of a majority of members who vote. We disagree.

So, it can't be much clearer than that, Your Honor. Local 14 argues, we disagree.

Later on in that same decision, here's the Court speaking:

> Contrary to Local 14's contention, neither NRS 288.160 nor NAC 288.110 states the Employee Organization is seeking exclusive representation, must have a majority of the employees who vote.

I'll paraphrase here -- well, no, I won't paraphrase. Rather, the statute administrative code plainly and unambiguously state that to win an election the employee must have a -- organization must have a majority of employees within the particular bargaining unit.

So, plainly, the Nevada Supreme Court had to address and interpret NRS 288.160 subsection (4) and NAC 288.110(10)(d) because Local 14 raised the proper interpretation as the issue. That's not dicta.

Also, the Board or Local 14, I think it's Local 14, is arguing now that somehow the Supreme Court's decision is dicta or not controlling because EMRB never interpreted NRS 288.160 subsection (4). It only interpreted the regulation. Well, that's incorrect because the EMRB, if you look at its 2005 order, it says: We've looked at NRS 288.160 sub (4) and it's silent on the

question of majority of the bargaining unit versus majority of voters. Okay? That, in itself, Your Honor, was an interpretation of NRS 288.160 subsection (4).

And, incidentally, Your Honor, although the Supreme Court upheld the EMRB's 2005 order, as did Judge Wall for that matter, okay, the Supreme Court disagreed with EMRB's assessment of NRS 288.160 sub (4). To the contrary, the EMRB says it's silent on the subject. To the contrary, the Nevada Supreme Court says: It plainly and unambiguously states it requires a majority of the entire bargaining unit.

So, of course, the Court interpreted NRS 288.160 subsection (4). It didn't defer to the EMRB because the EMRB thought that the statute was silent.

THE COURT: Can I ask you a question?

MR. FLAHERTY: You sure can.

THE COURT: Notwithstanding what the Supreme Court has said and ordered in this case, if we had this kind of a requirement in our elections by the general public, we'd never get anybody elected or we'd get somebody elected and you could never get them out. Why do you suppose the Legislature adopted the language that is at issue here? Why would the Legislature impose language that is so stringent, at least to perhaps people -- dissenters, if you will, in the union who want to change which union or go to

a no union? Why would they make it so that it has to be majority of all of the members instead of those who vote?

MR. FLAHERTY: You've heard a --

THE COURT: It's a fairly unwieldly standard. Isn't it?

MR. FLAHERTY: You've heard a lot in this case about what the Legislature intended and NRS 288. Okay. For one thing, and you hear various, you know, assertions with these various duties. The Board has to do this; the Board has to do that. The only thing that's really undisputed, Your Honor, is that the purpose of NRS Chapter 288 is labor stability.

THE COURT: Stability.

MR. FLAHERTY: And there's a Nevada Supreme Court case that says that and I think it's in both briefs or all of the briefs. Okay? It's stability.

In some states, Your Honor, public sector employees don't even get to bargain. And, in fact, in this state, State employees don't get to bargain. For whatever reason, the Nevada Legislature didn't give State employees the right to bargain but they said: We're going to let local government employees bargain. And, so, -- but if we're going to do it, there's going to be some rules here. It's Nevada. We've always got to be different.

THE COURT: And you're saying that was a new thing

to even allow them to bargain at all?

MR. FLAHERTY: It was, Your Honor. I think the statute came on the books in the '60s. It was called the Dodge Act. That's when NRS Chapter 288 came on the books.

THE COURT: Dodge?

MR. FLAHERTY: The Dodge -- I think that was Senator Carl Dodge maybe.

THE COURT: Yeah. Yeah. Okay.

MR. FLAHERTY: And, going back to your question about the general election, Your Honor, our right to vote for our elected officials, that comes from the United States and the Nevada Constitutions. I mean, that's a completely different animal. Thank goodness we're stuck with that and we're stuck with, you know, voter apathy and all that goes along with it until we can do something about it, but here it's different. The Legislature giveth and this is what they've giveth.

