HONORABLE CATHERINE RAMSEY, North Las Vegas Municipal Judge, Appellant, *v.* THE CITY OF NORTH LAS VEGAS; BARBARA A. ANDOLINA, City Clerk of North Las Vegas; BETTY HAMILTON; MICHAEL WILLIAM MORENO; and BOB BORGERSEN, Individually and as Members of "Remove Ramsey Now," Respondents.

No. 68450

April 13, 2017 392 P.3d 614

Appeal from a district court order denying injunctive relief and dismissing an action concerning the recall of a public officer. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Reversed and remanded.

Pickering, J., with whom Douglas, J., agreed, dissented.

Mueller Hinds & Associates, Chtd., and *Craig A. Mueller* and *Steven M. Goldstein*, Las Vegas, for Appellant.

Snell & Wilmer, LLP, and *Patrick G. Byrne, Richard C. Gordon*, and *Daniel S. Ivie*, Las Vegas, for Respondents the City of North Las Vegas and Barbara A. Andolina, City Clerk of North Las Vegas.

Gentile, Cristalli, Miller, Armeni & Savarese and *Dominic P. Gentile, Colleen E. McCarty*, and *Ross J. Miller*, Las Vegas, for Respondents Betty Hamilton, Michael William Moreno, and Bob Borgersen, individually and as members of Remove Ramsey Now.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Amicus Curiae Nevada Judges of Limited Jurisdiction.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

In 1976, amid growing concern that no central administrative authority existed to unify Nevada courts and that this state's judges were not being held to uniform and consistent standards, Nevada's voters approved the creation of the Commission on Judicial Discipline (the Commission) through constitutional amendment to provide for a standardized system of judicial governance. This amendment provides for the removal of judges from office as a form of

[1]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

discipline. Thus, in conjunction with the Commission's creation, a new Code of Judicial Conduct was developed with the expectation that these measures would promote judicial independence and political neutrality, while at the same time improving the public's ability to hold judges accountable for their conduct in office.

A group of individuals within the City of North Las Vegas seeks to remove a municipal judge, not through the system of judicial discipline established by the majority of voters in 1976, but through a special recall election. Whether the existing state constitutional provision providing for the recall of "public officers," Article 2, Section 9, applies to judges has not been previously considered by this court. However, even if the recall of public officers provision is interpreted to include judges, we conclude that the voters' subsequent approval of the system for judicial discipline, which plainly grants the Commission the exclusive authority to remove a judge from office with only one exception, the legislative power of impeachment, supersedes any provision that would allow for judges to be recalled by other means.

FACTUAL AND PROCEDURAL HISTORY

At the 2011 local election, City of North Las Vegas voters elected appellant Catherine Ramsey to a six-year term as a municipal judge. Before Ramsey's term expired, a group called "Remove Ramsey Now"[2] created a recall petition seeking to force an election to remove her from office. The group alleged that Ramsey improperly used city assets for personal use, was excessively absent from work, and mistreated staff and other people in her courtroom.[3] After gathering signatures, Remove Ramsey Now submitted the recall petition for verification to respondent Barbara Andolina, city clerk for respondent City of North Las Vegas. Sufficient signatures were certified, and the Secretary of State deemed the petition qualified.

Ramsey sought an emergency injunction from the district court and also later filed a complaint challenging the legal sufficiency of the recall petition. Ramsey argued that judges are not "public officers" subject to recall under Article 2, Section 9 of the Nevada Constitution, and that even if they once were, the voters' approval of

[2]For purposes of this case, Remove Ramsey Now is represented by respondents Betty Hamilton, Michael William Moreno, and Bob Borgersen.

[3]The Commission formally charged Ramsey with judicial misconduct in February 2016. On August 23, 2016, Ramsey and the Commission filed a Stipulation and Order in which Ramsey admitted to various violations of the Nevada Code of Judicial Conduct and consented to discipline including a three-month suspension from office without pay commencing three months prior to the expiration of her current term of office and a bar against seeking reelection to the North Las Vegas Municipal Court in 2017. *See Mack v. Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106 (2009) (stating that this court may take judicial notice of administrative proceedings when there is a valid reason for doing so).

the judicial discipline process in 1976 superseded all other forms of judicial removal except legislative impeachment. She also asserted that various issues with respect to notice of the signature verification process and the form of the petition violated her constitutional rights and invalidated the petition.

The district court consolidated the two actions. After a two-day evidentiary hearing, the district court denied all of Ramsey's claims, concluding that judges were public officers subject to recall under the Nevada Constitution and that Ramsey's rights ultimately were not violated. Ramsey now appeals.

DISCUSSION

This court reviews questions of constitutional interpretation de novo. *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). In interpreting an amendment to our Constitution, we look to rules of statutory interpretation to determine the intent of both the drafters and the electorate that approved it. *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011); *Halverson v. Sec'y of State*, 124 Nev. 484, 488, 186 P.3d 893, 897 (2008). We first examine the provision's language. *Landreth*, 127 Nev. at 180, 251 P.3d at 166. If plain, we look no further, but if not, "we look to the history, public policy, and reason for the provision." *Id*. When so doing, we keep in mind that "a contemporaneous construction by the [L]egislature of a constitutional provision is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper," because it is likely that legislation drafted near in time to the constitutional provision reflects the constitutional drafters' mindset. *Halverson*, 124 Nev. at 488-89, 186 P.3d at 897 (internal quotations omitted); *Porch v. Patterson*, 39 Nev. 251, 260, 156 P. 439, 442 (1916) (Coleman, J., dissenting) (same).

I.

Voter recall of "public officer[s]" has been available in Nevada since Article 2, Section 9 of the Nevada Constitution was adopted in 1912. In its current form, the article provides, in part, that

> [e]very public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents.

To force a recall election, at least 25 percent of the number of voters voting in the election in which the subject official was elected must sign a petition demanding the public officer's recall and setting forth the reasons therefor. Nev. Const. art. 2, § 9. If the public officer does not resign, a special election must be held. *Id.*

The term "public officer" is not expressly defined in the Nevada Constitution, and no prior judicial decision by this court has con-

sidered whether judges are within the scope of Article 2, Section 9. However, other states with similar constitutional provisions have decided, either expressly or impliedly, that "public officers" include judges.

Idaho and Washington each added amendments providing for the recall of "public officers" at around the same time Nevada adopted Article 2, Section 9. *See* Idaho Const. art. VI, § 6 (added 1911, ratified 1912); Wash. Const. art. I, §§ 33-34 (adopted by amendment 1911, approved 1912). Article VI, Section 6 of Idaho's constitution provides that "[e]very public officer . . . , excepting the judicial officers, is subject to recall." Similarly, Article I, Section 33 of Washington's constitution provides that "[e]very elective public officer in the state of Washington expect [except] judges of courts of record is subject to recall." (Alteration in original). Idaho's and Washington's explicit exclusion of judges from their respective recall provisions implies that judges are included in the term "public officer."

Arizona, Colorado, and Oregon also adopted constitutional recall provisions around the same time as Nevada, which also use the term "public officer," but did not specifically exclude judicial officers. *See* Ariz. Const. art. VIII, pt. 1, § 1; Colo. Const. art. XXI, § 1; Or. Const. art. II, § 18(1). In each of these states, the courts implicitly concluded that members of the judiciary were considered public officers and thus subject to recall pursuant to their constitutions. *See Abbey v. Green*, 235 P. 150, 152 (Ariz. 1925); *Marians v. People ex rel. Hines*, 69 P. 155, 155 (Colo. 1917); *State ex rel. Clark v. Harris*, 144 P. 109, 110 (Or. 1914).

We, like our sister states, believe that judges are public officers for purposes of Nevada's constitutional recall provision adopted in 1912. However, even if judges originally could be recalled, Ramsey argues that the creation of the Commission in 1976 superseded any such recall authority over judges. We agree.

II.

A.

Nevada voters entrusted the Commission with the power to remove judges from office under Article 6, Section 21. In 1967, the Nevada Legislature convened a commission to complete a comprehensive study of the organization and structure of the Nevada court system. Legislative Commission of the Legislative Counsel Bureau, *Nevada's Court Structure*, Bulletin No. 74, at 23 (1968) (citing S. Con. Res. 18, 54th Leg. (Nev. 1967)).[4] In exploring the election and removal of judges with a view toward promoting an independent judiciary under a uniform court system, the legislative commission

[4]*Nevada's Court Structure*, Bulletin No. 74, is *available at* https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1969/Bulletin074.pdf.

recommended modifying the court structure in two major respects. First, it suggested that the system be changed so that judges were appointed, rather than elected. *Id.* at 31-32. Second, the legislative commission recognized that election was also an ineffective and haphazard way to remove judges who were not performing their duties, and that an impartial removal process conducted by an informed, investigative body was necessary. *Id.* at 33-34. The legislative commission believed that a board comprised of laypersons and judges alike should be able to investigate complaints against a judge and would be in a better position to evaluate the performance of a judge and recommend corrective action, if warranted. *Id.* at 33.

Around the same time, various bills in the Legislature introduced the idea of the Commission, a neutral board that would have authority to discipline and remove judges from office. *See* Hearing on A.J.R. 5 Before the Assembly Judiciary Comm. 54th Leg. (Nev., March 29, 1967) (no action—held for future bill); Hearing on S.J.R. 23 Before the Senate Judiciary Comm., 55th Leg. (Nev., March 20, 1969) (complete revision of Article 6, defeated by the voters in 1972); Hearing on S.J.R. 23 Before the Senate Judiciary Comm., 56th Leg. (Nev., January 19, 1971) (same); Hearing on A.J.R. 16 Before the Assembly Judiciary Comm., 57th Leg. (Nev., March 6, 1973) (proposed creating the Commission only); Hearing on A.J.R. 16 Before the Assembly Judiciary Comm., 58th Leg. (Nev., May 6, 1975) (same; enrolled and delivered to Secretary of State and approved by voters in 1976). Although the voters rejected a large-scale revision of the court structure in 1972, including a plan to appoint judges, they individually approved several aspects of that revision in 1976, including vesting this court with authority over all other Nevada courts and the creation of the Commission. Nev. Const. art. 6, §§ 19, 21.

As enacted in 1976, Article 6, Section 21(1) states, in relevant part, as follows:

> A justice of the [S]upreme [C]ourt, a district judge, a justice of the peace or a municipal judge may, *in addition to the provision of Article 7 for impeachment*, be censured, retired, removed or otherwise disciplined by the commission on judicial discipline.

(Emphasis added.)[5] The emphasized language providing the single exception—for impeachment by the Legislature under Article 7—is, Ramsey asserts, proof that all other means of removing judges were superseded when the Nevada Constitution was amended to create the Commission.

To solidify the process of judicial discipline, along with the Commission as the enforcer of such discipline, work began in 1975 to

[5]Article 6, Section 21 was amended in 2015 to include judges on the newly created court of appeals.

create a comprehensive and enforceable code of judicial conduct, fashioned after the model code adopted by the American Bar Association. Hearing on S.B. 453 Before the Assembly Judiciary Comm., 59th Leg. (Nev., April 20, 1977). The resulting Nevada Code of Judicial Conduct (NCJC) was adopted in 1977. NCJC (1977). Testimony during the legislative hearing confirmed that the NCJC was intended to further the Legislature's goals of unifying the court system in an arrangement under which all judges were held to the same standards, enforced by the Commission and this court. Hearing on S.B. 453 Before the Assembly Judiciary Comm., 59th Leg. (Nev., April 20, 1977) (testimony of Judge Richard Minor, President, Nevada Judges Association); *see also* Hearing on S.B. 453 Before the Senate Judiciary Comm., 59th Leg. (Nev., April 13, 1977) (Ex. B, letter from Justice E.M. Gunderson to Governor Mike O'Callaghan).[6]

The legislative history demonstrates that, at the time Article 6, Section 21 was approved by the voters, the Commission was viewed as integral to protecting the judiciary's independence throughout the unified court system by providing a means by which all judges would be held to objective, established standards enforced in a consistent manner. Given this history and the seemingly intentional decision by the Legislature as the drafters of the constitutional amendment to omit any reference to recall in Article 6, Section 21, the provision must be read as the exclusive means of judicial removal except for legislative impeachment.

B.

On its face, Article 6, Section 21 expressly retains legislative impeachment as a means of removal but does not mention the Article 2, Section 9 recall provision. We are compelled to conclude that Article 6, Section 21 can be read no way other than as providing the exclusive means for judicial removal except for impeachment without defeating the very reasons for its adoption.

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[6]The dissent relies on a Legislative Counsel Bureau (LCB) report from 1981 suggesting that the purpose of creating the Commission was to rectify the shortcomings of other methods of judicial removal, not to supersede recall. Nev. Legis. Couns. Bureau, Res. Div., *Judicial Discipline* 1, 2 (Nev. Div. Res. Publ'ns, Background Paper No. 81-8, 1981), https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP81-08.pdf. The LCB was commenting on the ineffectiveness of recall as a means of removal. *Id*. at 1. It was noted that the judicial branch was to some extent dependent on the other branches of government and that judges were not completely independent from public control. *Id*. at 3. Proponents viewed judicial discipline commissions as a way to free the judiciary from these influences while also holding judges accountable for their conduct. *Id*. This comports with our conclusion today that the removal of judges from office, other than through impeachment, falls solely within the province of the Commission.

