

No. _____

**In the
Supreme Court of the United States**

Evan Scott Grant,

Petitioner,

v.

The State of Nevada Board of Parole Commissioners,
and Christopher DeRicco,

Respondents.

**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

“When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at ‘liberty to pick and choose among congressional enactments’ and must instead strive ‘to give effect to both.’” *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (citation omitted). Furthermore, for one act to supersede another there must be “a clearly expressed congressional intention[.]” *Id.*

However, within this Court’s jurisprudence of these principles are no applications to acts of state legislative bodies in which two separate laws concern the same topic. While this Court’s precedent dictates that separate acts passed sequentially by Congress concerning the same topic should be interpreted harmoniously, it has not determined what should be done when two acts are passed simultaneously concerning the same topic when one act does not reference the other, and whether these statutory interpretation precedents apply to state acts as well.

Furthermore, the Nevada Supreme Court has affirmed a lower court’s opinion that a statutory right is not a liberty interest which conflicts with over 100 years of this Court’s Due Process precedent.

The questions presented are:

Whether two separate acts passed by a state legislature concerning the same topic should be interpreted harmoniously when the language of neither act directly references the other.

Whether it is possible for a statutory right to not be protectable under the 5th and 14th Amendments of the Constitution of the United States of America.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the First Judicial District Court of the State of Nevada, and the Supreme Court of the State of Nevada:

- *Grant v. The State of Nevada Board of Parole Commissioners, and Christopher DeRicco*, No. 21 OC 00158 1B (1st Judicial Dist. Ct.), dismissal order issued February 1, 2022;
- *Grant v. The State of Nevada Board of Parole Commissioners, and Christopher DeRicco*, No. 84324 (Nev. Sup. Ct.), order of affirmance issued December 15, 2022;
- *Grant v. The State of Nevada Board of Parole Commissioners, and Christopher DeRicco*, No. 84324 (Nev. Sup. Ct.), order denying rehearing issued January 17, 2023.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 41.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Long before the Nevada Crimes and Punishment Act of 1911, the Nevada Legislature had passed multiple revisions of what constituted a crime and its severity within Nevada law. When Nevada's Legislature integrated the Crimes and Punishment Act of 1911 into the Nevada Revised Statutes in 1967, it put forth a new crime severity structure for felonies in NRS 193.130. Additionally, attempted felonies have had many designations within the Nevada Revised Statutes having moved to NRS 193.330 in 1967 and again to NRS 193.153 in 2022.

During the legislative session in 1995, then Nevada Senator Mark A. James stated, "S.B. 416, however, creates five categories of felonies listed in terms of severity."¹ S.B. 416 (Nev. 1995) established a new felony severity scale based on five categories in NRS 193.130 and an attempted felony severity scale in NRS 193.330 based on the same five categories.

In 1957, the Nevada Legislature established the State Board of Parole Commissioners with the passage of AB 468. However, it was not until 1995, during the same legislative session as the creation of the felony category system, that AB 288 was passed mandating that the Board consider "The severity of the crime committed[.]" NRS 213.10885(2)(a).

Despite the Nevada Legislature in 1995 mandating per NRS 213.10885(2)(a) that the Nevada

¹ *Makes various changes regarding sentencing of persons convicted of felonies: Hearing on SB 416 Before the Ass. Comm. on Ways and Means*, 1995 Leg. 68th Sess. 3 (Nev. 1995) (Statement of Senator Mark A. James, Clark County Senate District No. 8).

Board of Parole Commissioners shall consider the severity of the crime committed, and having established a severity scale for felonies during that same legislative session in NRS 193.130 and NRS 193.330, the Board claims that it does not have to follow the severities established in NRS 193.130 and NRS 193.330 as neither statute is specifically named in NRS 213.10885(2)(a). In fact, because no severity statute is specifically named, the Board claims that it has legislative discretion to determine its own crime severity scale for parole consideration purposes, when no such language exists in NRS 213.10885, and while considering a severity apart from NRS 193.130 and 193.330 conflicts the severity considered by the trial court at sentencing.

