In the
Supreme Court of the State of Nevada

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LUCIA CASTILLO, an individual, Appellant, vs. UNITED FEDERAL CREDIT UNION, a Federal Credit Union, Respondent.	**Case No. 70151** District Court Case No.: CV15-00421

Amicus Curiae Progressive Leadership Alliance Of Nevada's Motion To De-Publish Opinion And To Stay Issuance Of Remittitur, And For Possible Alternative Relief
And
Motion To Exceed Page Limitation

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
BRADLEY SCHRAGER, ESQ., NV Bar No. 10217
JORDAN BUTLER, ESQ., NV Bar No. 10531
DANIEL BRAVO, ESQ., NV Bar No. 13078
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Amicus Curiae

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

DATED this 23rd day of February, 2018.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*
BRADLEY S. SCHRAGER, ESQ. (NV Bar No. 10217)
JORDAN BUTLER, ESQ. (NV Bar No. 10531)
DANIEL BRAVO, ESQ. (NV Bar No. 13078)
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Amicus Curiae

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

MEMORANDUM OF POINTS AND AUTHORITIES

Amicus curiae, the Progressive Leadership Alliance of Nevada ("Amicus," or "PLAN"), moves this Court to de-publish its recently-issued opinion in *Castillo v. United Federal Credit Union,* Case No. 70151, issued on February 1, 2018, because its effect upon the many class action cases currently pending in Nevada's courts, and upon those that may yet be filed, is immediate, wide-ranging, and difficult to predict, and because such an abrupt sea-change in jurisdiction and procedure may not have been the Court's precise intention in rendering its opinion. Further, Amicus requests a stay of the issuance of the remittitur in this matter, currently scheduled for Monday, February 26, 2018.

I. THE PROPRIETY OF THE MOTION TO DE-PUBLISH

Amicus acknowledges this motion is procedurally uncommon. First, NRAP 36 clearly contemplates motions, even from non-parties, to reissue unpublished orders as published opinions. *See* NRAP 36(f). There is no apparent provision in the rules, however, for *de-publication,* or the *re-issuance* of an opinion slated to be published as

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

an unpublished order.[1] Amicus urges the Court to consider the present motion in recognition of the fact interested persons may, with similar reasoning to those seeking relief under NRAP 36, seek de-publication of an opinion, and that one may properly imply the opportunity to request such relief as a natural logic of Rule 36 itself. It ought not be a one-way street tending always towards publication, in other words.

Second, Amicus concedes, obviously, that this motion is not brought within the time periods set out by NRAP 36(f)(1), if the motion were to be construed under its terms. We can only beg the Court's indulgence; it can be difficult for non-parties to become aware of, digest, respond to, and quickly submit motions regarding cases in which counsel was not involved, and even in instances where awareness of issued opinions is prompt it can take some time both to formulate an understanding of the ramifications of a particular decision and then to bring concerns to the attention of the Court. The seriousness of the concerns we raise below mitigates the

[1] California, by way of example, does have an express provision and procedure in its Rules of Court for requesting de-publication of published opinions. *See* Cal. Rules of Court, rule 8.1125.

slight deviation from the timelines set out by rule.

Furthermore, having won her appeal on alternate grounds, Appellant has little incentive to ask the Court to reconsider, or rehear *en banc*, this matter in line with the concerns that Amicus propounds. If the Court, after considering the arguments below, were to afford Amicus the opportunity to be heard regarding that aspect of the opinion touching upon aggregation of claims or the adequacy of justice court as an appropriate forum for class action cases, it would be most welcome, although de-publication at this time may be the more prudent relief available.

II. INTEREST OF AMICUS CURIAE

PLAN was founded in 1994 to bring together diverse organizations into a cohesive force for social and environmental justice in Nevada. It functions as an advocacy group for Nevada workers and consumers, and its interests are in protecting and giving voice to the multitudes of our fellow Nevadans who often stand outside the political structures of the state. PLAN supports class actions as an important legal mechanism for vindicating the rights of the many, and for affecting positive social and legal change.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

PLAN has filed numerous *amicus curiae* briefs over the years in support of the rights of wage-earners in class action cases.[2]

III. ARGUMENT

A. De-Publication Is Appropriate In The Context Of This Appeal

PLAN asks the Court to de-publish its opinion in this matter not because it merely disagrees with the ruling or its rationale, but because it feels strongly that the vast impact of channeling, essentially, all class action cases in Nevada into justice court merits the full attention of the Court in tightly-focused briefing and argument arising from a case that places the question squarely before it and airs all the potential consequences such a change would effect in this state. *Castillo*, though it resolves important questions, is not such a case. Indeed, the briefing in *Castillo* does not appear to raise the complicated issues of justice court adequacy for class action cases at all, and certainly not to the level Amicus believes would be necessary for the Court to resolve the question appropriately.

