IN THE SUPREME COURT OF

THE STATE OF NEVADA

*****

MICHAEL KOSOR JR., A NEVADA RESIDENT, Appellant, vs. NEVADA REAL ESTATE DIVISION, Respondent.	**Court of Appeals Case No. 79830** District Court Case No. A-18-778387-C

APPELLANT'S PETITION FOR REVIEW

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Michael Kosor, Jr.
2. Nevada Real Estate Division
3. Olympia Companies, LLC

4. Garry V. Goett

5. Southern Highlands Community Association

6. Southern Highlands Development Corporation

7. Barron & Pruitt, LLP

8. State of Nevada ex rel. Nevada Real Estate Division

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRCP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) and NRAP 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **4,139** words; or

[ ] Does not exceed 10 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this Petition for Review is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of July, 2020.

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in finding that a Declarant's unilateral amendment to the CC&Rs of a common-interest community is shielded from all challenges after one year from recordation by NRS 116.2117(2)—even though the Declarant's amendment was **never** "adopted by the association pursuant to [section NRS 116.2117]"?

Can an amendment that is void *ab initio* under NRS 116.2122 and NRS 116.1206(1) be made valid by application of a statute of repose (NRS 116.2117(2))?

Is a Declarant's unilateral amendment to the CC&Rs of a common-interest community automatically void by operation of law pursuant to NRS 116.1206(1) if the Declarant's unilateral execution and recordation of the same amendment violated multiple provisions of NRS 116, including NRS 116.2117(1), (5) and NRS 116.2122?

Whether the Court of Appeals misinterpreted NRS 116.2117(2) by treating the plain and unambiguous modifying text "adopted by the association pursuant to this section" as superfluous, nugatory, and meaningless?

Whether the Court of Appeals erred in adopting the Nevada Real Estate Division's interpretation of NRS 116.2117(2) when such interpretation clearly conflicted with multiple limiting provisions of NRS 116, including NRS

116.2117(1), (5) and NRS 116.2122?

REASONS THE PETITION SHOULD BE GRANTED

This Petition for Review asks this Court to grant review under NRAP 40B to vacate the Court of Appeals' opinion issued in this case.[1] At its core, this case is about whether a declarant can prolong its control over an HOA (at the expense of resident homeowners) by unilaterally altering an HOA's CC&Rs in violation of multiple limiting provisions of NRS 116. Over the past near-decade, this Court has reviewed the statutory interpretation of numerous sections (and subsections) of NRS 116,[2] but has never before interpreted or addressed the language of NRS 116.2117(2), which provides that: "No action to challenge the validity of an amendment ***adopted by the association*** pursuant to this section may be brought more than 1 year after the amendment is recorded." [Emphasis added.] Accordingly, this Court has never interpreted the meaning and impact of the

[1] The Court of Appeals' Opinion (filed May 28, 2021) is attached as **Exhibit 1**.
[2] *E.g.*, Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE, 137 Nev. Adv. Op. 15, 485 P.3d 206 (2021) (interpreting NRS 116.3116(2)); Artemis Exploration Co. v. Ruby Lake Estates Homeowner's Ass'n, 135 Nev. 366, 449 P.3d 1256 (2019) (interpreting NRS 116.021 and NRS 116.31031(1)); Nationstar Mortgage, LLC v. Saticoy Boy LLC Series 2227 Shadow Canyon, 133 Nev. 740, 405 P.3d 641 (2017) (interpreting NRS 116.31162(5)); SFR Investments Pool 1, LLC v. Bank of New York Mellon, 134 Nev. 483, 422 P.3d 1248 (2018) (interpreting NRS 116.31168). Dezzani v. Kern & Associates, Ltd., 134 Nev. 61, 412 P.3d 56 (2018) (interpreting NRS 116.31183); Double Diamond v. Second Jud. Dist. Ct., 131 Nev. 557, 354 P.3d 641 (2015) (interpreting NRS 116.3105(2)).

modifier in the statute of repose[3] in NRS 116.2117(2)—"***adopted by the association pursuant to this section***." Moreover, this Court has never before interpreted the meaning of sister sections NRS 116.2117(1), (5) (setting forth the requirements for amendment of the CC&Rs) and NRS 116.2122 (limiting declarant amendment of the CC&Rs).

But these sections of NRS 116 directly affect the governance rights of tens of thousands of homeowners in common-interest communities throughout Nevada and will continue to do so for the foreseeable future. More specifically, NRS 116.2117 *pre*scribes the requirements for lawfully amending the CC&Rs and NRS 116.2122 *pro*scribes declarants from amending the CC&Rs to increase the number of units in the community "beyond the number stated in the original declaration"—an act that, if permitted, might allow the indefinite perpetuation of the declarant-control period, usurping the power of the owners.

In addition to being issues of first impression, the issues presented are fundamental issues of statewide public importance. In fact, this Court recently held that statements regarding these very issues affecting a single common-interest community with nearly 8,000 residences were "directly tied to the public

[3] This Court previously described NRS 116.2117(2) as a "one-year statute of limitations," Regency Towers Ass'n, Inc. v. Eighth Judicial Dist. Ct. of State ex rel. County of Clark, 281 P.3d 1212 (Nev. 2009); however, it may be better characterized as a statute of repose.

interest."[4] And there are "nearly 3,000 homeowners associations in Nevada" also subject to these same sections of NRS 116.[5] Accordingly, the issues before this Court affect the rights of a thousands of homeowners throughout this state and will continue to do so for the foreseeable future absent intervention by this Court.

STATEMENT OF THE CASE

The Southern Highlands is a master-planned community in Las Vegas, Nevada. In late 1999 and early 2000, Southern Highlands Development Corporation (Declarant) executed and recorded an original Master Declaration of Covenants, Conditions, and Restrictions (CC&Rs/master declaration). The master declaration established the Southern Highlands Community Association (SHCA), a non-profit corporation led by a board of directors, to exercise governance of the community and further established the maximum number of units in the community as 9,000 units.[6] Both provisions of NRS 116 and the master declaration terminated Declarant-control period—Declarant's ability to unilaterally appoint a majority of the SHCA board directors amongst other rights—after conveyance of 75% of the units within the SHCA.[7]

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[4] Kosor v. Olympia Companies, LLC, 136 Nev. Adv. Op. 83, 478 P.3d 390, 393 (2020).
[5] *See* State of Nevada, Dept. of Business & Industry website *available at* https://business.nv.gov/Homeowner/Homeowners_Association_Complaints/ (last visited July 7, 2021).
[6] JA, Vol. I, 62 (master declaration, section 2.23).
[7] *See* NRS 116.31032(1); JA, Vol. I, 61 (master declaration, section 2.19(a)).

In 2005, Declarant executed and recorded a Third Amendment to Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements (third amendment) in an attempt to increase the maximum number of units from 9,000 units to 10,400 units, thereby increasing the time Declarant would control the SHCA.[8] Such acts violated multiple provisions of NRS 116, including NRS 116.2117(1), (5) and NRS 116.2122.

Upon reviewing a SHCA budget[9] and provisions of NRS 116, Appellant Michael Kosor, Jr., a Southern Highlands homeowner since 2012, grew suspicious both of the validity of the third amendment and the Declarant's protracted control over the SHCA. Kosor communicated his concerns to the SHCA, which provided little response.[10] And so, he filed multiple complaints with the Nevada Real Estate Division (NRED) seeking investigation into whether the third amendment was valid and also whether Declarant-control should have already terminated.[11] NRED wrongly dismissed Kosor's first complaint in 2016 for lack of jurisdiction.[12]

NRED then dismissed Kosor's second complaint in 2017 "based on" a memo of legal advice from their designated deputy attorney general, which advised

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[8] JA, Vol. I, 55-56.
[9] JA, Vol. I., 67 (Southern Highlands 2015 Ratified Budget reflecting 7,041 Residential Units; 120 Siena Ancora Units; 1,079 Builder Units; and 456 Commercial Units).
[10] JA, Vol. I, 172:4-173:11; *see also* JA, Vol. I, 71-73; 75.
[11] JA, Vol. I, 173:6-12.
[12] JA, Vol. I, 173:22-174:2.

