

1 KIMBERLY MAXSON-RUSHTON, ESQ.
Nevada Bar No. 005065
2 LOUIS V. CSOKA, ESQ.
Nevada Bar No. 007667
3 COOPER LEVENSON APRIL
NIEDELMAN & WAGENHEIM, P.A.
4 6060 Elton Avenue, Suite A
Las Vegas, Nevada 89107
5 (702) 366-1125
FAX: (702) 366-1857
6 Attorneys for Amicus Curiae
Livery Operators Association of
7 Las Vegas
krushton@cooperlevenson.com
8 lcsoka@cooperlevenson.com

Electronically Filed
Jun 14 2013 09:33 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

9 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

10 CHRISTOPHER THOMAS, and)
CHRISTOPHER CRAIG,)
11 Individually and on behalf of others)
Similarly situated,)

Sup. Ct. No. 61681

12)
Appellants,)

Case No.: A-12-661726-C
Dept. No.: XXVIII

13)
14 vs.)

15 NEVADA YELLOW CAB)
CORPORATION, NEVADA CHECKER)
16 CAB CORPORATION NEVADA STAR)
CAB CORPORATION,)

17)
Respondents.)
18)
19)

20
21 **LIVERY OPERATORS ASSOCIATION OF LAS VEGAS'S REPLY TO APPELLANTS'**
22 **RESPONSE IN OPPOSITION TO MOTION OF LIVERY OPERATORS ASSOCIATION**
23 **OF LAS VEGAS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND TO BE HEARD**
24 **AT ORAL ARGUMENT**
25
26
27
28

1 COMES NOW, Livery Operators Association of Las Vegas (“LOA”) by and through their
2 attorneys, Kimberly Maxson-Rushton, Esq. and Louis V. Csoka, Esq. of the law firm Cooper
3 Levenson April Niedelman & Wagenheim, P.A., and submits the following Reply To Appellants’
4 Response In Opposition To Motion Of Livery Operators Association of Las Vegas For Leave To
5 File Amicus Curiae Brief And To Be Heard At Oral Argument.

6
7 I. ARGUMENT

8 A. In accordance with the great weight of legal authorities, the Association meets
9 the threshold requirements of “interest” and “desirability” to be admitted as
10 *amicus curiae*.

11 Pursuant to Nevada Rules of Appellate Procedure (“NRAP”) 29, there are two principal
12 factors relevant to this Court’s evaluation of whether to grant or deny a motion for leave to file an
13 *amicus* brief. The first factor is whether the *amicus* has an “interest” in the matter. *See* NRAP
14 29(c)(1). The second factor is whether the *amicus* brief is “desirable” and the matters asserted
15 relevant to the disposition of the case. *See id.* at (c)(2).

16 These factors are substantially similar to that applied by the Federal Court in analyzing what
17 constitutes an *amicus curiae*’s “interest” and what makes its brief “desirable.” *See Neonatology*
18 *Associates, P.A. v. CIR*, 293 F.3d 128 (3rd Cir. 2002); *see also* Federal Rules of Appellate Procedure
19 (“FRAP) 29(b)(1) and (2). In analyzing the requirement contained in FRAP 29, United States
20 Supreme Court Justice Samuel Alito, while sitting as a Circuit Court judge, opined that:

21 [A]n *amicus* who makes a strong but responsible presentation in support of a party
22 can truly serve as the court’s friend.

23 . . . Parties with pecuniary, as well as policy, interests also appear as *amici* in our
24 court. I thus reject the appellant’s argument that an *amicus* must be an impartial
25 person not motivated by pecuniary concerns.

26 *Id.* at 131-32 (internal citations omitted); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.
27 1982); *Sunbus Sys., Inc. v. State of California PUC*, 801 F.2d 1120, 1125 (9th Cir. 1986).

28 With regard to the issue of what makes an *amicus* brief “desirable,” Justice Alito observed:

Even when a party is very well represented, an *amicus* may provide important
assistance to the court. ‘Some *amicus* briefs collect background or factual references
that merit judicial notice. Some friends of the court are entities with particular
expertise not possessed by any party to the case. Others argue points deemed to far-

1 reaching for emphasis by a party intent on winning a particular case. Still others . . .
2 [help to] explain the impact a potential holding might have on an industry or group.’

3 *Neonatology Associates, P.A.*, 293 F.3d at 132.

4 For any of the foregoing reasons, an *amicus* brief would be deemed “desirable” and should
5 be admitted. *See id.* Moreover, in determining whether to allow an *amicus* brief, courts should have a
6 “broad reading” of the “desirability” requirement, which is “prudent,” as it is “preferable to err on
7 the side of granting leave.” *See id.*; *see also Miller-Wohl Co., Inc. v. Comm’n of Labor & Indus.*,
8 694 F.2d 203, 204 (9th Cir. 1982) (stating that “drawing the court’s attention to . . . [any legal
9 authorities] that escaped consideration is a classic role of *amicus curiae*”); *Andersen v. Leavitt*, 2007
10 U.S. Dist. LEXIS 59108 at * 6-7 (E.D.N.Y. 2007) (stating that an *amicus* brief is especially helpful
11 in cases involving matters of public interest).