THE COURT: Okay.

MR. FLAHERTY: Also, the Supreme Court had to examine NRS 288.160 subsection (4) in its very specific, unique, plain, unambiguous language to explain that Local 14's citation to the National Labor Relation Act and other state union election laws were not persuasive. Not even persuasive, much less controlling. So, again, it had to look at the statute because Local 14 is telling the Court:

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Petitioner, vs. NEVADA LOCAL GOVERNMENT EMPLOYEE MANAGEMENT RELATIONS BOARD, Respondent.	)	CASE NO. A-15-715577
	)	DEPT. NO. I
	)	**Transcript of Proceedings**

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

EDUCATION SUPPORT FOR EMPLOYEES ASSOCIATION'S PETITION FOR JUDICIAL REVIEW

WEDNESDAY, APRIL 20, 2016

APPEARANCES:

For the Petitioner: FRANCIS C. FLAHERTY, ESQ.

For Teamsters Local 14: KRISTIN L. MARTIN, ESQ.
THOMAS F. PITARO, ESQ.

For the Respondent: GREGORY L. ZUNINO, ESQ.

RECORDED BY: LISA LIZOTTE, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

WEDNESDAY, APRIL 20, 2016 AT 10:31 A.M.

THE CLERK: *Education Support Employees Association versus Nevada Local Government Employee*, case number H -- I'm sorry, A715577.

MR. PITARO: [Indiscernible] went to the restroom. She'll be right back.

THE COURT: Okay. So we need to wait for that -- we need to wait for them to come back. Right?

MR. PITARO: Yeah, she'll be -- she's momentarily.

THE COURT: Okay. If she's not right outside the door, what we'll do is call some other cases and get rid of them. I don't see them coming back. We'll have to ask you guys to let us know when you're all here. Okay? Give us the hi sign and we'll call you right up.

THE CLERK: There's nothing else.

THE COURT: Huh?

THE CLERK: There's nothing else to call.

THE COURT: Oh, there's nothing else. I take it back. You mean all these people are here for this? Geez. I thought for a minute it was one of these school day at court deals and then I took a look at the maturity of our group and decided that probably wasn't it.

[Pause in proceedings]

THE COURT: Will counsel enter your appearances,

please?

MR. FLAHERTY: Good morning, Your Honor. Frank Flaherty here on behalf of the ESA, the Education Support Employees Association.

THE COURT: Good morning.

MS. MARTIN: Kristin Martin from McCracken, Stemerman, and Holsberry representing Teamsters Local 14. With me is Tom Pitaro, who has been assisting my firm on this case.

THE COURT: I see. Good morning.

MR. PITARO: Good morning.

THE COURT: I have been wondering all morning what case you're on, Mr. Pitaro. I looked to see if your name was on the calendar and --

MR. ZUNINO: Your Honor, I'm Greg Zunino. I'm with the Office of the Attorney General and I'm here on behalf of Employee Management Relations Board.

THE COURT: Okay. Do you guys want the lay of the land or do you just want to go at it?

MR. FLAHERTY: Sure, Your Honor.

THE COURT: To this point, and as I've indicated earlier today, just because I say lay of the land as the way I am thinking, I am often -- have my mind changed by arguments, oral arguments which show me things in a different light and they may change my mind. To this

point, -- let me get my notes here.

To this point, it's -- it seems to me that the petition on behalf of ESEA must be granted. I just -- I have too much trouble getting around the wording of the Supreme Court in their rulings to believe that when they say it's a clear statute and you must, you know, abide by the intent of the statute, that the EMRB can say: Well, we've got a new approach, we've got a new idea, and we don't think we have to do it.

I think that the EMRB has, and is supposed to have, a lot of discretion in how they implement this and any statutes and I think that even the Supreme Court's rulings seem to at least hint at that, that they think the EMRB has a lot of discretion in it. But I don't think that that means that the Supreme Court says: And you can disregard what we're ruling in this order.