As noted above, Article 6, Section 21 provides for a comprehensive, standardized system for removing judges who violate their ethical and judicial performance duties, while expressly maintaining a singular exception for the Legislature to remove a judge from office through impeachment proceedings. No other method of removal is retained.[7]

As a result, the maxim *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), long adhered to in this state, instructs us to view the failure to acknowledge any other existing method of removal as intent to allow no other method. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision." (quoting *State ex rel. Keyser v. Hallock*, 14 Nev. 202, 206 (1879) (internal quotations omitted))); *see also State ex rel. Josephs v. Douglass*, 33 Nev. 82, 95, 110 P. 177, 181 (1910) ("We think the maxim '*Expressio unius est exclusio alterius*,' clearly applicable, and that the [C]onstitution by specifically designating certain particular offices of a particular class which may be consolidated, etc., intended to exclude from such provisions all other constitutional offices."), *overruled on other grounds by State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 765, 32 P.3d 1263, 1270 (2001); *Goldman v. Bryan (II)*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (noting "the 'well-recognized rule that an express constitutional provision requiring a certain thing to be done in a certain way is exclusive to like extent as if it had included a negative provision to the effect that it may not be done in any other way'" (quoting *Robison v. First Judicial Dist. Court*, 73 Nev. 169, 175, 313 P.2d 436, 440 (1957))); *State ex rel. O'Connell v. Slavin*, 452 P.2d 943, 946 (Wash. 1969) ("For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time."). Any existing authority to recall judges was thus superseded by the centralized system to hold all judges equally accountable to the public previously discussed.

This interpretation is supported by contemporaneous legislation. As Ramsey points out, in 1977, the Legislature enabled Article 6, Section 21 by enacting NRS 1.440, which provided, in pertinent part, that "[t]he commission on judicial discipline has exclusive jurisdiction over the censure, removal and involuntary retirement of justices of the peace and judges of municipal courts which is coex-

[7]The dissent maintains that Article 6, Section 21 only contemplates *for cause* removals and therefore does not supersede the recall provision permitting the removal of judicial officers for any reason. However, the legislative history of Article 6, Section 21, which clearly catalogs the drafters' efforts to subject judges to the consistent enforcement of uniform standards of conduct, is inconsistent with distinguishing *for cause* removals from *not for cause* removals.

tensive with its jurisdiction over justices of the supreme court and judges of the district courts." 1977 Nev. Stat., ch. 471, § 1, at 936-37. That same legislation excluded judges from the purview of NRS 283.440, which governs the removal of public officers from office. *Id*. at 937. This contemporaneous legislation strongly suggests that the Legislature, as the drafter of Article 6, Section 21, intended that process to be exclusive. *Halverson v. Sec'y of State*, 124 Nev. 484, 488-89, 186 P.3d 893, 897 (2008). Accordingly, as the Legislature recognized in NRS 1.440, Article 6, Section 21 must be read to exclude recall as a means of removing a judge from office.[8]

Contrastingly, the Oregon Constitution has provided for the right of its citizens to recall "public officer[s]" since 1908. Or. Const. art. II, § 18(1) (1908) (enacted). In 1967, the Oregon Legislature created a Commission on Judicial Fitness and Disability, giving it authority to investigate a judge's conduct and recommend removal to the Oregon Supreme Court. Or. Rev. Stat. §§ 1.410, 1.420 (1967). And the Oregon Constitution was amended at the same time to provide that its supreme court could remove a judge from office "[i]n the manner provided by law." Or. Const. art. VII, § 8(1) (1968) (amended). Unlike Nevada, however, Oregon's voters approved express language acknowledging that the supreme court's removal power coexisted with the citizens' recall power. Or. Const. art. VII, § 8(2). If the Nevada amendment was intended by the Legislature to maintain any recall power over judges, we presume that it, too, would expressly say so, as the amendment did with respect to the legislative impeachment power.[9] *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional.").

C.

Our precedent also permits us to consider *expressio unius* when determining whether an earlier enacted provision is repealed based

[8]The Commission's disciplinary decisions are subject to review by this court. Nev. Const. art. 6, § 21(1). Nothing in this opinion detracts from this court's authority over the conduct of Nevada judges. *See Lueck v. Teuton*, 125 Nev. 674, 677, 219 P.3d 895, 897 (2009) (noting that courts have the power to administrate justice, supervise judicial authority, and preserve judicial integrity).

[9]In 1970, the Arizona Constitution was amended to create a Commission on Judicial Conduct that had the authority to investigate judicial conduct and to recommend the removal of Arizona judges from office. *See Jett v. City of Tucson*, 882 P.2d 426, 429 (Ariz. 1994). In *Jett*, an appeal questioning whether the Commission's authority over magistrates annulled the City's power to remove a magistrate from office, the court recognized that the Commission's adoption did not divest "the citizens of their power of recall." *Id.* at 431. However, the Arizona recall provision does not indicate that other removal methods are invalid, as Nevada's does through express continuation of the impeachment power, compelling the implicit negation of any other removal powers.

on an omission from a later enacted provision. In *Thomas v. Nevada Yellow Cab Corp.*, we considered the effect that the constitutional minimum wage amendment's enactment had on NRS 608.250(2)'s longstanding explicit exemption of taxicab drivers from minimum wage requirements. 130 Nev. 484, 488, 327 P.3d 518, 521 (2014). In relying on *expressio unius*, we noted that the amendment provided for several exemptions from minimum wage but omitted any reference to a taxicab exemption. *Id*. We therefore concluded that because of this omission, the amendment must be interpreted as excluding any exemption for taxicab drivers, and thus inconsistent with and impliedly repealing NRS 608.250(2)'s taxicab driver exemption.[10] *Id*. at 488-89, 327 P.3d 521.

Furthermore, the conclusion here is more restrained than in *Thomas*, as there exists no certainty that the Legislature and the electorate in 1976 viewed the recall provision as applying to judges. Instead, only a *potential but uncertain interpretation* of Article 2, Section 9 is addressed. In so reading the provisions, we harmonize the Nevada Constitution by rejecting an application of Article 2, Section 9 that would be inconsistent with the later enacted language of Article 6, Section 21. *See We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) ("[T]he interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions.").

As we stated in *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 772, 383 P.3d 257, 260 (2016), a newer provision impliedly supersedes the older when "the two are irreconcilably repugnant, such that both cannot stand." (internal quotation marks omitted). According to the dissent, judicial recall under Article 2, Section 9 can be read harmoniously with Article 6, Section 21. However, such an interpretation would frustrate the purpose of a uniform code of judicial conduct and the creation of the Commission. Whereas the Commission's purpose is to be consistent, public opinion rarely is; instead, conduct that may yield a recall in one district may not do the same in another. The dissent correctly points out that recall is unique because it allows voters to initiate removal for cause they alone decide. Such a result is precisely what the creation of the Commission was intended to avoid. Thus, Article 6, Section 21 cannot stand alongside judicial recall under Article 2, Section 9.

The dissent also points to the ballot materials that accompanied the proposed amendment creating the Commission for the proposition that voters unwittingly gave up their recall power. Those materials provided:

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[10]The dissenting justices disapprove of our consideration of *expressio unius* in rendering our decision. However, it should be noted that both dissenting justices approved of our use of this widely accepted canon of construction when they joined in the majority in *Thomas*.

> A majority vote of "yes" would amend article 6 by adding a new section to the article. The new section would provide for the establishment of a Commission on Judicial Discipline which would be empowered to censure, retire, or remove justices or judges. Grounds for censuring justices or judges would be determined by rules by the Supreme Court. *Justices and judges could not be removed except for willful misconduct, willful or persistent failure to perform the duties of their offices or habitual intemperance.* Justices or judges could not be retired except for advanced age which interferes with the proper performance of their judicial duties, or for mental or physical disabilities which prevent the proper performance of their judicial duties and which are likely to be permanent in nature.

State of Nev. Dep't of State, Constitutional Amendments to be Voted Upon in State of Nevada at General Election, 57th and 58th Sess., at 15-17 (available at Nevada Legislative Counsel Bureau Research Library) (emphasis added). As the ballot materials suggest, voter recall was affirmatively supplanted by removal through the Commission.

This vote in favor of Commission removal reflects the unique status of the judiciary vis-à-vis other elected officials. The process and manner by which judicial officers are elected is unique among elected officials. Unlike those seeking legislative or executive office, those seeking election to the judiciary must remain largely apolitical: judges and judicial candidates are forbidden from acting "as a leader in, or hold[ing] office in, a political organization," "mak[ing] speeches on behalf of a political organization," "publicly endors[ing] or oppos[ing] a candidate for any public office," "solicit[ing] funds for a political organization or candidate for public office," "publicly identify[ing] himself or herself as a candidate of a political organization," or "seek[ing], accept[ing], or us[ing] endorsements or publicly stated support from a political organization." NCJC, Canon 4, Rule 4.1(A)(1)-(7). As noted in the commentary:

> Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.

Id. cmt. [1].

Also, the role of the judiciary is fundamentally different from those of the executive or legislative branches. "The judicial depart-

ment in the United States is subservient to only the Federal Constitution, the established law of the land, and, if a state judiciary, the state constitution." 16 C.J.S. *Constitutional Law* § 387 (2016) (citing *White v. State*, 47 So. 2d 863 (Fla. 1950); *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); *People v. Spegal*, 125 N.E.2d 468 (Ill. 1955); *People v. Scher*, 349 N.Y.S.2d 902 (N.Y. Sup. Ct. 1973)). Thus, while the role of the executive and legislative branches is to effect the will of the electorate, the role of the judiciary is, ultimately, to uphold and defend by rule of law the federal and Nevada Constitutions.

Finally, the dissent suggests that our conclusion divests the voters of their political power as secured by the Nevada Constitution. However, the voters exercised that very power when they voted to add Article 6, Section 21 to the Nevada Constitution. Through establishment of the Nevada Commission on Judicial Discipline, Nevada voters effectively created a regulatory body with oversight and power the likes of which are unique to the Nevada judiciary. Neither the legislative nor executive branch is subject to the same constitutionally mandated scrutiny as is the judiciary after the adoption of Article 6, Section 21. Thus, by approving the creation of the Commission, Nevada voters secured their interests in judicial oversight by establishing a governing body equipped to undertake the task.

In sum, we acknowledge that Nevada's judges were subject to voter recall under Article 2, Section 9 as that provision was enacted in 1912. However, the subsequent enactment of Article 6, Section 21 superseded voter recall of judicial officers under the Nevada Constitution. First, the legislative history indicates that creation of the Commission was intended to supplant other forms of judicial removal, save legislative impeachment. Second, Article 2, Section 9 and Article 6, Section 21 can be read harmoniously only if the latter is read to supersede the former with respect to judges. Thus, we must read Article 6, Section 21 as repealing voter recall of judicial officers. Finally, the ballot materials, legislative history, and public policy concerns behind Article 6, Section 21 highlight the importance of insulating the judicial branch from political influences, a prerogative that cannot be accomplished if voter recall of judicial officers under Article 2, Section 9 is read to have survived the 1976 amendment.

CONCLUSION

Based on the language and legislative history of the 1976 amendment implementing a central, uniform, and objective process for removing a judge from office, which expressly provides for the continuation of only one other removal method, we conclude that the drafters of the constitutional amendment and the electorate who ap-

proved it intended that recall no longer be an available means of removing a judge from office. Accordingly, the recall petition against Ramsey is invalid, and we reverse the district court's order.[11] Ramsey is entitled to an injunction preventing Remove Ramsey Now and the City of North Las Vegas from proceeding with the recall election, and we thus remand this matter to the district court for further proceedings consistent with this opinion.

CHERRY, C.J., and GIBBONS and PARRAGUIRRRE, JJ., concur.

PICKERING, J., with whom DOUGLAS, J., agrees, dissenting:

Nevada voters have the power to recall an elected judge. Article 2, Section 9 of the Nevada Constitution states: "Every public officer in the State of Nevada is subject, as herein provided, to recall by the registered voters." By its plain terms, this provision applies to judges equally with every other public officer in Nevada. That judges are also subject to discipline, up to and including removal from office, by the Nevada Commission on Judicial Discipline, Nev. Const. art. 6, § 21, does not exempt them from recall under Article 2, Section 9.

The conflict the majority contrives between citizen recall and Commission discipline is just that: contrived. Nothing—not text, context, history, the ballot materials the voters received, or the pronouncements of this court and Nevada's lead constitutional scholars—supports that our citizens gave up the right to recall judges when they approved the creation of the Judicial Discipline Commission. Citizen recall and Commission discipline can and do coexist, both in our Constitution and in the constitutions of other states with recall and judicial discipline provisions like ours, including California on whose constitution Nevada relied in creating our Judicial Discipline Commission.

Reasonable minds differ, and have historically differed, on the wisdom of subjecting judges to election and recall. Be that as it may, our job as judges is to enforce the Nevada Constitution as written. Whether the members of this court agree or disagree with the policy choices reflected in the Constitution, we may not, under the guise of interpretation, add or subtract words from its text to change its plain meaning. For the majority to revise the Constitution to exempt themselves and the rest of the Nevada judiciary from our citizens' constitutional right of recall sets dangerous interpretive precedent, from which I dissent.

I.