12 Because an *amicus curiae* is not a party to the case, their role is to provide assistance in a
13 case of general interest, supplement the efforts of counsel in the case, and draw the court's attention
14 to legal arguments that have escaped consideration. *See Miller-Wohl Co.*, 694 F.2d at 204, vacated
15 on other grounds by *Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus.*, 479 U.S. 1050, (1987),
16 citing *Funbus Sys., Inc.*, 801 F.2d at 1125.

17 The Livery Operators Association of Las Vegas (the “Association” or the “LOA”) is a
18 professional trade organization representative of the commercial motor carrier industry in Southern
19 Nevada. Accordingly, it has more than a general interest in this case; instead, it has a significant
20 interest based on the impact that an adverse ruling will have on the members of the LOA. *See NRAP*
21 *29(c)(1)*.

22 Additionally, the LOA’s *Amicus Curiae* Brief is “desirable” in that it establishes the impact
23 this Court’s holding will have on the Nevada commercial motor transportation industry and its 2000
24 plus drivers. *See, e.g.*, *Amicus Brief* at 1 and 10. Second, the brief raises arguments that Appellants
25 have failed to identify, such as the error in relying on an Attorney General Opinion as the sole
26 support for one’s position and the corresponding impact an implied repeal of a statute can have on
27 various categories of employees. For example, the Association’s members would have to
28 significantly alter their driver pay schedules to ensure that each hour of service is paid at or above

1 Nevada's minimum wage. Those owner/operators rely on the statutory exemption in negotiating
2 salary and benefits packages either through collective bargaining or standard hiring practices. Third,
3 as a collection of transportation providers, the LOA also brings a wealth of expertise and
4 experienced perspective on the commercial motor transportation industry in Nevada. Finally, the
5 LOA's *amicus* brief adds further factual references and legal authorities that were left out of the
6 initial briefing by the parties, such the broader impact, an additional lower court case attached in its
7 Appendix, as well as fifteen (15) additional cases on point, which were left out of the briefs.¹

8 Accordingly, the LOA's *Amicus Curie* Brief meets both the "interest" and "desirable"
9 standards consistent with NRAP 29(c)(1) & (2).

10 **B. The admission of the Association's *Amicus Curiae* Brief would not create an**
11 **"unnecessary delay" and is justifiable by the circumstances under which it has**
12 **been filed.**

13 A mere delay in filing an *amicus* brief is not a sufficient basis for deeming a submission to be
14 "untimely;" instead, the proper standard is whether granting leave to a party to file an untimely brief
15 will create an "unnecessary delay" in the final disposition of the matter. *See Andersen*, 2007 U.S.
16 Dist. LEXIS 59108 at * 17; *see also Community Ass'n for Restor. v. DeRuyter Bros. Dairy*, 54 F.
17 Supp. 2d 974, 975-78 (E.D.Wash. 1999) (granting leave to a non-party for filing *amicus* brief "on
18 the eve of summary judgment motions"); *Waste Mgm't. of Penn., Inc. v. City of New York*, 162
19 F.R.D. 34, 37 (M.D. Pa. 1995) (allowing a non-party to file *amicus* brief two (2) months after close
20 of briefing on the dispositive issues).

21 As previously stated in the Motion for Leave, the briefing schedule in this matter only
22 recently concluded and oral arguments have not been scheduled. These facts weigh in favor of
23 allowing the LOA to submit its untimely *Amicus Curiae* Brief. Moreover, Appellants fail to state
24 how the admission of the *Amicus Curiae* Brief will create an "unnecessary delay" other than to state

25
26 ¹ These cases were *Barratt*, *City of Las Vegas*, *Crane*, *Lemberes*, *Mengelkemp*, *Nevada Mining*
27 *Ass'n*, *Nigg*, *Paschall*, *Posadas*, *Professional Engineers*, *Rogers*, *Ronnow*, *Economy*, *Thompson*, and
28 *Thorpe*. *See Amicus Curiae* Brief Table of Authorities; *cf.* Respondents' Responding Brief Table of
Authorities; Appellant's Opening Brief Table of Authorities.

1 that the LOA's counsel was well "aware of this appeal when it was filed" and their purpose in filing
2 their amicus brief in a belated manner was to intentionally "delay the resolution of this appeal." *See*
3 Appellants' Response at 1, Lines 4-5, and Lines 19-20.

4 The LOA is a professional trade association focused on both state and federal transportation
5 issues. The multiple owner/operator members look to the LOA to provide up to date information
6 regarding regulatory oversight and industry matters that specifically pertain to the operation of
7 commercial motor vehicles, driver oversight and safety, and the safety of the traveling public.
8 Accordingly, employee compensation and minimum wage issues are commonly addressed by the
9 individual commercial motor carrier member. Additionally, in light of the fact that there have been
10 multiple cases filed in the Eighth Judicial District Court relative to this specific issue - whether the
11 amendment to Nevada Constitution, Article 15, Section 16 repealed the specific exemptions
12 contained in NRS 608.250(2) - and the present case is the first to be considered by the Nevada
13 Supreme Court, the LOA has a direct and substantial interest in participating in this appeal based on
14 the far ranging impact this case will have on commercial motor carriers in Nevada.

15 Notwithstanding Appellants' speculations about an intentional delay, any delay in this matter
16 was wholly unintentional as matters such as this are not regularly addressed by the LOA.

17 **C. The Association should be permitted to participate in oral argument.**

18 The participation of an *amicus curiae* lies wholly within the discretion of the court. *See*
19 *Hoptowit v. Ray, supra.*; *see also American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (Fed.
20 Cir. 2009) (holding similarly). An *amicus curiae* can even be invited to participate in oral argument.
21 *See, e.g., Industrial Risk Insurers v. Port Authority of New York and New Jersey*, 493 F.3d 283 (2nd
22 Cir. 2007). However, as Appellants correctly point out, pursuant to NRAP 29(h), for *amicus* to
23 participate in oral argument it should present "extraordinary reasons."

24 The LOA submits that its extraordinary reason is based on the Appellants' attempt to
25 erroneously convince this court that the implied repeal of an entire statutory scheme is consistent
26 with legal standards and should be found to have occurred in this instance. Specifically, Appellants
27 argue that Nevada voters by implication eliminated numerous categories of exemptions specific to
28 the minimum wage. *See* Appellants' Opening Brief. Without question, the voters' ability to repeal by

1 implication legislatively promulgated exemptions to NRS 608.250(2) presents an “extraordinary
2 reason” for the LOA to be heard, just as it could be heard before the Legislature or in ballot
3 materials.

4 Accordingly, the LOA respectfully asserts that “extraordinary reasons” exist for the
5 Association to participate in oral argument if set by the Court, insofar as Appellants seek to short-
6 circuit the legislative process and deny groups like the LOA an opportunity to be heard by claiming
7 an implied repeal, thereby turning over decades of exemptions impacting the LOA and other
8 industries. *See* NRS 608.250(2).

9 II. CONCLUSION

10 WHEREFORE, for the foregoing reasons, the Association respectfully requests that the
11 Court grant this Motion for Leave to File the Association’s *Amicus Curiae* Brief and to permit it to
12 be heard at Oral Argument.

13 DATED this 13th day of June, 2013.

14 Respectfully submitted,

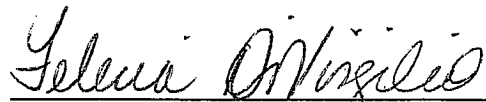
15 
16 _____
17 KIMBERLY MAXSON-RUSHTON, ESQ.
18 Nevada State Bar No. 005065
19 LOUIS V. CSOKA, ESQ.
20 Nevada State Bar No. 007667
21 Cooper Levenson April Niedelman
22 & Wagenheim, P.A.
23 6060 Elton Avenue, Suite A
24 Las Vegas, Nevada 89107
25 *Attorneys for Livery Operators Association*
26 *Of Las Vegas*
27
28

1 CERTIFICATE OF MAILING

2 I hereby certify that on the 13th day of June, 2013, service of the foregoing LIVERY
3 OPERATORS ASSOCIATION OF LAS VEGAS'S REPLY TO APPELLANTS' RESPONSE
4 IN OPPOSITION TO MOTION OF LIVERY OPERATORS ASSOCIATION OF LAS
5 VEGAS FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND TO BE HEARD AT ORAL
6 ARGUMENT was made this date by depositing a true copy of the same for mailing, first class mail,
7 at Las Vegas, Nevada, in an envelope addressed as follows:

8
9 Marc C. Gordon, Esq.
10 Tamer B. Botros, Esq.
11 YELLOW CHECKER STAR
12 TRANSPORTATION CO. LEGAL DEPT.
13 5225 W. Post Road
14 Las Vegas, Nevada 89118

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
LEON GREENBERG P.C.
2965 South Jones Boulevard – Suite E-4
Las Vegas, Nevada 89146

15
16
17
18
19
20
21
22
23
24
25
26
27
28

An employee of, COOPER
LEVENSON ATTORNEYS AT LAW