Because I believe that the EMRB is supposed to have a lot of discretion, I don't go so far as to say that they are powerless to hold a second or a third election if they determine, in their discretion, that that's necessary. In other words, I don't think that the Supreme Court intended that we'd wind up with a conundrum, for lack of a better word. Not only were you wrong, but you can't fix it. I don't think the Supreme Court intended that. I think the language in the statute that says that they --

and I don't recall the exact language of it, but the provision that says that they can hold a second one is broad enough that it could be -- probably should be interpreted to mean that the EMRB, under appropriate circumstances according to its discretion, can take action to make a determination.

So, that's the lay of the land. Do you want to argue?

MR. FLAHERTY: Yes, I do, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: Well, Your Honor, let's start by talking about the issues here. There's substantial disagreement among the parties regarding what the issues properly are before you.

THE COURT: Okay.

MR. FLAHERTY: The Board has pejoratively framed the issue as, must the Board perpetuate the status quo, as if labor stability, the Board's primary issue, was not important in this case. Local 14 essentially signs onto that issue by suggesting that it would have been arbitrary and capricious for the Board to maintain labor stability by leaving ESA in place as the recognized bargaining agent. Local 14 also wants to argue that the Board how -- the Board somehow exercised proper discretion when it decided to resolve any doubt. Okay? But the reality is the Board

abused its discretion by ignoring the Nevada Supreme Court which ruled on this twice already, Your Honor.

And in both of those cases, the Supreme Court specifically rejected the notion that because the results might not be meaningful, conclusive, whatever you want to phrase it as, Your Honor, in both of those cases, the Nevada Supreme Court says you have to follow the legislative mandate of 288.160 subsection (4) which is a majority of the entire bargaining unit, not just a majority of those who vote.

And Local 14 also wants to pose the issue as whether the Board's inference of majority support was rational and it relies on authority from the National Relations Labor Act and other states' union election laws, but the problem here is the Nevada Legislature has been very specific. You have to have -- it set a higher bar here, Your Honor. It's the majority of the entire bargaining unit, therefore, any inference based on something lesser than that is simply not permissible. It's a little bit like horseshoes and hand grenades, Your Honor.

THE COURT: Doesn't that make it pretty unworkable?

MR. FLAHERTY: No. It doesn't, Your Honor. And I want to talk about the conundrum.

THE COURT: Okay.

MR. FLAHERTY: Well, I'm going to talk about the conundrum that you raised, but --

THE COURT: Okay.

MR. FLAHERTY: -- let's talk about what the obvious primary issue here is: Did the Board violate 288.160 subsection (4) of NRS? And it did. And, also, did it engage in ad hoc rule making, which it also did.

But now to the conundrum. Okay. We've talked about NRS 288.160 subsection (4) a lot and I've talked before about the other subsections of 288.160 and I want to do that again in the context of the conundrum that you've raised. So subsections (1) and (2) of NRS 288.160, they apply when an employee organization is seeking initial recognition. They go to the employer with certain documents, you know, constitution and bylaws, a list of their officers, a pledge not to strike, but critical in this step is they have to prevent -- they have to present a verified membership list showing that they have membership of the majority of the entire bargaining unit.

And this is an important point, Your Honor. They can't come to the employer or to the Board and say: This membership list represents a majority of the people we asked to join. That doesn't cut it. Okay? It's got to be a majority of the entire bargaining unit or there's no recognition.

Then in subsection (3), it sets for the various reasons that a local government employer can go to the Board and say: Hey, we want permission to withdraw recognition from this union. And one of those reasons is they're no longer supported by a majority of the entire bargaining unit. Okay?

And let's -- and the entire bargaining unit, again, is not some lesser standard and let's just leap right in there under subsection (4). So, let's say the Board says, pursuant to this request from subsection (3); Well, gee, you know, you've raised a good question here. We have a good faith doubt.

