No. _____

In The

Supreme Court of the United States

AARON L. KATZ,

Petitioner,

v.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The First Amendment right to petition clause contains a heightened standard precluding liability when a citizen exercises his/her right to bring suit over issues of public concern. Under that standard, the filing of a well-founded lawsuit may not be punished where *objectively* it is determined to be founded upon some statutory and/or other legally recognized basis, even where his/her suit is brought for some improper purpose [*Bill Johnson Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-43, 103 S.Ct. 2161 (1983); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 58, 113 S.Ct. 1920 (1993); *BE&K Construction, Co. v. National Labor Relations Board*, 536 U.S. 516, 525, 528-37, 122 S.Ct. 2390 (2002)].

But this case addresses an issue left open by this Court in *BE&K*. Can attorney's fees rules/statutes be used to penalize a "pure petition" (meaning a citizen's lawsuit directly against a local government for declaratory and injunctive relief to redress grievances)?

Here the Nevada Supreme Court held in the affirmative, punishing Petitioner through use of a statute that Court characterized as "fee-shifting." Thus the following questions:

1. May a petitioning litigant be held liable for his/her adversary's litigation costs and attorney's fees based upon a *punitive* statute, where the litigant files a "pure petition" to redress grievances of public concern, and his/her litigation is not a "sham?"

QUESTIONS PRESENTED FOR REVIEW
– Continued

2. Should cases such as *Premier Electric Construction Company v. National Electric Contractors Association, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) and *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 554-57, 134 S.Ct. 1749 (2014), which approve of true "fee-shifting" statutes that trump petitioning immunity, be limited to lawsuits that do *not* directly involve local government nor seek redress of public grievances? If so, should cases such as *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 62, 52 P.3d 685 (2002), *Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 134 Cal.Rptr.3d 244 (2001), *and this one*, be overruled/vacated?

RULE 14.1(b) STATEMENT

A list of all parties to the court proceeding whose judgment is the subject of this Petition, is as follows:

Petitioner, Aaron L. Katz

Respondent, Incline Village General Improvement District, the Board of Trustees, who are: Kendra Wong; Sara Schmitz; Peter Morris; Matthew Dent; Tim Callicrate

LIST OF RELATED CASES

Katz v. Incline Village General Improvement District, No. 70440, Supreme Court of Nevada, Judgment entered February 26, 2018

Vargas v. City of Salinas, No. S140911, Supreme Court of California, Judgment entered June 17, 2009

Equilon Enterprises, LLC v. Consumer Cause, Inc., No. S094877, Supreme Court of California, Judgment entered August 29, 2002

Premier Electric Construction Company v. National Electric Contractors Association, Inc., No. 86-1935, 86-2035, and 86-2036, United States Court of Appeals for the Seventh Circuit, Judgment entered April 23, 1987

Clackamas County, Oregon Mitchell v. Clackamas River Water, No. 157776, Court of Appeals of Oregon, Judgment entered August 24, 2016

City of Aurora v. 1405 Hotel, LLC, No. 14CA2328, Colorado Court of Appeals, Judgment entered April 7, 2016

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RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner, AARON L. KATZ, respectfully petitions for a Writ of Certiorari to review the Order of Affirmance of the Supreme Court of the State of Nevada ("OOA") entered on November 21, 2019 in Appeal No. 71493.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Unpublished OOA, 452 P.3d 411 (Table). Order Denying Petition for en banc Reconsideration, filed March 4, 2020 (Westlaw: 2019 WL 6247743).

STATEMENT OF BASIS OF JURISDICTION

This Petition is filed within ninety (90) days of March 4, 2020, when the Nevada Supreme Court denied reconsideration. Therefore, this Court has jurisdiction per U.S. Sup. Ct. Rules 13.1, 13.3 and 28 U.S.C. §1257(a).

Per U.S. Sup. Ct. Rules 10(a) and (b), this Court should grant Certiorari because a court of last resort, the Supreme Court of the State of Nevada, has decided an important federal question in a way that conflicts with rulings of the Supreme Court. No citizen of the United States should suffer a money judgment – much less a six-figure one – as the penalty for petitioning his/her local government by bringing suit in state court

for declaratory, injunctive and other non-pecuniary relief relative to the local government's policies inculcated against its citizens, where his/her lawsuit is neither baseless nor a sham.

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED BY THIS PETITION

The First Amendment to the United States Constitution states *in para materia*:

> "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

NRS 18.010(2)(b) provides:

> "In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party . . . without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim, or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground **or** to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in **all appropriate situations**. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil

> Procedure in all appropriate situations to **punish for** and **deter** frivolous **or vexatious** claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public" (emphasis supplied).

STATEMENT OF THE CASE

This is an Application for Certiorari from the Supreme Court of the State of Nevada.

This case involves a Constitutional interpretation of NRS 18.010(2)(b), such that said statute, applicable in other situations, cannot apply consistently with the First Amendment, to a citizen who directly petitions government for redress of grievances.

Quoting from pages 2-4 of the Petition for en banc Reconsideration in *Katz v. Incline Village General Improvement District* ("IVGID"), Appeal No. 70440:

> "There are 79 general improvement districts ("GIDs") active throughout the State of Nevada. According to the Nevada Department of Taxation, GIDs comprise over 30% of *all* local governments in Nevada. Therefore, a large number of Nevadans are directly affected by their decisions. An even greater number are indirectly affected, being residents of counties within which GIDs exist. Yet, the Nevada

> Supreme Court has never published an opinion interpreting NRS Ch. 318 with respect to the many governmental issues raised in Mr. Katz's petition for redress of grievances."

IVGID is "a governmental subdivision of the State of Nevada, a body corporate . . . politic . . . quasi-municipal corporation" [NRS 318.075(1)], general improvement [NRS 318.020(4)] and special district [NRS 308.020(2)]. Its boundaries encompass unincorporated portions (Incline Village and Crystal Bay) of Washoe County located on the northeastern rim of Lake Tahoe. Petitioner is a permanent resident of Incline Village, and a local property owner.

Not being a true municipality, a GID's basic power(s) are limited to those:

> "Stated in (its) initiating ordinance (as long as) . . . one or more of those authorized in NRS 318.116, as supplemented by . . . sections of . . . chapter (318) designated therein" [NRS 318.055(4)(b)]. "Basic powers not provided in its formation . . . (may be) add(ed by) . . . proceedings . . . cause(d) . . . to be had by the board of county commissioners ("county board") similar, as nearly as may be, to those provided for the formation of the district [NRS 318.055-318.070], and with like effect" [NRS 318.077].

IVGID was created by the county board on June 1, 1961. Its initiating ordinance granted the following basic powers: "paving, curbs and gutters, sidewalks, storm drainage, sewer disposal and water supply."

Shortly after IVGID's creation, Incline Village's developer, Crystal Bay Development Co. ("CBD"), began selling residential lots. "As part of the consideration (paid) for the purchase of property, every purchaser . . . contracted to pay yearly dues sufficient to purchase, improve and maintain . . . community beaches." CBD created a nonprofit homeowners' association [Incline Beach Recreation Corporation ("IBRC")] to coordinate the beaches' acquisition, ownership, operation and maintenance. Thus every purchaser of Incline Village property simultaneously purchased one share of stock (and vote) in the IBRC. According to the "Declaration of Protective Restrictions" created by CBD, which ran with the lands of all Incline Village property owners, their purchase guaranteed that each parcel owner would have *exclusive* access to and use of the beaches for perpetuity.

But CBD was unable to deliver on its promises because it had encumbered the beaches. So it needed someone to pay off those encumbrances. Since CBD had no means of compelling local property owners to pay more, that "someone" became IVGID.

Since recreation was not a power any county board could grant to GIDs, nor was it a power authorized by NRS 318, at IVGID's urging SB297 in 1967 added *public recreation* as a new basic power which could be granted to GIDs. And shortly thereafter, the IVGID Board asked the Washoe county board to "commence proceedings for the addition of powers of *public recreation*." The only testimony in support came from an IVGID trustee. He testified that,

1. If this new power were granted, the *only* recreational facilities to be acquired would be "park properties (including two beaches) . . . All (other envisioned) . . . recreational facilities . . . w(ould) be *privately owned . . . operated*" and presumably financed;

2. Addressing "economic . . . sound(ness) and feasib(ility)" [NRS 318.055(4)(c)(2)], IVGID's *ad valorem* taxes "together with its expected growth, w(ould) readily finance . . . acquisition and operation of the . . . beaches"; and,

3. Addressing "public convenience and necessity" [NRS 318.055(4)(c)(1)], the facilities to be acquired would be "*public property*."

On October 25, 1965 a divided (3 to 2) county board approved IVGID's request. And on November 15, 1965 Ordinance 97, Bill 132 was adopted granting IVGID this new basic power.

This grant spawned multiple lawsuits as CBD had represented the beaches would be *private property* and for owners' exclusive use. Eventually that litigation was settled and it was agreed the beaches would be purchased by IVGID. Funding would take place by issuing revenue bonds which would be paid from assessments against Incline Village properties [NRS 318.350(1)]. And on June 4, 1968 CBD's successor conveyed the beaches to IVGID.

In anticipation, on October 5, 1967 the IVGID Board adopted Resolution 420 which called for issuance of "recreation and revenue bonds." Contemporaneously,

Resolution 419 was adopted creating the Recreation Facility Fee ("RFF") intended to service those bonds/pay the beaches' operating costs.

Under a beach deed containing covenants and easements, IVGID "accepted and approved" (thus constituting a contract) a use covenant which restricted access to "property owners . . . and their tenants . . . within IVGID as (then) constituted . . . only for the purposes of recreation, by and for the(ir) benefit." This made IVGID Petitioner's beach steward and fiduciary, Petitioner a third-party beneficiary of the beach deed's covenants, and the beaches *private property* [*Wright v. Incline Village General Improvement District*, 597 F.Supp.2d 1191, 1197 (2009); *Kroll v. Incline Village General Improvement District*, 598 F.Supp.2d 1118, 1126-28 (2009); *Wright v. Incline Village General Improvement District*, 665 F.3d 1128, 1137-38 (9th Cir. 2011)].

Since the RFF had worked so well insofar as beach acquisition was concerned, and following this "playbook," IVGID's recreation facilities and services began to expand. Initially IVGID acquired two golf courses, an adjacent unimproved two acre parcel (which later became a driving range), a ski resort (today known as Diamond Peak) and other properties. To finance this acquisition, Resolution 1262 was adopted which called for $5.71 million of bonds. And to service those bonds/pay increased operating costs, Resolution 1261 was adopted which doubled the RFF.

In the years that followed, the IVGID Board acquired/developed: a tennis complex, skateboard park, mountain bike pump track, cross-country ski area, multi-use Recreation Center, two community centers, athletic fields, restaurants, food courts, bars, regional transportation, magazine publishing, and other facilities. Due to its isolated geographical location, staff were enabled to offer services which ordinarily would be provided by the County. To finance these endeavors and pay for these facilities' acquisition, renovation maintenance and operating costs, the RFF has steadily increased. Today's RFF/Beach Facility Fee ("BFF") has mushroomed from $50 to $830, and now totals nearly $7 million annually!

Given IVGID is neither a county (NRS 244), city (NRS 266) nor unincorporated town (NRS 269), and nowhere in NRS 318 are GIDs granted general (police) powers (to provide for the health, safety and welfare of their inhabitants), its residents' governance is by-and-large left to the Washoe county board. Although the county board "is vested with authority to create (GIDs) within the county, (its district attorney has opined that) . . . once . . . in existence (GIDs) are independent legal entities with their own perpetual existence (NRS 318.105 and) . . . *not* subject to direct . . . county board . . . review or oversight." And because of Resolution 1480 and Policy 3.1.0, the IVGID Board has abdicated essentially all day-to-day powers [including the hiring, retention (NRS 318.180), firing (NRS 318.210) and compensation (NRS 318.185) of staff; and the management, control, operation, and supervision of all

business and affairs of the district (NRS 318.175)] to un-elected staff.

Since IVGID lacks the size and tax base to support its expansive services, its primary funding source comes from the operation of a number of commercial "for profit," recreation businesses. Because they are *public*, and designed to be under-utilized by "the inhabitants . . . of (Incline Village/Crystal Bay) and of the State of Nevada" [as NRS 318.015(1) instructs], staff primarily cater to the *world's tourists*. But this revenue source is *insufficient* to cover IVGID's massive (nearly $7 million annually) budgeted *overspending*. Since this deficiency must come from "somewhere," it comes from two impermissible (NRS 361.445, Nev. Const. Art. 4, §§20-21) *special taxes against property* disingenuously labeled NRS 318.197(1) "standby service charges" (the RFF/BFF). And just like *ad valorem* and consolidated ("C")-tax revenues, the IVGID Board now budgets expenditures tied to an anticipated RFF/BFF pegged to whatever sum "the market will bear."

Although IVGID represents that the RFF/BFF pay for mere "availability" for assessed parcels/residential dwelling units to use recreation facilities that are just as "available" to the general *public*, they really pay for nothing more than up to five *forced* membership cards which themselves furnish nothing other than preferred access and the opportunity for cardholders to pay *additional* user fees (from an allegedly "preferred" fee schedule) to actually use those facilities. *No other local government in Nevada imposes such charges*.

There is no political remedy for property owners (who are the ones most primarily affected) because two-thirds are owned by non-natural persons, non-citizens, non-residents (their parcels are "vacation/second homes"), or their owners own multiple parcels who because of "one man, one vote," they are proportionally disenfranchised when it comes to voting for trustees.

Only after exhaustive extra-judicial attempts to redress these wrongs failed was Petitioner able "to resort to the *only other* available option; a lawsuit (filed in the Second Judicial District of the State of Nevada, County of Washoe) against IVGID for declaratory, injunctive," and other mostly non-pecuniary relief. Because of pleading rules requiring all causes of action to be joined in a single lawsuit, Petitioner sued IVGID on multiple theories, *none of which has ever been declared baseless*:

First cause of action: Given IVGID has no service plan, Petitioner sought a judgment declaring IVGID must prepare/the county board must approve a service plan [NRS 308.030(1)] "describ(ing in part) the facilities to be constructed . . . services to be provided . . . an estimate of costs, including the cost of acquiring land, engineering services, legal services, proposed indebtedness . . . any . . . proposed bonds and . . . other securities to be issued . . . annual operation and maintenance expenses, and other major expenses related to . . . formation and operation of the district." It was founded upon NRS 30.040(1) [declaratory relief],

34.160 (mandamus) and NRS 308.030 (control of special districts).

Second cause of action: In the alternative, Petitioner sought a judgment declaring the limits on facilities, services and activities IVGID is authorized to furnish; its permissible use of those facilities and the revenues generated therefrom; and, its permissible use of public employees devoted thereto. It was founded upon NRS 30.040(1), 30.070 (use of declaratory relief in any un-enumerated proceeding in which a judgment or decree will terminate the controversy/remove an uncertainty), 34.160, 34.320 (prohibition) and the implied remedy of NRS 308.080(4) [unreasonable departure from service plan].

Third cause of action: Petitioner sought a judgment declaring that resolutions/modified resolutions in accordance with NRS 354.612(1) were required for each of IVGID's funds/sub-funds (given there were primarily none) which set limits on the: object/purposes of each fund/sub-fund; expenditures IVGID can charge to each fund/sub-fund; and, transfers IVGID can make from each fund/sub-fund. It was founded upon NRS 354.030 (IVGID's duty to adopt resolutions creating accounting funds), NRS 30.040(1), 34.160, and 34.320.

Fourth cause of action: Petitioner sought a judgment declaring IVGID's rights, duties and the applicable standard of review under NRS 318.199(6) insofar as the utilities it furnishes, and the rates/tolls it can charge users given IVGID's water and sewer rates/charges were subject to NRS 704.040(1)'s "just

and reasonable" standard before NRS 318.199(1) was enacted. It was founded upon NRS 30.040(1), 34.160 and 318.199(6).

Fifth cause of action: Petitioner sought a judgment declaring and enjoining the: limited objects and purposes of IVGID's Utility Fund/sub-funds; the permissible uses of the rates/tolls IVGID charges for utility services; permissible uses of the revenues, reserves and balances assigned to the Utility Funds/sub-funds; and because IVGID had been using those revenues, reserves and balances to pay for expenditures unrelated to the direct objects and purposes of that fund/sub-funds, it be ordered to repay $2,430,000 to this fund/sub-funds. It was founded upon NRS 30.040(1), 30.070, 33.010 (injunction) and 34.160.

Sixth, fifteenth and twenty-fifth causes of action: Petitioner sought a judgment setting aside resolutions establishing new utility rates, and ordering refund of all 2011-2012 increased water/sewer rates/charges plus interest. They were founded upon NRS 318.199(6) and 33.010.

Seventh, tenth and sixteenth causes of action: Petitioner sought a judgment declaring the BFF/RFF to be special recreation taxes for which no statutory authority exists; and consequently, they cannot be assessed, liened and collected against property, nor collected on the county tax roll. Further, assuming *arguendo* the BFF/RFF could be assessed, liened and collected, Petitioner sought a judgment declaring neither can: exceed the just, reasonable and necessary

costs IVGID actually incurs to furnish and/or incidentally operate the beaches/other recreational facilities; nor pay for expenditures not appropriated in the beach/recreation funds/sub-funds; nor pay for expenditures in excess of those represented in final reports/resolutions pursuant to NRS 318.201(8)-(9) adopting the 2010-11 BFF/RFF as otherwise limited by NRS 318.116 and 318.015(2); declaring that Petitioner must be allowed to "disconnect" from the recreational facilities IVGID provides and the taking of its services [NRS 318.197(3)]; and because for at least the previous three years IVGID had exacted/expended $141,500 or more in impermissible *de facto* special taxes from properties with beach access, including Petitioner's, it be ordered to repay this sum to the beach fund (the one from which they were debited); and, $1,990,500 or more in impermissible *de facto* special recreation taxes from all properties, to the community services fund/sub-fund(s) from which they were debited. These causes of action were founded upon NRS 30.040(1), 33.010 and 34.320. And given IVGID's adoption of 2011-12 Resolution 1800 and 2012-13 Resolution 1811 were alleged to be arbitrary, capricious and not supported by substantial evidence, Petitioner's sixteenth cause of action was also founded upon NRS 34.160.

Eighth and eleventh causes of action: Petitioner sought refunds of his 2010-12 BFFs/RFFs paid under protest/duress. Given Petitioner alleged the express refund remedies of NRS 318.201(12), Resolutions 1794 and 1800 were unavailable, inadequate and illusory, his causes of action were founded upon NRS 30.040(1),

34.160, *Thomas v. City of East Palo Alto*, 53 Cal.App.4th 1084, 1087-88, 62 Cal.Rptr.2d 185 (1997), and *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96, 100-01 (2008).

Ninth cause of action: Petitioner sought a judgment setting aside the resolution adopting the final report setting 2011-12's BFF/RFF. It was founded upon NRS 318.199(6), 30.040(1), and 34.320.

Twelfth cause of action: Petitioner sought a judgment allowing him to inspect, copy and/or receive in electronic format various public books, records, documents and files requested yet denied; directing IVGID to make public books, records, documents and files stored electronically on public computers, available during normal office hours to members of the public for their inspection/copying; and, invalidating portions of Resolution 1801 which prevents members of the public from requesting examination of particular public books, and assessing fees in excess of those allowed under NRS 239 [the Nevada Public Records Act ("NPRA")]. It was founded upon NRS 239.011(1)(a), 30.040(1) and 34.320.

Seventeenth cause of action: Petitioner sought a judgment interpreting the beach deed by declaring: he is a third-party beneficiary; that IVGID had violated the beach deed and a related court approved settlement agreement; that the BFF was being impermissibly used as a method for financing the costs of developing private property since the beaches are private [NRS 318.015(2)]; since the purposes for IVGID's

acquisition of the beaches had been fulfilled, its continued ownership was no longer necessary; and for these reasons IVGID should be removed as Petitioner's beach steward/fiduciary and a receiver appointed to protect the beaches' equitable owners, including Petitioner.

Thus Petitioner challenged IVGID's *ultra vires* acts, and he alleged standing as a person who "suffer(ed) . . . special or peculiar injury (i.e., the RFF/BFF and excessive water and sewer service rates) different from that sustained by the general public" as a whole.

In response IVGID filed a motion for partial judgment on the pleadings. On August 22, 2012 the trial court granted judgment in IVGID's favor dismissing ten (10) of Petitioner's first twelve (12) causes of action it labeled "requests for declaratory relief." It held that "aside from containing no express private remedy for citizens like Katz, [NRS Ch. 318 or 354 (the Local Government Budget and Finance Act)] militates against any implication of a private remedy . . . (Thus) the Declaratory relief Katz requests is simply unavailable under NRS Chapter 318." On October 29, 2012 it dismissed Petitioner's sixteenth cause of action for similar reasons.

Petitioner then filed a motion for leave to file a supplemental complaint which proposed a number of new causes of action expressly supported by a statute [such as NRS 318.199(6) to set aside resolutions adopting changed RFFs/BFFs, NRS 318.201(12) to refund past RFFs/BFFs] or case law [*Clean Water Coalition v.*

The M Resort, LLC, 127 Nev. 301, 255 P.3d 247 (2011) which recognizes declaratory relief to challenge the validity of a "fee" which is really a "tax" (here the RFF/BFF); *City of Fernley v. State, Dep't of Taxation*, 132 Nev. Ad. Op. 4, 366 P.3d 699 (2016) which recognizes declaratory relief to challenge the constitutionality of a statutory scheme [NRS 318.197(1) and 318.201(1)] which takes property without just compensation or due process [U.S. Const. Amendments V and XIV, §1, Nev. Const. Art. 1, §§8(5)-(6)]; and, *City of Reno v. Goldwater*, 92 Nev. 696, 558 P.2d 532 (1976) which recognizes declaratory relief to challenge the constitutionality of acts which impair contracts government has made with the public[1] (U.S. Const. Art. 1, §10, Nev. Const. Art. 1, §15)]. The motion was denied as being "futile" in light of the court's judgment on the pleadings.

With respect to Petitioner's requests to set aside IVGID's changed water and sewer resolutions [NRS 318.199(6)], the trial court interpreted the standard of review (an issue of first impression); whether the board of trustees' actions were arbitrary or capricious amounting to an abuse of discretion. And on that basis, granted summary judgment to IVGID.

Petitioner's public records cause of action survived two summary judgment motions and went to trial. After Petitioner had rested his case, the trial court denied

[1] Here that: the recreational facilities to be acquired would be *public*; they would be *limited* to "park properties (including two beaches)"; acquisition and operational costs would be paid from IVGID *ad valorem* taxes; and, the beach deed covenants.

IVGID's motion for directed verdict. Notwithstanding, the trial court ultimately ruled in favor of IVGID. It created a litmus test to determine what was a public record, and ruled upon IVGID's several claims of privilege.

IVGID followed with its motion for attorney's fees per NRS 18.010(2)(b) and 7.085(1)[2]. Importantly, *nowhere* in the motion did IVGID contend that any of Petitioner's claims was *groundless*. Rather, its motion was founded "*solely*" upon "harassment." IVGID alleged Petitioner had acted with "*improper motivation*" it asserted was "purely harassment." And that harassment, according to IVGID, consisted of the following *extra-judicial* conduct:[3]

1. "Many hundreds of requests for public records" IVGID believed were targeted to adduce technical NPRA violations rather than actually obtaining useful documents;

2. Requests to examine additional public records the night after IVGID's Public Records Officer's court testimony;

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[2] Inapplicable as Petitioner was not licensed as an attorney.

[3] In contrast, NRS 18.010(2)(b) fees/costs must be based upon *judicial* conduct because they are intended "to punish for and deter frivolous or vexatious (judicial) *claims and defenses* (which) . . . overburden limited *judicial resources*, hinder the timely resolution of meritorious (judicial) claims and increase the costs of . . . providing professional (judicial) services to the public."

3. Protected public comment at an IVGID Board meeting where Petitioner attempted to explain away the trial court's rulings;

4. A pattern and practice of litigiousness (*not* involving IVGID) in proper person; and,

5. Attacks in the form of NRS 281A.710(1)(b) ethics complaints filed with the Nevada Commission on Ethics, and NRS 241.039(1) open meeting law complaints filed with the Nevada Attorney General.

Although the trial court chided Petitioner for his "dogged and misguided persistence," *nowhere* in its attorney's fee order did it point to *any* claim for relief *clearly foreclosed* by statute and/or case law. And significantly, in adjudicating the merits of Petitioner's appeal in Case No. 70440, *nowhere* did the Nevada Supreme Court point to any statute or case law that *clearly foreclosed* any claim of Petitioner's. Moreover, nowhere in that OOA did the Nevada Supreme Court use the words "frivolous" or "baseless." Nor did it suggest Petitioner's suit had been unreasonably brought or maintained. Notwithstanding none of Petitioner's conduct constituted legal harassment, the subject money judgment was founded upon Petitioner's alleged extra-judicial harassment of his local government.

IVGID sought $226,466.80 in attorney's fees, and another $2,925.95 in legal costs. On July 15, 2016 the trial court entered its Order granting these sums, and it thereafter entered a money judgment in this amount.

In support of its attorney's fee Order the trial court relied upon 13 salient findings and conclusions essentially adopting IVGID's allegations. Although the court concluded Petitioner's "actions, taken as a whole, (led) . . . to one undeniable conclusion: this was a frivolous lawsuit," *nowhere* did it identify any cause of action which was allegedly frivolous nor without basis in law or fact. Instead, it concluded Petitioner's lawsuit was a "clear abuse of the judicial system" because "what began as a quest . . . to invalidate (a) $800 recreation fee[4] . . . morphed into an obsession of obstructing the staff of IVGID with burdensome records requests and contentious litigation." As a consequence, the court concluded Petitioner had: abused the judicial resources of the court by using improper dilatory tactics designed to obstruct the operation of IVGID; evaded, avoided and ignored orders; disregarded rules of civil procedure;[5] and, filed repetitive pleadings "rarely supported by case law or good faith argument." "Neither courts nor the laws of Nevada exist so *those who detest their local governments* can bully them into submission."[6]

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[4] The trial court did not understand Petitioner's lawsuit was about taking away the funding source to finance the District's myriad of *ultra vires* activities at local property owners' expense.

[5] The trial court's attorney's fee order cannot be sustained as a sanction because in Nevada a motion for sanctions "*must be made separately* from any other motion" [NRCP 11(c)(2)].

[6] "Ill will is not uncommon in litigation . . . we may presume . . . every litigant intends harm to his adversary" (*BE&K Construction*, *supra*, 536 U.S. 534).

Insofar as Petitioner's public records cause of action was concerned, the trial court found Petitioner had often requested documents that did not exist or were not public records under its newly announced "balancing" litmus test, on a case-by-case basis. It chided Petitioner for insisting IVGID provide him access to the District's computerized document storage system so he could search public records with assistance of an IVGID employee when needed. And it concluded IVGID had made every effort to accommodate Petitioner's numerous requests for documents.

Petitioner's appeal to the Nevada Supreme Court relative to the award of attorney's fees was grounded upon a number of theories. But his first and the most important was: "NRS 18.010(2)(b) cannot apply to a lawsuit serving the public interest, pursuant to the First Amendment of the United States Constitution." Petitioner framed the issue as follows: "Can NRS 18.010(2)(b) apply to a lawsuit serving the public interest, founded upon the First Amendment Petition Clause of the United States Constitution in public interest litigation? If not, what is the First Amendment standard for adjudicating IVGID's motion (and) did IVGID present evidence meeting that standard?"

The Nevada Supreme Court ruled that a NRS 18.010(2)(b) award does not violate a litigant's First Amendment right to petition. Rather, it merely requires him/her to bear the costs incurred in exercising that right. Further, it ruled Petitioner had failed to establish that any of his claims was protected speech entitled to absolute immunity (citing *Vargas*

as authority). In other words, the Nevada Supreme Court assumed NRS 18.010(2)(b) was a fee-shifting statute, and it aligned itself with *Vargas*' holding that "fee-shifting" is not civil liability within the meaning of *Noerr-Pennington*.

REASONS FOR GRANTING THIS PETITION

I. First Amendment Petition Immunity Extends to States Under the Fourteenth Amendment to the United States Constitution.

1. The First Amendment to the U.S. Constitution guarantees "Congress shall make no law . . . abridging the . . . right of the people . . . to petition . . . government for a redress of grievances." Freedoms protected against federal encroachment by the First Amendment are entitled, under the Fourteenth Amendment, to the same protection from infringement by the States [*New York Times Co. v. Sullivan*, 376 U.S. 254, 276-77, 84 S.Ct. 710, 723-24 (1964); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222-23, 88 S.Ct. 353, 356-57 (1967)]. Therefore to the extent NRS 18.010(2)(b) has been used by government to retaliate against a citizen for exercising his right to petition, it is unconstitutional when applied to a "pure petition" [*Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)].

II. The Right to Petition Occupies the Highest Rung of First Amendment Values.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" (*New York Times*, *supra*, 376 U.S. 270). Although "the established elements of speech, assembly, association, and petition (are) . . . not identical, (they) are inseparable" [*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 102 S.Ct. 3409 (1982)]. Thus a citizen's right to speak on matters of public concern "is more than self-expression; it is the essence of self-government" [*Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209 (1964)]. Since "[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values" [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759, 105 S.Ct. 2939 (1985)], the court may not punish petitioning on the ground it views a particular expression unwise or irrational [*Democratic Party of U.S. v. Wisconsin ex rel. La Fallete*, 450 U.S. 107, 124, 101 S.Ct. 1010, 1020 (1981); *Elfbrandt v. Russell*, 384 U.S. 11, 17, 86 S.Ct. 1238, 1241-42 (1966)]. "[I]f there is a bedrock principle underlying the First Amendment it is that . . . government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" [*Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989)]. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection" [*Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56, 108 S.Ct. 876 (1988)].

If "pure speech" on matters of public concern is entitled to special protection under the First Amendment [*Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S.Ct. 1207, 1215 (2011)], why wouldn't the same be true insofar as "pure petitioning" is concerned? How can this Honorable Court justify penalizing a citizen who takes leave of the opportunity for free political discussion and debate on public issues in an uninhibited, robust and wide-open fashion? Rather than attorney's fee-shifting in a case which does not allow for attorney's fee awards to either side, a $229,392.75 money judgment which "punish(es) for . . . vexatious claims," by any other name, is an impermissible penalty.

III. First Amendment Petition Immunity Extends to Lawsuits Against Government.

The First Amendment protects the right to ask government, *at any level*, to right a wrong or correct a problem. It allows citizens to: focus government attention on unresolved ills; provide information to elected leaders about unpopular policies; expose misconduct, waste, corruption, and incompetence; and, vent popular frustrations without endangering the public order. It is "among the most precious liberties safeguarded by the Bill of Rights," and encompasses the very idea of government (*United Mine Workers*, *supra*, 389 U.S. 222), and "is arguably one of the most important rights we have."

Therefore the right to file suit in a court of law for resolution of legal disputes represents "but one aspect

of the right of petition" [*California Motor Transport, Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609 (1972); *Vargas*, *supra*, 200 Cal.App.4th 1342]. It "protects the right of individuals to appeal to courts and other forums established . . . for resolution of . . . actual issues of public concern" [*Borough of Duryea, PA v. Guarnieri*, 564 U.S. 379, 382-83, 131 S.Ct. 2488, 2491-92, 2494 (2011)]. Since access to the courts is often the only method by which a person may seek vindication of federal and state rights and ensure accountability in the affairs of government, meaningful access to the courts, where a party "request(s) . . . the court do or not do something" [*Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005)], is recognized as "a fundamental right within the protection of the First Amendment" [*United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585, 91 S.Ct. 1076, 1082 (1971)].

IV. First Amendment Petition Immunity is Not Limited to Antitrust Matters.

Here the Nevada Supreme Court "declin(ed) . . . to extend the *Noerr-Pennington* doctrine . . . to the (subject) award of attorney fees" because it was of the opinion "*Noerr-Pennington* immunizes petitioning activity (only) *in the antitrust context*" (OOA:2). But *Noerr-Pennington* immunizes legitimate efforts to influence a branch of government not merely in the antitrust context, but from *virtually all forms of civil liability* [*Tichinin v. City of Morgan Hill*, 177 Cal.App.4th 1049, 1065, 99 Cal.Rptr.3d 671, 674 (2009); *Jourdan River*

Estates, LLC v. Favre, 278 So.3d 1135, 1149-53 (Miss. 2019); *Sewell v. Racetrack Petroleum, Inc.*, 245 So.3d 822, 826-27 (Fla. App. 2017)]. We know from *Bill Johnson*, *BE&K Construction*, and *Equilon Enterprises* that the Nevada Supreme Court's refusal was fundamentally wrong.

V. First Amendment Petition Immunity Extends to Extra-Judicial Conduct Ancillary or Incidental to Litigation.

The Ninth Circuit Court of Appeals recognizes that *Noerr-Pennington* immunity extends to *extra-judicial* conduct[3] incidental to a lawsuit or ancillary to litigation [*Theme Productions, Inc. v. News Am. Marketing*, 546 F.3d 991, 1006-07 (9th Cir. 2008); *White v. Lee*, 227 F.3d 1214, 1231-32 (9th Cir. 2000); *Sousa v. Direct TV, Inc.*, 437 F.3d 923, 936-38 (9th Cir. 2006)]. Given the trial court's fee award was founded entirely upon extra-judicial activities incidental or ancillary to the subject litigation that was allegedly "harassing" to IVGID, this conduct was protected by the petition clause.

VI. First Amendment Petition Immunity Extends to Common-Law Torts Such as Abuse of Process.

Theme Productions, *supra*, 546 F.3d 1007 joins a number of other courts in holding "a common-law tort doctrine *can(not)* . . . permissibly abridge or chill the constitutional right of petition." The stated facts in

support of IVGID's motion for attorney's fees, especially because they were essentially all *extra-judicial*,[3] amounted to the common law tort of malicious prosecution. In Nevada the elements of NRS 18.010(2)(b) liability are the same as those for abuse of process: 1) filing a lawsuit for an ulterior purpose other than resolving a legal dispute; and, 2) committing a willful act in the use of that process not proper in the regular conduct of the proceeding [*LaMantia v. Redisi*, 118 Nev. 27, 38 P.3d 877, 897 (2002)]. And because here IVGID alleged "malice" (NRS 193.0175), "want of probable cause," and "termination in IVGID's favor," the trial court should have "disregard(ed IVGID's) labeling (and) . . . instead conclude(d) the gravamen (to be) . . . malicious prosecution" [*City of Cotati v. Cashman*, 29 Cal.4th 69, 78-99, 124 Cal.Rptr.2d 519 (2002); *Ramona Unified School District v. Tisknas*, 135 Cal.App.4th 510, 37 Cal.Rptr.3d 381, 390 (2005)] and found Petitioner's activities to be protected under the Petition clause.

Moreover, governmental entities are not entitled to recover their expenses of suit[7] for this behavior because:

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[7] Special damages because IVGID incurred attorney's fees arising from Petitioner's tortious conduct. But "because parties always know lawsuits are possible when disputes arise, the mere fact (IVGID) . . . was forced to . . . defend a lawsuit (wa)s insufficient to support an award of attorney fees as damages" [*Sandy Valley Assoc. v. Sky Ranch Estate Owners Assoc.*, 117 Nev. 948, 35 P.3d 964, 969-70 (2001), receded from on other grounds in *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982, 987-88 (2007)].

1. In Nevada claims for malicious prosecution are pre-conditioned upon termination of a *criminal action* in favor of the person initiating proceedings (*LaMantia*, *supra*, 38 P.3d 879). Since Petitioner's underlying lawsuit was not criminal, any malicious prosecution claim for fees brought by reason of IVGID's successful defense is barred;

2. "The policy of encouraging free access to the courts is so important that the litigation privilege extends . . . *to claims of abuse of process*, intentional infliction of emotional distress, negligent misrepresentation, invasion of privacy, fraud, and . . . interference with contract and prospective economic advantage. . . . In fact, *the privilege extends to any (civil) action*" [*Pacific Gas & Electric Co. v. Bear Stearns Co.*, 50 Cal.3d 1118, 1132-33, 270 Cal.Rptr. 1 (1990); *Wilcox v. Superior Court*, 27 Cal.App.4th 809, 822, 33 Cal.Rptr.2d 446 (1994), abrogated on *other* grounds ("to the extent . . . held to the contrary") in *Equilon Enterprises*, *supra*, 29 Cal.4th 68 (fn.5)];

3. Both malicious prosecution and abuse of process actions, when brought by governmental entities, are *barred* because of the "chilling effect of considerable dimension (they) . . . generate . . . upon the exercise of the right to petition the government through the courts for redress of grievances. . . . Constitutional . . . and tort principles combine to make the existence of a(n abuse of process) . . . action (to) . . . recover (government's) . . . expenses of suit . . . *inappropriate in this context*" [*City of Long Beach v. Bozek*, 31 Cal.3d 527, 532, 538-39, 645 P.2d 137 (1982), *reinstated*, 33

Cal.3d 727, 190 Cal.Rptr. 918, 919 (1983); *Ramona USD*, *supra*, 37 Cal.Rptr.3d 390; *PG&E*, *Id*.]; and,

4. When it comes to malicious prosecution and abuse of process claims prosecuted by governmental entities, they lack standing because their claims "are properly treated as those for *injuries to the person*" [*Northwest Airlines, Inc. v. Camacho,* 296 F.3d 787, 791 (9th Cir. 2002)]. Because IVGID is *not* a "person," it is not capable of incurring special damage/these alleged injuries regardless of label.

If IVGID is barred from suing Mr. Katz on theories of malicious prosecution or abuse of process, and attorney's fees in defending a frivolous lawsuit constitute special damages in such a lawsuit,[7] how can the First Amendment condone a money judgment in IVGID's favor?

VII. First Amendment Petition Immunity Extends to Public Records Litigation.

NRS 239.010 is the statutory embodiment of petitioning insofar as public records are concerned. NRS 239.011(1) allows citizens to bring suit to compel examination/copying of public records (Petitioner's twelfth cause of action). Although NRS 239.011(2) allows for attorney's fees *against* government where the requester prevails, it does *not* allow reciprocity where the government prevails. Legislative history shows this unequal treatment was *intentional* to ensure the public's exercise of this right would not be "chilled."

Yet here IVGID was able to circumvent this prohibition by seeking fees under NRS18.010(2)(b). Because this circumvention conflicts with First Amendment immunity as well as NRS 239.011(2) prohibition, it should not be condoned.

VIII. Unless a Lawsuit Against Government Seeking to Redress Grievances is "Baseless," Petitioner Cannot be Penalized.

First Amendment immunity for petitioning for redress of grievances was initially recognized in two antitrust cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523 (1961) and *Mine Workers v. Pennington*, 381 U.S. 657, 669, 85 S.Ct. 1585 (1965). In *Noerr*, this Court recognized "a narrow exception . . . to avoid chilling the exercise of the First Amendment right to petition . . . government for . . . redress of grievances" (*Octane Fitness*, *supra*, 572 U.S. 556); the "sham" exception [*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S.Ct. 609 (1972); *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344 (1991)]. The sham exception "encompasses situations in which persons use the governmental *process*, as opposed to the *outcome* of that process (*PRE*, *supra*, 50 U.S. 60-61)," for "illegal and reprehensible practice(s) which may corrupt the . . . judicial process" (*California Motor Transport*, *supra*, 404 U.S. 513). Stated differently, where the governmental process is "a mere sham to cover what is actually nothing more than an attempt

to interfere directly with the business relationships of a competitor" (*Noerr*, *supra*, 365 U.S. 144).

Under the test first articulated in *Omni Outdoor Advertising*, *supra*, 499 U.S. 379-80 and thereafter *PRE*, *supra*, 508 U.S. 60-61, this Court adopted a two-part test for determining "sham" litigation. The first prong requires the court to determine whether a petitioner's allegations are "baseless," meaning he/she lacked probable cause to issue such legal proceedings. Moreover, that determination is an *objective* one (meaning *a matter of law*) in the sense no reasonable litigant could realistically expect success on the merits (*PRE*, *supra*, 508 U.S. 60, 63; *BE&K Construction*, *supra*, 536 U.S. 529-30).

Moreover, as *Bill Johnson* and *BE&K Construction*, *supra*, 536 U.S. 528-37 instruct, "objectively baseless" for petition purposes means *more* than "without merit" or "unsuccessful" because "even unsuccessful but reasonably based suits advance some First Amendment interests. . . . Unsuccessful suits allow the public airing of disputed facts . . . and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around" (*BE&K Construction*, *supra*, 536 U.S. 532).

So could some future citizen activist not named Aaron Katz take IVGID to task on issues like the RFF/BFF, utility rates and public records and be successful? Or could IVGID change trustees and/or staff, and new policy makers realize Mr. Katz was actually

correct, or even arguably correct, and thus change how the District raises revenues, sets utility rates and/or handles public records requests? These questions cannot be answered "no possible way."

Because here IVGID failed to allege (let alone prove that) Petitioner's lawsuit was "baseless," and the Nevada Supreme Court declined to extend *Noerr-Pennington* immunity to non-antitrust petitioning, the subject attorney's fee judgment cannot be sustained.

