assembly?

Points and Authorities

A. Introduction

This case involves an important legal question of first impression of statewide importance: Does a prosecutor violate Nevada’s separation of powers where she simultaneously serves as a senator in the Nevada

1 legislature? Two District Courts have reached conflicting decisions on
2 this question and a third District Court will soon be ruling on the issue.
3
4 This question affects numerous prosecutions and this Court’s prompt
5 resolution of the issue is urgently needed for prosecutors and
6
7 defendants alike. The Court should entertain this writ.

8 **B. Factual Background and Procedural History**

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10 The facts relevant to this petition are undisputed. Deputy District
11 Attorney Melanie Scheible is a prosecutor for the Clark County District
12 Attorney’s Office. Deputy DA Scheible also serves as a senator in the
13 Nevada Assembly.
14

15 Deputy District Attorneys Melanie Scheible and Ekaterina
16 Derjavina brought a prosecution on behalf of the State against
17 Defendant Samuel Caruso (“Samuel”). Deputy DAs Scheible and
18 Derjavina charged Samuel, via criminal complaint, with seven counts of
19 sexual assault, two counts of open or gross lewdness, and one count of
20 burglary relating to two accusers. Samuel steadfastly maintains his
21 innocence of all charges.
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25 There is no indication that elected District Attorney Steve Wolfson
26 has had any involvement in the case.
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1 Upon learning that he had been charged, Samuel turned himself
2 in to the police on September 27, 2019. The State held Samuel in the
3 Clark County Detention Center as a pre-trial detainee for nearly eleven
4 months, from September 27, 2019, to August 17, 2020. Then, the
5 District Court granted Samuel's release from detention, ordering him to
6 be on high level electronic monitoring.
7

8
9 Following preliminary hearing the case was bound over to District
10 Court. The District Court then granted Samuel's motion to sever counts
11 that pertained to each accuser.
12

13
14 On December 2, 2020, Samuel filed a *Motion to Dismiss Case and*
15 *Exclude Evidence for District Attorney's Violation of the Separation of*
16 *Powers under the Nevada Constitution.* The State opposed the Motion
17 on December 9, 2020, arguing that DA Scheible's prosecution did not
18 violate the separation of powers because she is a mere public employee
19 and not an elected public official. The State argued that only the elected
20 District Attorney could violate the separation of powers by
21 simultaneously serving in the legislature and carrying out prosecutions.
22 The State placed principal reliance on an advisory opinion from the
23 Attorney General's Office that makes this same argument. *See* 2004
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1 Nev. Op. Atty. Gen. No. 03 (Nev. A.G.) 2004 WL 723329. Samuel filed
2 his Reply on December 14, 2020.
3

4 On December 22, 2020, the District Court denied Samuel's motion.
5 **See** Appendix to Petition for Writ of Prohibition or Mandamus
6 ("Appendix"), **Ex. A.** The order indicated that the District Court denied
7 the motion "for the reasons and arguments stated in the State's
8 Opposition." *Id.* This writ petition followed.
9
10

11 **C. District Courts' Conflicting Decisions on this Issue**

12 District Courts have reached conflicting decisions on whether
13 prosecution by a Deputy District Attorney who is also State legislator
14 violates the separation of powers. In *State v. Plumlee*, Eighth Judicial
15 District Court, Dept. II, Case No. C-20-346852-A, District Court Judge
16 Scotti reversed a defendant's DUI conviction based on the State's
17 violation of the Separation of Powers because the prosecutor (Deputy
18 DA Scheible) was also a senator in the Nevada Assembly. **See**
19 Appendix, **Ex. B.** Judge Scotti held that the plain language of the
20 Nevada Constitution forbids members of the legislative branch, such as
21 senators, from simultaneously serving as prosecutors who are vested
22 with power to enforce the laws as members of the executive branch. *Id.*
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1 Judge Scotti in *Plumlee* concluded it constituted a violation of
2 procedural due process of “nearly the highest order for a person to be
3 tried and convicted by a public official...in charge of both writing and
4 enforcing the law.” *Id.* at 3.
5

6
7 More recently, the *Plumlee* case was reassigned to Department
8 XIX. The State moved to clarify and stay Judge Scotti’s order
9 overturning the conviction. After hearing, District Court Judge Eller
10 denied the State’s motion, concluding that Judge Scotti’s prior decision
11 was “legally correct and properly based on the Nevada Constitution and
12 the principle of Separation of Powers.” *See* Appendix, **Ex. F**, at 2.
13
14