Okay? We're in subsection (4) now. Now the Board doesn't have to conduct an election because the statute is very clear that if it has a good faith doubt, it may conduct an election, okay, but let's suppose the Board says: Well, you know, we have a good faith doubt. We're going to go ahead and have an election. And the choices on the ballot are going to be union or no union. Okay?

And, so, even if no union gets more votes than union, okay, if no union does not get a majority if the entire bargaining unit to vote in favor of not having a union, then if there in fact is a union already in place, it stays in place. That's what labor stability is all about.

At one point in time, ESA was recognized based on verifiable, demonstrated majority support. Okay? That recognition doesn't go away unless and until the ESA says: We don't want to represent the union anymore. Okay? But more likely it doesn't go away unless and until the employer says: We don't think there's sufficient support. We don't think there's a majority support. Or a rival union comes in and says: We don't think there's majority support. We think we have majority support.

But when the Board says, okay, we have a good faith doubt, we're going to order an election, whether it's the no union vote or the rival union, the only way that they get to displace that incumbent is by getting votes from a majority of the entire bargaining unit.

And then all subsection (5) says, Your Honor, is without involving the Board, the parties can agree: Hey, -- two unions can say: Hey, we want to have an election, okay, to see which one of us is going to represent this unit. Okay? And then at some point, the Board would likely become involved, but nothing in subsection (5) authorizes the parties or even the Board, for that matter, to deviate from the high bar the Nevada Legislature has set. Nevada is different, Your Honor.

THE COURT: Are you talking about subsection (5) of 288.160?

MR. FLAHERTY: I am, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: I am.

So, Nevada is different. Nevada is a right to work state. Okay? And some of these other states, some of these other jurisdictions that you're seeing cases from, people can be compelled to pay union dues. People can be compelled to call -- to pay what's called an agency fee, to help the union to fray the costs of representing nonmembers. You can't do that here in Nevada.

So, the Nevada Legislature starts the bar high there and then it goes a step further and it says to local government employers, you know, you don't have to recognize someone who hasn't demonstrated verifiable majority support. And if at some point in time you don't think they enjoy that majority support, you have the option, but not the duty -- you have the option of trying to withdraw that support with permission from the Board. So there's really not a conundrum here, Your Honor. Okay.

Now, ESA cannot have it both ways. I know that, Your Honor. Those two Supreme Court decisions are the law of the case. Absolutely. And I defer to you, Your Honor, -- of course, I have to defer to you, but if you look at that second Supreme Court decision from 2009 and you say that based on the recitation in that opinion you believe

this particular fact pattern was squarely before the Supreme Court in the sense that the question of whether or not the results were inconclusive were squarely before the Supreme Court, then that's the law of the case and we're stuck with it.

On the other hand, if you think there's latitude in there, you could look at this and you could look at the numbers in this case, Your Honor. And a good way to do that is let's start with a hypothetical bargaining unit of 1,000 employees. Okay? If we've got 1,000 employees, we've got no union. Okay? Two unions, Union A and Union B, approach the employer and they present a verified membership list saying -- showing they represent a majority of the bargaining unit. And, so, the employer is scratching its head and say: Wait a minute. The math doesn't add up. How can they both have the majority of the bargaining unit? And maybe the employer has other reasons to not want either union in place. So the whole thing winds up in front of the Board. The Board says: You know, we've got a good faith doubt. We've got discretion. Yeah, let's have an election. Union A gets 400 votes. Union B gets 300 votes. And no union gets 150 votes.

Well, there's two ways to look at that, Your Honor. The Board could look at that and said: Well, the statute plainly and unambiguously says it's got to be the

majority of the entire bargaining unit. None of these three options got votes -- none of them got 501 votes, therefore none of these options prevails and so it's the status quo. And the status quo is: There's no union here. Okay?