The question presented is whether an elected municipal court judge is a "public officer" whose recall Article 2, Section 9 allows.

[11]In light of this conclusion, we need not reach Ramsey's arguments concerning notice and the recall petition's validity.

"In interpreting Article 2, Section 9, we . . . 'are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)). "It must be very plain—nay, absolutely certain—that the people did not intend what the language they have employed, in its natural signification, imports, before a Court will feel itself at liberty to depart from the plain reading of a constitutional provision." *State v. Doron*, 5 Nev. 399, 412 (1870) (internal quotation omitted).

A.

A straightforward reading of Article 2, Section 9 is that it includes judges when it says:

> Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents.

Merriam-Webster defines "every" as "each individual or part of a group without exception." *Every*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). A "judge" is "[a] public official appointed or elected to hear and decide legal matters in court." *Judge*, *Black's Law Dictionary* (10th ed. 2014). And an "officer" is "[a] person who holds an office of trust, authority or command. In public affairs, *the term refers esp. to a person holding public office under a national, state or local government, and authorized by that government to exercise some specific function*." *Id.*, *Officer* (emphasis added).

Giving its words their normal and ordinary meaning, Article 2, Section 9 includes judges among the public officers it subjects to recall.

B.

The majority does not analyze Article 2, Section 9's text, or explain how its words can fairly be read to exclude judges. Instead, it concedes that, as originally enacted, Article 2, Section 9 *may* have applied to judges, majority opinion *ante* at 97-99, 104, then hedges its concession by disparaging this reading as "only a *potential but uncertain interpretation* of Article 2, Section 9." *Id.* at 104 (emphasis in original). But history demonstrates no uncertainty: The Nevadans who adopted Article 2, Section 9 knew that it subjected judges to recall and adopted it with that express understanding in mind.

Nevada added Article 2, Section 9 to its Constitution in 1912. At the time, "the 'progressive' movement for giving the people closer

control over the laws and officials was especially strong in many Western states," Nevada among them. Don W. Driggs, *The Constitution of the State of Nevada: A Commentary*, at 29 (1961). Believing that "voters should have [the] power to bypass or countermand elected officials," W. Richard Fossey, *Meiners v. Bering Strait School District and the Recall of Public Officers: A Proposal for Legislative Reform*, 2 Alaska L. Rev. 41, 42 (1985), "states began building into their constitutions opportunities for direct lawmaking by the citizen voters themselves," including provisions that "allowed voters to recall state legislators, as well as state executive and judicial officers." Vikram Amar, *The 20th Century—The Amendments and Populist Century*, 47 Fed. Law. 32, 35 (May 2000).

In 1908 Oregon became the first state to place a recall provision in its constitution. Fossey, *supra*, at 42. Arizona, California, Colorado, Idaho, Washington, and Nevada soon followed. *Id.*; *see* Ariz. Const. art. VIII, pt. 1, § 1 (1912); Cal. Const., Art. 23 (1911, amended and recodified as Cal. Const. art. II, §§ 13-14 (1976)); Colo. Const. art. XXI, § 1 (added 1913); Idaho Const. art. VI, § 6 (added 1911, ratified 1912); Wash. Const. art. I, §§ 33-34 (adopted by amendment 1911, approved 1912); Nev. Const. art. 2, § 9 (added 1912, amended 1970 and 1996). These recall provisions mirrored one another in that each used "public officer" to describe whom the voters can recall. But they differed when it came to judges: Idaho and Washington expressly exempted judges from recall. Idaho Const. art. VI, § 6 ("[e]very public officer . . . , *excepting the judicial officers*, is subject to recall") (emphasis added); Wash. Const. art. I, § 33 ("[e]very elective public officer in the state of Washington *expect [except] judges of courts of record* is subject to recall") (alteration in original; emphasis added). The other states, Nevada included, subjected "every public officer" to recall, without exception. Ariz. Const. art. VIII, pt. 1, § 1 ("[e]very public officer in the State of Arizona . . . is subject to recall"); Cal. Const. art. 23, § 1 ("[e]very elective public officer of the State of California may be removed from office at any time by the electors"); Colo. Const. art. XXI, § 1 ("[e]very elective public officer of the state of Colorado may be recalled from office at any time"); Or. Const. art. II, § 18(1) ("[e]very public officer in Oregon is subject, as herein provided, to recall").

This difference in form reflected a deep philosophical divide. *See* Driggs, *supra*, at 29 (noting that "[t]he application of recall to judges [was] a very controversial issue"). Those opposed to allowing voters to recall judges objected "that a judge might be recalled because of unpopular decisions and not because he has proved himself incompetent," *id.*, and that "the common use of this method of removal would tend to drag [judges] into politics." A.J. Maestretti & Charles Roger Hicks, *The Constitution of the State of Nevada, Its Formation and Interpretation*, 34 U. Nev. Bull., Dec. 2, 1940, at 43. Proponents of judicial recall responded:

> The judiciary is but an agency of government created by the people for their service, and if its members fail to serve this purpose and prove dishonest, incapable, or indifferent to their duties or to the rights of the people, the people should have the right to remove them . . . . The people now elect the judges, in the first instance . . . ; why should they not have the power to remove them after they have been tried and found wanting? In fact, every reelection of a judge is in the nature of a recall.

Cal. Sen. Const. Am. No. 23, Recall by the Electors of Public Officials, Ballot Materials, "Reasons Why Senate Constitutional Amendment No. 23 Should Be Adopted" (1911), available at http://repository.uchastings. edu/ca_ballot_props/8.

The debate moved to the national stage in 1911, when then-President, later-Chief Justice, Taft vetoed Arizona's statehood request because its charter subjected judges to voter recall. *See* Eleanore Bushnell & Don W. Driggs, *The Nevada Constitution: Origin and Growth* 125 (5th ed. 1980). In response, "Arizona deleted the clause that had offended the president, was admitted to the Union, and then restored the clause providing for recall of judges!" *Id.*; *see* Jana Bommersbach, *How Arizona Almost Didn't Become a State* (Feb. 13, 2012), available at http://archive.azcentral.com/arizonarepublic/news/articles/20120130arizona-centennial-state-fight.html. Arizona readopted its public officer recall provision on November 5, 1912. Ariz. Const. art. VIII, pt. 1, § 1 (approved Nov. 5, 1912, eff. Dec. 5, 1912). This was the same day Nevadans voted by a 9:1 margin to add Article 2, Section 9 to the Nevada Constitution, George Brodigan, *Nevada Secretary of State Official Returns of the Election of November 1912* (certifying Article 2, Section 9 passed 9636 to 1173), over strenuous opposition from the Nevada and American Bar Associations and a leading Nevada newspaper. *See Don't Favor the Recall*, Carson City Daily Appeal, July 26, 1912, at 4 (urging Nevadans to reject Article 2, Section 9 because it allowed judges to be recalled, which the Nevada Bar Association opposed); Joel B. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* 53 (1965) (describing the ABA's campaign against judicial recall provisions as an "intense, vituperative, almost hysterical propaganda offensive").

There was, in sum, nothing "uncertain" or "potential" about Article 2, Section 9's application to judges when it was adopted or thereafter. And, soon after adopting their comparable provisions, Arizona, Colorado, and Oregon applied them to judges, and no one, not even the targeted judges, disputed that judges were "public officers" and subject to recall. *See Abbey v. Green*, 235 P. 150, 151 (Ariz. 1925); *Marians v. People ex rel. Hines*, 169 P. 155, 155 (Colo. 1917); *State ex rel. Clark v. Harris*, 144 P. 109, 110 (Or. 1914).

II.

A.

In 1976, Nevada amended its Constitution to create the Commission on Judicial Discipline and empower it to censure, remove, or otherwise discipline judges for misconduct. Nev. Const. art. 6, § 21. The amendment contained no repealing clause or other provision purporting to repeal or amend Article 2, Section 9 in whole or in part. Citing the "implied repeal" doctrine, the majority nonetheless posits that Article 6, Section 21 *impliedly*—that is to say, silently—amended Article 2, Section 9, so that now Nevada has the Idaho/Washington form of public-officer recall provision, which excludes judges, instead of the Arizona/California/Colorado/Oregon form, which applies to all public officers, judges included. Majority opinion *ante* at 99, 106. In effect, the majority has rewritten Article 2, Section 9 to add the words shown in italics, as follows: "Every public officer in the State of Nevada *except judges and justices* is subject, as herein provided, to recall."

Judges do not have the authority to rewrite unambiguous constitutional text this way. A constitution, including its amendments, is "one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr*, 188 U.S. 537, 543 (1903). "Nothing new can be put into the Constitution except through the amendatory process [and n]othing old can be taken out without the same process." *Ullmann v. United States*, 350 U.S. 422, 428 (1956); *see* Nev. Const. art. 16, §§ 1 and 2, art. 19 § 2 (specifying how citizens can amend the Nevada Constitution); *Stevenson v. Tufly*, 19 Nev. 391, 391-92, 12 P. 835, 835-36 (1887) (the Constitution cannot be amended except by following the procedures it prescribes). Once amended, "the Constitution, including all amendments thereto, must be construed as one instrument, and as a single enactment," as if the entire document had been enacted at one time. *People v. Field*, 181 P. 526, 527 (Colo. 1919). "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." *Ullmann*, 350 U.S. at 428.

The "implied repeal" doctrine, on which the majority relies to justify its revision of Article 2, Section 9, has never been applied to give one provision of the Nevada Constitution preeminence over another. *See Bowens v. Superior Court*, 820 P.2d 600, 607 (Cal. 1991) ("a constitutional provision generally should not be construed to impliedly repeal another constitutional provision"). The doctrine normally applies to statutory interpretation, where an older, preexisting statute is argued to have been impliedly repealed by a later-adopted statute or constitutional provision with which it irreconcilably conflicts. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (holding the Minimum Wage Amend-

ment, Nev. Const. art. 15, § 16, directly conflicted with, and therefore impliedly repealed, a preexisting statute). And, even in the statutory arena, "[r]epeals by implication are disfavored—very much disfavored." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012) (internal quotation omitted); *accord Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (describing implied repeals as "heavily disfavored").

"An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003), *quoting Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Arguable inconsistency will not do. The earlier and later enactment must be "irreconcilably repugnant, such that both cannot stand," *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 772, 383 P.3d 257, 260 (2016), or "logically coexist," *Thomas*, 130 Nev. at 488, 327 P.3d at 521. Even if "different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative," especially when interpreting a written constitution. Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 58 (1868); Scalia & Garner, *supra*, at 180 ("there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously"); *accord Nevadans for Nevada v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006) ("the Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision"). Last, for an implied repeal to be found, the intention to repeal must be "clear and manifest." *Posadas*, 296 U.S. at 503.

B.

Textually, the majority builds its entire implied-recall case on subparagraph (1) of Article 6, Section 21, which states: "A justice of the Supreme Court . . . , a district judge, a justice of the peace or a municipal judge may, *in addition to the provision of Article 7 for impeachment*, be censured, retired, removed or otherwise disciplined by the Commission on Judicial Discipline." (Emphasis added.) Because this subparagraph specifies the Commission's removal powers are "in addition to the provision of Article 7 for impeachment," the majority writes that it feels itself "compelled to conclude that Article 6, Section 21 can be read no way other than as providing the exclusive means for judicial removal except for impeachment without defeating the very reasons for its adoption." Majority opinion *ante* at 101.[1] Hyperbole aside, the majority misses the obvious: Commis-

[1]Besides the "implied repeal" doctrine, the majority cites the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of

sion discipline under Article 6, Section 21 and impeachment by the Legislature under Article 7, Section 2 resemble, and are "in addition to," one another in that each provides a method whereby the government can remove judges for willful misconduct. They have nothing to do with, and do not impinge, the citizens' right under Article 2, Section 9 to recall judges, equally with any other public officer. So construed, the provisions do not conflict; they harmonize.

There are "four methods by which a . . . justice or . . . judge may be removed from office during a term." Bushnell & Driggs, *supra*, at 123. Two are, to be sure, those mentioned in Article 6, Section 21(1): impeachment by the Legislature "for Misdemeanor or Malfeasance in Office," Nev. Const. art. 7, § 2; and removal by the Judicial Discipline Commission for "willful misconduct, willful or persistent failure to perform the duties of his office or habitual intemperance," *id.* art. 6, § 21(8)(a). But the Constitution provides, *in addition*, for judges to be removed by legislative address, *id.* art. 7, § 3,[2] and to be recalled by the voters pursuant to Article 2, Section 9. Last, although not a removal method per se, Article 6, Section 17 deems a judge who is absent from the State of Nevada for more than 90 days to have vacated office, empowering the Governor to fill the seat. Nev. Const. art. 6, § 20.

If Article 6, Section 21(1) repeals all judicial removal provisions except impeachment and discipline, as the majority holds, not only does Article 2, Section 9 have to be amended to exclude judges and justices, Article 7, Section 3, providing for removal by legislative address and, arguably, Article 6, Sections 17 and 20, dealing with a judge's departure from the State, need to be repealed. A more benign reading—that requires no judge-made changes to any constitutional text—recognizes that impeachment by the Legislature under Article 7, Section 2, and removal by the Commission under Article 6, Section 21(8) overlap: Each targets misbehavior by a judge while in office, authorizing removal only for malfeasance, willful misconduct, or willful or persistent dereliction of duty; the grounds must be proved at a hearing or trial; and the process is initiated and con-

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another—to support its revision of Article 2, Section 9. Majority opinion *ante* at 102. But maxims, including this one, "are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects of the instrument. . . . In relation . . . to such a subject as a constitution, the natural and obvious sense of its provisions, apart from any technical or artificial rules, is the true criterion of construction." 1 Joseph Story, *Commentaries on the Constitution of the States* § 448, at 319-20 (1851) (footnote omitted).