IX. Given Petitioner's Lawsuit Was Not "Baseless," The Trial Court Was Precluded From Basing its Award Upon Motive.

Although there is a second prong to the "sham" litigation test (whether petitioner brought his/her action for an improper, malicious purpose), a court *cannot* even examine the matter unless and until the first prong is met (*PRE*, *supra*, 508 U.S. 60). Therefore, a plaintiff's motivation for filing and maintaining a lawsuit is *irrelevant* [*Bill Johnson*, *supra*, 461 U.S. 740-43 (filing of a well-founded lawsuit by an employer may not be enjoined as an unfair labor practice, even if it would not have been commenced *but for the employer's desire to retaliate against an employee's protected rights*); *Omni Outdoor Advertising*, *supra*, 499 U.S. 380 (private party's *selfish motives* are irrelevant to the doctrine precluding liability for petitioning government)].

In the context of petitioning, application of the plain either "or" language of NRS 18.010(2)(b) leads to

an unconstitutional result (*Yick Wo*, *Id*.). Although "frivolousness" *or* "harassment" seem to be alternative bases for NRS 18.010(2)(b) awards, just as they seem for FRCP 11 awards, they are *not*. Given it is impermissible "to use Rule 11 to *penalize* the assertion of non-frivolous substantive claims" [*Townsend v. Holman Consulting Co.*, 929 F.2d 1358, 1362-63 (9th Cir. 1990)], "even when (the pleader's motives are) . . . not entirely pure" [*Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832, 834 (9th Cir. 1986)], it should be equally impermissible here.

Since here the trial court by-passed the first prong of the "sham" test (baselessness), and the Nevada Supreme Court declined to apply the test altogether, the subject attorney's fee judgment is constitutionally repugnant.

X. Moreover, the Trial Court Erred in its Definition of Harassment.

Inquiry into the second prong of the "sham" exception looks not to the petitioner's intent or purpose but rather, whether his/her efforts are genuinely aimed at procuring favorable government action (*PRE*, *supra*, 508 U.S. 58, 61). In other words,

> [s]ome "form . . . of illegal and reprehensible practice which . . . corrupt(s) the administrative or judicial processes. . . . Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . One claim, which a court or

> agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused . . . actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression'" (*California Motor Transport*, *supra*, 404 U.S. 513).

Given the Nevada Supreme Court has never interpreted NRS Ch. 318, generally, and never previously applied the "express administrative remedy" doctrine (viz. a clearly inapplicable statute) to justify ignorance of a citizen's claims and allow a GID to act as a "fiefdom", how can this Court conclude Mr. Katz reasonably could not have expected any success on the merits of his lawsuit when he filed it? Since the trial court never made this inquiry (instead it concentrated on Petitioner's alleged detest for his local government),[6] and the Nevada Supreme Court declined to apply the test altogether, the subject attorney's fee judgment is constitutionally repugnant.

XI. This Court Cannot Rely on the Nevada Supreme Court's Summary Conclusion Petitioner Failed to Establish Absolute Immunity Under the First Amendment.

Assuming this Court were to agree with everything Petitioner has stated so far (which it should), the question arises: is the Nevada Supreme Court's conclusion at OOA:2-3 that "Katz has failed to establish that

his claims are protected speech and thereby entitled to absolute immunity under the First Amendment" sufficient to deny this Petition? The answer must be no.

It is elementary that this Court cannot rely on a conclusion of law when there are no findings of fact, or the findings do not support the conclusion [*Sun Mutual Insurance Co. v. Ocean Insurance Company*, 107 U.S. 485, 508 (1883); *The Annie Lindsley*, 104 U.S. 185, 191 (1881); *Interstate Circuit v. United States*, 304 U.S. 55, 56-58, 58 S.Ct. 768 (1938)]. Indeed, meaningful review is well-nigh impossible without the entry of findings of fact *and* conclusions of law [*Sampson v. Murray*, 415 U.S. 61, 98-99, 94 S.Ct. 937 (1974), J. Marshall, dissenting].

Although the OOA points to *Bill Johnson* ("baseless litigation is not immunized") and Vargas ("upholding California's fee-shifting statute"), both the trial court and the Nevada Supreme Court neglected to discuss baselessness. And, fee-shifting is not a First Amendment immunity exception.

Thus to summarily "decline to apply First Amendment principles in the context of a postjudgment award of attorney fees under NRS 18.010(2)(b)" because Petitioner failed to meet some undiscussed burden should not foreclose review.

XII. The "Fee-Shifting" Statute Exception.

Although this Court has never *directly* recognized another basis (other than baseless litigation) for

stripping a petitioning litigant of his/her First Amendment immunity, in *Octane Fitness*, *supra*, 572 U.S. 556-57, this Court questioned why the shifting of attorney's fees under 35 U.S.C. §285 would diminish that right. Similarly, the few courts which have considered the issue [*Premier Electric*, *supra*, 814 F.2d 373; *Equilon Enterprises*, *supra*, 124 Cal.Rptr.2d 514-15; *Vargas*, *supra*, 134 Cal.Rptr.3d 255 (only because "we are bound by *Equilon*")] have declined to extend the (immunity) doctrine to preclude attorney's fee awards under true fee-shifting statutes [*Clackamas County, Oregon Mitchell v. Clackamas River Water*, 280 Or.App. 366, 382 P.3d 598, 601 (2016)]. The reasoning has been nothing more than "requiring a party to bear the costs of litigation is not the same thing as subjecting the party to liability for petitioning conduct, which is what the *Noerr-Pennington* doctrine prohibits" (Id.). Stated differently, true fee-shifting "simply requires the party that creates the costs to bear them" (*Equilon Enterprises*, *supra*, 124 Cal.Rptr.2d 515).

But to diminish "arguably one of the . . . most precious liberties safeguarded by the Bill of Rights" (*United Mine Workers*, *supra*, 389 U.S. 222) because of simple "fee-shifting" is constitutionally repugnant.

XIII. NRS 18.010(2)(b) is Not a "Fee-Shifting" Statute.

Without critical discussion, the Nevada Supreme Court was apparently of the view NRS 18.010(2)(b) is a "fee-shifting" statute which permitted it to conclude

"attorney fees to a prevailing party is not the same as civil liability for filing a lawsuit" (even when the fees awarded are reduced to a six-figure money judgment). Petitioner does not characterize NRS 18.010(2)(b) as a mere fee-shifting statute but rather, as a codification of a malicious prosecution or abuse of process tort relative to the attorney's fees incurred in defending a lawsuit.