Now the other way the Board could look at that is the Board could look at that and say: Well, you know, the top two vote getters were Union A and Union B, you know, and let's have a runoff election to see what happens with all those no union votes. Okay? So we have a runoff election and, in this hypothetical, all of those 150 no union votes, they migrate to Union B. So now the score is 400 for A and 450 for B. Still, we're not going to get a union because we don't have 501 votes for A or B, status quo. On the other hand, if the Board does that runoff and all of those no union votes migrate to Union A, well now Union A has got 650 -- no 550, excuse me. So now Union A will become the recognized bargaining agent.

So there's really no conundrum here because the Legislature's entire objective in Chapter 288 is labor stability. Okay? That's why the bar is so high.

N ow, again, Your Honor, ESA can't have it both ways. If you think the 2009 order of affirmance from the Nevada Supreme Court precludes that construction or that interpretation, then we're stuck with that. And you're not

stuck with it, Your Honor. As you pointed out many times, this is really the Board's responsibility. They've got to sort this out, but of course what you've made very clear is they can only sort it out within the jurisdiction that's granted them by the Nevada Constitution and by the Nevada Legislature in this case, NRS 288.160 subsection (4).

I don't think I need to recite the quotes from the Nevada Supreme Court cases again other than in both cases the Court said that both the statute and the administrative code were plain and unambiguous. In the first case, in 2005, it went on to add that:

> In a case of an unambiguous case, the EMRB is required to follow the law regardless of result.

Okay? So, all along the parties have been arguing -- well, not the parties. Local 14 has been arguing all along: This is an unworkable standard. We're not getting the majority of the bargaining unit to vote for anybody. The Supreme Court's like: We hear what you're saying but we're not the Legislature. We defer to the Nevada Legislature. The Board, EMRB, you've got to follow the law regardless of the result.

And then in 2009, the majority vote is equally applicable in the runoff election. Okay? It certainly can't be argued, Your Honor, that those two cases are not the law of the case and they're certainly not dicta. And,

in fact, citing Supreme Court Rule 123, the EMRB successfully argued to you in May of last year that the law of the case required you to dismiss ESEA's prior Petition for Judicial Review and you did that. And, so, I think the EMRB is judicially estopped from standing here in front of you today and telling you that the Supreme Court's orders are not the law of the case.

It's always been the same EMRB case number, A1045735. The significance of that is that was the EMRB case number the first time this was in District Court in front of Judge Wall, all of the times in front of you, all three trips to the United States -- excuse me, to the Nevada Supreme Court. Let's not make more trouble here. To the Nevada Supreme Court. And it's still the case number today.

Now, Local 14 is trying to rely on the *Shoe* [phonetic] case from the Nevada Supreme Court to say that: Wait a minute, the law of the case shouldn't apply here. And since the last time we were here, Local 14 was drilled down a little bit more and in the *Shoe* [phonetic] case the Nevada Supreme Court is citing *Clem versus State*, another Nevada Supreme Court case. And there's a quote from *Clem* in the *Shoe* [phonetic] case and this is what the quote says. Open quotes:

We will depart from our prior holdings only where

we determine that they are so clearly erroneous that continued adherence to them would work manifest injustice.

I think, Your Honor, that you picked up that I emphasized the word we in that quote. It appeared twice. The word we in that quote refers to the Nevada Supreme Court.

THE COURT: And not to me.

MR. FLAHERTY: Yeah, not to you. I was going to say not to the EMRB, Your Honor, but, yes, it doesn't --

THE COURT: Oh, okay.

MR. FLAHERTY: -- apply to you either.

THE COURT: Okay.

MR. FLAHERTY: Okay?

THE COURT: Okay.

MR. FLAHERTY: So, after considering the specific exceptions adopted by federal and other state courts, the Nevada Supreme Court only adopted one. Okay? Now Local 14 wants to argue, because the Supreme Court said we impliedly recognize exceptions to the law of the case doctrine in a prior decision, that somehow that threw open all of the exceptions but the Nevada Supreme Court was very specific. They only adopted one and that is when there's been -- when the controlling law of the state is substantively changed during the pendency of a remanded matter, at trial or an

appeal, the courts of the state will apply the change and do substantial justice.