In fact, the Court could have decided the appeal without

[2] *See Western Cab Co. v. Dist. Ct. (Perera)*, Case No. 68796; *Nevada Yellow Cab Corp. v. Dist. Ct. (Thomas)*, Case No. 68975; *Boulder Cab, Inc. v. Dist. Ct. (Herring)*, Case No. 68949.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

reaching the question of aggregation or the adequacy of justice court as a forum for complex class actions. Holding that Appellant's statutory damages could be combined with her deficiency amount to reach the jurisdictional threshold, or that the pleading of an injunctive claim provided the district court with original jurisdiction, would have been sufficient to resolve the case. This alone supports de-publication. Appellant won her appeal; her case remains in district court notwithstanding the Court's reasoning regarding aggregation and justice court jurisdiction in other circumstances. Permitting the opinion to stand as law of the case below is perfectly appropriate, while de-publication will allow resort to the opinion as persuasive authority without activating binding precedential effect to discussion which, while not determinative of the appeal at hand, may have significant effects upon pending and future class action litigation in Nevada. *See* NRAP 36(c)(2).[3]

[3] Amicus also notes that issuing *Castillo* as an unpublished order would not be extraordinary. The Court's Internal Operating Procedures express that "Although it is contemplated that panel decisions would be by order, a panel may publish its decision when a significant new point of law is involved." Rule 9(a). Amicus concedes that new points of law are contained in the *Castillo* decision, but urges the Court to consider the wider context expressed herein in addressing the present motion.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

B. There Are Many Indicators That Justice Court Cannot Serve as An Appropriate Forum For Resolving Class Action Cases In Nevada

There are a whole host of very complicated questions and issues that arise in rooting class actions in justice court for jurisdictional reasons. This Court would benefit from a fuller discussion of these issues, because they very definitely go to the question of whether justice court provides an adequate forum for these complex civil cases.

1. Technically, class action cases may not end up in justice court proper at all, but rather in small claims court

Most, if not all, class actions in Nevada feature plaintiffs claiming relatively small amounts of money damages—in wage and hour cases, for example—but who seek to represent hundreds or thousands of similarly-situated class members.[4] Most of these amounts are small enough that under current jurisdictional thresholds, the cases will not be heard in justice court, but will instead be shunted to *small claims court*, a division of justice court, the jurisdictional threshold for which is any damages claims up to $10,000. NRS 73.010.

[4] In *M.D.C. Restaurants, LLC v. District Court (Diaz)*, Case No. 71289, currently pending before this Court and argued on January 3, 2018, the certified class consists of nearly 3,000 members, and total compensatory damages are estimated in the mid-seven figures.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

It may be that class actions are not plausibly permitted by small claims court at all, resulting in a complete lack of a forum for such cases. *See* JCRCP 88-100. Even if it is somehow conceivable that small claims court can, in fact, entertain class action cases, there are no provisions at all for discovery in that jurisdictional division, much less the kind of discovery that a complex class action case requires. The very idea that small claims court can function as a class action forum is not plausible, and it may be that the Court did not have this eventuality in the forefront of its analysis in deciding *Castillo*.

2. The rules and structure of justice court cannot accommodate complex class actions

Even if class action plaintiffs avoid small claims court and can plead, individually, damages between $10,001 and $15,000, the rules and function of justice court itself would transform class actions into unrecognizable, and likely unjust, proceedings. Absent special leave of the court, discovery in justice court civil matters is sharply curtailed in timing, scope, and breadth. The default rules direct that parties get one one-hour deposition, 10 written interrogatories, and the production of ten documents (not ten requests for production of documents, but the production of ten documents). JCRCP 25A(b).

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

Juries in justice court consist of four persons, but may be expanded to six if the party requesting expansion pays additional juror fees. JCRCP 47(a).

Justice court trials are to take place within 120 days of the filed scheduling order, and call for each side to have two hours to present their respective cases. JCRCP 39A(c).

Maybe justices of the peace would make rulings to avoid these strictures, or alleviate them as best they could, but the premise remains: justice courts are constructed to handle cases of simple and uncomplicated varieties, not class actions, which are much more—not less—complex than garden variety civil actions in district court. A scenario in which the standing procedures will become to obliterate the rules already in place just to accommodate the basic nature of an action indicates that justice court is not a feasible forum for class actions.