This Court's intervention is warranted as the publication of this case with its current Nevada Supreme Court holding affirming the Board's interpretation, that two state statutes concerning the same topic should not be interpreted together without direct reference from one to the other, will pose a danger to the Due Process rights of every person within the United States of America regardless of state jurisdiction. Not only does allowing the Nevada Supreme Court to afford discretion to the Nevada Board of Parole Commissioners to determine the severity of felonies in Nevada permit the Board to declare that child murder is the least severe felony and provide those convicted a friendlier release consideration regardless of any danger posed to society, but leaves the door open for every state agency in the United States to use Nevada's precedent and claim unintended discretionary authority because state statutes that limit discretion are not named directly within one another.

Furthermore, the Nevada Supreme Court affirms the First Judicial District Court of Nevada's conclusion that a recognized statutory right does not require Due Process. This justification is used, in part, to dismiss Grant's case with prejudice.

These conclusions are critically dangerous because a fundamental aspect of state common law is the reliance on the precedents of other states to establish legal understandings within a state's statutory or regulatory context. For example, in *Garrison v. Target Corp.*, 435 S.C. 566, 869 S.E. 2d. 797 (2022), the Supreme Court of South Carolina relied on holdings from the Supreme Courts of Alaska and Nevada to determine the difference between the purpose of prejudgment interest versus the purpose of punitive damages.

"When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (citation omitted). Furthermore, for one act to supersede another there must be "a clearly expressed congressional intention[.]" *Id.*

"We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is the protection of the individual against arbitrary action of government[.]" *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

To preserve the integrity of State statutes in the United States of America, the time has come to expand on this Court's precedent in *Epic* to specifically include

Acts of State Legislatures. Furthermore, this Court has a duty to reaffirm the Due Process protections of the 5th and 14th Amendments as Nevada has forgotten their sacred purpose. This Petition must be granted to once again preserve the Due Process rights of every person in the United States from arbitrary acts of government.

OPINIONS BELOW

The Nevada Supreme Court's order of affirmance is unpublished and reproduced at App.1-4. The First Judicial District Court of Nevada's dismissal is unpublished and reproduced at App.5-22. The Nevada Supreme Court's order denying rehearing is unpublished and reproduced at App.23-24.

JURISDICTION

The Nevada Supreme Court issued an order of affirmance on December 15, 2022, followed by an order denying rehearing on January 17, 2023. This Court has Jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Nevada Revised Statute 213.10885(2) provides, in part, “In establishing the standards, the Board shall consider the information on decisions regarding parole that is compiled and maintained pursuant to NRS 213.10887 The other factors the Board considers must include, but are not limited to: (a) The severity of the crime committed;”

Additionally involved are Nevada Revised Statute 193.130 entitled “Categories and punishment of felonies” and Nevada Revised Statute 193.153 (formerly 193.330) entitled “Punishment for attempts.”

STATEMENT OF THE CASE

A. This Court's Decision In *Epic* Concerning The Interpretation Of Acts Of Congress

In *Epic*, this Court was faced with a challenge regarding provisions of the Federal Arbitration Act by multiple employers and employees. They alleged that arbitration agreements agreed to by the parties should be voided by the Court due to their agreements violating the National Labor Relations Act triggering the “saving clause” of the Arbitration Act. In its analysis of this issue, the Court had to determine how two separate Acts of Congress that were passed 10 years apart, during times when the United States had different alternative dispute resolution preferences, could or should exist in harmony as the older Arbitration Act was still valid law and both had coexisted for over 80 years.

The first approach was to look closely at the language of the saving clause in the Arbitration Act based upon the claim that it was triggered by violations of the NLRA. In doing so, this Court, relying on various precedents, identified which elements had to be satisfied for the saving clause to be triggered and determined that the requisite conditions for judicial override of the parties' arbitration agreements were not present.

Next, the Court addressed the claim that the NLRA overrides the Arbitration Act as the NLRA was passed by Congress 10 years after the Arbitration Act. Here, the Court began the discussion by stating:

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same

topic, this Court is not at “liberty to pick and choose among congressional enactments” and must instead strive “to give effect to both.” *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “a clearly expressed congressional intention” that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The intention must be “clear and manifest.” *Morton*, *supra*, at 551, 94 S.Ct. 2474. ...

