IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, Appellant, vs. EDUCATION SUPPORT EMPLOYEES ASSOCIATION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14; and CLARK COUNTY SCHOOL DISTRICT, Respondents.	**SUPREME COURT CASE NO. 70586** District Court Case No. A-15-715577-J

STATE OF NEVADA'S MOTION FOR APPEAL TO BE EXPEDITED AND FOR EN BANC REVIEW IN THE FIRST INSTANCE

ADAM PAUL LAXALT
Nevada Attorney General
GREGORY L. ZUNINO (Bar No. 4805)
Bureau Chief
DONALD J. BORDELOVE (Bar No. 12561)
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave. #3900
Las Vegas, NV 89101
Telephone: (702) 486-3094
Fax: (702) 486-3416
dbordelove@ag.nv.gov
Counsel for *State of Nevada Local Government Employee-Management Relations Board*

Appellant State of Nevada, Local Government Employee-Management Relations Board ("EMRB" or the "Board") hereby moves for this appeal to be expedited and for en banc review in the first instance.

BACKGROUND

In 2002, the EMRB concluded, following an evidentiary hearing, that good faith doubt existed whether Education Support Employees Association ("ESEA") or International Brotherhood of Teamsters, Local 14 ("Local 14") or any other employee organization was supported by a majority of support staff employees of the Clark County School District ("District"). Based on that conclusion, the EMRB ordered an election pursuant to NRS 288.160(4).

When the first election was held, less than half of all potential voters cast ballots. Nonetheless, Local 14 won 57 percent of the votes cast. Unfortunately, the EMRB had adopted an experimental interpretation of its regulation indicating that the provision meant that, in order to prevail in the election, ESEA or Local 14 had to win votes from a majority of all potential voters regardless of how many votes were cast. Local 14 petitioned for judicial review, and the court ordered the EMRB to hold a runoff election pursuant to NAC 288.110(7). The runoff election was held in early 2015. Local 14 won 71% of the votes actually cast.

Following the runoff election, the EMRB acknowledged the experimental and dysfunctional nature of the vote-counting rule adopted only for this election. The EMRB stated that the history of this case showed that the majority of all potential voters standard (also known as the "supermajority standard") was a failed experiment incapable of any meaningful practical application. The EMRB held that the ability to hold an election under a standard that will actually produce a meaningful result is

essential to carrying out its statutory duty to hold elections and to resolve its good faith doubt. The supermajority standard would not produce meaningful results, as the repeated failure of that standard in this matter plainly indicated. As such, the EMRB elected to follow a majority of the votes actually cast standard, which the EMRB had from its very origination in 1969 used to conduct elections. Following said previously and widely used standard was not only supported by proper statutory interpretation, but also brought the EMRB in line with the prevailing standard in labor law and with Nevada's prevailing standard for elections in general. The supermajority standard was a failed experiment incapable of any meaningful practical application.

Thereafter, the EMRB decided that it would resolve the good faith doubt that first prompted it to order a competitive election between Local 14 and ESEA with a discretionary second runoff election and determine the outcome based on that majority of votes actually cast standard. The third election, or second runoff election, was held in late 2015. Local 14 won 81% of the vote. On January 20, 2016, the EMRB declared that Local 14 was the exclusive bargaining representative of the employees in the bargaining unit.

In its Petition for Judicial Review, ESEA challenged that order wherein the EMRB determined that Local 14 was entitled to act as the exclusive bargaining agent for non-teacher support staff employed by the District. The issue before the court was whether, following an election pursuant to NRS 288.160 and NAC 288.110(10), the EMRB was required to leave ESEA in place as the bargaining agent for the District employees even though the election returns demonstrated overwhelming support for Local

14. ESEA argued, among other things, that the election was without force and effect because the election returns failed to prove with mathematical certainty that Local 14 was supported by a majority of all potential voters, as opposed to a majority of those who actually cast votes in the election.

On May 17, 2016, the District Court entered an Order Granting ESEA's Petition for Judicial Review (the "Order"), thereby nullifying the results of the election at which Local 14 was chosen to replace ESEA as the bargaining agent for the District employees in question.

ARGUMENT

I. Expedited review is necessary so that the results of the second runoff election can be implemented without further delay

Expedited review is warranted because this case has been ongoing since 2002 including an election that was held and decided in late 2015. The election at issue was the third in a series of elections involving the ongoing struggle between ESEA and Local 14 for control of the bargaining unit. Employees have been waiting roughly 14 years for this dispute to resolve. Moreover, the employees have been waiting since late 2015 for the results of the third election to be implemented but, to date, the incumbent union which indisputably lost the election remains the employees' exclusive bargaining representative. Delay in implementing election results cannot be adequately remedied. In election contests between a union and employer, "delay itself almost inevitably works to the benefit of the employer and may frustrate the majority's right to choose to be represented by a union" because the status quo is maintained throughout the delay. *NLRB v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 451 n.1 (9th Cir.1988), *quoting Amalgamated Clothing & Textile Workers v. NLVRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984); *c.f.*

United Parcel Svc. v. Mitchell, 451 U.S. 56, 63 (1981) ("[O]ne of the leading federal policies in this area is the relatively rapid disposition of labor disputes."). Here, delay unfairly benefits ESEA because ESEA remains the employees' exclusive bargaining representative and collects union dues from employees despite the overwhelming vote against ESEA.

As such, expedited review is necessary in order to resolve this dispute.

II. En banc review in the first instance is warranted because this appeal raises substantial public policy issues and is necessary to maintain the uniformity of the Court's decisions

The full Court's consideration is warranted in cases "raising substantial precedential, constitutional or public policy issues, or where en banc consideration is necessary to secure or maintain uniformity of the court's decisions." IOP Rule 13(a); *cf. also* NRAP 40A(a). Such consideration is especially important where, as here, the issue is significant and recurring.

As indicated in the EMRB's Docketing Statement and Case Appellate Statement, this is not the first time this matter is before the Supreme Court. This Court decided *Education Support Employees Ass'n v. State of Nevada, Local Gov't Employee Management Relations Bd. et al.*, Case Nos. 42315 and 4233 (2005) ("*ESEA I*"). ESEA I upheld the experimental rule adopted by the EMRB about how votes would be counted under the supermajority standard. As indicated, the EMRB had previously used the more familiar vote counting rule (*i.e.* the candidate that wins the majority of votes actually cast in an election wins the election).

The election held pursuant to the supermajority standard demonstrated the practical difficulties that the new vote counting rule causes when many

voters abstain. Local 14 won the election, but under the decision in *ESEA I*, Local 14 could not be declared the winner. Relying on NAC 288.110(7) which provides that "[i]f the results are inconclusive, the Board will conduct a runoff election," the District Court ordered a runoff election.

This Court also decided *International Brotherhood of Teamsters, Local 14 v. Education Support Ass'n et al.*, Case No. 51010 (2009) ("*ESEA II*"). The Court ordered that the EMRB was required to hold a runoff election as the results from the election were inconclusive. However, as indicated above, that runoff election again produced an inconclusive and unworkable result under the supermajority standard. The Court noted that it recognized that a runoff election may produce those similar inclusive results; however, the parties could agree to an alternative method in which to conduct the runoff election. Unfortunately, ESEA, as the organization in power, would naturally not agree to a majority of the votes actually cast standard.

A decision from this Court is needed to explain how the election process is to be brought to a conclusion under the current supermajority standard, or whether that rule should be abandoned as the EMRB later held because it was unworkable in favor of the proven and widely used majority of the votes cast standard. When a prior decision creates unworkable consequences, it may be overruled. *See, e.g.*, *Swift & Co. v. Wickman*, 382 U.S. 111, 116 (1965).

The EMRB maintains that the final election was well attended and "demonstrates" overwhelming support for Local 14, albeit not to a mathematical certainty. Moreover, the standard to be applied in elections of this nature presents an important public policy issue. As indicated, the

practical application of the supermajority standard advanced by ESEA produces an unworkable result. In both the first election and the runoff election that standard failed to come close to resolving the EMRB's good faith doubt. In general, the supermajority standard not only makes it difficult to install a new union, but makes it equally difficult to get rid of unions altogether (*i.e.* de-unionize). As a practical matter, it makes it nearly impossible in some cases (as in this case with a bargaining unit consisting of roughly 11,000 members) to displace an entrenched labor union.

The EMRB's ability to hold an election under a standard that will actually produce a meaningful result is essential to carrying out its statutory duty to hold elections and to resolve good faith doubt. Indeed, under the National Labor Relations Act[1], the wording of the statute is substantially same for conducting elections (*i.e.* representation by an employee organization is based upon the choice of "… the majority of the employees **in a unit**…" 29 U.S.C. § 159(a) (**emphasis** added). *See also* 29 U.S.C. § 159(e)(1) ("…the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer"); *compare* NAC 288.110(10) ("majority of the employees within the particular bargaining unit"). Nonetheless, the courts have held that the appropriate standard for such elections is the majority of the vote cast standard. *Virginian Railway Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560 (1937); *N.L.R.B. v. Deutsch Co.*, 265 F.2d 473, 479 (9th Cir. 1959) (explaining that "[i]t has repeatedly been held under well recognized rules

[1] Please note that the Local Government Employee-Management Relations Act (NRS 288) is generally modeled after the National Labor Relations Act. *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993).

attending elections that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting"); Conduct Elections, N.L.R.B., https://www.nlrb.gov/what-we-do/conduct-elections (last visited Aug. 18, 2016) (stating elections are "decided by a majority of votes cast"); Charles D. Johnson, *Labor Law: National Labor Relations Act: Elections: What Constitutes a Majority*, 39 MICH. L. REV. 668 (1941) (indicating that "the court relied upon several leading cases decided by the Supreme Court of the United States involving political decisions" in reaching its decision). The widely used national majority of the vote cast standard provides a realistic approach to conducting an election and provides for just resolution under NRS 288.160(4) and NAC 288.110(10).

CONCLUSION

For all the foregoing reasons, Appellant State of Nevada, Local Government Employee-Management Relations Board respectfully requests the Court to grant this motion for the appeal to be expedited and for en banc review in the first instance.

DATED this 24th day of August, 2016

ADAM PAUL LAXALT
Attorney General

By: /s/ Donald J. Bordelove
Gregory L. Zunino
Bureau Chief
Donald J. Bordelove
Deputy Attorney General
Attorneys for *State of Nevada, Local Government Employee-Management Relations Board*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 24th day of August, 2016 I served the foregoing **STATE OF NEVADA'S MOTION FOR APPEAL TO BE EXPEDITED AND FOR EN BANC REVIEW IN THE FIRST INSTANCE** via Eflex Electronic Service to the following:

Francis C. Flaherty, Esq.
Sue Matuska, Esq.
Dyer Lawrence Flaherty Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703

Scott Greenberg, Esq.
Clark County School District
5100 W. Sahara Avenue
Las Vegas, Nevada 89146

Kristin Martin, Esq.
McCracken Stemmerman & Hoslberry
1630 S. Commerce St., Suite A-1
Las Vegas, Nevada 89102

s/ Marilyn Millam
An Employee of the
Office of the Attorney General