In other words, the doctrine of the law of the case should not apply where in the interval between the two appeals of the case there's been a change in the law by a judicial ruling entitled to deference. We haven't had a change in the law, Your Honor. There's nothing different between -- as we stand here right now and as we stood here or as when the case was before the Nevada Supreme Court and it issued its 2009 decision. We had two runoff elections since then and in both of those runoff elections, Local 14 outpolled ESEA, but that's the same result we had in the very first election and all three elections Local 14 failed to obtain votes from the majority of the bargaining unit, the high bar established by the Nevada Legislature.

Also, contrary to Local 14's decisions or assertion, rather, the Supreme Court decisions, the key points that are controlling here, Your Honor, they're not dicta. Local 14 itself presented the issue squarely to the Nevada Supreme Court. And this is what the Nevada Supreme Court had to say in 2005 and here's the open quote:

> Local 14 argues that the EMRB erred in interpreting NRS 288.160 and NAC 288.110. It is stating that a majority status election is won by a majority of all members in the bargaining unit instead

of a majority of members who vote. We disagree.

So, it can't be much clearer than that, Your Honor. Local 14 argues, we disagree.

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question of majority of the bargaining unit versus majority of voters. Okay? That, in itself, Your Honor, was an interpretation of NRS 288.160 subsection (4).

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So, of course, the Court interpreted NRS 288.160 subsection (4). It didn't defer to the EMRB because the EMRB thought that the statute was silent.

THE COURT: Can I ask you a question?

MR. FLAHERTY: You sure can.

THE COURT: Notwithstanding what the Supreme Court has said and ordered in this case, if we had this kind of a requirement in our elections by the general public, we'd never get anybody elected or we'd get somebody elected and you could never get them out. Why do you suppose the Legislature adopted the language that is at issue here? Why would the Legislature impose language that is so stringent, at least to perhaps people -- dissenters, if you will, in the union who want to change which union or go to

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to even allow them to bargain at all?

MR. FLAHERTY: It was, Your Honor. I think the statute came on the books in the '60s. It was called the Dodge Act. That's when NRS Chapter 288 came on the books.

THE COURT: Dodge?

MR. FLAHERTY: The Dodge -- I think that was Senator Carl Dodge maybe.

THE COURT: Yeah. Yeah. Okay.

MR. FLAHERTY: And, going back to your question about the general election, Your Honor, our right to vote for our elected officials, that comes from the United States and the Nevada Constitutions. I mean, that's a completely different animal. Thank goodness we're stuck with that and we're stuck with, you know, voter apathy and all that goes along with it until we can do something about it, but here it's different. The Legislature giveth and this is what they've giveth.

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MR. FLAHERTY: Also, the Supreme Court had to examine NRS 288.160 subsection (4) in its very specific, unique, plain, unambiguous language to explain that Local 14's citation to the National Labor Relation Act and other state union election laws were not persuasive. Not even persuasive, much less controlling. So, again, it had to look at the statute because Local 14 is telling the Court:

Well, look at the National Labor Relations Act. Look at the law in this jurisdiction. Court says: No, 288.160 subsection (4) is very specific. It's got to be majority of the entire bargaining units. Those cases just aren't helpful.

Finally, Local 14 argues that because the Nevada Supreme Court disagreed with its argument that only a majority of those voting is required, its decision on that point was dicta. Well, that's a pretty convenient argument. When the Supreme Court rules against you on your appeal, you get to start over again with the agency or the District Court. So, so much was a finality of an appeal, so much for judicial efficiency. I guess we're just going to be here over and over, Your Honor, because we're never going to get an answer because if either party loses, we get to start over. That's not a logical argument, Your Honor.

The fact the first runoff election didn't produce a result that made the Board comfortable, and I know you're not comfortable with the result either, Your Honor, but despite that uncomfort, the Board is not clothed with new powers not given to it in the statute. It doesn't authorize the Board to violate the Supreme Court orders. And we've already talked about whether or not those elections were conclusive and we've already talked about

whether you feel constrained by what the Nevada Supreme Court has said to disagree with a conclusion -- well, I hate to put it this way, but the conclusion the election results were inconclusive.

