

1 **MICHAEL MEE, ESQ.**
2 Nevada Bar No. 13726
3 400 S 4th St #500
4 Las Vegas, NV 89101
5 (702) 990-0190
6 mmee@defenselawyervegas.com
7 *Attorney for Plaintiff Jose DeCastro*

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 JOSE DECASTRO,

11 Plaintiff,

12 vs.

13 LAS VEGAS METROPOLITAN POLICE
14 DEPARTMENT; STATE OF NEVADA;
15 BRANDEN BOURQUE; JASON TORREY; C.
16 DINGLE; B. SORENSON; JESSE
17 SANDOVAL; OFFICER DOOLITTLE and
18 DOES 1 to 50, inclusive,

19 Defendants.

Case No.: 2:23-cv-00580-APG-EJY

**PLAINTIFF’S RESPONSE IN
OPPOSITION TO DEFENDANTS’
SECOND MOTION FOR SUMMARY
JUDGMENT**

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21 **Certificate:** This Brief is timely filed. *See* ECF 104.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Procedural History.**

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4 Plaintiff was wrongfully convicted in Las Vegas Justice Court of the underlying conduct
5 which, likewise, formed the basis for his unlawful detention, arrest, excessive force, and other
6 offenses, all committed by the Defendants to this action.

7
8 Defendant maintained, at trial to that proceeding, that he had a First Amendment right to
9 do what he was doing, and therefore the entire police interaction from *Terry* stop, to verbal
10 detention, to physical detention, to physical abuse, to physical arrest, were unlawful. Nevada
11 declared that this, in fact, is the law, and that Plaintiff was correct.

12
13 Based upon this change, the Court permitted the parties to file supplemental briefing prior
14 to ruling on issues of summary judgment. Following that briefing, this Court issued an Order
15 granting relief in part to Defendants on their claims of Summary Judgment. This Court also
16 granted leave for renewed motion filing to be made through October 4, 2024. Defendants filed a
17 Second Motion for Summary Judgment (ECF No. 102) on that date.

18
19 **II. Summary of Issues Raised in Second Motion for Summary Judgment.**

20
21 Defendants' Second Motion for Summary Judgment raises limited arguments. Movants
22 argue that they are entitled to summary judgment as to DeCastro's state law false arrest claim
23 and unlawful search and seizure claim. ECF 102 at 8-9.

24
25 Defendants argue that they are immune from liability under Nevada's discretionary-
26 function immunity statute, NRS 41.032.

1 The Defendants also claim that decisions regarding arrests and searches fall within this
2 immunity because they involve discretion and public policy considerations, such as officer safety
3 and public security.
4

5 Next, movants argue that they are entitled to summary judgment on Plaintiff's Invasion
6 of Privacy Claim. *Id* at 11-12. First, they claim immunity under Nevada's discretionary-function
7 immunity statute, NRS 41.032. They argue that DeCastro cannot circumvent this immunity by
8 framing his claim as an invasion of privacy.. They argue that his provocative and uncooperative
9 behavior, including his refusal to comply with Officer Bourque's commands, rendered any
10 expectation of privacy unreasonable.
11

12
13 **III. Legal Argument.**

14 By clearly established law, a court deciding a motion for summary judgment is required to
15 consider all disputed facts in the light most favorable to the nonmoving party. See *A. K. H.*, 837
16 F.3d at 1010; *Harris v. Roderick*, 126 F.3d 1189, 1192 (9th Cir. 1997) ("We state the facts, as we
17 must on this appeal, as they are set forth in [the operative] Complaint.").