[2]Removal by address originated in England and refers to the removal of judges by joint address (resolution) of both houses of parliament. Burke Shartel, *Retirement and Removal of Judges*, 20 J. of the Am. Judicature Soc'y 133, 146-47 (1936). Nevada provided for removal of judges both by impeachment, Nev. Const. art 7, § 2, and legislative address, *id.* art. 7, § 3, after contentious constitutional debate. Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada*, Impeachment and Removal, at 541-65 (1866).

trolled by the government, not the voters. These similarities make it appropriate to specify that Legislative impeachment and Commission removal are "in addition to" each other, to avoid argument that one preempts or excludes the other.

Unlike removal via impeachment or discipline, recall is initiated by the voters, for cause they alone decide. While a recall petition must state "the reasons why such recall is demanded," Nev. Const. art. 2, § 9, such statement need not

> . . . suggest misfeasance, nonfeasance or malfeasance. All that is demanded is that "the" reason be stated. The merit of that reason as grounds for removal is for the electorate to determine, not the court. The reason, in whatever manner expressed, presents a political issue for resolution by vote, not a legal question for court decision.

Batchelor v. Eighth Judicial Dist. Court, 81 Nev. 629, 633, 408 P.2d 239, 241 (1965). Similarly, Article 7, Section 3's provision for removal by legislative address allows a justice or judge to be removed "[f]or any reasonable cause, to be entered on the journal of each House [of the Legislature], which may or may not be sufficient grounds for impeachment."

Limiting Article 6, Section 21(1)'s "in addition to" clause as I propose also avoids a separate constitutional dilemma, which the majority's reading creates but does not acknowledge: In 2014, Nevadans approved amending the Constitution to create a court of appeals; in doing so, they also amended Article 7, Section 3, which permits supreme court justices and district court judges to be removed by legislative address, adding court of appeals judges to those who can be removed by this means. *See* 2014 Ballot Question No. 1: Senate Joint Resolution 14 (76th Session), http://nvsos.gov/sos/elections/initiatives-referenda/petition-archive/2014-petitions. If all methods of removing judges except legislative impeachment and Commission removal were repealed when voters approved Article 6, Section 21 in 1976, there would have been nothing left of Article 7, Section 3 to amend in 2014. It would have died in 1976, and could not have been revivified by amendment in 2014. *Cf. Jackson v. State*, 93 Nev. 677, 681, 572 P.2d 927, 930 (1977) (declining to find an implied repeal where the statute argued to have been impliedly repealed is later amended without mentioning the intervening statute).

B.

To support its implied-repeal claim, the majority traces the legislative proceedings that led to the creation of the Commission, beginning in 1967 and continuing through to the voters' adoption of Article 6, Section 21 in 1976. Majority opinion *ante* at 99-101. The historical recitation is accurate, as far as it goes. It fails to acknowledge, though, that Nevada modeled its judicial discipline commission sys-

tem on California's, *see Nevada's Court Structure*, Bulletin No. 74, at 33, *available at* https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1969/Bulletin074.pdf, and that California retained its public-officer recall provision, subjecting judges to voter recall, even after it amended its constitution to create the California Commission on Judicial Performance. *See, e.g.*, Cal. Const. art. 6, §§ 8 & 18 (providing for discipline and removal of judges for misconduct by the California Commission on Judicial Performance); Cal. Const. art. 23 (1911, amended and recodified as Cal. Const. art. II, §§ 13-14 (1976)) (providing for the public recall of public officers, including judges). Similarly, both Arizona and Oregon, which have public-officer recall provisions like Nevada's and later created judicial discipline commissions, retained their recall provisions. *E.g.*, *Jett v. City of Tucson*, 992 P.2d 426, 429 (Ariz. 1994) (acknowledging that the creation of the judicial discipline commission did not divest the electorate of their right to recall an elected judge); *see* Or. Const. art. II, § 18; *id.* art. VII, § 8. Thus, experience elsewhere, including in California from whose constitution we drew Article 6, Section 21, does not support that the creation of a judicial discipline commission displaces or supersedes popular recall of elected judges. In fact, it supports the opposite.

Remember, "the goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification." *Strickland*, 126 Nev. at 234, 235 P.3d at 608-09. With no source cited, the majority offers that "the electorate who approved [Article 6, Section 21, creating the Commission] intended that recall no longer be an available means of removing a judge from office." Majority opinion *ante* at 106-07. But if that was the trade—the public gave up its right to recall judges in exchange for the establishment of the Nevada Judicial Discipline Commission—you would expect the ballot materials to have told the voters what they were giving up. *See Strickland*, 126 Nev. at 239, 235 P.3d at 611 (consulting ballot materials in interpreting constitutional text). They did not. All the ballot materials said was that a "majority vote of 'yes' would amend article 6 by adding a new section to the article [that] would provide for the establishment of a Commission on Judicial Discipline which would be empowered to censure, retire, or remove justices or judges" and that "[j]ustices and judges could not be removed except for willful misconduct, willful or persistent failure to perform the duties of their offices or habitual intemperance." State of Nev. Dep't of State, Constitutional Amendments to be Voted Upon in State of Nevada at General Election, 57th and 58th Sess., at 15-17 (available at Nevada Legislative Counsel Bureau Research Library).

Citizens voted to establish the Commission because they "fel[t] that public officials, including judges, were not being held account-

able for many of their actions." Nev. LCB, *Judicial Discipline* 1 (Nev. Div. Res. Publ'ns, Background Paper No. 81-8, 1981) https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP81-08.pdf. The Commission was created to address the "shortcomings of impeachment, recall and legislative address." *Id*. at 3. Acknowledging shortcomings in the preexisting constitutional methods of removing judges is one thing; deleting them from the Constitution is another matter altogether. Article 6, Section 21 was enacted to provide *an additional, more effective option* for removing judicial officers. The electorate's ability to recall public officers—including judicial officers—through the preexisting political processes, however, remained intact.

This position—that recall and discipline are independent, alternative means of removing a judge from office—has been accepted by every court and commentator to have addressed the subject until today. This includes two of the four members of the majority, who joined the court's opinion in *Halverson v. Hardcastle*, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007), which states: "Under the Nevada Constitution, a judge can be removed from office only *by the voters* [footnoting Nev. Const. art. 2, § 9], by the Legislature [footnoting Nev. Const. art. 7, §§ 2 and 3], or, as of 1976, by the Nevada Commission on Judicial Discipline [footnoting Nev. Const. art. 6, § 21(1).]" (emphasis added) (dictum). It also includes the Nevada Attorney General, who opined in 1987, after Article 6, Section 21 was adopted, that judges are subject to recall under Article 2, Section 9, *see* 87-7 Op. Nev. Att'y Gen. 22, 26 (1987); Nevada constitutional scholars, Bushnell & Driggs, *supra* at 123, who wrote in 1980, just four years after voters approved Article 6, Section 21, that "[t]here are four methods by which a Nevada Supreme Court justice or district judge may be removed from office during a term: recall, impeachment, legislative [address], and removal by the Commission on Judicial Discipline. . . . *All elected judges in Nevada are subject to removal during their terms through the [constitutional] recall process*" (emphasis added to that in original); and those who attempted to recall justices of this court in 2003, *see* Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary's Role as Helpful Arbiter of Conflict*, 4 Nev. L.J. 518, 518-19 & n.3 (2004).

D.

The policy arguments the majority offers against subjecting judges to recall echo those made in 1972, 1988, and again in 2010, when Nevada voters were asked to amend the Constitution to provide for the appointment instead of the election of judges. *See* 2010 Ballot Question No. 1: Senate Joint Resolution 2 (74th Session), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2010.pdf; 1988 Ballot Question No. 4: Senate

Joint Resolution 17 (63d Session), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1988.pdf; 1972 Ballot Question No. 4: Senate Joint Resolution 23 (55th Session), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1972.pdf. Each of these measures failed, by wide margins. *Id.* This signifies that Nevada citizens prize their electoral control over our state court judges above the vision of good government the majority espouses. *See Batchelor*, 81 Nev. at 633, 408 P.2d at 241 (describing the right of recall in Article 2, Section 9 as "the people's prerogative" and stating, "Our governmental scheme dignifies the people; a treasured heritage, indeed," of which the "provision for recall is but one example."). It also signifies that, had our citizens been told in 1976 that a vote to amend the Constitution to create the Judicial Discipline Commission meant a vote to repeal the preexisting constitutional right to recall elected judges, they would not have approved the adoption of Article 6, Section 21, creating the Commission. Given this history, I cannot subscribe to the majority's implied repeal analysis, which legitimizes a bait-and-switch on the voters who approved passage of Article 6, Section 21 in good faith, not knowing they would later be held to have abandoned their preexisting right of recall.

III.

In the end, none of this matters very much to the parties. The City of North Las Vegas eliminated Ramsey's seat, so her term expires on June 30, 2017, N.L.V. Mun. Code §§ 2.06.010 and 2.06.020, and she has agreed to suspension without pay for the final three months of her term. *See Stipulation and Order of Consent to Discipline* (August 23, 2016), *In re Judicial Discipline of Ramsey*, Docket No. 71096. It appears to me that Ramsey's statutory rights were violated when the signature verification process for her recall proceeded without sufficient notice to her of its time and place. *Compare* NRS 293.1277(8) (giving a public officer who is the subject of a recall petition the right to witness the verification of that petition but not requiring advance notice of time and place), *with Sheriff, Humboldt Cty. v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989) (construing a statute similarly affording a right to attend without specifying notice of time and place to require reasonable notice). If so, this matter is probably moot, as sufficient time does not remain to reverse and remand, conduct a proper signature verification, and convene and conduct a recall election.

The case has enduring significance, though, to our constitutional form of government. No matter how strong the policy argument for exempting judges from citizen recall, unless and until the voters amend the Constitution, the text of Article 2, Section 9 remains as written when it was adopted in 1912. By its terms, Article 2, Section 9, subjects judges, as public officers, to citizen recall. Public policy

considerations do not and should not override clear constitutional text.

While I concur in the reversal to the extent a do-over of the signature verification process is needed, I therefore dissent in all other respects.

MICHAEL SOLID, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE, RESPONDENTS, AND MY ENTERTAINMENT TV; AND THE STATE OF NEVADA, REAL PARTIES IN INTEREST.

No. 71089

April 27, 2017 393 P.3d 666

Original petition for a writ of mandamus or prohibition challenging a district court order allowing filming of petitioner's criminal trial by real party in interest My Entertainment TV.

Petition denied.

David M. Schieck, Special Public Defender, and *Robert Arroyo, Randall H. Pike*, and *JoNell Thomas*, Deputy Special Public Defenders, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Agnes M. Lexis*, Deputy District Attorney, Clark County, for Real Party in Interest the State of Nevada.

Greenberg Traurig, LLP, and *Tami D. Cowden, Mark G. Tratos*, and *Lisa J. Zastrow*, Las Vegas, for Real Party in Interest My Entertainment TV.

Law Office of Lisa Rasmussen and *Lisa A. Rasmussen*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this petition, we are asked to interpret Supreme Court Rules governing media in the courtroom. The writ petition arises from

My Entertainment TV (MET) filming petitioner Michael Solid's first-degree murder trial for use in the television show *Las Vegas Law*. Solid contends that (1) MET is not a "news reporter" under these rules; (2) MET's footage will not be used for solely educational or informational purposes, but may instead be used for unrelated advertising purposes; (3) the district court erred by allowing MET to film the trial; and (4) the terms of MET's television series agreement with the Clark County District Attorney require the Special Public Defenders assigned to Solid's case to give written consent to allow filming.

We conclude that (1) MET is a "news reporter" under Supreme Court Rule (SCR) 229, (2) MET is using the footage for educational or informational purposes pursuant to SCR 241, (3) the district court did not err in allowing MET to film Solid's trial under SCR 230, and (4) the television series agreement does not require the consent of Solid's trial counsel. For these reasons, we deny Solid's writ petition.

FACTS AND PROCEDURAL HISTORY

Television series agreement

MET films and produces *Las Vegas Law*, a television "docudrama" focused on the Clark County District Attorney's Office. MET and Clark County signed a television series agreement allowing MET to film and produce the show.

In relevant part, the television series agreement provides:

> [Clark] County agrees to allow [MET] to enter the [Clark County District Attorney's Office] with personnel and equipment . . . for the purpose of . . . [conducting] ("Filming Activity") in connection with [*Las Vegas Law*] . . . .

Additionally,

> [i]n regards to Filming Activity directly involving County personnel, County facilities and County property, [MET] agrees that:
>
> (i) Whether a County employee is to be recorded, filmed, taped or photographed is a personal decision of each individual County employee. All Filming Activity of County employees will be undertaken only with each individual employee's written consent . . . .