that the plain language of NRS 116.2117(2) barred Kosor's complaint.[13] The advice offered was specifically given for this case—to achieve a specific outcome—was never widely disseminated for application. NRED's dismissal of the second complaint did not: (1) set forth any generally applicable formal NRED opinion on the interpretation of NRS 116.2117(2) or even discuss the meaning of the enacted qualifier "***adopted by the association pursuant to this section***" in that statute; (2) disclose the results of any investigation into the number (or percentage) of units conveyed in Southern Highlands, a figure determinative of the termination of Declarant-control; or (3) explain why the third amendment was not automatically void as a matter of law under NRS 116.1206(1).

Kosor then filed a complaint in district court seeking declaratory relief to declare that the deputy attorney's general opinion was in error, invalidate the third amendment, require NRED to reopen the case it dismissed, and terminate Declarant's control over the SHCA.[14] In response, NRED filed a motion to dismiss.[15] Kosor opposed the motion to dismiss, arguing in part that NRS 116.2117(2) was inapplicable to his challenge to the third amendment because ***the third amendment was never "adopted by the [SHCA] pursuant to [NRS***

[13] JA, Vol. I, 176-178; *see also* NRS 116.620(3)(a) (a designated deputy attorney general provides opinions to NRED upon all questions of law relating to the construction or interpretation of NRS 116).
[14] JA, Vol. I, 1-7.
[15] JA, Vol. I, 23-37.

116.2117]" and instead adopted only by the Declarant, in violation of multiple sections of NRS 116.[16] Consistent with before, NRED failed to offer any proof to the contrary. Instead, NRED argued that NRS 116.2117(2) should be interpreted as a bar to Kosor's challenge to the third amendment, even in the face of the foregoing facts. Thereafter, the district court granted the motion to dismiss, adopting NRED's misguided and erroneous interpretation of NRS 116.2117(2) and—like NRED—ignored Kosor's claim that even if the third amendment were somehow valid, Declarant-control should still have terminated.[17]

Kosor then appealed on multiple grounds, including that the district court erred in its interpretation and application of NRS 116.2117(2).[18] But the Court of Appeals affirmed the dismissal decision of the district court by holding NRED's interpretation of NRS 116.2117(2) was "within the statute's plain language" and concluding that "NRED's decision to dismiss both of Kosor's complaints related to the 2005 amendment is consistent with the policy rationale underlying the statute or repose[.]"[19] In so affirming, the Court of Appeals expressly "decline[d] to carve out an exception to the statute to permit [Kosor's challenge]" even though the

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[16] JA, Vol. I, 38-79.
[17] JA, Vol. I, 2:20-28; 3:8-15.
[18] *See* **Exhibit 1**, 2-3.
[19] Id., 5. The Court of Appeals failed to even offer any opinion as to whether the district court's other findings of fact and conclusions of law from which Kosor timely appealed were erroneous and/or abusive. Id., 3.

Legislature had already enacted the qualifier "adopted by the association pursuant to this section" to limit the applicability of NRS 116.2117(2).[20] The Court of Appeals clearly misunderstood Kosor's argument when it concluded that "according to Kosor, it was impossible for the SHCA to adopt the amendment because it was immediately unlawful or void ab initio."[21] To the contrary, Kosor's point was that because *SHCA* did not adopt the amendment, it was void *ab initio*; otherwise, it would have been valid.[22]

ARGUMENT

This case concerns whether a Declarant may unilaterally violate NRS 116 by amending the CC&Rs to its own successful gain—and avoid any challenge to such violating amendment(s) or declaration, such that any challenge to a violating amendment(s) is void if brought more than one year after recordation. In 2005, the Declarant for the Southern Highlands clearly violated NRS 116 when it unilaterally executed and recorded an amendment provision to increase the maximum number of units. As enacted, NRS 116.2122 limits what a Declarant may amend and expressly states that "***the declarant may not in any event increase the number of units*** in the planned community beyond the number stated in the original

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[20] Id., 6.
[21] Id., 3.
[22] The Court of Appeals did not consider whether the district court's findings were clearly erroneous when it determined NRS 116.760(1) also time-barred Kosor's complaints. **Exhibit 1**, 3.

declaration[.]" [Emphasis added.] This statute preserves the existing rights of homeowners by barring a declarant from unilaterally changing the size of the community and diluting votes and/or protracting its control over the HOA.

Under NRS 116.1206(1), "[a]ny provision contained in a declaration . . . of a common-interest community that violates the provisions of [NRS 116]: (a) Shall be deemed to conform with those provisions ***by operation of law***, and any such declaration . . . is not required to be amended to conform to those provisions." [Emphasis added.] Thus, the third amendment provision as executed and recorded by the Declarant (*not the SHCA*) must automatically, "by operation of law" be deemed void due to its violation of NRS 116.2122.[23] And the automaticity of this voiding/conformance event predates any statute of repose or limitations.[24] In short, the violating provision is void *ab initio*.

Additionally, Declarant's unilateral third amendment did not conform with

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[23] *See also* Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC, 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (applying NRS 116.1206(1) to void a provision in the CC&Rs that violated a subsection of NRS 116); Washoe Med. Ctr. v. Second Judicial Dist. Ct., 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (a document that is void *ab initio* has no force or effect, does not legally exist, and cannot be amended).

[24] *Compare* U.S. Home Corp. v. Michael Ballesteros Tr., 134 Nev. 180, 183-84, 415 P.3d 32, 36 (2018) (discussing contractual nature of CC&R terms) *with, e.g.,* Riverside Syndicate v. Munroe, 882 N.E.2d 875, 878 (N.Y. 2008) (permitting declaratory judgment because a statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time"); *see also* Washoe Med. Ctr., 122 Nev. at 1304, 148 P.3d at 794.

NRS 116.2117(1), which states in pertinent part that "***the declaration . . . may be amended only by vote or agreement of units' owners of units*** to which at least a majority of the votes ***of the association*** are allocated, unless the declaration specifies a different percentage for all amendments or for specified subjects of amendment[.]" [Emphasis added.] Also, Declarant's unilateral third amendment did not conform with NRS 116.2117(5), which states that "Amendments . . . to be recorded by the association . . . must be prepared, executed, recorded and certified on behalf of the association by any officer ***of the association*** designated for that purpose or, in the absence of designation, by the president ***of the association***." [Emphasis added.] Further underscoring the intentional security built into this rule, the officers of the SHCA are fiduciaries by statute to the association.[25]

Thus, the third amendment as executed and recorded by the Declarant (*not the SHCA*) must also automatically, "by operation of law" be deemed void due to its violation of NRS 116.2117(1), (5). Of course, if SHCA adopts an equivalent amendment to the third amendment (which would require notice and approval by a supermajority of the owners) it would be valid—but it has not.

A. The Plain Text of NRS 116.2117(2) Supports Kosor's Position that Amendment of the Master Declaration by the Association *and Not the Declarant* Is Shielded from Challenge After One Year.

As with other subsections of NRS 116.2117, the plain text of NRS

[25] NRS 116.3103(1).

116.2117(2) clearly contemplates amendment of the master declaration "by the association," distinct from "by the declarant." The two parties have competing interests at times. And differences between the meanings of "association" and "declarant" are also established by NRS 116.[26] But NRS 116.2117(2) is unambiguous on its face and shields from challenge recorded amendments "***adopted by the association pursuant to [NRS 116.2117]***"—not unilateral amendments attempted by a declarant after the creation of the association.

On its face, NRS 116.2117(2) shields only an association's properly adopted amendment(s). And, "[i]f a statute is unambiguous, this court interprets the statute according to its plain language."[27] And so, NRS 116.2117(2) should be interpreted as barring only untimely challenges to amendments adopted by the full HOA pursuant to NRS 116.2117. Meanwhile, challenges to rogue amendments recorded by anyone but the association or adopted by some process other than that set forth in NRS 116.2117 should be permitted, even after one year from recordation.