A true fee-shifting statute is one that merely "require(s) the loser to pay the winner's (attorney's) fees" (*Premier Electric*, *supra*, 814 F.3d 373). It "declares which party, *one or the other*, can recover its attorney's fees" (*Equilon Enterprises*, *supra*, 124 Cal.Rptr.2d 514). But here NRS 18.010(2)(b) is *not* such a statute. It does not "award . . . attorney fees to the prevailing party" (*Id.*). And rather than declaring "which party, *one or the other*, (who) can recover its attorney's fees," it "*punishes*" the party who brings or maintains a "claim, counterclaim, cross-claim or third-party complaint or defense . . . without reasonable ground," or the non-prevailing party who brings or maintains such "claim, counterclaim, cross-claim or third-party complaint or defense . . . to harass the prevailing party." And rather than "simply requir(ing) the party that creates the costs to bear them," or the one "who wants to publish a newspaper pay for the ink, the paper, and the press" (*Premier Electric*, *Id.*), NRS 18.010(2)(b)'s stated purpose is to "*punish* for and deter frivolous or vexatious claims and defenses."

Finally, unlike a true "fee-shifting" statute, a petitioning litigant is not placed on notice ahead of time

that if he/she is unsuccessful, he/she may be liable for his/her petitioning government's attorney's fees and costs. If that were the case, few if any citizens would ever choose to exercise this fundamental right. Moreover, Petitioner cannot think of a better way to chill a citizen's decision to petition the judiciary to redress the grievances he/she has with his/her government than to condone use of a statute like NRS 18.010(2)(b) to *punish* him/her.

XIV. Even if NRS 18.010(2)(b) is a "Fee Shifting" Statute, it Cannot Dispossess Petitioner of his First Amendment Immunity.

The Nevada Supreme Court apparently construed *Premier Electric*, *supra*, 814 F.2d 373 for the proposition NRS 18.010(2)(b) does not conflict with First Amendment immunity for petitioning because it is a "fee-shifting" statute. However, *Premier Electric* had *nothing* to do with a *direct* petition for redress of grievances (meaning a civil lawsuit where a citizen sues his/her *local government* for declaratory and injunctive relief). Instead, the plaintiffs therein challenged horizontal price fixing involving a labor union's assistance as an extrinsic violation of antitrust law.

There the Seventh Circuit emphasized the difference between a true petition for redress of grievances and a Sherman Act lawsuit:

> "The antitrust laws allow people to ask the government for a monopoly, and they allow them to keep what they get. A request for

> something that, if granted, is lawful, is also lawful. A request for something that, if granted, is unlawful, is also unlawful. And self-help to an unlawful end is unlawful. There is no such thing as the lawful enforcement of a private cartel. The Fund's suits in the courts of Illinois did not ask the court to enforce a law or a regulatory victory. The Fund wanted the court to enforce a private contract. The Fund invoked a rule of decision created by the Association and the Union. *It was not a petition for a favorable rule of law; it was not an effort to implement an existing rule of law; it was an unvarnished effort to enforce a private price-fixing agreement*. The first amendment does not protect efforts to enforce private cartels, in court or out [*National Society of Professional Engineers v. United States*, 435 U.S. 679, 397-99, 98 S.Ct. 1355, 1368-69 (1987)]. If the effort inflicted injury, §4 of the Clayton Act supplies a damages remedy" (*Premier Electric*, *supra*, 814 F.2d 376).

Moreover, both of the parties to the *Premier Electric* litigation were *private* parties. Likewise, neither *Equilon Enterprises* or *Octane Fitness* involved a direct petition for redress of grievances, nor was a governmental entity a party. Although *Clackamas County* and *Vargas* involved governmental entities, neither case involved a direct petition for redress of grievances. The lawsuit in *Clackamas County* was an election contest, and the lawsuit in *Vargas* sought the recovery of public resources and funds allegedly spent on unlawful campaign activities. Finally, in both cases attorney's

fees were awarded pursuant to true "fee-shifting" statutes which "required the loser to pay the winner's (attorney's) fees."

In contrast, here Petitioner brought a direct petition for redress of grievances and there was no applicable statute which "required the loser to pay the winner's (attorney's) fees." Moreover, given IVGID is a governmental entity, Petitioner points to the following cautionary *dicta* in *Clackamas County*, *supra*, 382 P.3d 601:

> "The First Amendment's guarantee of the right to petition *might impose some restriction on fee-shifting* in election contests or *other direct challenges to governmental action* – as distinct from litigation involving only private parties."

This is the very holding Petitioner implores this Court to make!

Oregon courts are not the only ones to recognize the public-private litigant distinction. In *City of Aurora v. 1405 Hotel, LLC*, 2016 COA 52, 371 P.3d 794, 802-03 (Colo. App. 2016), citing *Protect Our Mountain Environment v. District Court*, 677 P.2d 1361, 1363-64 (Colo. Sup. 1984), the same distinction was recognized:

> "The heightened standards in *POME*[8] . . . are inapplicable to *purely private disputes*, as

[8] "Plaintiffs' alleging a defendant's misuse or abuse of the administrative or judicial processes of government must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities (a)re not immunized from

> opposed to cases implicating matters of public concern. . . . (Since) here, the Hotels . . . filed an action against CEDC, a state government agency, and Aurora, a city . . . for judicial review of state agency action regarding an award of millions of dollars in taxpayer subsidies to a city to develop a project it deems to be of 'major public importance,' (the action) is not purely private" and *the heightened standards in POME apply*.

Finally, in *Octane Fitness*, *supra*, 572 U.S. 556-57, this Court relied upon the fact that the financial threat of the underlying litigation itself, antitrust liability and the attendant treble damages under 15 U.S.C. §15 in *Premier Electric* and patent infringement in *Octane Fitness*, "far more significantly chill(ed) the exercise of the right to petition than d(id) the mere shifting of attorney's fees." However in the true direct petition for redress of grievances case, where little if any pecuniary relief is sought, a true fee-shifting statute far more onerously and significantly chills the exercise of the right to petition. And that is exactly what has happened here.

The subject lawsuit was not one filed in a court of law for patent infringement, antitrust liability, or any other common law or statutory cause. It was not an election contest. It did not involve anti-S.L.A.P.P. And other than a refund of two years' worth of RFFs/BFFs, it sought no individual pecuniary relief. It was a

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liability under the First Amendment. These claims are considered 'sham' claims" (*City of Aurora*, *supra*, 371 P.3d 803).

lawsuit directly against a local government primarily for declaratory and injunctive relief. It was a pure petition for redress of grievances. For all of these reasons, the subject case should be distinguished from the typical "fee-shifting" case.

Petitioner is mindful of the following *dicta* in *BE&K Construction*, *supra*, 536 U.S. 537:

> "Nothing in our holding today should be read to question the validity of . . . statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff."

However, like *Premier Electric*, *Equilon Enterprises*, and *Octane Fitness*, *BE&K Construction* did not involve a private citizen suing his/her local government in a "pure petition" case. Rather, it involved *private* parties (an industrial general contractor and a labor union). Nor did the decision turn on a true "fee-shifting" statute. Nor did it address whether a "fee-shifting" statute can trump First Amendment immunity where a private citizen petitions his/her local government to redress grievances of public concern.

CONCLUSION

This Court should grant the Petition and declare that a statute, whether "fee-shifting" or not, cannot trump the First Amendment *Noerr-Pennington* immunity where a citizen sues his/her local government directly for declaratory and injunctive relief and objectively, it is not baseless.

DATED this 2nd day of June, 2020.

Respectfully submitted,

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