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it’s the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Epic, 138 S.Ct. at 1624. Based upon this premise in conjunction with other precedential analysis, this

Court concludes that the NLRA does not supersede the Arbitration Act “Because we can easily read Congress’s statutes to work in harmony, that is where our duty lies.” *Id.* at 1632.

B. Nevada’s Legislature’s Felony Severity Structure

In 1995, the Nevada Legislature redesignated the severity of felonies within the State’s statutory architecture. Under the previous provisions, there was no unifying system to identify how one felony offense compared to another. With the passage of S.B. 416 in 1995, every felony offense in Nevada was assigned to the new severity structure found in NRS 193.130 and NRS 193.330 thereby standardizing severity designations in Nevada.

During the legislative session that passed S.B. 416 (Nev. 1995), then Nevada Senator Mark A. James commented on this new system stating, “S.B. 416, however, creates five categories of felonies listed in terms of severity.”² S.B. 416 (Nev. 1995) established a new felony severity scale based on five categories in NRS 193.130. Additionally, S.B. 416 (Nev. 1995) used those same category designations for an attempted felony severity scale in NRS 193.330. In 2022, NRS 193.330 was moved to NRS 193.153.

Under the new structure, all felonies would fall into either Category A, B, C, D, or E. NRS 193.130; NRS 193.153. Category A would be the most severe

² *Makes various changes regarding sentencing of persons convicted of felonies: Hearing on SB 416 Before the Ass. Comm. on Ways and Means*, 1995 Leg. 68th Sess. 3 (Nev. 1995) (Statement of Senator Mark A. James, Clark County Senate District No. 8).

and the only Category to carry a life sentence both with and without parole eligibility. Category E would be the least severe carrying a maximum penalty of four years in prison. Specific offenses that did not conform to the prescribed penalty per the new category structure would still be assigned a to Category despite carrying a unique penalty. NRS 193.330(1).

C. Statutory Consideration Of Felony Severity During Parole Consideration

In 1957, the Nevada Legislature established the State Board of Parole Commissioners with the passage of AB 468. However, it was not until 1995 that AB 288 was passed mandating that the Board consider “The severity of the crime committed[.]” NRS 213.10885(2)(a). A.B. 288 (Nev. 1995) was passed in the same legislative session that also passed S.B. 416 (Nev. 1995) which established the Category A, B, C, D, and E crime severity system.

While NRS 213.140(1) does not afford Nevada inmates a protectable due process or liberty interest in release on parole, the Nevada Supreme Court held that “eligible Nevada inmates do have a statutory right [per NRS 213.140(1)] to be considered for parole by the Board.” *Anselmo v. Bisbee*, 396 P.3d 848, 849 (Nev. 2017) (emphasis added). As a result, the court determined that Anselmo’s due process right to proper parole consideration per NRS 213.140(1) was violated by the Nevada Board of Parole Commissioners when it considered an inapplicable aggravating factor thus ordering a vacation of his parole denial and a new and proper hearing. *Id.* at 853.

Per the Nevada Board of Parole Commissioners' arguments and the orders of both the First Judicial District Court of Nevada, App.13, and Nevada Supreme Court, App.2, it is recognized that the consideration of crime severity is mandated in the parole consideration process by NRS 213.10885(2)(a).

D. Factual And Procedural Background

In 2016, Grant was convicted of two attempted counts of NRS 201.230. Per NRS 201.230(2)(a), a violation is Category A felony with a mandatory penalty of life in prison with the possibility of parole after 10 years. However, as Grant was convicted of an attempt, per NRS 193.153(1)(a)(1), an attempt conviction is a Category B offense carrying a prison term with a discretionary sentence of a minimum of 2 years and maximum of 20 years. At sentencing, Grant was sentenced to two consecutive, minimum 2 year to maximum 8 year, sentences as he was convicted of two Category B offenses.

In 2020, Grant became eligible for parole after serving his 4 year minimum. On February 20, 2020, he appeared before the Nevada Board of Parole Commissioners under the direction of Parole Board Chairman Christopher DeRicco. The following month, Grant received a parole denial based, in part, on consideration of Grant's conviction being the highest severity level, which, per the Nevada Legislature, is a Category A offense carrying a life sentence.