Although the Court of Appeals concluded that its interpretation was consistent with the plain meaning of the text of NRS 116.2117(2), the Court of Appeals erred. It is well stablished in Nevada that, "statutory interpretation should

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[26] *Compare* NRS 116.011 (defining "Association") *with* NRS 116.035 (defining "Declarant").

[27] SFR Investments Pool 1, LLC v. Bank of New York Mellon, 134 Nev. 483, 486, 422 P.3d 1248, 1251 (2018) (citing Williams v. United Parcel Servs., 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013)).

not render any part of a statute meaningless[.]"[28] But the interpretation of NRS 116.2117(2) by the Court of Appeals, the district court, and NRED clearly renders the enacted modifier "adopted by the association pursuant to this section" meaningless—to achieve a desired and ***arbitrary or capricious*** interpretation. To end Kosor's complaint, they treat that modifier as superfluous and nugatory.

But Nevada statutes should be "construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory" because of the "presumption that every word, phrase and provision in the enactment has meaning."[29] Accordingly, it was clear error to construe NRS 116.2117(2) as broadly barring challenges to an amendment **never** adopted by the association pursuant to NRS 116.2117—contrary to its plain text. And, unless this petition is granted, the Court of Appeals' decision has the practical effect of altering the law away from NRS 116.2117(2) as it was duly enacted by the

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[28] Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007); *see also* Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nev., Inc., 99 Nev. 739, 744, 670 P.2d 102,105 (1983) (concluding that Nevada courts avoid "[a] reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation").

[29] Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 366-67, 184 P.3d 378, 386-87 (2008); *see also* Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (seminal case) ("[W]e construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage."); Orion Portfolio Servs. 2 LLC v. Cty. of Clark, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.")

Legislature. Such a reading judicially creates new and broad law where none currently exists.

B. Kosor's Interpretation Reads Harmoniously within NRS 116.

Because the plain language of NRS 116.2117(2) is unambiguous, there is no need to look beyond the plain language of the statute.[30] Nevertheless, Kosor's interpretation of NRS 116.2117(2) reads harmoniously with other statutes within NRS 116.[31] Similar to Subsection (2)'s description of amendment "***by the association***," subsections (1) and (5) of NRS 116.2117 both describe actions "***of the association***"—not the declarant—to effect amendment of the master declaration. Moreover, interpreting NRS 116.2117(2) to shield a declarant's violation of NRS 116.2117(1), (5) reads discordantly.

Similarly, NRS 116.2122 prohibits the declarant from increasing the number of units in the planned community beyond the number stated in the original declaration—and interpreting NRS 116.2117(2) to shield a declarant's clear violation of NRS 116.2122 produces a statutorily dissonant result, instead of a

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[30] JED Prop., LLC v. Coastline RE Holdings NV Corp., 131 Nev. 91, 94, 343 P.3d 1239, 1241 (2015) ("We do not look to other sources … unless a statutory ambiguity requires us to look beyond the statute's language to determine the legislative intent.")

[31] *Cf.* Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes."); Allstate Ins. Co. v. Fackett, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) ("We read statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.")

statutorily harmonious one. In fact, NRED's interpretation invalidates NRS 116.2122 under the facts of this case.

C. The Court of Appeals Erroneously Construed the Policy Rationale of NRS 116.2117(2).

The Court of Appeals' decision did not rely on any court decision or ULI commentary regarding the Uniform Common Interest Ownership Act from which NRS 116.2117(2) was adopted.[32] Nor did the Court of Appeals' decision cite to any relevant legislative history. Nevertheless, that court concluded that NRED's dismissal decisions were consistent with "the policy rationale underlying [NRS 116.2117(2)], which is to limit the time to challenge an amendment."[33] Meanwhile, this Court has found NRED's opinions about NRS 116 persuasive ***when they comported with both the statutory text and the Uniform Law Commission's Joint Editorial Board for Uniform Real Property Acts' interpretation of the UCIOA***.[34] Not only did the Court of Appeals' decision fail to

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[32] *See* Double Diamond v. Second Jud. Dist. Ct., 131 Nev. 557, 562, 354 P.3d 641, 644 (2015) ("When the Legislature codified NRS Chapter 116, it modeled the chapter on the Uniform Common Interest Ownership Act (UCIOA). *See, e.g.,* Hearing on A.B. 221 Before the Assembly Judiciary Comm., 66th Leg. (Nev., March 20, 1991); Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg. (Nev., May 23, 1991).")

[33] **Exhibit 1**, 5-6.

[34] *See* SFR Investments Pool 1 v. U.S. Bank, 130 Nev. 742, 754, 334 P.3d 408, 417 (2014), *holding modified by* Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Div. of Wells Fargo Bank, N.A., 133 Nev. 28, 388 P.3d 970 (2017), *superseded by statute*.

cite to any legislative basis for its interpretation of the policy rationale, its conclusion is overly broad. Surely, the Legislature did not intend to prohibit homeowners to challenge an amendment to the CC&Rs that on its face violates Nevada statutory law, was not adopted by the association or homeowners and was recorded by the Declarant, also in violation of Nevada law. In brief, it did not intend to make valid, with the mere passage of time, a provision it expressly prohibited.

Indeed, the commentary on the Uniform Common Interest Ownership Act of 1982, 7 U.L.A., part II (2009) (amended 1994, 2008) (UCIOA), upon which the Legislature based NRS 116.2117, supports the conclusion that the statute was intended to set forth the means by which an association (*not a declarant*) may lawfully amend a declaration.[35] They also describe how either process—vote or agreement—of the association would ultimately result in an agreement by the association (*not a declarant*).[36] Thus, the policy rationale underlying NRS 116.2117(2) supports Kosor's interpretation of that statute.

And contrary to the obvious policy interest of protecting the agreement of

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[35] *See* § 2-117. Amendment of Declaration., Unif.Common Interest Ownership Act (2008) § 2-117 cmt. 1 ("The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners.")

[36] Id.

the owners as to amendments, Declarant's attempted unilateral third amendment improperly prolonged its ongoing control over the SHCA. More than fifteen years since the recordation of the third amendment, Declarant's control still allows it to exercise its influence over the SHCA concerning the protracting of Declarant-control of the SHCA. In short, if allowed to stand, this improper third amendment permits the Declarant to improperly maintain control over the SHCA and not permit homeowners to vote a majority of their HOA board of directors. It would also set bad precedent for all other Nevada common-interest communities.

D. The Legislature Already Limited the Applicability of NRS 116.2117(2).

Also, the Court of Appeals' conclusion that "[a]llowing Kosor to challenge the 2005 amendment . . . would nullify the statute's purpose to prevent ongoing challenges to the amendment years into the future with no definitive end in sight and thereby delaying an amendment's effective date" lacks legal basis for its overly broad interpretation of the statute's purpose. The UCIOA provision enacted by the Legislature carved out that exception—protecting the interests of homeowners in the process. Accordingly, no Nevada court need rewrite NRS 116.2117(2). Moreover, NRS 116.1206(1) and section 25.5 of the master declaration void amendments such as the third amendment, which violate NRS 116, by automatic process of law. Consequently, a homeowner such as Kosor should be permitted to petition a Nevada court to simply declare the third

amendment void (whether by reviewing it on its face or allowing that homeowners' legal challenge to proceed on its merits.)

E. The Third Amendment Is Void *Ab Initio*.

In the end, the mere passage of time cannot make valid a provision in clear violation of NRS 116.2122, when NRS 116.1206(1) conforms and invalidates such provision "by operation of law." "[A] legal nullity at its creation is never entitled to legal effect because 'void things are no things'."[37] And failure to grant this petition would leave in place an absurd outcome, making an amended provision void at inception valid by the passage of time.

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[37] *See* Faison v. Lewis, 32 N.E.3d 400 (2015).