18
19 Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings,
20 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
21 show that there is no genuine issue as to any material fact and that the moving party is entitled to
22 judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A material fact is one relevant to a claim or
23 defense and capable of affecting the outcome of the suit, as determined by the substantive law
24 governing the case. Thus, disputes over irrelevant or unnecessary facts do not prevent summary
25 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
26

1 The existence of a “genuine” issue regarding a material fact can be a close call. However,
2 the nonmoving party “must do more than simply show that there is some metaphysical doubt as to
3 the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
4 Rule 56 further specifies that if the moving party identifies parts of the record showing no genuine
5 issue of material fact, the nonmoving party cannot rely on mere allegations in the pleadings to
6 prevent summary judgment. *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968). Instead,
7 the nonmoving party must provide “specific facts showing that there is a genuine issue for trial.”
8 *Fed. R. Civ. P. 56(e)*; see also *Kaiser Cement Corp. v. Fischbach Moore, Inc.*, 793 F.2d 1100,
9 1103-04 (9th Cir. 1986). The nonmoving party cannot merely claim it will discredit the opposing
10 evidence at trial or hope to find supporting evidence later; it must offer significant probative
11 evidence now. *Anderson*, 477 U.S. at 256-57; *Cities Serv.*, 391 U.S. at 289-90.

15 To proceed to trial, Rule 56(c) does not require that the issue of material fact be
16 conclusively resolved in favor of the party asserting its existence; only that enough evidence is
17 presented to require a jury or judge to resolve differing versions of the truth at trial. Thus, at the
18 summary judgment stage, the judge does not weigh conflicting evidence or make credibility
19 determinations; such tasks are left to the factfinder at trial. If direct evidence from the nonmoving
20 party conflicts with that from the moving party, the judge must assume the truth of the nonmoving
21 party’s evidence. Summary judgment must be denied if a rational trier of fact could find in favor
22 of the nonmoving party. *Matsushita*, 475 U.S. at 587; *Cities Serv.*, 391 U.S. at 289.

25 Inferences must also favor the nonmoving party. Courts may draw inferences from
26 undisputed background or contextual facts and from contested facts that may be resolved at trial
in the nonmoving party’s favor. However, such inferences must be rational or reasonable within

1 the context of the substantive law. *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587; *Barnes*
2 *v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985). Without reasonable limits on these
3 inferences, Rule 56(e)'s requirement for "specific facts" would be undermined.
4

5 The court's inquiry is thus to decide whether the "specific facts" presented by the
6 nonmoving party, along with undisputed background or contextual facts, could allow a rational
7 jury to return a verdict in its favor. If the nonmoving party provides direct evidence of a material
8 fact, the court must not judge the credibility of this evidence or weigh it against conflicting
9 evidence. However, inferences from these specific facts to other material facts are permissible only
10 if they are reasonable in light of the undisputed background or contextual facts and are allowable
11 under the governing law. This process ensures a "genuine" issue of material fact for the factfinder
12 to decide at trial.
13
14

15 In *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154 (9th Cir. 2014), the Ninth
16 Circuit overturned the district court's summary judgment rulings on excessive force and qualified
17 immunity because the district court improperly weighed conflicting evidence with respect to
18 disputed material facts. *Id.* at 1166. Specifically, the court drew conclusions based upon
19 conflicting testimony, relying upon the officers' version of events rather than the non-moving
20 party's version. *Id.* "[I]n weighing the evidence in favor of the officers, rather than the Sandovals,
21 the district court unfairly tipped the reasonableness inquiry in the officers' favor," an error that
22 mandated reversal. *Id.* at 1167.
23
24
25

26 **Defendants are not Entitled to Summary Judgment.**

Summary judgment shall be granted when "there is no genuine dispute as to any material
fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

1 The moving party has the initial burden of showing the absence of a genuine issue of
2 material fact with evidence demonstrating the same and the court must view the facts and
3 reasonable inferences in the light most favorable to the non-moving party. See *Zoslaw v. MCA*
4 *Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982); see also *Celotext Corp. v. Catrett*, 477 U.S. 317,
5 323 (1986).
6

7 Here, as an initial matter, Defendants fall well short of their burden of *showing* the absence
8 of genuine issues of material facts. Defendants merely incorporate other factual statements (in
9 prior pleadings and this Court’s Order) by reference. This is insufficient to carry their burden of
10 *showing* they are entitled to judgment as a matter of uncontested material fact. See Motion at 7:12-
11 21.
12

13 **Discretion Function Immunity Does Not Apply to the Arrest, Seizure, or Search**