Filming of Solid's trial

Prior to jury selection, MET filed a media request to film Solid's trial. The district court granted the request. Solid then filed a motion to reconsider MET's request.

The district court issued an order denying Solid's motion to reconsider. The district court analyzed MET's filming of the trial under

the framework required by the Supreme Court Rules on Electronic Coverage of Court Proceedings. The district court found, inter alia, that (1) MET is a news reporter as defined by SCR 229(1)(c); (2) the factors set forth in SCR 230(2) favor coverage by MET; and (3) the television series agreement between Clark County and MET does not give Solid's counsel, as county employees, a right of consent to allow filming. Following the district court's order denying his motion for reconsideration, Solid filed the instant writ petition seeking interpretation of the Supreme Court Rules involving media in the courtroom.

ANALYSIS

Solid's writ petition is justiciable

Since MET has already filmed Solid's trial, there are issues of mootness for many of Solid's claims. "The question of mootness is one of justiciability." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). "This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Id.* Accordingly, "a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Id*. (citations omitted).

"Even when an appeal is moot, however, [this court] may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Id.*; *see also Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing that the capable-of-repetition-yet-evading-review exception to the mootness doctrine applies when the duration of the challenged action is "relatively short term" and there is a "likelihood that a similar issue will arise in the future").

Although Solid's trial has concluded, the remaining shows on the current production contract, as well as episodes on any future seasons, will present many of the same issues of widespread importance. Thus, the issues presented in Solid's petition are "capable of repetition, yet evading review." *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. Given the ongoing nature of *Las Vegas Law*, we conclude Solid's petition is justiciable.

Review of the petition is warranted

"This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of

discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted). Alternatively, a writ of prohibition is available "when a district court acts without or in excess of its jurisdiction." *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 817, 313 P.3d 849, 852 (2013) (internal quotation marks omitted). As the petitioner, Solid bears the burden of demonstrating why extraordinary relief is warranted. *See We the People Nev. v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008).

Because writ relief is an extraordinary remedy, consideration of the petition is entirely within the discretion of this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, this court will exercise its discretion to consider a writ petition when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170, 34.330; *see Sandpointe*, 129 Nev. at 817, 313 P.3d at 852. However, this court may address writ petitions when they "raise important issues of law in need of clarification." *Int'l Game Tech.*, 122 Nev. at 142-43, 127 P.3d at 1096.

Solid seeks an interpretation of Supreme Court Rules, which leaves no direct appellate review available to him. *See* SCR 243 ("No direct appellate review of the interpretation or application of [the relevant Supreme Court Rules] shall be available to the news reporters or parties. News reporters or parties may, however, seek extraordinary relief by way of writ petition."). Additionally, the petition presents a novel, important issue of law in need of this court's clarification. Accordingly, we exercise our discretion to review the writ petition.

MET is a news reporter under SCR 229

Solid argues that, because MET's stated purpose is to create a compelling "docu-drama," as opposed to a more traditional news program, MET is not a "[n]ews reporter" under SCR 229(1)(c). We disagree.

We "review de novo [the district court's] legal conclusions regarding court rules." *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). This court only looks beyond the plain language of a court rule if it is ambiguous or silent on the issue in question. *See In re Estate of Black*, 132 Nev. 73, 75, 367 P.3d 416, 418 (2016) (utilizing plain language to analyze NRCP 6(b)).

SCR 229(1)(c) defines a "[n]ews reporter" as "any person who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

Under the plain language of SCR 229(1)(c), MET meets the definition of a news reporter. The footage required to make *Las Vegas Law* is collected, edited, and published by MET and concerns local events (trials within the community) for dissemination to the public.

Additionally, Solid argues that MET is not a news reporter because of the editorial control of, and royalties paid to, Clark County. While this is perhaps an uncommon arrangement in the news business, it does not run afoul of any requirement under SCR 229(1)(c). Therefore, we conclude MET meets the definition of news reporter as contemplated by SCR 229(1)(c).

MET's footage of the trial is being used for educational or informational purposes under SCR 241(1)

Solid argues MET's intention to create an "entertaining" television show runs afoul of SCR 241, which requires the footage be used only for "educational or informational purposes," but not "unrelated advertising" purposes. In supporting this argument, Solid points to language within the television series agreement that demonstrates MET owns the rights to all footage for all purposes, including "advertising and promotional purposes in connection therewith." We conclude MET's footage of the trial is being used for educational or informational purposes under SCR 241(1).

The operative phrases in SCR 241(1) are "only . . . educational or informational purposes" and "unrelated advertising purposes." This requires this court to make two determinations: (1) whether the content of *Las Vegas Law* is educational or informational, and (2) whether the footage is used for *unrelated* advertising purposes. We conclude *Las Vegas Law* satisfies both prongs of this analysis.

First, the show focuses on criminal justice in Clark County, which, although potentially entertaining, satisfies the requirement for the recording to be used for informational or educational purposes. Such a conclusion comports with the above determination that MET is a news reporter, as that requires MET to provide either news or information to the public. Additionally, the determination of the relative entertainment of an otherwise informational or educational news program is outside the scope of this court's analysis. Indeed, "[t]he line between the informing and the entertaining is too elusive" for a court to decide when assessing the protections for a free press. *Winters v. New York*, 333 U.S. 507, 510 (1948). Thus, we conclude *Las Vegas Law*'s footage is used for an educational or informational purpose in compliance with SCR 241(1).

Second, we conclude any footage used in relation to the creation of the show would be used for a *related* advertising purpose and, thus, satisfies the second prong of SCR 241(1). Indeed, even advertisements about the show would be related to the show's central

educational or informational purpose and, therefore, within the purview of SCR 241(1). Thus, unless the footage is used in a context entirely outside of the filming and production of *Las Vegas Law*, we conclude the recording at issue here complies with SCR 241(1).

The district court did not err by allowing MET to film Solid's trial under SCR 230(2)

The district court issued an order analyzing MET's filming of Solid's trial under SCR 230(2) and concluded that MET could film the trial but could not film jurors or non-consenting witnesses. Solid argues that the district court erred in this analysis and that his right to a fair trial would be jeopardized because his trial counsel will be distracted by the MET cameras in the courtroom. Additionally, Solid argues that the district court erred in allowing the filming because the filming would potentially dissuade witnesses from testifying and detract from the dignity of the proceedings. We conclude the district court did not err in its analysis.

The Supreme Court Rules governing media in the courtroom are "applicable to all civil and criminal trials in Nevada," "recognize the importance of preserving the decorum and dignity of the court, and require limitations imposed when any media representative is interfering in any way with the proper administration of justice." *Minton v. Bd. of Med. Exam'rs*, 110 Nev. 1060, 1083 n.16, 881 P.2d 1339, 1355 n.16 (1994) (internal quotation marks omitted), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 491 (2014).

Additionally, SCR 230(2) provides:

> [T]here is a presumption that all courtroom proceedings that are open to the public are subject to electronic coverage. A judge shall make particularized findings on the record when determining whether electronic coverage will be allowed at a proceeding, in whole or in part. Specifically, the judge shall consider the following factors:
>
> (a) The impact of coverage upon the right of any party to a fair trial;
>
> (b) The impact of coverage upon the right of privacy of any party or witness;
>
> (c) The impact of coverage upon the safety and well-being of any party, witness or juror;
>
> (d) The likelihood that coverage would distract participants or would detract from the dignity of the proceedings;
>
> (e) The adequacy of the physical facilities of the court for coverage; and
>
> (f) Any other factor affecting the fair administration of justice.

We conclude that Solid failed to overcome the presumption allowing electronic recording in the courtroom and, thus, the district court did not err in its findings pursuant to SCR 230(2). Solid's argument about the fairness of trial being impacted is premised on the camera's presence rendering his trial counsel ineffective. The record does not support this argument. Solid did not present evidence showing how MET's cameras affected the fairness of the trial, the dignity of the proceedings, or the ability of trial counsel to present effective advocacy any differently than the other cameras in the courtroom. Additionally, the district court prohibited MET from filming jurors and non-consenting witnesses. Accordingly, we conclude the district court did not err in allowing MET to film Solid's trial.

The television series agreement does not require the consent of Solid's trial counsel

The television series agreement is a contract between Clark County and MET. Solid argues the written consent of his trial counsel, the Clark County Special Defender, is required prior to filming per the terms of the television series agreement. MET contends the language of the television series agreement applies only to filming outside the courtroom and that, regardless of those provisions, SCR 240 does not require consent of attorneys to be filmed in the courtroom.

"Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011). "A basic rule of contract interpretation is that every word must be given effect if at all possible." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) (internal quotation marks omitted). "A court should not interpret a contract so as to make meaningless its provisions." *Id.* (internal quotation marks omitted).

When all sections are read together, the television series agreement does not require written consent from Solid's trial counsel. Section 1 discusses an agreement between Clark County and MET to "enter the [Clark County District Attorney's Office] . . . for the purpose of" conducting MET's "Filming Activity." Sections 1(a) and 1(a)(i) of the television series agreement further clarify the consent requirements for county employees pursuant to MET's filming activity. We conclude the consent requirements of Section 1(a) and 1(a)(i) apply only to the filming activity occurring in the district attorney's office, as described in Section 1. To require consent of any county employee outside the scope of filming activities within the district attorney's office would make the provisions of Section 1 meaningless.

Thus, we conclude the television series agreement does not require the consent of counsel because its provisions should be read together and should be read to comport with this court's rules on electronic coverage of court proceedings.[1]

CONCLUSION

Given the above analysis, we conclude that (1) MET is a "news reporter" under SCR 229(1)(c); (2) MET is using the footage for educational or informational purposes, as opposed to unrelated advertising as required by SCR 241; (3) the district court did not err in allowing MET to film the trial because Solid did not overcome the presumption in favor of electronic coverage provided by SCR 230(2); and (4) the television series agreement does not require the consent of Solid's trial counsel. We therefore deny Solid's writ petition.[2]

CHERRY, C.J., and DOUGLAS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

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[1]We note that Nevada Attorneys for Criminal Justice filed an amicus brief arguing that the filming of *Las Vegas Law* requires attorneys to make extrajudicial statements in violation of Nevada Rule of Professional Conduct (RPC) 3.6(a). Extrajudicial statements are those that have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." RPC 3.6(a). MET only airs episodes of *Las Vegas Law* after the filmed trials have already concluded. We conclude this limits the likelihood that the episodes could materially prejudice an already concluded trial and, thus, does not run afoul of RPC 3.6(a).

[2]We have considered Solid's other arguments and conclude they are without merit.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, A PUBLIC AGENCY, A PUBLIC ENTITY AND COMPONENT OF THE STATE OF NEVADA, APPELLANT, *v.* SHAE E. GITTER, AN INDIVIDUAL; AND JARED SHAFER, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF KRISTINE JO FRESHMAN, RESPONDENTS.

No. 69208

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, A PUBLIC ENTITY AND COMPONENT UNIT OF THE STATE OF NEVADA, APPELLANT, *v.* SHAE E. GITTER, AN INDIVIDUAL; AND JARED SHAFER, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF KRISTINE JO FRESHMAN, RESPONDENTS.

No. 69939

W. CHRIS WICKER; AND WOODBURN AND WEDGE, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES CROCKETT, DISTRICT JUDGE, RESPONDENTS, AND SHAE E. GITTER; AND JARED SHAFER, REAL PARTIES IN INTEREST.

No. 69961

April 27, 2017 393 P.3d 673

Consolidated appeals from a district court judgment and post-judgment awards of interest, fees, and costs, and an original petition for a writ of mandamus challenging an award of attorney fees. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed in part, vacated in part, reversed in part; petition granted; and remanded with instructions.

Woodburn and Wedge and *W. Chris Wicker* and *Joshua M. Woodbury*, Reno, for Public Employees' Retirement System of Nevada, W. Chris Wicker, and Woodburn and Wedge.

Christopher G. Nielsen, Carson City, for Public Employees' Retirement System of Nevada.

Bailey Kennedy and *Dennis L. Kennedy, Kelly B. Stout*, and *Amanda L. Stevens*, Las Vegas, for Shae E. Gitter and Jared Shafer, as Special Administrator of the Estate of Kristine Jo Freshman.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this consolidated matter, we are asked to determine whether (1) Nevada's general slayer statutes apply to the Public Employees' Retirement Act (PERS Act) for the purposes of determining payment of survivor benefits, (2) the Public Employees' Retirement System of Nevada (PERS) is exempted from paying prejudgment or post-judgment interest out of the PERS trust fund, (3) an expert consultant must testify to recover $1,500 or less in costs for that expert under NRS 18.005(5), and (4) attorney fees were appropriate under NRS 7.085 and 18.010. We hold that Nevada's general slayer statutes are applicable to the PERS Act so that any person who kills their PERS-member spouse must be treated as if they predeceased the PERS-member spouse for the purposes of determining payment of survivor benefits. In such a case, the PERS member shall be treated as unmarried at the time of his or her death so that benefits may be paid to a survivor beneficiary. We also hold that PERS is not exempt from paying prejudgment or post-judgment interest, though interest should have been awarded in this case under NRS 17.130. We further hold it is within the district court's discretion to award up to $1,500 in reasonable costs for a nontestifying expert consultant under NRS 18.005(5). Finally, we reverse the award of attorney fees, which we conclude should not have been awarded under NRS 7.085 and 18.010.