**1. Nevada Board of Parole Commissioners
Defers To The Nevada Department Of
Corrections To Assign A Severity Level
To Felonies In Lieu Of Legislatively
Determined Severity Levels**

Under NRS Chapter 233B known as the Nevada Administrative Procedures Act, NRS 233B.040(1) provides:

To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers[.]

Upon a review of the Nevada Administrative Codes governing parole consideration, NAC 213.495 through 213.565, inclusive, Grant discovered that the Board had adopted NAC 213.512 to carry out the function of considering the severity of a crime as mandated by NRS 213.10885(2)(a). While NRS 213.10885 does not mention the Nevada Department of Corrections a single time, NAC 213.512(1) provides:

The Board will assign to each crime for which parole is being considered a severity level of “highest,” “high,” “moderate,” “low moderate” or “low.” The severity level will be the same as the severity level assigned to the crime by the Department of

Corrections for the purpose of classifying offenders pursuant to NRS 209.341.

However, upon a review of NRS 209.341, it was discovered that this statute pertains to the Director of the Department of Corrections “Establishing ... a system of initial classification and evaluation for offenders who are sentenced to imprisonment in the state prison[,]” “Assign[ing] every person who is sentenced to imprisonment in the state prison to an appropriate institution or facility of the Department[,]” and “Administer[ing] a risk and needs assessment to each offender for the purpose of guiding institutional programming and placement.”

Nowhere in NRS 209.341 is the Director of the Department of Corrections authorized to assign a severity level to an offense. In fact, the words “severity,” “level,” nor “crime” appear a single time in NRS 209.341.

Furthermore, nowhere in NRS 213.10885 is the Board authorized to assign a severity level. Per NRS 213.10855(2)(a), the Board is only authorized to consider the severity of an offense.

Per Grant’s right to challenge the validity of any NAC per NRS 233B.100, he filed a petition with the Nevada Board of Parole Commissioners requesting that it amend NAC 213.512 to recognize the legislatively assigned severity levels of felonies per NRS 193.130 and NRS 193.330 (now 193.153) and further amend NAC 213.516 and NAC 213.522 as they are based on severity level assigned per NAC 213.512. Additionally, per NRS 233B.110, Grant exercised his right to seek NRS Chapter 30 “Declaratory judgment to determine validity or applicability of regulation” in

the First Judicial District Court of Nevada which is the case currently before this Court.

2. The First Judicial District Court Of Nevada Dismisses Grant's Case With Prejudice Holding That A Statutory Right Is Not A Liberty Interest

In his complaint, Case No. 21 OC 00158 1B, filed with the First Judicial District Court of the State of Nevada on October 15, 2021, Grants begins his Points and Authorities in Support of Complaint with a discussion on Nevada Supreme Court precedent concerning due process rights in proper parole consideration. "Generally, an inmate does not have a protectable due process or liberty interest in release on parole, unless that right is created by state statute ... eligible Nevada inmates do have a statutory right to be considered for parole by the Board." *Anselmo*, 396 P.3d at 849. This statutory right recognition by the Nevada Supreme Court results in Anselmo's parole denial being vacated and a new parole hearing ordered to correct the Nevada Board of Parole Commissioner's improper consideration of an inapplicable aggravating factor during his parole consideration.

A question presented in Grant's complaint was whether NRS 213.10885(2)(a) mandated that the Board consider the crime severities legislatively established in NRS 193.130 and NRS 193.330 (now 193.153) for parole consideration to be proper.

NRS 213.10885(2) provides:

In establishing the standards, the Board shall consider the information on decisions regarding parole that is compiled and maintained pursuant to NRS

213.10887 and all other factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued. The other factors the Board considers must include, but are not limited to:

(a) The severity of the crime committed;

....

Grant argues that as NRS 213.10885(2)(a) mandates consideration of “The severity of the crime committed” and NRS 193.130 and NRS 193.330 (now 193.153) are the only Legislatively established crime severity levels. He then argues that the Legislature intended for the Board to use the legislature’s severities when considering an inmate for release as the Legislature authored all three statutes and did not use any permissive words in regard to the Board’s consideration of crime severity. As his relief, he sought a declaration that NRS 213.10885(2)(a) requires the Board to use the legislatively determined crime severity levels and an injunction ordering the Board to amend NAC 213.512, NAC 213.516, and NAC 213.522 to harmonize those NACs with Nevada law.