15 In *State v. Bills*, Eighth Judicial District Court, Dept. XXI, Case
16 No. C-20-351790, the defendant also has brought a separation of powers
17 challenge based on the Deputy District Attorney’s concurrent service in
18 the Nevada legislature (Senator Nicole Cannizzaro). The District Court
19 has set hearing on the Motion for January 21, 2021.
20
21

22 **D. Standard for Issuance of Writ**

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24 Pursuant to NRS 34.160 a writ of mandamus may be issued “to
25 compel the performance of an act which the law enjoins as a duty
26 resulting from an office, trust or station” This Court will not
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28

1 consider petitions for extraordinary relief such as a writ of mandamus
2 where the petitioner has a “plain, speedy and adequate remedy in the
3 ordinary course of the law.” *A.J. v. Eighth Judicial Dist. Court in & for*
4 *Cty. of Clark*, 133 Nev. 202, 204, 394 P.3d 1209, 1212 (Nev. 2017). This
5 Court has complete discretion to determine whether to consider
6 extraordinary writs. *Cote H v. Eighth Judicial Dist. Ct.*, 124 Nev. 36,
7 29, 175 P.3d 906, 908 (Nev. 2008).

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11 This Court routinely exercises its discretion when faced with an
12 important legal question of first impression that arises with some
13 frequency. *Id.* at 39-40, 908. When that occurs the interests of judicial
14 economy favor consideration of the petition. *Id.*

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17 The counterpart to mandamus, a writ of prohibition compels a
18 government official or body to cease performing acts beyond its
19 authority. *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665, 856 P.2d
20 244, 246 (Nev. 1993). A writ of prohibition may issue when the district
21 court exceeds its authority. *Wynn Resorts, Ltd. v. Eighth Judicial Dist.*
22 *Court in & for Cty. of Clark*, 133 Nev. 369, 373, 399 P.3d 334, 341 (Nev.
23 2017).

1 Both writs are intended to resolve legal, not factual, questions.
2
3 *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534,
4 536 (Nev. 1981). This Court may in its discretion treat a petition for
5 writ of mandamus as one for prohibition, or vice versa, treat a notice of
6 appeal interchangeably as a petition for a writ. *Messner v. District*
7 *Court*, 104 Nev. 759, 760 n.1, 766 P.2d 1320, n.1 (Nev. 1988).
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9
10 **E. The Court should issue a writ because this is a substantial**
11 **legal issue of first impression on which District Courts**
12 **have reached conflicting decisions.**

13 To date this Court has not addressed whether a prosecutor who
14 simultaneously serves in the Nevada legislature violates the separation
15 of powers under Article 3, section 1 of Nevada's Constitution. This
16 purely legal issue requires the Court's urgent resolution. A significant
17 number of prosecutions and convictions are Constitutionally suspect
18 due to the prosecutor-legislator simultaneously carrying out functions of
19 two branches of government. This issue has statewide importance.
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22 In addition, District Courts are reaching conflicting decisions on
23 whether the prosecutor's dual role violates the separation of powers.
24 Absent the Court promptly resolving this issue, District Courts will
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1 continue reaching different conclusions, creating further uncertainty
2 and confusion both for the prosecutors and the accused.
3

4 In this case, Samuel has no plain, speedy, and adequate remedy at
5 law. *Guerin v. Guerin*, 114 Nev. 127, 953 P.2d 716 (1998); *Gladys Baker*
6 *Olsen Family Trust v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994);
7 NRS 34.320. The District Court's denial of Samuel's motion to dismiss
8 is not appealable. The State continues to prosecute Samuel without
9 lawful authority and in violation of the separation of powers. Lacking
10 lawful authority to proceed, the State's prosecution of Samuel is a legal
11 nullity over which the District Court lacks jurisdiction.
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15 **F. The State's Prosecution of Samuel by a Deputy District**
16 **Attorney who simultaneously serves as a Nevada Senator**
17 **violates the Separation of Powers of Nevada's Constitution.**

18 Unlike the federal constitution, Nevada's constitution expressly
19 provides for the separation of powers under Article 3, Section 1:
20

21 1. The powers of the Government of the State of
22 Nevada shall be divided into three separate
23 departments,--the Legislative,--the Executive and
24 the Judicial; and no persons charged with the
25 exercise of powers properly belonging to one of
26 these departments shall exercise any functions,
27 appertaining to either of the others, except in the
28 cases expressly directed or permitted in this
constitution.

1 Nev. Const. art. III, § 1. Time and again, this Court has emphasized the
2 foundational importance of the separation of powers to our system of
3 government. “The division of powers is probably the most important
4 single principle of government declaring and guaranteeing the liberties
5 of the people. *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241
6 (Nev. 1967)(holding statute requiring District Judge to determine
7 qualifications of minister in awarding or denying certificate to perform
8 marriages was unconstitutional because it imposed nonjudicial powers
9 on District Court judges).

14 The Separation of Powers “expressly prohibits any one branch of
15 government from impinging on the functions of another.” *State v.*
16 *Second Judicial Dist. Court in & for Cty. of Washoe*, 134 Nev. 786, 790,
17 432 P.3d 154, 158 (Nev. 2018)(quoting *Comm’n on Ethics v. Hardy*, 125
18 Nev. 285, 292, 212 P.3d 1098, 1103 (Nev. 2009)). Each branch serves as
19 a check against the power of the others, preventing too much power
20 being concentrated in any one branch. *Blackjack Bonding v. City of Las*
21 *Vegas Mun. Court*, 116 Nev. 1213, 1219, 14 P.3d 1275, 1279 (Nev. 2000).
22 For this constitutional structure to function properly, each branch must
23 be allowed to operate independently. *Id.*

1 Each branch has certain inherent powers to carry out its basic
2 functions. *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 363, 302
3 P.3d 1118, 1128 (Nev. 2013). These powers are “broader and more
4 fundamental than the inherent power conferred by the separation of
5 powers.” *Id.* (internal quotation omitted). In addition to the specific
6 powers assigned to each branch, each branch has ministerial powers
7 that are “methods of implementation to accomplish or put into effect the
8 basic function” of a branch. *Id.* (internal quotation omitted). Ministerial
9 functions allow each branch to accomplish its basic function so that the
10 branches can function in a coordinated, interdependent fashion. *Id.*
11 Through ministerial functions the powers of one branch may at times
12 appear to overlap with those of another. *Galloway v. Truesdell*, 83 Nev.
13 13, 21, 422 P.2d 237, 243 (Nev. 1967). Where any duplication of
14 authority can be traced back to a branch’s “essential functions and basic
15 source of power, the overlapping may be valid, but it is essential to the
16 balance of powers that each branch is careful not to impinge on the
17 authority of the other two branches, even in a small and seemingly
18 harmless manner.” *Id.*

1 In *Del Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250 (Nev.
2 1996), this Court explained that “legislative power is the power of law-
3 making representative bodies to frame and enact laws, and to amend
4 and repeal them... [and] [t]he executive power extends to the carrying
5 out and enforcing the laws enacted by the legislature...” In *Steffen*, this
6 Court held that certain Supreme Court Justices violated the Separation
7 of Powers where they initiated an investigation to expose sources of
8 improper news leaks to the media. *Id.* at 369, 246-7. The Justices’
9 investigation into potentially criminal behavior was an improper
10 exercise of executive power that the Nevada Constitution vests in the
11 executive branch, not the judicial branch. *Id.* at 251, 378. This Court
12 issued a writ of prohibition and concluded that the Justices’
13 investigation exceeded their jurisdiction and, therefore, was a legal
14 nullity. *Id.* at 253, 383.

15 There is little question that Deputy DA Scheible exercises both
16 legislative and executive power. Serving as a state senator who makes
17 laws is a quintessential legislative function; serving as a prosecutor is a
18 quintessential executive function. Nevertheless, the State argued to the
19 District Court that Deputy DA Scheible was a mere public employee –
20

1 as opposed to the elected District Attorney who is a public official – and
2 that only public officials exercised executive power sufficient to violate
3 the separation of powers. The State relies principally for this argument
4 on an advisory opinion that lacks the force of law. Compounding the
5 problem, the advisory opinion itself bases much of its advice on a
6 Nevada Supreme Court decision that was not resolved on separation-of-
7 powers grounds, *Heller v. Legislature of State of Nev.*, 120 Nev. 456,
8 473, 93 P.3d 746, 757 (Nev. 2004)(holding Secretary of State lacked
9 standing to seek mandamus to prevent state government employees
10 from serving in state legislature).

15 Deputy DA Scheible plainly exercises executive power in her role
16 as a prosecutor. Deputy DA Scheible exercises prosecutorial discretion
17 and makes charging decisions about individual defendants. *Id.* Given
18 that “[t]he Criminal Division of the Clark County District Attorney’s
19 Office has the responsibility to prosecute over 55,000 felony and
20 misdemeanor cases each year¹” the elected District Attorney cannot
21 make charging decisions on each individual case. This Court explained
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26 ¹ Clark County District Attorney Website,
27 [https://www.clarkcountynv.gov/government/departments/district_attorn](https://www.clarkcountynv.gov/government/departments/district_attorney/divisions/criminal/index.php)
28 [ey/divisions/criminal/index.php](https://www.clarkcountynv.gov/government/departments/district_attorney/divisions/criminal/index.php)

1 in *State v. Second Judicial Dist. Court in & for Cty. of Washoe*, 134 Nev.
2 783, 786, 432 P.3d 154, 158 (Nev. 2018), that charging decisions in a
3 criminal case are an executive function. *See also Stromberg v. Second*
4 *Judicial Court*, 125 Nev. 1, 2-3, 200 P.3d 509, 510 (Nev. 2009).
5
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7 Prosecutors such as deputy district attorneys exercise executive
8 power and perform core functions of the executive branch. Indeed,
9 pursuant to NRS 252.070(1), although deputy district attorneys lack
10 policymaking authority, they are endowed with prosecutorial power to
11 the same extent as the elected District Attorney:
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14 All district attorneys may appoint deputies, who
15 are authorized to transact all official business
16 relating to those duties of the office set forth in
17 NRS 252.080 and 252.090 to the same extent as
18 their principals and perform such other duties as
19 the district attorney may from time to time
20 direct. The appointment of a deputy district
21 attorney must not be construed to confer upon
22 that deputy policymaking authority for the office
23 of the district attorney or the county by which the
24 deputy district attorney is employed.

25 Nev. Rev. Stat. Ann. § 252.070 (West).
26

27 Next, this Court's decision in *State v. Second Judicial Dist. Court*
28 *in & for Cty. of Washoe*, 134 Nev. 783, 784, 432 P.3d 154, 157 (Nev.
2018), teaches that Deputy District Attorneys – not just the elected

1 District Attorney – exercise sufficient executive power to violate the
2 separation of powers. In *Cty. of Washoe* this Court struck down part of a
3 statute for violating the separation of powers where the statute
4 prohibited a district court from assigning criminal defendants to the
5 veterans court program “unless the prosecuting attorney stipulates to
6 the assignment.” *Id.* This Court explained that because sentencing
7 decisions are within the power of the judiciary, “... requiring that a
8 prosecutor stipulate to the district court’s [sentencing] decision, the
9 effect of [the statute] is to afford an executive veto over a judicial
10 function.” *Id.* at 788, 159. This Court further observed that “...**[a]ny**
11 prosecutorial power over the district court’s disposition at this stage of
12 the proceedings is offensive to the separation of powers.” *Id.* (emphasis
13 supplied).

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20 This Court in *Cty. of Washoe* did not draw any distinction between
21 the elected District Attorney and other prosecutors such as a Deputy
22 District Attorney. Nor does Article 3, section 1 of the Nevada
23 Constitution make any distinction between an elected public official,
24 such as the elected District Attorney, and what the State terms “mere
25 public employees,” such as the Deputy District Attorney. Nothing in
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1 this Court’s separation-of-powers jurisprudence suggests this
2 distinction makes any Constitutional difference.
3

4 Deputy District Attorneys exercise the power to enforce the law
5 and bring charges that carry penalties of years in prison. This is the
6 essence of executive power – not some ministerial function, as the State
7 contends.
8

9
10 Nor is this question merely academic. A legislator who also serves
11 as a prosecutor has the power to write the law and then enforce it. The
12 legislator-prosecutor is incentivized to write the law in ways that give
13 her advantage in a prosecution. Likewise, the legislator-prosecutor may
14 decide not to fix gaps in the law that redound to her benefit. Or, in a
15 worst-case scenario, she may provide input on legislation that targets
16 specific defendants. Each of these scenarios results in dangers to
17 criminal defendants and in a justice system that is less fair, with less
18 integrity. This is one of the very dangers Article 3, section 1 of the
19 Nevada Constitution protects all Nevadans against.
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24 **G. Conclusion**

25 All in all, Deputy DA Scheible simultaneously exercises core
26 functions of the executive branch and legislative branch. In her capacity
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1 as a senator she is empowered to make the law. As a prosecutor she
2 enforces the law by deciding whether to bring charges against a
3 particular defendant and what charges to bring. She then takes the
4 ultimate enforcement action of prosecuting a defendant and seeking
5 punishment for violation of the law.
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8 Because her dual role violates Nevada's separation of powers, the
9 instant prosecution of Samuel lacks constitutional authority. The Court
10 should dismiss this case as a legal nullity and as violative of Samuel's
11 right to due process.
12
13

14 Dated this 21st day of January 2021.
15

16 Respectfully submitted,
17

18 By: 

19 RYAN A. HAMILTON, ESQ.
20 NEVADA BAR NO. 11587
21 SARAH I. PEREZ, ESQ.
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Verification of Samuel Josiah Caruso

State of Nevada)
) **ss:**
County of Clark)

Samuel Josiah Caruso, being first duly sworn under penalty of perjury, deposes and says:

That I am the Petitioner in the above-entitled action; that I have read the foregoing Petition for Writ of Prohibition or Mandamus and know the contents thereof; that the same is true of my own knowledge.

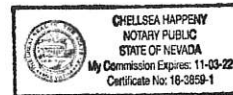


Samuel Josiah Caruso

SUBSCRIBED and SWORN to before me this 19th day of January, 2021.



NOTARY PUBLIC in and for said COUNTY AND STATE



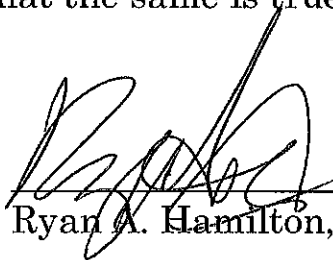
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Verification of Ryan A. Hamilton

State of Nevada)
)
County of Clark) ss:

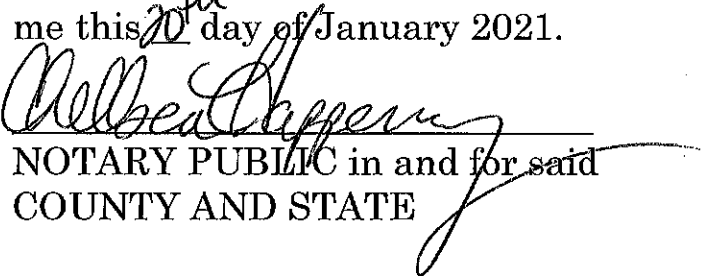
Ryan A. Hamilton, Esq., being first duly sworn under penalty of perjury, deposes and says:

That I represent the Petitioner in the above-entitled action; that I have read the foregoing Petition for Writ of Prohibition or Mandamus and know the contents thereof; that the same is true of my own knowledge.



Ryan A. Hamilton, Esq.

SUBSCRIBED and SWORN to before me this 20th day of January 2021.



NOTARY PUBLIC in and for said COUNTY AND STATE



1 **CERTIFICATE OF COMPLIANCE**

2
3 1. I hereby certify that this petition complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirement of NRAP
5 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this
6 brief has been prepared and proportionally spaced typeface using
7 Century Schoolbook 14-point font.
8

9
10 2. This petition complies with NRAP 21(d) in that it contains 2,971
11 words.

12
13 3. I further certify that this petition is neither frivolous nor
14 interposed for any improper purpose. I understand I may be
15 subject to sanctions if the brief does not comply with the
16 requirements of the Nevada Rules of Appellate Procedure.
17

18 Dated this 21st day of January 2021.
19

20 Respectfully submitted,

21 By: 

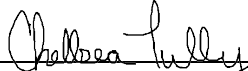
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of HAMILTON LAW, LLC, and that on this 21st day of January 2021, **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** was served via the court’s electronic filing system to the following persons:

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Employee of
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