FACTS AND PROCEDURAL HISTORY

Kristine Jo Freshman was employed by the Clark County School District and a member of PERS for 24 years. In 2009, Kristine was killed by her husband, Walter Freshman. Walter pleaded guilty to second-degree murder and was adjudicated a killer as defined by NRS 41B.130 the following year. Before her death, Kristine designated her daughter, Shae E. Gitter, as her survivor beneficiary.

PERS survivor benefits

In 2011, Gitter applied to PERS for survivor benefits. PERS denied Gitter's request, indicating the following in its denial letter:

> NRS 286.671 [et seq.] governs [PERS] regarding benefits for survivors. In the case of a member who was married at the time of death, the member's spouse and minor children are the persons eligible to receive benefits.

> NRS 286.669 provides that if the spouse is convicted of the murder or voluntary manslaughter of a member of [PERS], the spouse is ineligible to receive any benefit conferred by any provision of the [PERS Act] by reason of death of that member. Neither this provision, nor any other provision in the [PERS Act], makes any other person eligible to receive such benefit. Based upon the previously mentioned statutes, [PERS] is unable to pay benefits pursuant to your application.

After retaining legal representation, Gitter and respondent Jared Shafer, as special administrator of the Estate of Kristine Jo Freshman (Kristine's Estate or, collectively, Gitter), requested copies of Kristine's PERS records. PERS indicated it was unable to release records to Gitter or Kristine's Estate because neither was entitled to survivor benefits. Ultimately, Gitter petitioned the probate court and obtained a court order instructing PERS to provide copies of Kristine's records.

After PERS produced Kristine's records, Gitter and Kristine's Estate filed suit seeking to collect Gitter's survivor benefits. On Gitter's motion for partial summary judgment, the district court granted Gitter's claim for declaratory relief establishing that NRS Chapter 41B (Nevada's slayer statutes) is applicable to NRS Chapter 286 (the PERS Act). Specifically, the district court found as follows:

> NRS Chapter 41B applies to PERS benefits for survivors of a deceased PERS member, including, but not limited to Spousal Benefits and benefits for a survivor beneficiary pursuant to NRS 286.6767.
>
> . . . Pursuant to NRS 41B.310(3), [Walter] is deemed to have predeceased [Kristine] for the purposes of determining entitlement to PERS benefits for survivors as set forth in NRS 286.671-286.679, inclusive.
>
> . . . Pursuant to NRS 41B.310(3), PERS shall treat [Kristine] as being unmarried at the time of her death for the purpose of determining entitlement to PERS benefits for survivors.
>
> . . . .
>
> . . . Gitter is entitled to survivor benefits as set forth in NRS 286.6767-286.6769, inclusive.

In light of the district court's summary judgment order, the parties stipulated to the amount of back payments that PERS owed to Gitter: $203,231.76. However, Gitter filed a motion seeking prejudgment and post-judgment interest after PERS asserted it was not permitted to pay interest under the PERS Act. Gitter argued PERS owed prejudgment and post-judgment interest under NRS 99.040(1)(a), NRS 99.040(1)(c), or NRS 17.130. PERS argued it was not obligated to pay interest because interest is not identified as an expense that may be paid from the PERS trust fund pursuant to NRS 286.220(4).

The district court granted Gitter's motion and, in its judgment on the amounts due, ordered PERS to pay interest under NRS 99.040(1)(a). The district court found that in 1986, Kristine and her qualified employer entered into a contract, which "includes eligibility for PERS benefits (including survivor benefits) as part of its compensation package" and "does not fix a rate of interest for any portion of the compensation due thereunder."

Expert witness fees

Gitter later filed a memorandum of costs and disbursements, which included $5,000 in expert witness fees as costs for a financial consultant. Gitter provided the district court with the financial consultant's invoice and curriculum vitae. PERS moved to retax costs, challenging the $5,000 in fees paid to a nontestifying expert. The district court found "[i]t was reasonable for Gitter to retain a financial consultant to review amounts calculated by PERS and calculate interest amounts," and that the financial consultant was qualified to do so, even though the consultant was not disclosed as an expert witness. Additionally, the district court found that Nevada law was unclear as to whether fees could be recovered in excess of $1,500 for nontestifying experts. Because the consultant was not deposed and did not present any testimony, reports, or affidavits, the district court could not evaluate whether excess costs were appropriate. Thus, the district court granted PERS's motion in part, limiting the expert costs to $1,500 pursuant to NRS 18.005(5).

Attorney fees

Gitter also filed a motion for attorney fees pursuant to NRS 7.085 and 18.010, seeking $96,272.50 and arguing that PERS and its counsel repeatedly took unreasonable positions that were unsupported by Nevada law. At a hearing on the motion, PERS and its counsel maintained that its defense was well grounded and based on a reasonable interpretation of the PERS Act. Nonetheless, the district court granted Gitter's motion and ordered PERS and its counsel to pay attorney fees pursuant to NRS 7.085(1)(a) and 18.010(2)(b).

In its order, the district court found that Gitter was entitled to attorney fees because PERS and its counsel acted unreasonably and vexatiously, and maintained a defense without reasonable grounds and not warranted by existing law. The district court also found that in contesting Gitter's entitlement to benefits and interest, "PERS raised numerous arguments that were unsupported by any legal authority, violated established canons of statutory interpretation, and/or were completely devoid of merit." With respect to the reasonableness of the fees, the district court found that the hourly rates charged by the attorneys and paralegals working on Gitter's case were reasonable; the invoices' billing descriptions were of "suffi-

cient detail to assess the difficulty, intricacy, importance, and skill required to perform each task"; and the number of hours billed was reasonable.

After the district court ordered attorney fees against PERS and its counsel, PERS filed the instant consolidated appeals, and its counsel filed the instant writ petition.

DISCUSSION

Nevada's slayer statutes are applicable to the PERS Act

The parties dispute the applicability of Nevada's general slayer statutes, NRS Chapter 41B, to the PERS Act, NRS Chapter 286. The PERS Act allows a survivor beneficiary to receive payments only "if the member is unmarried on the date of the member's death." NRS 286.6767(1). Otherwise, the payments go to the member's spouse and any minor children. *See* NRS 286.673, 286.674-.67665. Pursuant to the PERS Act slayer statute, however, "[a]ny person convicted of the murder or voluntary manslaughter of a member of [PERS] is ineligible to receive any benefit conferred by any provision of this chapter by reason of the death of that member." NRS 286.669.

Similarly, NRS 41B.200(1) mandates "that a killer cannot profit or benefit from his or her wrong." Pursuant to NRS 41B.310(1), "a killer of a decedent forfeits any appointment, nomination, power, right, property, interest or benefit that, pursuant to the provisions of a governing instrument executed by the decedent or any other person, accrues or devolves to the killer based upon the death of the decedent." Unlike the PERS Act slayer statute, however, NRS 41B.310(3) further provides that "[i]f a killer of a decedent forfeits any appointment, nomination, power, right, property, interest or benefit pursuant to this section, the provisions of each governing instrument affected by the forfeiture must be treated as if the killer had predeceased the decedent."

PERS argues there are no eligible beneficiaries to receive payments of Kristine's contributions. PERS maintains that (1) under NRS 286.6767 it "is prohibited by law from making payments to [Gitter] because [Kristine] was married at the time of her death," and (2) under NRS 286.669, it "is prohibited by law from making payments to [Walter] who was convicted of the murder of [Kristine]." In reaching its conclusion, PERS argues that Nevada's general slayer statutes are incompatible with and cannot be applied to the PERS Act, and that its interpretation of the PERS Act is entitled to deference.

Standard of review

PERS challenges the district court's order granting partial summary judgment on Gitter's declaratory relief claim, which ordered that NRS Chapter 41B applies to NRS Chapter 286 so that Walter

is treated as predeceasing Kristine, such that Gitter is entitled to survivor benefits. This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Additionally, "[q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *Davis v. Beling*, 128 Nev. 301, 314, 278 P.3d 501, 510 (2012) (quotation marks omitted).

Gitter is entitled to PERS survivor benefits because Nevada's slayer statutes are applicable to the PERS Act

PERS argues that applying Nevada's slayer statutes to the PERS Act would render the provisions of NRS 286.669 meaningless and superfluous. We disagree.

"[W]hen a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). Only when a statute is ambiguous will this court "resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 339, 325 P.3d 1259, 1262 (2014) (internal quotation marks omitted). While "statutory interpretation should not render any part of a statute meaningless," a statute "should not be read to produce absurd or unreasonable results." *Leven*, 123 Nev. at 405, 168 P.3d at 716 (internal quotation marks omitted). Accordingly, "whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 131 Nev. 783, 789, 358 P.3d 228, 232 (2015) (quoting *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999)).

NRS Chapter 41B applies to governing instruments, *see* NRS 41B.310, "[n]otwithstanding any other provision of law," NRS 41B.200(1). Governing instrument is defined to include "[a]ny public or private plan or system that entitles a person to the payment or transfer of any property, interest or benefit, including, without limitation, a plan or system that involves . . . [p]ension benefits, retirement benefits or other similar benefits." NRS 41B.090(9)(a).

Accordingly, we hold that Nevada's slayer statutes are applicable to the PERS Act. PERS is a governing instrument, and the statutory language of NRS 41B.090(9)(a) clearly indicates NRS Chapter 41B applies to the instant matter notwithstanding NRS 286.669. Additionally, reading the statutes together does not render NRS 286.669 meaningless. Rather, we read the statutes in harmony so that Walter receives no benefits under NRS 286.669, but is also treated as if he predeceased Kristine, under NRS 41B.310, for the purpose of determining that Gitter is entitled to survivor beneficiary benefits.

Additionally, PERS argues that the application of NRS 41B.310(3) is directed at the spousal benefit and, thus, provides no basis to award Gitter survivor beneficiary benefits under NRS 286.6767. We disagree.

The provisions of NRS Chapter 41B "do not abrogate or limit the application of . . . [a]ny provision of a governing instrument that designates . . . [a]ny other beneficiary who is not a killer of the decedent." NRS 41B.200(2)(b)(2). Because nothing in NRS Chapter 41B abrogates the rights of a nonkiller, we conclude that Gitter, as an innocent party, has her own rights to claim benefits under the PERS Act.

Deference to PERS

PERS argues that its interpretation of the PERS Act is entitled to deference—namely, that NRS 286.6767 allows for benefits to be paid only if the member dies unmarried. We disagree.

While PERS may be granted deference in interpreting the PERS Act, it is not entitled to deference in interpreting other statutes of general applicability like those organized within NRS Chapter 41B. *See, e.g.*, *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003) (noting "courts generally give great deference to an agency's interpretation of *a statute that the agency is charged with enforcing*" (emphasis added) (internal quotation marks omitted)). Therefore, we do not defer to PERS in concluding that NRS Chapter 41B applies to the PERS Act.

Interest should have been awarded under NRS 17.130

Standard of review

The parties next dispute whether and under which statute PERS must pay prejudgment and post-judgment interest. Whether the statutes allowing for prejudgment and post-judgment interest are applicable here is a question of law that this court reviews de novo. *See Kerala Props., Inc. v. Familian*, 122 Nev. 601, 604, 137 P.3d 1146, 1148 (2006) ("We review an award of prejudgment interest for error."). *Cf. In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009) (applying de novo review "when a party's eligibility for a fee award is a matter of statutory interpretation").

PERS is not exempted from paying interest

PERS argues the payment of prejudgment and post-judgment interest is neither anticipated by nor permitted under NRS Chapter 286. PERS argues that it has a duty not to pay interest because interest is not identified as an expense that may be paid from the PERS trust fund pursuant to NRS 286.220(4). Additionally, PERS argues that the payment of interest would diminish the fund and adversely

affect all PERS members. We disagree with PERS's contention that it does not have to pay interest.

Interest may be awarded where allowed by statute. *Gibellini v. Klindt*, 110 Nev. 1201, 1208, 885 P.2d 540, 544 (1994). Prejudgment and post-judgment interest awards are allowed by the statutes at issue here, NRS 99.040 and 17.130, and PERS points to no statute that prohibits the district court from awarding interest under the circumstances of this case. Therefore, if either of these statutes applies, PERS is obligated to pay prejudgment and post-judgment interest even though the PERS Act does not expressly provide for the payment of interest.

PERS must pay interest pursuant to NRS 17.130

PERS argues that NRS 99.040(1)(a) does not apply because Gitter was not a party to any contract, and Gitter's right to benefits can only be based on statutes. Rather, PERS argues, if interest is appropriate, it should have been awarded under NRS 17.130. We agree.

"When there is no express contract in writing fixing a different rate of interest," NRS 99.040(1)(a) provides for interest in cases "[u]pon contracts, express or implied, other than book accounts." NRS 17.130(2) provides for interest on any judgment "[w]hen no rate of interest is provided by contract or otherwise by law, or specified in the judgment."

The district court erred in concluding that Gitter's survivor benefits constituted money due in a case upon a contract. Pensions are part of an employment contract, *see Pub. Emps.' Ret. Bd. v. Washoe Cty.*, 96 Nev. 718, 722, 615 P.2d 972, 974 (1980), but Gitter has not produced a contract to which she is the intended beneficiary—PERS's obligation to pay survivor benefits is statutory, not contractual, and a designation form identifying a member's intended beneficiaries is not a contract. Thus, we reverse the district court's award of interest under NRS 99.040(1)(a) and remand with instructions for the district court to award interest under NRS 17.130.