The Board's merely a State agency. It's not a court interpreting various conflicting statute. The Board, Local 14, they're arguing that the Board somehow had to harmonize and reconcile the conflicting duties it had in NRS 288.160 subsection (4). The Board doesn't get to do that. The courts get to do that. Well, at least the Board doesn't get to that in this case because the courts have already looked at the statute and said they're plain and unambiguous.

Now as stated, --

THE COURT: I'm sorry to interrupt, but I want to go back to a theme we were just discussing that could give me some, perhaps, comfort to why we would interpret the statute as it is plainly written that it requires a majority of all members. Where -- what is the authority upon which you rely for the proposition that in this case or in all of these statutes the stability of the labor -- how did you put that?

MR. FLAHERTY: Labor stability.

THE COURT: Labor stability, is paramount and the guiding principle even as of when the statute was written.

I mean, is there legislative history that backs that up or is there interpretive authority from the Supreme Court that backs that up?

MR. FLAHERTY: There is a Nevada Supreme Court case and it's cited, I think, in the briefs. It involves -- I think it involves the Clark County School District and the Local Government Employee Management Relations Board. It's cited in the case.

THE COURT: Okay.

MR. FLAHERTY: And I think, Your Honor, if we went back to the legislative history of Chapter 288 we would find that labor stability is its primary purpose. My understanding is that Chapter 288 was adopted in the wake of some strikes or some threatened strikes here in Las Vegas. But that's going back a long way.

THE COURT: Yeah.

MR. FLAHERTY: And, so, the Board has expressed this as it had to resolve or harmonize these conflicting statutes.

THE COURT: Is that -- you said it was the '60s?

MR. FLAHERTY: Yeah. I think it was maybe 1969.

THE COURT: Does that go back to the Bramlet days or do you --

MR. FLAHERTY: I don't know.

THE COURT: -- know?

MR. FLAHERTY: You've got me at a disadvantage, Your Honor. I'm not familiar with that.

THE COURT: Okay.

MR. FLAHERTY: Okay.

THE COURT: No wonder.

MR. FLAHERTY: So this was the conflict that the Board thought it had. This is what Local 14 has identified as the conflict:

> Its characterization of NRS 288.160 subsection (4) as the aspirational goal of resolving doubt versus the fundamental legislative objective of ensuring labor peace by allowing employees to choose their representative.

Okay? As stated, the ESEA doesn't dispute the labor stability as a fundamental objective with NRS Chapter 288. Everything else in that language that I just read to you, that's manufactured by the Board and by Local 14. And it's worth noting that even Local 14 characterizes it as an aspirational goal of resolving doubt, but in other places Local 14 is trying to argue that the Board has a duty to resolve doubt or the Board is trying to say it has a duty to resolve doubt. It has no such duty, Your Honor.

Also contrary to Local 14's assertions, there's no gaps to fill here. There's no ambiguities. There's nothing for a State agency to do here because the Nevada

Supreme Court has said that the language is clear and unambiguous. They said it twice. Twice, the Nevada Supreme Court has said: You've got to apply that language. You've got to apply the majority votes -- majority of the bargaining unit standard, regardless of the results. Or even if we're going to get the same so-called inconclusive results.

THE COURT: Well what if the Board in its infinite wisdom determined that, you know, for whatever reason, the factors are such that they could anticipate getting a vote by all of the members? I mean, are you saying even those circumstances they would not have discretion to order another runoff election?

MR. FLAHERTY: Well, Your Honor, I think then the Board has -- the Board has a -- now the Board really has competing goals. Well, it's got one statutory duty. The statutory duty is labor stability.

THE COURT: Okay.

MR. FLAHERTY: It has the authority to order an election. Once it orders an election, to use your language, steps into the breach. If it chooses to characterize the results of that election as inconclusive, well now it's bound by its own regulation to say that we're going to have a runoff election. Okay?