CONCLUSION

Based on the foregoing arguments and authorities, Appellant respectfully requests that the Court grant his petition for review of the questions presented and issue an order reversing the Court of Appeals decision and remanding the matter for further determination on the briefs.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July, 2021, I served the foregoing **APPELLANT'S PETITION FOR REVIEW** upon all counsel of record:

☒ By electronically filing and serving the document(s) listed above with the Nevada Supreme Court: or

☐ By personally serving it upon him/her: or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es).

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EXHIBT 1

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL KOSOR, JR., A NEVADA RESIDENT,
Appellant,
vs.
NEVADA REAL ESTATE DIVISION,
Respondent.

No. 79831-COA

FILED

MAY 28 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Kosor, Jr., appeals from a district court order granting a motion to dismiss in a declaratory relief action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

The Southern Highlands is a master-planned community regulated by the Southern Highlands Community Association (SHCA).[1] Southern Highlands Development Corporation (Declarant), which has controlled the SHCA since its inception, initially recorded a Master Declaration of Covenants, Conditions and Restrictions, and Reservation of Easements (master declaration) that limited the maximum number of approved-for-development units to 9,000. Both Nevada common-interest ownership law and the master declaration required that the Declarant's control over the SHCA would terminate after conveying 75% of the units within the SHCA.

In 2005, Declarant's vice president recorded an amendment to the master declaration that increased the maximum number of approved-for-development units to 10,400, thereby increasing the time it would have control over the SHCA. In 2012, Kosor became a homeowner in the

[1]We do not recount the facts except as necessary to our disposition.

Southern Highlands. Kosor alleged that sometime around late August of 2015, he reviewed the SHCA's 2015 budget—ratified in 2014—and realized that 75% of 9,000 units within the community were conveyed. He notified the SHCA and argued that the 2005 master declaration amendment was invalid and the Declarant should terminate its control. After little response from the SHCA, Kosor filed a complaint in 2016 to the Nevada Real Estate Division (NRED), an administrative agency authorized to hold hearings over issues concerning NRS Chapter 116, but it dismissed the complaint for lack of jurisdiction. He filed a second complaint to NRED, but NRED dismissed the second complaint because an opinion from the Attorney General's office suggested that NRS 116.760(1) and NRS 116.2117(2) time-barred Kosor's complaint. *See* Nev. Att'y Gen., Opinion Letter on NRS 116.2117(2) to NRED (Jan. 5, 2018).

Kosor then filed a complaint in district court. In the complaint, Kosor requested declaratory relief to invalidate the 2005 master declaration amendment, terminate Declarant's control over the SHCA, require NRED to reopen the case it dismissed, and announce that the Attorney General's opinion was in error. NRED filed a motion to dismiss, which Kosor opposed. The district court granted NRED's motion to dismiss, finding that NRS 116.2117(2) time-barred Kosor's complaint because he could not challenge the amendment's validity more than a year after its recorded date. In addition, the district court found that NRS 116.760(1) time-barred Kosor's complaint because he reasonably should have discovered potential violations when the SHCA ratified the budget in 2014.

On appeal, Kosor argues the district court's order erred for two reasons. First, Kosor claims the district court incorrectly interpreted NRS 116.2117(2) and thus improperly applied it to the instant case. Second,

Kosor claims the district court made clearly erroneous factual findings in determining that NRS 116.760(1) began to run when the SHCA ratified its budget. Because we agree that NRS 116.2117(2) is a statute of repose, which bars Kosor's claims, we affirm the district court's order and decline to address the other issues Kosor raises on appeal. Specifically, we do not consider whether the district court's factual findings were clearly erroneous when it determined NRS 116.760(1) time-barred Kosor's complaint.

Kosor avers that the district court erred in adopting the Attorney General's interpretation of NRS 116.2117(2) for two reasons. First, Kosor argues that the district court's interpretation of NRS 116.2117(2) ignores the issues as to whether the SHCA *validly* adopted the 2005 master declaration amendment. He claims that NRS 116.2117(2) cannot apply because the statute not only requires that the amendment be recorded, but also that an amendment must be "adopted by the association." In his complaint and below, Kosor alleged that the SHCA did not adopt the amendment because the Declarant's vice president (who may not have been an SHCA officer) executed the amendment and recorded it, not the SHCA. Second, Kosor avers that the amendment was void ab initio,[2] as it violated NRS 116.2122, which prohibits a declarant from increasing the number of units beyond the number stated in the original declaration. Thus, according to Kosor, it was impossible for the SHCA to adopt the amendment because it was immediately unlawful or void ab initio.

We review statutory construction issues de novo. *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018). However, in

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[2]When a document or law is void ab initio, it has no force or effect, does not legally exist, and cannot be amended. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006).

administrative cases, we defer to an agency's interpretation of statutes that it has authority to execute "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. 129, 133, 414 P.3d 305, 308 (2018) (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006)). The agency's interpretation must be within the statute's language. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). "We give effect to a statute's or a regulation's plain, unambiguous language and only look beyond the plain language where there is ambiguity." *State, Local Gov't Emp.-Mgmt. Rels. Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 718, 429 P.3d 658, 661 (2018).

NRS 116.2117(2) provides, "[n]o action to challenge the *validity* of an amendment adopted by the association pursuant to this section may be brought more than 1 year after the amendment is recorded." NRS 116.2117(2) (emphasis added). Black's Law Dictionary defines "validity" as "[l]egally sufficient; binding." *Valid, Black's Law Dictionary* (11th ed. 2019).

As pertinent here, the Nevada Supreme Court has distinguished between a statute of limitations and a statute of repose by reasoning that "[a] statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). Alternatively, a statute of repose "bars a cause of action after a specified period of time regardless of when the cause of action was discovered." *Id.* A statute of repose "defines the right involved in terms of the time allowed to bring suit." *Id.* (quoting *P.*

Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004)). The stricter timeline under a statute of repose brings defendants a peace of mind by barring delayed litigation, and it prevents unfair surprises that result "from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded." *Id.*

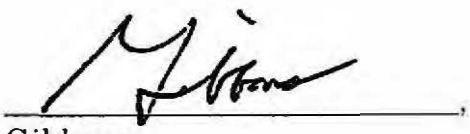
We agree with NRED and the Attorney General's interpretation that the 2005 amendment to the master declaration is presumptively valid after one year of its recording date for two reasons. First, NRED's interpretation is within the statute's plain language. NRS 116.2117(2) is unambiguous; it sweepingly prohibits any challenge to an amendment's "validity" after one year of its recording date. Both of Kosor's arguments seek to challenge the amendment's validity, either by arguing the SHCA did not validly adopt it or that the amendment itself was invalid. Because NRS 116.2117(2) is a statute of repose, Kosor, who was not a homeowner during the one-year period available to challenge the amendment, would of course never have been able to do so. However, when he purchased the property in 2012, he should have been provided with the master declaration and the 2005 amendment thereto. At this time, Kosor could have decided whether or not to purchase property within the master planned community in light of the amendment.

Second, we agree that NRED's decision to dismiss both of Kosor's complaints related to the 2005 amendment is consistent with the policy rationale underlying the statute of repose, which is to limit the time to challenge an amendment. Allowing Kosor to challenge the 2005 amendment, after the one-year statute of repose expired, would nullify the statute's purpose to prevent ongoing challenges to the amendment years into the future with no definitive end in sight and thereby delaying an

amendment's effective date. We decline to carve out an exception to the statute to permit this. Accordingly, we affirm the district court's order granting the motion to dismiss Kosor's declaratory relief claim as being untimely pursuant to NRS 116.2117(2).[3]

Therefore, we

ORDER the judgment of the district court AFFIRMED.



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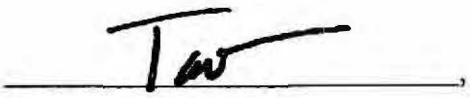

_____, J.
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cc: Hon. David M. Jones, District Judge
Barron & Pruitt, LLP
Attorney General/Carson City
Eighth District Court Clerk

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[3]Nothing in our decision precludes Kosor from filing a timely complaint with NRED in the future should the Declarant fail to relinquish control over SHCA once the terms and conditions of the 2005 amendment have been satisfied.