In its order granting motion to dismiss complaint, the First Judicial District Court of Nevada concludes that:

Had it wanted to, the Legislature could have specified how the Board was to determine crime severity by pointing to particular statutes such as NRS 193.130 or NRS 193.330, but the Legislature chose to

leave this determination to the Board's discretion. (App. 10)

...

While NRS 213.10885 mandates consideration of the severity of the crime, its unambiguous terms do not require that the NRS Chapter 193 severity levels be utilized. (App. 13)

...

The Nevada Supreme Court in *Anselmo*, made it clear that parole consideration is a statutory right in Nevada and not a liberty interest. (App. 17)

Grant's case was dismissed with prejudice.

3. The Nevada Supreme Court Affirms First Judicial District Court's Holding On Appeal And Concludes That A Statutory Right Is Not A Liberty Interest Or A Due Process Right

After Case No. 21 OC 00158 1B was dismissed with prejudice, Grant timely filed Case No. 84324 with the Supreme Court of the State of Nevada on June 17, 2022.

In his appeal, Grant argues that a statutory right is a liberty interest quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is the protection of the individual against arbitrary action of government[.]" And, the words "shall" and "must" in NRS 213.10885(2) "creates a protected liberty interest by placing substantive

limitations on official discretion.” *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

Furthermore, Grant argues that nowhere in NRS 213.10885 is there discretionary language applicable to the Board’s consideration of crime severity. Nowhere in NRS 213.10885 is the Nevada Department of Corrections identified as an element. The First Judicial District Court recognized that NRS 193.130 and NRS 193.330 (now 193.153) are the crime severity levels established by the Legislature. And, it is absurd to construe NRS 213.10885(2)-(2)(a) to permit the Board discretion to determine where crime severity levels come from, as only the Legislature can create public policy, and the Legislature has already spoken on crime severity. These arguments were made in conjunction with *English v. State*, 9 P.3d 60, 62 (Nev. 2000), “A statute should be construed in light of the policy and spirit of the law, and the interpretation should avoid absurd results.”

On December 15, 2022, the Nevada Supreme Court issued an order of affirmance. In it, the court concludes:

Under NRS 213.10885(2)(a), the Board must consider crime severity in evaluating an inmate’s probability of violating the law if parole is granted. However, as the district court determined, that statute does not require that the Board use the crime severity levels in NRS 193.130 and NRS 193.153 (formerly NRS 193.330), as Grant argues. Thus, we perceive no error in the district court’s conclusion that the Board may properly use the crime severity levels developed by the NDOC in the

Board's risk assessment metric. ... Thus, the district court properly dismissed Grant's claim for relief on this ground. (App.3-4)

...

And insofar as Grant claims a liberty interest or due process rights in his parole hearing, he is mistaken. *See Anselmo v. Bisbee*, 133 Nev. 317, 318, 396 P.3d 848, 851, 850. (App.4)

In *Anselmo*, parole consideration is recognized as a "statutory right." *Anselmo*, 396 P.3d at 849. However, "the Nevada statutory scheme does not provide any due process right in the grant of parole." *Id.* at 851. This distinction originates from the statutory language: "When a prisoner becomes eligible for parole pursuant to this chapter or the regulations adopted pursuant to this chapter, the Board shall consider and may authorize the release of the prisoner on parole...." NRS 213.140(1). Consideration is explicitly mandatory. Release is discretionary.

This case concerns proper statutory parole consideration as codified on the Nevada Administrative Code and does not challenge Grant's parole determination. Applying the premise of discretionary release to a statutory right to proper parole consideration is an arbitrary denial of the 5th and 14th Amendment Due Process protections of the United States Constitution that the Nevada Legislature entitled to every Nevada prisoner in NRS 213.140(1).

**4. The Nevada Supreme Court Denies
Petition for Rehearing Made On Grounds
That Its Affirmation Violated United
States Supreme Court Precedent**

On January 3, 2023, Grant filed a timely petition for rehearing. Per the Nevada Rules of Appellate Procedure, a petition for rehearing may be considered “When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case[.]” NRAP 40(c)(2)(A). Additionally, “When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.” NRAP 40(c)(2)(B).

In his petition for rehearing, Grant argues that the court went against the fundamental common law statutory interpretation traditions of the United States specifically quoting *Epic*. “When confronted with two Acts allegedly touching on the same topic, this Court must strive ‘to give effect to both.’” *Epic*, 138 S.Ct. at 1624. In *Epic*, this Court goes on to say that”

A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “a clearly expressed congressional intention” that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The intention must be “clear and manifest.” *Morton*, *supra*, at 551, 94 S.Ct. 2474. ...

Epic, 138 S.Ct. at 1624.

Grant argues that interpreting NRS 213.10885(2)(a) to afford the Board the discretion to determine crime severity levels other than those established in NRS 193.130 and NRS 193.153 (formerly 193.330) would frustrate the intent of NRS 193.130 and NRS 193.153 per documented Legislative history. Because there is no specific language in NRS 213.10885(2) that permits the Board to determine the severity of crimes in Nevada as the statute specifically mandates consideration, there is no clear and manifest legislative intent for the Board to do so.

Grant concludes by quoting a recent opinion of this Court concerning statutory construction:

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be “shaped, at least in some measure, by the nature of the question presented”—whether Congress [or any legislature] in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

West Virginia v. EPA, 142 S.Ct. 2857, 2607-2608 (2022).

On January 17, 2023, the Nevada Supreme Court issued its order denying rehearing. In its entirety, the court held, “Rehearing denied. NRAP 40(c).” App 23. NRAP 40(c) is the same Rule Grant used to bring the petition for rehearing alleging the court failed to consider this Court’s precedent.

REASONS FOR GRANTING THIS PETITION

The decisions of the Nevada Courts that a recognized statutory right is not a liberty interest or due process right is a direct attack on the United States Constitution. The 5th and 14th Amendment Due Process protections that have guided fair and equitable adjudication of statutory law would be unenforceable in Nevada if this is allowed to stand. While the Nevada Supreme Court Affirmed the First Judicial District Court’s conclusion that “parole consideration is a statutory right in Nevada and not a liberty interest[.]” App.17, this idea that a statutory right is not a liberty interest could easily be applied beyond parole consideration to any statutory right. Furthermore, Nevada’s highest court has literally concluded that when the Legislature gives a person a statutory right, that right is not guaranteed Due Process protection in a court of law.

In the 124 years since *Dent*, and long before *Dent* was decided, this Court has strived to ensure that the rights enshrined in the United States Constitution are not abridged by an arbitrary act of government. In the year 2023, this Court is, not only, once again faced with an arbitrary act of government, but an entire State court system that believes a statutory right is not a liberty interest or a due process right.

Furthermore, the Nevada Supreme Court refuses to recognize the statutory interpretation precedent of this court which holds, with very limited exceptions of which none apply in this case, that two acts concerning the same topic must be read in harmony to fulfill the legislative intent of the statutes.

What has occurred cannot be what this Court intended based on its legacy nor what Nevada's Legislature intended by giving statutory rights to the people living in Nevada. The time is ripe for this Court's review of whether two separate acts simultaneously passed by a state legislature concerning the same topic must be interpreted harmoniously when the language of neither act directly references the other and whether it is possible for a statutory right to not be protectable under the 5th and 14th Amendments of the Constitution of the United States of America.

**I. The Decision Below Conflicts With
This Court's Precedents**

**A. Under *Epic*, The Decision Below Is
Not A Harmonious Interpretation of
Statutory Law**

In *Epic*, this Court held the heavy burden of showing that two statutes touching on the same topic cannot be read in harmony is placed on the party making such a claim. The Board claiming that language of NRS 213.10885(2)(a) allows for it to determine the severity of crimes while recognizing that NRS 193.130 and NRS 193.330 (now 193.153) are the crime severities established by the Legislature frustrates *Epic*.

NRS 213.10885(2) provides, in its entirety:

In establishing the standards, the Board shall consider the information on decisions regarding parole that is compiled and maintained pursuant to NRS 213.10887 and all other factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued. The other factors the Board considers must include, but are not limited to:

- (a) The severity of the crime committed;
- (b) The criminal history of the person;
- (c) Any disciplinary action taken against the person while incarcerated;
- (d) Any previous parole violations or failures;
- (e) Any potential threat to society or to the convicted person; and
- (f) The length of his or her incarceration.

“Consider” means “to think about carefully[.]” *Consider*, *Merriam-Webster*, online ed., 2023. When claiming that the Nevada Legislature gave the Board discretion to determine crime severity, it made no effort to identify any language that affords discretion to determine crime severity. “Determine” means “to settle or decide by choice of alternatives.” *Determine*, *Merriam-Webster*, online ed., 2023.

Instead, the Board relies on the “... all other factors which are relevant in determining ...” language of NRS 213.10885(2) to claim crime severity determination authority. It does this by failing to

understand that crime severity is a mandated factor. The “... all other factors which are relevant...” refers to the discretion to consider factors that are not based on “the information on decisions regarding parole that is compiled and maintained pursuant to NRS 213.10887[,]” NRS 213.10885(2), or listed as mandatory within NRS 213.10885(2)(a)-(f).

To be successful under *Epic* in showing that two statutes on the same topic cannot be read in harmony, the Board would had to have shown that the language of NRS 213.10885(2) permitted deviation from the crime severity categories of NRS 193.130 and NRS 193.153 (formerly 193.330). By not being able to identify any element of NRS 213.10885(2) that affords discretion to determine the severity of crimes, NRS 213.10885(2)(a) can only be mandating consideration of NRS 193.130 and NRS 193.153 (formerly 193.330) crime severities as no other felony severity structure exists in Nevada law, and the Nevada Board of Parole Commissioners only considers felons for release from prison. A harmonious interpretation demands that the Legislature’s crime severities be considered.

The First Judicial District Court and Nevada Supreme Court agreed with the Board’s claim of crime severity determination authority based on the Board’s arguments. Both courts below frustrate this Court’s opinion in *Epic*.

B. Under *EPA*, The Decision Below Frustrates This Court’s Principles Of Statutory Construction

In *EPA*, this Court recently held that “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and

with a view to their place in the overall statutory scheme.” *EPA*, 142 S.Ct. at 2607-2608. Furthermore, “Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be ‘shaped, at least in some measure, by the nature of the question presented’—whether Congress [or any legislature] in fact meant to confer the power the agency has asserted.” *Id.* at 2608 (citation omitted).

Both S.B. 416 (Nev. 1995), which established the felony severity scale in NRS 193.130 and NRS 193.330 (now 193.153), and A.B. 288 (Nev. 1995), which mandated the Board consider the severity of the crime committed, were passed in the same legislative session. During that Session, Nevada Senator Mark A. James stated, “S.B. 416, however, creates five categories of felonies listed in terms of severity.”³

No where in NRS 213.10885 did the Legislature accidentally or deliberately confer power to determine crime severity to the Nevada Board of Parole Commissioners. Doing so would result in the very situation Grant experienced where he was considered by one crime severity when he was sentenced and another when the Board considered him for release.

When Grant was sentenced, it was public opinion that he committed a Category B felony which is not the most severe nor carry a life sentence. When he was considered by the Board, it allowed the Department of

³ *Makes various changes regarding sentencing of persons convicted of felonies: Hearing on SB 416 Before the Ass. Comm. on Ways and Means*, 1995 Leg. 68th Sess. 3 (Nev. 1995) (Statement of Senator Mark A. James, Clark County Senate District No. 8).

Corrections to determine that Grant had committed a crime of the highest severity level thus equal to the most reprehensible in Nevada which carry a life sentence, and it did so apart from public opinion.

Based on the fact that the language of NRS 213.10885(2) does not confer on the Board the authority to determine crime severity, only to consider crime severity, the legislative intent is clear and unmistakable. Consider the crime severities established by the Legislature.

The Courts below concluding that it was the intent of the Legislature to allow the Board to determine crime severity outside of the crime severities established by the Legislature frustrates *EPA* in light of the Legislative history of S.B. 416 (Nev. 1995), A.B. 288 (Nev. 1995), and the language of NRS 213.10885(2) itself. It is impossible for their conclusion that the Board was conferred authority to determine crime severity to be properly read into the overall Nevada statutory scheme.

II. The Decision Below Creates State Level Precedent That Can Be Used By Other States To Deny Due Process Protection

In this case, the Nevada Supreme Court has held that two state statutes which concern the same topic do not have to be read in harmony with each other. Additionally, it has held that a statutory right is not a liberty interest or a due process right. These precedents are critically dangerous as they could easily be used in subsequent holdings to justify conferring power onto other state agencies that was not intended by the Nevada Legislature and deny

those affected access to the courts as observed when the Nevada Supreme Court based its affirmance of dismissal with prejudice for this case, in part, on the idea that a statutory right is not a liberty interest or due process right. Furthermore, and more concerning, this precedent could also be used by other states to do the same.

A fundamental aspect of state common law is the reliance on the precedents of other states to establish legal understandings within a state's statutory or regulatory context. For example, in *Garrison v. Target Corp.*, 435 S.C. 566, 869 S.E. 2d. 797 (2022), the Supreme Court of South Carolina relied on holdings from the Supreme Courts of Alaska and Nevada to determine the difference between the purpose of prejudgment interest versus the purpose of punitive damages. In *State v. Koval*, 2022 ND 100, 974 N.W.2d. 384 (2022), the Supreme Court of North Dakota relied on a holding from the Nevada Supreme Court to explain the function of the collateral bar rule.

In *Dent*, this Court held that “The touchstone of due process is the protection of the individual against arbitrary action of government[.]” *Dent*, 129 U.S. at 123. The precedent created by the Nevada Supreme Court in this case fundamentally undermines that protection. This is especially true as it has the potential to spread across every State of the United States of America as state agencies use it to claim power that was not conferred by their Legislatures and State Supreme Courts use it to take away access to the courts on the premise that a statutory right is not protectable.

III. The Questions Presented Warrant The Court's Review In This Case

This Court's intervention is warranted in this case, both to repudiate this blatant effort to undermine the 5th and 14th Amendments of the Constitution of the United States of America and clarify that the statutory interpretation precedent of this Court equally applies to Acts of the Federal and State Legislatures. The Nevada Supreme Court's affirmation that "parole consideration is a statutory right in Nevada and not a liberty interest[.]" App.17, is too dangerous a precedent to be allowed to stand. The Nevada Supreme Court's affirmation that two state statutes concerning the same topic do not have to be read in harmony violates long standing precedent of this court which must be clarified to ensure equal application to the Acts of both Federal and State Legislatures.

Allowing the Nevada Supreme Court's conclusion to remain precedent in Nevada common law poses a critical danger to the entire United States of America. The frequent reliance by individual state supreme courts on the precedents of other state supreme courts poses a real risk that the mistakes of the Nevada Supreme Court will be repeated throughout the country. The consequences of not acting on these issues now will only be amplified by any undue delay.

Furthermore, this case presents an ideal opportunity to ensure that the statutory interpretation and construction precedents in *Epic* and *EPA* are both applied to state statutes. While it should not be a farfetched idea that the interpretation of statutory law should be the same regardless of the legislative body passing it, the actions of the Nevada

Supreme Court have shown that United States Supreme Court clarification on this matter is desperately needed.

Finally, since the 5th Amendment was ratified in 1791 and the 14th Amendment in 1868, Due Process protection has been a hallmark of the American Legal System. Due Process precedents of this Court including *Dent* in 1889 and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) which have stood for over 100 years are now under direct attack by the Nevada Supreme Court.

The Nevada Courts have had ample opportunities throughout this case to conform to the precedents of this Court and have made it clear that they do not intend to do so. This Court needs to grant review and make it clear that state statutes concerning the same topic should be read in harmony with each other and that the fundamental Due Process rights of every person in the United States are not to be abridged.

CONCLUSION

The Court should grant the petition.

Thank you for your time and consideration.

Respectfully submitted,

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