Gitter is entitled to $1,500 in costs for expert fees under NRS 18.005(5)

Standard of review

The parties next dispute the availability of costs for a nontestifying expert consultant under NRS 18.005(5). This court "review[s] an award of costs for an abuse of discretion." *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015).

The district court did not abuse its discretion in awarding costs to Gitter for expert fees under NRS 18.005(5)

PERS argues that the district court abused its discretion in awarding costs under NRS 18.005(5) because Gitter's "expert consultant

was never disclosed, never filed a report and never testified." We disagree.

NRS 18.020(3) provides that "[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." Under NRS 18.005(5), costs include "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee."

The district court did not abuse its discretion in awarding $1,500 in costs for Gitter's expert consultant. Nevada law establishes that an expert must testify to recover more than $1,500 in expert fees. *See* NRS 18.005(5); *Khoury v. Seastrand*, 132 Nev. 520, 541, 377 P.3d 81, 95 (2016). However, "NRS 18.005 does not require an expert witness to testify in order to recover fees less than $1,500." *Logan*, 131 Nev. at 268, 350 P.3d at 1144. Additionally, the district court found the fees to be reasonable. Accordingly, the district court's findings are sufficient for this court to affirm its award of costs under NRS 18.005(5).

Nonetheless, we take this opportunity to clarify the law with respect to expert witness fees under NRS 18.005(5). *See Frazier v. Drake*, 131 Nev. 632, 646 n.12, 357 P.3d 365, 374 n.12 (Ct. App. 2015) (noting the seemingly inconsistent caselaw on this issue); *see also Bergmann v. Boyce*, 109 Nev. 670, 680, 856 P.2d 560, 566 (1993) (affirming an award of expert fees below the statutory cap and holding an expert need not be called as a witness as a predicate for such an award); *Mays v. Todaro*, 97 Nev. 195, 199, 626 Nev. 260, 263 (1981) (allowing witness fees "if the witness had been sworn and testified"). Under NRS 18.005(5), an expert witness who does not testify may recover costs equal to or under $1,500, and consistent with *Khoury*, "[w]hen a district court awards expert fees in excess of $1,500 per expert, it must state the basis for its decision." 132 Nev. at 541, 377 P.3d at 95. With respect to cases in which the expert acts only as a consultant and does not testify, however, district courts may award $1,500 or less, so long as the district court finds such costs constitute "[*r*]*easonable* fees." NRS 18.005(5) (emphasis added).

No attorney fees are warranted under NRS 7.085 or 18.010

Lastly, PERS appeals the district court's order awarding attorney fees against it under NRS 18.010. Additionally, W. Chris Wicker and Woodburn and Wedge (collectively, petitioners), counsel for PERS, petition this court for a writ of mandamus directing the district court to vacate its order finding PERS's counsel jointly and severally liable for attorney fees under NRS 7.085.

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Extraordinary relief may be available where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. As petitioners have no other means by which to challenge the district court's order making them jointly and severally liable for more than $95,000 in attorney fees and costs, and as they raise issues warranting our attention, we exercise our discretion to consider their petition. *See Watson Rounds*, 131 Nev. at 786-87, 358 P.3d at 231 ("Sanctioned attorneys do not have standing to appeal because they are not parties in the underlying action; therefore, extraordinary writs are a proper avenue for attorneys to seek review of sanctions.").

Based on the following, we hold that the district court abused its discretion in awarding attorney fees and costs under NRS 7.085 and 18.010.[1]

Standard of review

This court reviews a district court's order awarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014).

The district court abused its discretion by awarding attorney fees under NRS 7.085 and 18.010

PERS and petitioners argue that the district court improperly awarded attorney fees under NRS 7.085(1) and 18.010(2)(b) because PERS's defense was not frivolous and was based on reasonable interpretations of the PERS Act and NRS Chapter 41B, a novel issue of law. We agree.

NRS 18.010(2)(b) permits a district court to award attorney fees to a prevailing party when the district court determines that a claim or defense of the opposing party was brought or maintained without reasonable grounds or to harass the prevailing party. Under NRS 7.085(1), the district court can hold an attorney personally liable for the attorney fees and costs an opponent incurs when the attorney "[u]nreasonably and vexatiously extend[s] a civil action or proceeding" or "[f]ile[s], maintain[s] or defend[s] a civil action . . . [that] is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good

[1]Because we reverse the attorney fees award, we need not address whether certain fees were supported by the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), or were appropriately awarded against petitioners for the time PERS was represented only by the Office of the Attorney General.

faith." In the context of an attorney fees award, this court has previously held that "a district court abuses its discretion by making such an award without including in its order sufficient reasoning and findings in support of its ultimate determination." *Watson Rounds*, 131 Nev. at 789, 358 P.3d at 233 (internal quotation marks omitted).

Here, PERS and petitioners should not be subject to attorney fees under NRS 7.085(1) or 18.010(2)(b). From a review of the record and the district court's order, it is not clear that PERS maintained a defense that was "not well-grounded in fact or [was] not warranted by existing law," that petitioners acted "[u]nreasonably and vexatiously," or that the defense imposed was "without reasonable ground." NRS 7.085(1), 18.010(2)(b). Indeed, because PERS's defenses were based upon novel and arguable, if not ultimately successful, issues of law—i.e., whether NRS Chapter 41B applies to the PERS Act and whether PERS can be ordered to pay interest—we conclude that the district court abused its discretion in finding that PERS's arguments "were unsupported by any legal authority, violated established canons of statutory interpretation, and/or were completely devoid of merit" such that its defenses were unreasonable. Accordingly, we grant the petition and reverse the attorney fees awards under NRS 7.085(1) and 18.010(2)(b).

CONCLUSION

We conclude that NRS Chapter 41B applies to the PERS Act; consequently, Gitter is entitled to survivor benefits. Accordingly, we affirm the district court's judgment for Gitter. Because we conclude that Gitter is entitled to prejudgment and post-judgment interest under NRS 17.130, however, we vacate the portion of the district court's judgment awarding interest under NRS 99.040(1)(a), and remand with instructions to award interest under NRS 17.130. In concluding that up to $1,500 in fees is permitted for expert consultants who do not testify, we also affirm the district court's award of costs under NRS 18.005(5). Finally, we conclude that the attorney fee awards were unwarranted under NRS 7.085(1) and 18.010(2)(b). Therefore, we reverse the order awarding fees against PERS, and we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order awarding attorney fees against petitioners.

CHERRY, C.J., and DOUGLAS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

IN THE MATTER OF THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972.

ELEANOR C. AHERN, AKA ELEANOR CONNELL HARTMAN AHERN, APPELLANT, *v.* JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER, RESPONDENTS.

No. 66231

IN THE MATTER OF THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972, AN INTER VIVOS IRREVOCABLE TRUST.

ELEANOR CONNELL HARTMAN AHERN, APPELLANT, *v.* KATHRYN A. BOUVIER; AND JACQUELINE M. MONTOYA, RESPONDENTS.

No. 67782

IN THE MATTER OF THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972, AN INTER VIVOS IRREVOCABLE TRUST.

ELEANOR CONNELL HARTMAN AHERN, APPELLANT, *v.* JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER, RESPONDENTS.

No. 68046

May 4, 2017 393 P.3d 1090

Consolidated appeals from orders issuing a preliminary injunction, appointing a temporary trustee, granting summary judgment, and awarding attorney fees in a trust action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed in part and dismissed in part.

Brownstein Hyatt Farber Schreck, LLP, and *Kirk B. Lenhard, Tamara Beatty Peterson*, and *Benjamin K. Reitz*, Las Vegas, for Appellant.

Albright Stoddard Warnick & Albright and *Whitney B. Warnick*, Las Vegas; *The Rushforth Firm, Ltd.*, and *Joseph J. Powell*, Las Vegas, for Respondents.

Before DOUGLAS, GIBBONS and PICKERING, JJ.

OPINION[1]

Per Curiam:

W.N. and Marjorie T. Connell established the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972. Appellant Eleanor C. Ahern is the only surviving child of W.N. Connell and the adopted daughter of Marjorie. Eleanor has two daughters, respondents Jacqueline M. Montoya and Kathryn A. Bouvier. The 1972 Trust was funded in part with oil, gas, and mineral rights and leases (the oil assets) that were W.N. Connell's separate property and which generated royalties. During the trustors' joint lifetimes, they served as trustees and subtrust No. 1 governed principal and distributions.

W.N. Connell died in November 1979. Upon the first trustor's death, the 1972 Trust provided that the assets therein were to be divided into two subtrusts, Trust No. 2, of which Eleanor was the beneficiary, and Trust No. 3, of which Marjorie was the beneficiary. Marjorie remained trustee. In May 1980, Marjorie filed a substitution of trustee, adding Eleanor "as [c]o-[t]rustee of the separate property [the oil assets] of W. N. Connell presently held in the [1972] Trust." Between 1980 and Marjorie's death in 2009, Marjorie received 65% of the oil royalties and Eleanor received 35%. During this time, K-1 tax forms were prepared for Marjorie for Trust No. 3, and Eleanor for Trust No. 2, reflecting this distribution. The oil assets remained titled in the 1972 Trust and were not split into Trust No. 2 or Trust No. 3. While division orders from the oil companies listed Marjorie and Eleanor as cotrustees of the 1972 Trust, starting in 1986, Marjorie provided the oil companies with an IRS employee identification number (EIN) for Trust No. 2. An affidavit from Marjorie's tax preparer for the 1972 Trust stated that Marjorie provided Trust No. 2's EIN to the oil companies because it was associated with the bank account that Marjorie used to collect and distribute the royalties and so that the oil companies would have an EIN for recordkeeping purposes, not to reflect any change in ownership.

Marjorie executed a pour-over will that exercised the power of appointment in Trust No. 3, which on her death transferred the assets in Trust No. 3 to the MTC Living Trust, whose beneficiaries were respondents. After Marjorie's death, title to the oil assets remained with the 1972 Trust, but the parties continued to split the royalties, 65% to respondents and 35% to Eleanor. In 2013, Eleanor ceased distributions of the royalties to respondents, claiming that Trust No. 2 owned 100% of the oil assets and that the previous 65% distribution of royalties had been gifts from Eleanor.

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[1]We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant respondent Montoya's motion to reissue the order as an opinion, *see* NRAP 36(f), and issue this opinion in place of our prior order.

Respondents initiated the underlying litigation, petitioning the court in 2013 and 2014 for declarations that the MTC Trust owned 65% of the oil assets, for attorney fees based on Eleanor's alleged breach of fiduciary duties, and for a preliminary injunction directing Eleanor to distribute 65% of the royalties to the MTC Trust. The parties subsequently filed cross-motions for summary judgment.

The district court ordered the appointment of a new temporary trustee pending the resolution of this litigation and granted a preliminary injunction conditioned on respondents posting a bond. The district court later granted summary judgment in respondents' favor, construing the 1972 Trust as requiring a split of the oil assets with Trust No. 2 receiving a 35% interest and Trust No. 3 receiving a 65% interest, and that regardless, laches barred Eleanor from asserting that Trust No. 2 owned 100% of the oil assets. The district court also granted summary judgment on respondents' breach-of-fiduciary-duty claim and awarded them attorney fees under NRS 153.031. Eleanor appeals.

Summary judgment regarding the trust interpretation

Under the 1972 Trust, Trust No. 1 held all of the oil assets during the trustors' joint lifetimes. Upon the first trustor's death, the trustee was required to allocate to Trust No. 3 the fractional share of W.N. Connell's separate property (i.e., the oil assets) "equal to the maximum marital deduction allowed" by federal tax law, less any other amounts that qualified as a marital deduction but that were not a part of the 1972 Trust. The remaining fractional portion of the oil assets was to be allocated to Trust No. 2. In light of the evidence, the district court correctly determined that under the 1972 Trust, Trust No. 2, and thus Eleanor, received a 35% interest in the oil assets and the remaining 65% was apportioned to Trust No. 3, and thus to respondents as beneficiaries under the MTC Trust. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing de novo a district court's summary judgment and recognizing that summary judgment is proper where there are no genuine issues of material fact); *see In re Cable Family Trust*, 231 P.3d 108, 111 (N.M. 2010) (reviewing trust interpretation de novo).

Although Eleanor contends that the fourth article, which provides that "[a]ll income received by this Trust from the separate property of the Decedent shall be paid to [Eleanor]," governs the entire trust, that article governs Trust No. 2, only. Applying the fourth article to the entire 1972 Trust instead of just Trust No. 2 would create an inconsistency by requiring income from other portions of the 1972 Trust, of which Eleanor is not a beneficiary, to be paid to Eleanor as the beneficiary of Trust No. 2. Thus, interpreting the 1972 Trust as a whole requires rejecting Eleanor's construction. *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d

377, 380-81 (2012) (explaining that the intentions of contracting parties are ascertained by considering documents as a whole).