3. The mandatory fee-shifting provisions in justice court will wreak havoc in class actions

Justice court civil actions feature full fee shifting provisions, in which attorney fees are treated as costs. *See* NRS 69.020, 69.030. In other words, in justice court, the loser pays. This provision alone would spell the end of class actions in Nevada, as it would be unconscionable

for any attorney to permit, for example, a worker owed a few thousand dollars of back pay to place themselves at risk of paying the attorney fees of an employer-company defending the claims of a thousand-member class.

4. Justice court rules and the Nevada Constitution already prevent it from acting as an appropriate forum for class actions, because justice courts cannot fashion injunctive relief

There are also internal contradictions in the JCRCP rules themselves. For instance, it is basic state constitutional law that justice courts do not have the power to issue injunctions. Nev. Const. art. 6, § 6; *cf.* art. 6, § 8. Yet JCRCP 23, the class action rule, is a carbon copy of NRCP 23, and features among its provisions the "injunctive class" option, at JCRCP 23(b)(2). In this respect, justice courts cannot fulfill their own rules of court where class actions are concerned; only district courts can fully implement Rule 23.

5. Appeal rights in class actions maintained in justice court would also be adversely affected

Apart from the additional time and expense it would require to take an appeal to district court, and then on to this Court, in a complex class action, the rules of such appeals are inadequate to meet the

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

circumstances that would arise. *See* JCRCP 72-76B. Page lengths, time for filing, and other usual appellate procedures are sharply curtailed in appeals from justice court to district court. Forcing class actions through this extended system of review is unnecessary and prejudicial.

6. *Castillo* would have immediate negative effects on pending cases throughout Nevada

Changes in subject matter jurisdiction have immediate, and mandatory, effects on ongoing cases. The impact of *Castillo* upon cases that are years old, that feature already-certified classes, is uncertain and introduces an instability for which the legal system should have a general lack of tolerance. De-publishing *Castillo* will insulate current cases from this instability while the questions it raises can be addressed in cases yet to come before the Court. Otherwise, it is likely that pending cases will see floods of motions to dismiss—or even *sua sponte* dismissals—based on the confusion over subject matter jurisdiction that *Castillo* invites.

C. Request To Exceed Page Limitations

Further asking the Court's indulgence, Amicus asks leave to exceed the page limitations set forth in NRAP 27(d)(2) for this motion.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

IV. CONCLUSION

There are many necessary considerations that go into a determination of the adequacy of justice court as a forum for class actions in Nevada, over and above the question in *Castillo* of whether a plaintiff may aggregate claimed damages with class members. Amicus fully concedes there are interesting, and valid, competing arguments about how to interpret jurisdictional requirements in the class action context, and those arguments should indeed be pursued. What Amicus is here suggesting is that we should conduct those arguments in full, in cases that raise and air every possible concern parties and the Court may have, including any problems or inconsistencies with the rules and procedures of the courts that are or will be charged with handling complex class actions in Nevada.

Rather than establishing a sweeping and unpredictable class action procedure as an unforeseen byproduct of an appeal that did not require it, Amicus urges the court to de-publish *Castillo* and seek more appropriate settings to address jurisdictional issues.

Class actions are not uncontroversial, but they have long functioned, here and across the country, as important, established

mechanisms for the administration of effective justice.

> The class action is among the most powerful legal tools available in the United States. It enables the vindication of claims that otherwise could never be litigated, no matter how meritorious. Use of the courts to assert rights is practicable only if the potential benefits exceed the cost, and the costs of litigation are considerable. Claims that are too small to cover the cost of litigation will not be pursued. No matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well not exist, for it can be violated with impunity.

Janet Cooper Alexander, "An Introduction to Class Action Procedure in the United States," *Group Litigation in Comparative Perspective*, Geneva, Switzerland (July 21-22, 2000).

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WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

By de-publishing the opinion, the decision will remain law of that case, but will lose the force of binding precedent, giving the Court the opportunity to consider the crucially-important question of jurisdiction over class actions in a more suitable context.

DATED this 23rd day of February, 2018.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley S. Schrager, Esq.*
BRADLEY S. SCHRAGER, ESQ. (NV Bar No. 10217)
JORDAN BUTLER, ESQ. (NV Bar No. 10531)
DANIEL BRAVO, ESQ. (NV Bar No. 13078)
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Amicus Curiae

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. RUSSELL ROAD, SECOND FLOOR
LAS VEGAS, NEVADA 89120
TEL (702) 341-5200 • FAX (702) 341-5300

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2018, a true and correct copy of the foregoing **MOTION TO DE-PUBLISH OPINION AND TO STAY ISSUANCE OF REMITTITUR, AND FOR POSSIBLE ALTERNATIVE RELIEF AND MOTION TO EXCEED PAGE LIMITATION** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By: /s/ *Dannielle Fresquez*
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP