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 REPLY IN SUPPORT OF MOTION FOR APPEAL TO BE EXPEDITED AND FOR EN BANC REVIEW IN THE FIRST INSTANCE

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

ARGUMENT

I. Expedited review is necessary as the delay unfairly benefits ESEA

In its Opposition, Education Support Employees Association ("ESEA") does not dispute that this case has been ongoing for roughly 14 years. Moreover, ESEA does not dispute that the 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 so that the results of the most recent election can be implemented, and the support staff employees of the Clark County School District can have the representation they have been fighting for, for over a decade.

II. This appeal raises substantial public policy issues or is necessary to maintain uniformity of the Court's decisions

In its Opposition to the instant Motion, ESEA argues the merits of this matter as well as baselessly attacks the EMRB's Motion for the failure to detail every aspect of the roughly 14 year history of this case (though the span of this case's existence is indicative of the substantial public policy issues at play). However, the subject motion requested the full Court's consideration as warranted in this case as raising substantial public policy issues or where en banc consideration is necessary to maintain uniformity of the court's decisions. IOP Rule 13(a); *cf. also* NRAP 40A(a). As such, the current issue before the court is the determination of such and not the merits of the appeal.

Instead of arguing that substantial public policy issues are not before this Court, ESEA tellingly devotes the majority of its Opposition to the merits of the appeal. Indeed, ESEA simply concludes that "every matter that the Board considers is a matter of 'public policy'" and thus illogically implies that somehow none of the matters the Board considers can ever be issues of public policy before this Court. *See* ESEA Opposition, at 5-6. ESEA also groundlessly concludes that "[t]he Board does not assert that there are other matters pending before the Board, or even likely to appear before the Board in the near future, that involve the same issue." ESEA Opposition, at 6. Assuming, *arguendo*, that was the relevant standard for determining whether substantial public policy issues were before the Court (which ESEA cites no authority whatsoever in support thereof), the matter of elections before the Board as well as its ability to carry out its statutory authority, as further detailed below, will be a prevalent issue before the Board for years to come – a consideration of the Board's decision to initiate this appeal in the first place.

Moreover, ESEA does not dispute that this matter has previously been before the Supreme Court – as evident by its unnecessary rendition of the history of this matter that was plainly indicated in the Board's Docketing Statement and Case Appellate Statement. Indeed, the prior application of the standard of review by this Court to the Board's ruling was quite different from that before this Court now (in terms of the EMRB's informed interpretation of its own regulations and the deference required to be given pursuant thereto).

As the December 21, 2005 Order of Affirmance stated in explaining the standard of review – "we defer 'to an agency's interpretation of a statute that the agency is charged with enforcing.'" *Education Support Employees Ass'n v. Employee-Management Relations Board*, Docket Nos. 42315/42338 (December

21, 2005) ("2005 Order of Affirmance"), at 3, attached as Exhibit "A" to ESEA's Opposition; *see also Clark County School Dist. v. Local Govt. Employee-Mgmt. Rel. Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974) (holding that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action"; "[i]ndeed, NRS 288.100 charges the [EMRB] with that responsibility and great deference should be given to the agency's interpretation when it is within the language of the statute."). After noting the proper standard of review, the Nevada Supreme Court held:

> As a result of this clear language, **the EMRB held** that NRS 288.160(4) and NAC 288.110(9)(d) required a majority of all members within the bargaining unit, not just those who vote.
>
> ...
>
> In light of this plain and unambiguous language, **we will not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110**.

2005 Order of Affirmance, at 11-12 (**emphasis** added).

As evident, the Court was deferring to the EMRB's experimental interpretation of its own regulation. Since that time, the EMRB has expressly overruled its prior interpretation based, in part, on the substantial evidence presented before it – such as the results of the elections. *International Brotherhood of Teamsters, Local 14 v. Clark County Sch. Dist.*, Item No. 520Q, EMRB Case No. A1-045735 (2015), attached hereto as Exhibit "A"; *see, e.g., Swift & Co. v. Wickman*, 382 U.S. 111, 116 (1965) (stating that when a prior decision creates unworkable consequences, it may be overruled). Moreover, in the Nevada Supreme Court's 2009 Order of Affirmance, the Court simply deferred to its prior 2005 Order of Affirmance in this regard (implicitly deferring to the deferential standard of review therein) – though the real issue in

that matter was the ordering of the runoff election. *See International Brotherhood of Teamsters, Local 14 v. Education Support Employees Ass'n*, Docket No. 51010 (December 21, 2009) ("2009 Order Affirmance"), at 2-3, attached as Exhibit "B" to ESEA's Opposition. The Nevada Supreme Court stated,

> In a previous order resolving consolidated appeals involving the same parties, we determined that the language of NRS 288.160 and NAC 288.110 are plain and unambiguous and required an employee organization to obtain support from a majority of all of the members of the bargaining unit and not just a majority of those who vote. See Education Support v. Employee-Management Relations Board, Docket Nos. 42315/42338 (Order of Affirmance, December 21, 2005).

2009 Order Affirmance, at 2.

Additionally, the EMRB will request the Court to reverse its prior decisions as ESEA claims that the Court's prior decisions preclude any other result. This supports the necessity of having the full court's consideration.

Tellingly, ESEA spends much attention in its Opposition arguing the merits of this appeal; yet, the question before the Court is whether the full Court's consideration is warranted in this case as "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).

Importantly, 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 pursuant to NRS 288.160(4) and NAC 288.110(10). The EMRB has been unable to fulfill its statutory duty due to its prior experimental interpretation of its regulation which **it expressly overruled** once the substantial evidence presented before it by the

elections demonstrated its unworkable application. The standard to be applied in elections of this nature presents an important public policy issue. The EMRB elected to follow a majority of the votes actually cast standard for a number of reasons including the fact that the EMRB had from its very origination in 1969 successfully used this standard to conduct elections. As will be submitted to this Court in the EMRB's Opening Brief, following said previously and widely used standard was not only supported by proper statutory interpretation (as will be demonstrated and in which the EMRB is afforded deference in interpretation of its own regulations), but also brought the EMRB in line with the prevailing standard in labor law and with Nevada's prevailing standard for elections in general. As such, the full court's consideration is warranted as the issues before it raise substantial precedential or public policy issues, or where en banc consideration is necessary to secure or maintain uniformity of the court's decisions.

CONCLUSION

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

DATED this 9th day of September, 2016

ADAM PAUL LAXALT
Attorney General

By: /s/ Donald J. Bordelove
Gregory L. Zunino
Bureau Chief
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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 9th day of September, 2016 I served the foregoing **STATE OF NEVADA'S REPLY IN SUPPORT OF MOTION FOR APPEAL TO BE EXPEDITED AND FOR EN BANC REVIEW IN THE FIRST INSTANCE** via Eflex Electronic Service to the following:

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EXHIBIT A

EXHIBIT A

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, Petitioner,	CASE NO. A1-045735
vs.	**ORDER**
CLARK COUNTY SCHOOL DISTRICT, and EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Respondents.	ITEM NO. 520Q
EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Counter Claimant,	
vs.	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, and CLARK COUNTY SCHOOL DISTRICT, Counter Respondents.	

On February 11 and 12, 2015, this matter came on before the State of Nevada, Local Government Employee Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Local Government Employee-Management Relations Act ("the Act") and NAC Chapter 288.

Certification of Runoff Election Results

The Commissioner has conducted the runoff election in this matter. The election was conducted by secret ballot as required by NRS 288.160(4). The ballots were mailed to eligible employees in the Clark County School District support staff bargaining unit on January 5, 2015. The ballots were retrieved and counted on February 3, 2015. No party has filed an objection to the conduct of the election or to conduct affecting the results of the election. See NAC 288.110(8).

The Board reviewed the Tally of Ballots prepared by the Commissioner, which is attached hereto. No timely objections having being filed, the Board will certify the results of the election as reported on the Tally of Ballots.

Implications of Runoff Election Results

Having certified the results of the runoff election, the Board looks to the implications of this runoff election. This runoff election was mandated by an order of the Nevada Supreme Court entered on December 21, 2009. That order concluded that this runoff election was subject to a majority vote requirement such that in order to prevail an employee organization needed "to obtain support from a majority of all of the members of the bargaining unit and not just a majority of those who vote." This order, in turn, referred to a prior decision from the Nevada Supreme Court that had affirmed this Board's decision in Item No. 520F that interpreted our own election regulation as requiring this standard.

The bargaining unit, as reported by the Commissioner, included a total of 11,114 employees. The Tally of Ballots indicates that neither the Education Support Employees (ESEA) nor the International Brotherhood of Teamsters, Local 14 (Local 14) received the requisite number of votes required to achieve a majority of members of the bargaining unit under this standard. The Tally of Ballots shows that only 5,255 ballots were cast. Of those ballots, 3,692 were cast in favor of Local 14 and 1,498 were cast in favor of ESEA. In the same 2009 order, the Nevada Supreme Court stated that election results are inconclusive where the "majority of the unit" standard is not met. ESEA is the incumbent bargaining agent and has remained as such for the duration of this election process. The results of this runoff election do not justify removing ESEA in favor of Local 14 under the majority vote requirement imposed in the Supreme Court's 2009 order. As such ESEA will continue as the recognized bargaining agent.

As with the original vote, the results of the runoff election do not provide a conclusive result, neither organization having received the required majority of the bargaining unit. NAC 288.110(7) does not require that additional runoff elections be held until the "majority of the unit" standard is met. The Board specifically interprets NAC 288.110(7) as mandating only a single runoff election when the results of a first election are inconclusive, and we emphatically

reject any interpretation to the contrary. This Board adopted NAC 288.110(7) and in doing so selected language that states that "if the results [of an election] are inconclusive, the Board will conduct *a* runoff election." NAC 288.110(7) (emphasis added). The Supreme Court's 2009 order also used similar language: "[w]e conclude that based upon the plain and unambiguous language of NAC 288.110(7) the EMRB must conduct *a* runoff election. We further conclude that NRS 288.160(4) and NAC 288.110(10)(d)'s majority vote requirement is equally applicable to *the* runoff election." (emphasis added). Had the Board intended through NAC 288.110(7) to self-impose a requirement for an endless cycle of runoff elections, we would have said so. We did not.

Further, it appears based upon the Supreme Court's 2009 order that an additional runoff election made mandatory under this subsection would be subject to the "majority of the unit" standard, which has failed twice now to resolve our good faith doubt as to majority support in this bargaining unit. An interpretation of NAC 288.110(7) as requiring additional mandatory elections would entail the same majority vote counting standards be used and would lock this Board into a potentially perpetual cycle of runoff elections with no end in sight. The concept of stability in labor relations, which is a fundamental objective of the Act, cannot be reconciled with an open-ended process of this sort. Existing doubt as to majority support is not conducive to stability in labor relations and thus the basic premises of the election process are that the election process will have a conclusion, that it will supply an answer to our good faith doubt and that elections can be conducted in a relatively expeditious manner. None of those objectives can be achieved under the "majority of the unit" standard. The employees and employers subject to the Act should not be left under a perpetual cloud of unresolved questions about which organization will actually represent a bargaining unit. The legislature has decreed that they deserve better when it adopted a mechanism for questions of majority support to be definitively resolved by this Board. NRS 288.160(4).

NAC 288.110(7)'s requirement for a single runoff election is premised upon the understanding that a singular runoff election should, ordinarily, supply an effective answer to the Board's good faith doubt in those circumstances where the original election does not do so, and

thus its requirement is only for a single runoff election. We also note that an interpretation of our own regulation as requiring never-ending runoff elections would effectively impose an unfunded mandate on this Board that was never intended. Accordingly, we interpret NAC 288.110(7) as requiring only a single runoff election where the results of a first election are inconclusive. Having now met that requirement in this case, and having complied with the Supreme Court's order, the Board is not obligated to conduct another runoff election. Doing so under the obligations of the Supreme Court's 2009 order would only repeat the runoff election that has failed to produce a meaningful result in resolving this dispute.

It is obvious that the "majority of the unit" standard is incapable of answering our good faith doubt whether any organization enjoys majority support in this case. At this juncture, the Board is faced with two options: either the Board concedes that its good faith doubt can never be resolved and closes this case, leaving that doubt forever unanswered; or else the Board excises the cause of the futility in this case and proceeds under something different than the "majority of the unit" standard. The first option is not a viable option. This Board was created and charged by the legislature with the duty to carry out representation elections and to determine majority support. To walk away from that process at this point after more than a decade of proceedings and two elections without any answer to our good faith doubt would be an affront to our statutory charge under NRS 288.160 and the underlying purposes of the Act. The second option to proceed under a different standard is the only viable option. We find that the ability to hold an election under a standard that will actually produce a meaningful result is essential to carry out our statutory duty to hold elections and to resolve our good faith doubts.

Although the Board is not obligated by NAC 288.110(7) to conduct yet another runoff election, it remains within the Board's discretionary authority, as well as implied authority, to do so. While NAC 288.110(7) does not mandate another runoff, neither does that section preclude the exercise of Board discretion to conduct a discretionary second runoff election. A discretionary second runoff election is warranted if it is conducted under a standard that is likely to produce meaningful results. Thus, where it appears that a discretionary runoff election will produce meaningful results that will resolve this Board's good faith doubt, it is within our

authority under both NRS 288.160(4) and NAC 288.110(7), as well as our implied authority, to conduct a discretionary second runoff election.

But as we stated above, a second runoff election conducted under the same "majority of the unit" standard will not lead to meaningful results, as the repeated failure of that standard in this case plainly indicates. We note that prior to this case, this Board had, from its very origination in 1969, conducted its elections under a simple "majority of votes cast" standard. See, e.g., Laborers' Int'l Union, Local 169 v. Washoe Medical Center, Item No. 1., EMRB Case No. 1 (1970); Stationary Engineers , Local 39 v. Airport Authority of Washoe County, Item No. 133, EMRB Case No. A1-045349 (July 12, 1982); Elko General Hospital v. Elko County Employees Association, Item No. 312, EMRB Case No. A1-045537 (April 1, 1993); City of Mesquite & Teamsters, Local 14, Item No. 434, EMRB Case No. A1-045644 (Sept. 10, 1998); International Union of Operating Engineers, Local No. 3 v. Mount Grant General Hospital, Item No. 473, EMRB Case No. A1-045683 (Sept. 20, 2000). This list of prior election decisions by this Board, which is by no means exhaustive, stands in stark contrast to the experience of this case. These decisions that applied the simple "majority of votes cast" standard demonstrate that under that standard, not only was it possible for Board elections to actually produce meaningful results, but that Board elections did so much more expeditiously than we have experienced thus far in this proceeding.

NAC 288.110(10)(d) states that the Board will deem an organization to be the exclusive bargaining agent if the election demonstrates that the organization is "...supported by a majority of employees within the particular bargaining unit." We now interpret this subsection as permitting the Board to infer majority support of the unit as a whole based upon a majority of votes cast in accord with the well-recognized principle "that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines the choice." N.L.R.B. v. Deutsch Co., 265 F.2d 473, 479 (9th Cir. 1959). Following the "majority of votes cast" standard will not only bring the Board in line with the prevailing standard in labor law, as stated in Deutsch Co., it will also bring the Board in line with Nevada's prevailing standard for elections in general, which bases election results on the

number of votes cast. See Nev. Const. Art. 5 § 4. To the extent that our interpretation of NAC 288.110(10)(d) conflicts with our prior order in this case at Item No. 520F, we overrule that portion of our prior order. While the Supreme Court's 2009 order does not allow the Board to apply this principle to the mandated runoff election that was just conducted, that order speaks to a single and mandatory runoff election; it does not foreclose application of the principle to a second runoff election conducted entirely at the Board's discretion.

As an alternative grounds, even if our interpretation of NAC 288.110(10)(d) is found to be incorrect, the Board also has implied authority, separate and apart from NAC 288.110, to follow the simple "majority of votes cast" standard where the "majority of the unit" standard proves to be inadequate, as it clearly has in this case.

The history of this case shows that the "majority of the unit" standard is a failed experiment incapable of any meaningful practical application. A discretionary second runoff election in this case is warranted, but only if it is conducted under the same "majority of votes cast" standard that this Board had used prior to this case. We find that this discretionary second runoff election under the simple "majority of votes cast" standard is calculated to lead to meaningful results, to bring an end to this election process and to finally provide the definitive answer to the question of our good faith doubt that the School District, ESEA, Local 14 and the employees in the bargaining unit all deserve.

Based upon the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED that the results of the runoff election reflected in the Tally of Ballots is certified, as set forth above;

IT IS FURTHER ORDERED that the Commissioner shall conduct the discretionary second runoff election as soon as practicable, and as allowed by the budget constraints of the

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EMRB. The winner of the discretionary second runoff election shall be determined by the majority of votes cast.

DATED the 17th day of February, 2015.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
PHILIP E. LARSON, Chairman

BY: _____
BRENT C. ECKERSLEY, ESQ., Vice-Chairman

BY: _____
SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, Petitioner, vs. CLARK COUNTY SCHOOL DISTRICT, and EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Respondents.	CASE NO. A1-045735 **NOTICE OF ENTRY OF ORDER**
EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Counter Claimant, vs. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, and CLARK COUNTY SCHOOL DISTRICT, Counter Respondents.	

To: Education Support Employees Association and their attorneys Michael W. Dyer, Esq., Frank Flaherty, Esq. and Dyer, Lawrence, Flaherty, Donaldson & Prunty

To: International Brotherhood of Teamsters, Local 14 and their attorneys Kristin L. Martin, Esq. and Davis, Cowell & Bowe. LLP

To: Clark County School District and their attorneys Carlos L. McDade, Esq., Office of the General Counsel for the Clark County School District

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on February 17, 2015. A copy of said order is attached hereto.

DATED this 17th day of February, 2015.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____

BRUCE K. SNYDER, Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 17th day of February, 2015, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

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BRUCE K. SNYDER
Commissioner

NEVADA LOCAL GOVERNMENT
EMPLOYEE-MANAGEMENT RELATIONS BOARD

International Brotherhood of Teamsters,
Local 14, AFL-CIO,

Petitioner,

vs.

Case No. A1-045735

Clark County School District and Education Support Employees Association,

Respondents.

And related counter-claim

FILED

FEB 05 2015

STATE OF NEVADA
E.M.R.B.

TALLY OF BALLOTS

As Commissioner of the Nevada Local Government Employee-Management Relations Board, I hereby certify that the results of the tabulation of ballots cast in the election held in the above-captioned matter, and concluded on the date set forth below, were as follows:

1. Number of ballots cast: 5255
2. Number of void ballots cast: 26
3. Number of ballots challenged based on alleged defect in ballot: 38
   3(a). Number of challenges sustained: 18
   3(b). Number of challenges overruled (include in 4 or 5, as appropriate): 20
4. Number of valid votes cast for Teamsters Local 14: 3692
5. Number of valid votes cast for Education Support Employees Association: 1498
6. Total number of valid votes counted (sum of 4 and 5): 5190
7. Number of ballots challenged based on alleged ineligibility of voter: 21

Dated: February 3, 2015.

By the Commissioner
Bruce K. Snyder

We acknowledge receipt of a copy of this tally:

Teamsters Local 14	Clark County School District	Education Support Employees Association
By	By	By Esq.