14 Pursuant to NRS 41.031, Nevada waives immunity as set forth therein:
15

16 1. The State of Nevada hereby waives its immunity from
17 liability and action and hereby consents to have its liability determined
18 in accordance with the same rules of law as are applied to civil actions
19 against natural persons and corporations, except as otherwise provided
20 in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any
21 statute which expressly provides for governmental immunity, if the
22 claimant complies with the limitations of NRS 41.010 or the limitations
23 of NRS 41.032 to 41.036, inclusive. The State of Nevada further
24 waives the immunity from liability and action of all political
subdivisions of the State, and their liability must be determined in the
same manner, except as otherwise provided in NRS 41.032 to 41.038,
inclusive, subsection 3 and any statute which expressly provides for
governmental immunity, if the claimant complies with the limitations
of NRS 41.032 to 41.036, inclusive.

25 2. An action may be brought under this section against the
26 State of Nevada or any political subdivision of the State. In any action
against the State of Nevada, the action must be brought in the name of
the State of Nevada on relation of the particular department,
commission, board or other agency of the State whose actions are the
basis for the suit. An action against the State of Nevada must be filed
in the county where the cause or some part thereof arose or in Carson
City. In an action against the State of Nevada, the summons and a copy
of the complaint must be served upon:

1 (a) The Attorney General, or a person designated by the
2 Attorney General, at the Office of the Attorney General in Carson City;
and

3 (b) The person serving in the office of administrative head
4 of the named agency.

5 3. The State of Nevada does not waive its immunity from
6 suit conferred by Amendment XI of the Constitution of the United
7 States.

8 The Supreme Court of Nevada has been quite clear that decisions of officers to engage in
9 abusive conduct while engaged in “on-the-spot” decision making when dealing with
10 suspects/citizens is not a *discretionary action involving policy* which NRS 41.032(2) applies to:

11 “We also conclude that respondents were not entitled
12 to discretionary-function immunity under NRS 41.032(2). We held
13 in *Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168 P.3d 720,
14 729 (2007), that discretionary-function immunity applies when (1) the
alleged wrongful acts involve "an element of individual judgment or
choice," and (2) the act is "based on considerations of social, economic,
or political policy."

15 **Despite respondents' arguments to the contrary, we are not**
16 **persuaded that, under the specific facts of this case, Officer Miller's**
17 **on-the-spot decision to use lethal force is "susceptible to policy**
18 **analysis" for purposes of *Martinez's* second prong.** *See Garcia*
19 *v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) ("While law
20 enforcement involves exercise of a certain amount of discretion on the
21 part of individual officers, such decisions do not involve the sort of
22 generalized social, economic and political policy choices that Congress
intended to exempt from tort liability."); *Caban v. United States*, 671
23 F.2d 1230, 1233 (2d Cir. 1982) (concluding that the INS's decision to
24 detain someone did not implicate public policy considerations).

25 Accordingly, we conclude that respondents were not shielded
26 by discretionary-function immunity insofar as Lydia and Ricardo
sought to hold respondents liable for Officer Miller's decision to use
lethal force. We therefore reverse the district court's decision to grant
summary judgment against Lydia and Ricardo on their claims. As such,
we need not consider the parties' arguments regarding issue
preclusion.”

Estate of Brenes v. Las Vegas Metro. Police Dep't, No. 78272, at *2-3
(Nev. July 24, 2020)(emphasis added).

1 An “on-the-spot” decision to execute an arrest, or search, will often not implicate
 2 considerations of policy which render the decision *discretionary in relation to public policy* was
 3 required by Nevada law in
 4

5 To counter this view, Defendants cite first *Ortega v. Reyna*. Defendants claim that this
 6 holding supports the belief that the decision to arrest someone is discretionary and protected by
 7 NRS 41.032(2). *See* Motion at 9-10 citing to *Ortega v. Reyna*, 114 Nev. 55, 62, 953 P.2d 18, 23
 8 (Nev. 1998). *Ortega* applied the following analysis prior to granting immunity:

9
 10 “The state waives its immunity under NRS 41.031, but retains
 11 immunity under NRS 41.032 for officials exercising discretion. A
 12 “discretionary act” is one which requires “exercise of personal
 13 deliberation, decision and judgment.” *Travelers Hotel v. City of*
 14 *Reno*, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (1987). The record
 15 shows that the trooper used his judgment in stopping appellant, in
 16 concluding that appellant refused to sign the traffic citation, and in
 17 taking appellant to jail after arresting her. *See Maturi v. Las Vegas*
 18 *Metro. Police Dep’t*, 110 Nev. 307, 871 P.2d 932 (1994) (arresting
 19 officers' decision to handcuff behind the prisoner's back rather than in
 20 the front is discretionary and affords officers immunity). Accordingly,
 21 we conclude that the trooper is entitled to immunity with respect to the
 22 state law claims against him, and that the district court properly entered
 23 summary judgment in his favor.”

24 *Ortega v. Reyna*, 114 Nev. 55, 62 (Nev. 1998)

25 Defendants fail to identify that *Ortega* was in fact overruled (or at minimum clarified to
 26 the extent that the rule utilized in *Ortega* has been rendered obsolete in Nevada) in *Martinez v.*
 27 *Maruszczak*.¹ As can be seen, the above analysis wholly omits the second-prong of the test adopted
 28 in *Martinez*, which calls the Court’s attention to:

29
 30 “We therefore adopt the *Berkovitz-Gaubert* approach and clarify that to
 31 fall within the scope of discretionary-act immunity, a decision must (1)
 32 involve an element of individual judgment. or choice and (2) **be based**
 33 **on considerations of social, economic, or political policy.** In this, we

¹ Undersigned counsel notes that, per Casetext, *Ortega v. Reyna* is noted as having “negative treatment,” the first result for which is “**Overruled by *Martinez v. Maruszczak*,**” and should not be relied upon by the Defendants nor this Court.

1 clarify that decisions at all levels of government, including frequent or
2 routine decisions, may be protected by discretionary-act immunity, if
3 the decisions require analysis of government policy concerns.
4 However, discretionary decisions that fail to meet the second criterion
5 of this test remain unprotected by NRS 41.032(2)'s discretionary-act
6 immunity.”

Martinez v. Maruszczak, 123 Nev. 433, 446-47 (Nev. 2007)(emphasis
7 added).

8 As *Ortega* predated the above decision, the Court did not perceive the need to analyze this second-
9 prong of the analysis, and indeed, did not do so. It is for this basis *Ortega* is overturned by
10 *Martinez*, or at least “clarified” to render the fact-based analysis applied to that case as being
11 obsolete, to the extent it omits factual inquiry into the policy-relatedness of the particular discretion
12 identified.

13 In the most recent relevant decision identified above, that being *Estate of Brenes*, the
14 Supreme Court of Nevada relied upon federal case law calling into question the policy-relatedness
15 of most on-the-spot law enforcement decision-making. *Estate of Brenes v. Las Vegas Metro.*
16 *Police Dep't*, No. 78272, at *3 (Nev. July 24, 2020)(citing *Garcia v. United States*, 826 F.2d 806,
17 809 (9th Cir. 1987) (“While law enforcement involves exercise of a certain amount of discretion
18 on the part of individual officers, such decisions do not involve the sort of generalized social,
19 economic and political policy choices that Congress intended to exempt from tort liability.”).

20 Again, it is movant’s burden to *show facts* entitling it to relief. In its argument, movant
21 only makes the following appeal to the facts of this case:
22

23
24 “Here, the Defendant Officers are immune from liability with respect
25 to their discretionary decision to arrest DeCastro and to conduct a
26 search incident to arrest. It is well-settled an officer’s decision to arrest
is discretionary because it involves elements of judgment or choice and
is based on considerations of public policy. Likewise, the Defendant
Officers’ decision to conduct a search incident to arrest here was
discretionary because it involves an element of judgment or choice and
is based on considerations of public policy, namely the need to adduce

1 whether DeCastro was armed or otherwise posed a threat to officer
2 safety.” *See* Motion at 10.

3 This brief statement is not a factual showing whatsoever, and the claim that the movant
4 need-not pin down this analysis in more specificity because “an officer’s decision to arrest [...] is
5 based upon considerations of public policy” is belied by the applicable most recent case law, as
6 well as common sense. Some decisions to arrest may be based on policy considerations, others
7 may be split-second reactions or retaliations or actions of bad faith, all of which require an inquiry
8 into the specific facts of the case. Furthermore *Martinez v. Maruszczak*, as followed by the Nevada
9 Supreme Court’s reluctance to render any split-second law enforcement decision one of public
10 policy as explained in *Estate of Brenes v. Las Vegas Metro. Police Dep’t*, casts doubt on the State
11 of Nevada’s desire to afford *blanket* immunity to these case-by-case officer decisions.
12

13 **Non-Policy Discretion and Bad Faith**

14 Indeed, the federal case law cited by the Defendants contains the following qualification:
15 “It is only when officers act in bad faith or in disregard for a citizen's rights that they lose
16 discretionary-function immunity.” *See* NRS 41.032; *Jones v. LVMPD*, 873 F.3d 1123, 1133 (9th
17 Cir. 2017).” *Napouk v. Las Vegas Metro. Police Dep’t*, 669 F. Supp. 3d 1031, 1047 (D. Nev. 2023).
18

19 This Court has already held, as it relates to the point of bad faith, that: “Because a
20 reasonable jury could find that Bourque lacked probable cause or that he engaged in First
21 Amendment retaliation (as discussed below), a reasonable jury may also find that the arrest and
22 search incident to arrest were in bad faith or violated the Constitution.
23

24 Discretionary immunity therefore does not apply.” *See* ECF 100 at 26. This being the case,
25 the Court should not now reverse course and grant discretionary function immunity before letting
26 the jury decide whether Bourque was acting “in bad faith” in reference to “arrest and search.”

1 *Napouk v. Las Vegas Metro. Police Dep't*, 669 F. Supp. 3d 1031, 1047 (D. Nev. 2023)(discussing
2 the loss of discretionary function where there is evidence of bad faith).

3
4 If this Court disagrees and believes Plaintiff must go to the evidence to respond, there exist
5 general contests of material fact which should preclude summary judgment on this point. To
6 establish the existence of a genuine factual dispute, the non-moving party need not establish a
7 material issue of fact conclusively in its favor but show the factual dispute requires a jury or judge
8 to resolve the differing versions of the truth at trial. See *Schuster v. Bannister*, Case No. 3:11-cv-
9 00081-HDM (WGC), 2012 WL 6917787 at *2 (D. Nev. Dec. 7, 2012).

10
11 To survive summary judgment (assuming *arguendo* this Court were to find that the moving
12 party has met its initial burden), Plaintiff need only identify facts or contested facts which could
13 entitle the jury to find that the Defendants' actions were not *policy-related* discretionary acts, or
14 that they were done in bad faith. This Court has already observed (or taken as true for the purposes
15 of summary judgment) the following²:

- 17 • DeCastro has presented evidence that he was engaged in protected First
18 Amendment activity by filming the police and making comments to Bourque.
- 19 • DeCastro's general right to film and to hurl insults at Bourque or verbally challenge
20 Bourque's conduct were clearly established First Amendment rights.
- 21 • Arresting a person for exercising those rights would chill the First Amendment
22 activities of a person of ordinary firmness.
- 23 • A reasonable jury could find there was a substantial causal relationship between the
24 arrest and DeCastro's filming and speech.
- 25
- 26

² See ECF 100 at p. 35-36.

- 1 • If the jury finds there was no probable cause, they may conclude that the arrest was
2 motivated by retaliatory animus rather than probable cause.
- 3 • Although Bourque told DeCastro he could continue filming, viewing the facts in
4 the light most favorable to DeCastro, a reasonable jury could find that Bourque
5 released the driver and turned his attention to DeCastro because DeCastro was
6 filming the incident and insulted Bourque and verbally challenged his authority.
- 7 • Additionally, three other individuals came close to and walked through the area
8 where DeCastro was being detained who were not filming or making disparaging
9 comments, and they were neither warned to move nor arrested. That difference in
10 treatment may support a finding that Bourque treated DeCastro differently because
11 he was filming and commenting.

12 This being the case, the Court has already correctly found that the evidence would support a theory
13 that Officer Bourque's on-the-spot decision to arrest Plaintiff was not tied to public policy
14 considerations, but rather was motivated by bad faith, retaliation, or merely being annoyed by
15 Plaintiff's filming and comments.

16 This being the case, especially given the fact movant has not identified the absence of
17 material factual disputes on these issues, the Court cannot conclude as a matter of law that the (1)
18 Defendants' actions were public-policy-related discretion; (2) *and* not done in bad faith, both of
19 which would be required to apply discretionary function immunity.

20 Indeed, the evidence at trial will establish that Bourque's decision to arrest Plaintiff was
21 not related to public policy discretion, and indeed was done in bad faith. As this Court is already
22 aware, Bourque's actions can be reasonably interpreted as contradicting his stated reasons for
23 arresting DeCastro. Bourque did not interfere with other individuals meandering through the scene.

1 Bourque admittedly lied in telling DeCastro that the driver was entitled to privacy, but at trial he
2 claimed he only said this as, essentially, a ruse to get DeCastro to back away. Bourque did not
3 decide to arrest DeCastro until DeCastro continued filming and used insulting language, both of
4 which give rise to an inference that the arrest was motivated by retaliation rather than legitimate
5 public policy. Under these circumstances, application of the discretionary function immunity, *as*
6 *understood by Nevada*, would be wholly inappropriate. The Motion (ECF 102) must be denied.
7

8 **Summary Judgment is not Appropriate as to Invasion of Privacy**

9
10 Next, Defendants argue that the invasion of privacy claim must also be dismissed for
11 multiple reasons. The first reason is that the invasion of privacy was discretionary for the same
12 reasons argued above. However, as Plaintiff has rebutted the Defendants' argument above, and
13 again the movant cites no facts whatsoever in support of this proposition, they have not met their
14 burden and this part of the argument must be rejected. *See* Motion at 11.
15

16 Next, Defendants argue that "DeCastro did not have an objectively reasonable expectation
17 of privacy in his personal effects during the event because of his provocative and uncooperative
18 conduct during the subject incident, namely his insistence on willfully disobeying the commands
19 of Ofc. Bourque prior to his arrest. Resultantly, the Court should grant summary judgment to that
20 claim." *Id* at 11.
21

22 This argument must be rejected. This argument is essentially that, even if a juror would be
23 entitled to find that DeCastro was exercising his constitutional rights, and that his arrest and search
24 (and therefore invasion of privacy) was retaliatory, DeCastro could not reasonably expect Officers
25 not to break the law and retaliate against him, because he was being "provocative and
26 uncooperative during the subject incident." This would mean that citizens cannot reasonably
expect privacy so-long as they are well aware of the fact that law enforcement officers might
routinely respond to provocation by breaking the law. This principle should not be ratified by this

1 Court, as it would mean that state agents defeat a right of privacy merely by making it well-known
2 that they are predisposed to do something, even something unlawful, in response to First
3 Amendment filming or the hurling of insults. This is not a reasonable application of the law.
4

5 Citizens in Nevada are entitled to have a subjective expectation that their rights and privacy
6 will be carefully guarded so-long as their conduct is lawful, even if their conduct is provocative.
7 Provocative lawful conduct does not, or should not, erase a person's constitutional or common law
8 protections, such as privacy. Indeed, provocative individuals are often the ones most in need of
9 those rights.
10

11 The Motion (ECF 102) must be denied.

12 Dated this 1st day of November, 2024.
13
14

15 **/s/ Michael Mee, Esq.**
16 MICHAEL MEE, ESQ.
17 Nevada Bar #: 13726
18 400 South Street #500
19 Las Vegas, Nevada 89101
20 Tel: (702) 990-0190
21 attorneymichaelmee@gmail.com
22 *Counsel for Appellant*
23
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25
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Appendix was served upon those parties registered to receive electronic service in the above-captioned matter.

Dated this 1st day of November, 2024.

/s/ Michael Mee, Esq.
MICHAEL MEE, ESQ.
Nevada Bar #: 13726
400 South Street #500
Las Vegas, Nevada 89101
Tel: (702) 990-0190
attorneymichaelmee@gmail.com
Counsel for Appellant