Eleanor's interpretation would also render the third article superfluous. *See Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998). The third article provides that a fractional share of the oil assets "equal to the maximum marital deduction" shall be allocated to Trust No. 3, and when making that allocation, the determination of the amount allocated "shall be as finally established for federal estate tax purposes." Although a copy of the federal estate tax return filed on W.N. Connell's behalf could not be located, respondents provided an IRS closing letter, which reflected a net federal estate tax for W.N. Connell of $18,081, and a Texas estate tax return for W.N. Connell, which was facially based on the federal estate tax form and which indicated 64.493% of the oil assets had been distributed to Marjorie, via Trust No. 3, and 35.507% had been distributed to Eleanor, via Trust No. 2. Respondents' expert witness stated that the distribution on the Texas return was consistent with maximizing the marital tax deduction for federal estate tax purposes and with the IRS closing letter.[2]

While Eleanor argues that because the Texas return erroneously showed that Marjorie, instead of Trust No. 3, inherited 65% of the oil assets, the return "could contain other errors as well," Eleanor failed to offer evidence supporting her contentions and her speculation that there may be other inaccuracies is insufficient to defeat summary judgment. *See* NRCP 56(e); *Wood*, 121 Nev. at 732, 121 P.3d at 1031. Similarly, although Eleanor argued that the Texas return was unreliable because respondents' expert report indicated that W.N. Connell had $3,674 of separate property outside of the 1972 Trust that partially offset the marital deduction, Eleanor failed to offer evidence that W.N. Connell had additional property or funds that were not accounted for and which could have further reduced the oil assets allocated to Trust No. 3. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Eleanor also points to several acts between 1980 and 2009 that she argues demonstrate Trust No. 2's ownership of 100% of the oil assets. These post hoc acts are generally irrelevant because the third article in the 1972 Trust explicitly provides that "the determination of the character and ownership of the said property and the value thereof shall be as finally established for federal estate tax purposes." Regardless, these acts do not raise genuine issues of material fact that would preclude summary judgment.

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[2]While Eleanor argues on appeal that the expert witness report that respondents submitted as evidence was hearsay or did not meet NRCP 56(c) and (e)'s affidavit requirements, this argument was not made in the district court, and we therefore decline to consider it on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

In particular, although Eleanor argues that the failure to distribute the oil assets to the MTC Trust demonstrates that Trust No. 2 owns 100% of the assets, this argument fails to recognize that the assets are titled in the name of the 1972 Trust, not Trust No. 2, and that Eleanor, as trustee, was the only person who could have distributed the oil assets in accordance with the 1972 Trust and Marjorie's exercise of her appointment powers. Eleanor should not benefit from her own failure to perform her duties as trustee. Eleanor also argues that she and Marjorie identified Trust No. 2 as the owner of the oil assets when they conducted business with the oil companies; however, all of the division orders and correspondence with the oil companies reflect the 1972 Trust as the owner of the oil assets.

Finally, although Eleanor argues Trust No. 2's ownership of the oil assets is demonstrated by the fact that Trust No. 2's EIN was provided to the oil companies, this argument fails because an affidavit from Marjorie's tax preparer stated that Trust No. 2's EIN was provided for record-keeping purposes and the record shows that tax returns were filed for both subtrusts between 1980 and 2013, all of which reflect the 65/35 split of the oil royalties. Eleanor did not meaningfully refute this evidence, and, moreover, she never filed a gift tax return to support her assertion that her distribution to Marjorie was a gift. Thus, aside from her affidavits concerning the use of Trust No. 2's EIN, Eleanor did not provide any evidence that Trust No. 2 owned 100% of the oil assets. As none of the acts that Eleanor points to are sufficient to raise a genuine issue of material fact as to the 1972 Trust's distribution of the oil assets, the district court did not err in concluding that the 1972 Trust contemplated a distribution of the oil assets into the subtrusts and that the undisputed evidence demonstrated that the oil assets were split 65% into Trust No. 3 and 35% into Trust No. 2 upon W.N. Connell's death. Therefore, we affirm the district court's summary judgment.[3]

Summary judgment regarding breach of fiduciary duty and attorney fees

Concerning the summary judgment on breach of fiduciary duties and the resulting award of attorney fees, we agree with the district court that Eleanor breached her fiduciary duties of impartiality and to avoid conflicts of interest when she unilaterally ceased distributions to respondents without seeking court instructions and when she advocated as trustee for a trust interpretation favoring herself as beneficiary; consequently, attorney fees were warranted. NRS 153.031(3)(b) (providing that the district court may award a petitioner attorney fees "to redress or avoid an injustice" and that a

[3]In light of our conclusion, we need not consider the district court's alternative basis of "laches" for summary judgment.

trustee may be made personally liable for the attorney fees if the trustee "breached his or her fiduciary duties"); *Riley v. Rockwell*, 103 Nev. 698, 701, 747 P.2d 903, 905 (1987); Restatement (Third) of Trusts § 79 (2007); *see Hearst v. Ganzi*, 52 Cal. Rptr. 3d 473, 481 (Ct. App. 2006) (recognizing a trustee's duty to treat all beneficiaries equally); *see also In re Duke*, 702 A.2d 1008, 1023-24 (N.J. Super. Ct. Ch. Div. 1995) (explaining that a trustee may not advocate for either side in a dispute between beneficiaries). We therefore affirm the district court's summary judgment and award of attorney fees under NRS 153.031(3).

Preliminary injunction

In light of this disposition, the preliminary injunction has merged with the final judgment. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). It is therefore moot, *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010), and we dismiss Eleanor's appeal of the preliminary injunction in Docket No. 66231.[4]

TOMMY LAQUADE STEWART, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 70069

May 4, 2017 393 P.3d 685

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary, robbery, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

Marchese Law Offices, PC, and *Jess R. Marchese*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

Before DOUGLAS, GIBBONS and PICKERING, JJ.

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[4]As to the order appointing a new temporary trustee, Eleanor failed to address this issue in her opening brief and we thus decline to consider it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). We have considered the parties' remaining contentions on appeal and conclude that they do not warrant a different outcome.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we are asked to analyze issues related to dual convictions for first-degree kidnapping and robbery, as well as the sufficiency of the warning given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant Tommy Stewart, along with another unidentified man, demanded entry into victim Natasha Lumba's apartment at gunpoint, ordered Lumba to lie face down in her bedroom while being guarded, and stole electronics, cash, and other personal items from the apartment. After a three-day jury trial, Stewart was found guilty on all counts and given a sentence of life with the possibility of parole. On appeal, Stewart argues that (1) there was insufficient evidence to support a conviction of both robbery and kidnapping and (2) the *Miranda* warning given by police was legally insufficient.

We hold that (1) there was sufficient evidence to support Stewart's convictions for kidnapping and robbery and (2) the *Miranda* warning was legally sufficient. Accordingly, we affirm the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

The crime

On January 20, 2015, Stewart and another unidentified man approached Lumba as she entered her apartment, held her at gunpoint, and told her to let them into the apartment. Once in the apartment, the men told Lumba to lie face down on the ground in the back bedroom. The men took turns guarding Lumba while ransacking her apartment and looking for things to steal. While Lumba was on the floor, one of the attackers put his hand under her bra and underwear to search for money or items she might have concealed.

After approximately 10 or 15 minutes, the two men finished their search of the apartment. Just before leaving, the two men told Lumba not to call the police or they would come back to kill her. The two men left Lumba's apartment, taking with them various electronics and cash. Lumba later called 911, and Las Vegas Metropolitan Police Department (LVMPD) personnel arrived on scene.

The investigation

During their investigation, LVMPD evidence technicians found Stewart's fingerprints on Lumba's jewelry box. Additionally, LVMPD detectives conducted a follow-up interview and photographic lineup, wherein Lumba identified two potential suspects, one of whom was Stewart. The LVMPD located Stewart and detained him for further questioning.

The interrogation

Prior to questioning, an LVMPD detective read Stewart the warning from the LVMPD *Miranda* card:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning. Do you understand these rights?

Stewart indicated that he understood his rights and agreed to talk with the detective. Stewart initially denied being at Lumba's apartment but later admitted to being there after being confronted with the fingerprint evidence. Stewart admitted to being in Lumba's apartment on the night in question with another man and admitted to stealing her personal effects, but Stewart stated that he had not entered the bedroom.

The trial

The State charged Stewart with conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon.

Stewart filed two pretrial motions to suppress his statement to LVMPD detectives, arguing that the LVMPD's *Miranda* warning was legally insufficient. The district court denied both motions.

After a three-day trial, the jury found Stewart guilty on all counts. Stewart was sentenced to life with the possibility of parole, and he then filed the instant appeal.

ANALYSIS

Sufficient evidence exists to support Stewart's dual convictions of first-degree kidnapping and robbery

Stewart challenges the evidence underlying the first-degree kidnapping conviction, arguing his conviction for first-degree kidnapping is not supported by the evidence because the movement of Lumba was incidental to the robbery, it did not substantially increase the risk of harm to her, nor did it go beyond that contemplated for completion of the robbery. We disagree.

In order to determine "whether a verdict was based on sufficient evidence to meet due process requirements, this court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (internal quotation marks omitted). "The jury's verdict will not be disturbed on

appeal when there is substantial evidence supporting it." *Brass v. State*, 128 Nev. 748, 754, 291 P.3d 145, 150 (2012).

The crime of first-degree kidnapping is described in NRS 200.310(1), while the crime of robbery is defined in NRS 200.380. A conviction for first-degree kidnapping requires that a "person . . . willfully seizes, confines, . . . conceals, kidnaps or carries away a person by any means whatsoever . . . for the purpose of committing . . . robbery upon or from the person." NRS 200.310(1). A conviction for robbery requires "the unlawful taking of personal property from the person of another . . . against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property." NRS 200.380. Dual convictions under both statutes are permitted based upon the same conduct. *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006). However, in such cases:

> [T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

Id. at 275, 130 P.3d at 181. In general, "[w]hether the movement of the victim is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases." *Curtis D. v. State*, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982); *see also Gonzales v. State*, 131 Nev. 481, 498, 354 P.3d 654, 666 (Ct. App. 2015).

Here, we conclude that there is sufficient evidence to support Stewart's dual convictions for robbery and first-degree kidnapping. The jury heard evidence that Stewart took Lumba's personal property against her will by means of force, violence, or fear of injury. Further, the jury heard evidence that Lumba's movement substantially exceeded the movement necessary to complete the robbery and/or substantially increased the harm to her. Indeed, Lumba was accosted as she entered her residence, taken to the back bedroom, guarded at gunpoint, face down, while Stewart and the other suspect rummaged through her house and stole her belongings. Whether Lumba's movement was incidental to the robbery, and whether the risk of harm to her was substantially increased, are questions of fact to be determined by the jury in "all but the clearest of cases." *Curtis D.*, 98 Nev. at 274, 646 P.2d at 548. This is not one of the "clearest of cases" in which the jury's verdict must be deemed unreasonable; indeed, a reasonable jury could conclude that Stewart forcing Lum-

ba from her front door into her back bedroom substantially exceeded the movement necessary to complete the robbery and that guarding Lumba at gunpoint substantially increased the harm to her. We conclude that the evidence presented to the jury was sufficient to convict Stewart of both robbery and first-degree kidnapping.

The district court did not err in denying Stewart's motion to suppress statements made to police because the Miranda warning given to Stewart was sufficient

Stewart argues the *Miranda* warnings given to him failed to advise him that he could consult with an attorney before and during interrogation. Stewart contends the warnings simply indicated that he had the right to an attorney, while failing to convey directly or indirectly, that he could actively consult with that attorney throughout the questioning. We disagree.

Miranda establishes procedural safeguards "to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation." *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007). *Miranda* prescribed the four now-familiar warnings:

> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Florida v. Powell, 559 U.S. 50, 59-60 (2010) (alterations in original) (quoting *Miranda*, 384 U.S. at 479). To be constitutionally adequate, *Miranda* warnings must be "sufficiently comprehensive and comprehensible when given a commonsense reading." *Powell*, 559 U.S. at 63.

Stewart first argues the *Miranda* warning given in this case did not inform him that he could consult an attorney before and during questioning. This argument is not supported by the record. The *Miranda* warning given to Stewart stated, in part, "You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning." Given a commonsense reading, these two clauses provide a constitutionally adequate warning—the warning informed Stewart he had the right to counsel before and during questioning, as specifically required by *Miranda*. *See Powell*, 559 U.S. at 63. Although the warnings were perhaps not the clearest possible formulation of *Miranda*'s right-to-counsel advisement, they were constitutionally sufficient. *Id.* Thus, we conclude Stewart's first *Miranda* argument fails.

Additionally, Stewart argues that the warning only advised him that he had the right to an attorney but not that he could actively consult with that attorney throughout the questioning. We conclude this argument is without merit. Indeed, the right to an attorney *is* the right to consult with that attorney, and the argument to the contrary relies on an absurd interpretation of the *Miranda* warning. *See Powell*, 559 U.S. at 62-63. Thus, we conclude Stewart's second *Miranda* argument fails.

Therefore, we hold that the district court did not err in determining Stewart received an adequate *Miranda* warning prior to making statements to police and, thus, did not err in denying Stewart's motions to suppress those statements.

CONCLUSION

We conclude that there was sufficient evidence to support Stewart's convictions for kidnapping and robbery and that the *Miranda* warning was legally sufficient. Accordingly, we affirm the district court's judgment of conviction.

DOUGLAS and PICKERING, JJ., concur.