Now, the Board made it very clear in its latest

order, its 2015 order, that its interpretation of NAC 288.110 subsection (7), that's the runoff election regulation, only requires a single runoff election and the Board actually relies on the Nevada Supreme Court and says that the Nevada Supreme Court's language also is consistent with that.

THE COURT: Well the Board said a lot of things.

MR. FLAHERTY: Well, sure. Now getting to your --

THE COURT: Yeah.

MR. FLAHERTY: -- question, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: You believe that maybe the Board is incorrect and the Board has the authority to order another runoff election. Certainly, though, it's still bound by NRS 288.160 sub (4) and you can't displace an incumbent unless the challenger gets votes from the majority of the bargaining unit.

So now the question for the Board becomes: Well, how far do we take this and at what point have we gone so far that we're undermining labor stability?

THE COURT: Yeah.

MR. FLAHERTY: Because that's happened in this case, Your Honor. This thing has been --

THE COURT: Yeah.

MR. FLAHERTY: -- dragging on since 2002. Okay?

We're stuck with it after it's started and all that time, you know, --

THE COURT: We'd be --

MR. FLAHERTY: -- you have the left side of the courtroom and the right side of the courtroom here. They've been beating on each other saying horrible things about each other.

THE COURT: We'd be better off to do pistols at dawn.

MR. FLAHERTY: When they all could have been out there, you know, representing the employees, you know, the -- Local 14's got its employees and ESEA's got its employees and it's done damage to ESEA. The ESEA has been eroded. Its opponent has, you know, said bad things about it. It's encouraged people to drop their membership and -- in ESA, to revoke their dues authorizations. And, so, it's been a really rocky road, Your Honor, and, as I've said before, what's happened is exactly the antithesis of labor stability. The Board has undermined labor stability in this case.

So, to your point, Your Honor, the Board could order another election, maybe, but at some point, Your Honor, they've really clearly crossed the line and they've gone way past labor stability at that point.

Local 14 also cites cases --

THE COURT: Would you agree though that there are really more than one goal of -- and perhaps prescription involved in these statutes besides labor stability? You've got to have labor stability as you say they had before: No, no unions. But besides labor stability, there is the goal at least, whether it's aspirational or mandated, to allow workers to make a determination and that that, you know, over the passage of time and the passage of workers, a whole new set of workers, they might conceivably determine that they want no union in order to have stability or they want a different union. I mean, is that not built into the statute as well, a goal to allow them to make that determination?

MR. FLAHERTY: It's allowed, Your Honor, but it's subject to the requirement that to displace the incumbent --

THE COURT: Understood.

MR. FLAHERTY: -- you've got to get votes from the majority of the entire bargaining unit.

THE COURT: I understand.

MR. FLAHERTY: So, it's allowed. It's not required.

THE COURT: I just -- you know, to me, that's kind of the answer to your pointing out that it's done damage over the long haul and it's actually detracted from labor

stability. Mightened it be necessary to have a little bit of instability hopefully not for as long as this has dragged on, but while the union members make the determination if the EMRB determines that they -- that -- you know, using their criteria under the statute, that it's appropriate? And isn't that something -- in other words, I guess what I'm saying is: Although labor stability clearly -- I agree with you. Labor stability is built right into this statute and I think the Supreme Court's ruling crystalizes that, I mean, by saying that you must adhere to the clear precept -- the clear language of the statute. You're saying labor stability, but that's not to say that it's of no moment if the workers decide that they collectively do want to change.

MR. FLAHERTY: I've got two answers to that, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: Two points to make in response to what --

THE COURT: All right.

MR. FLAHERTY: -- you've said. And the first one has to go to an argument that the ESEA lost a long time ago.

THE COURT: Okay.

MR. FLAHERTY: All right. And I know that. I

know we lost that argument a long time ago, which is: Should we have ever had the first election?

THE COURT: Ah.

MR. FLAHERTY: Okay? In other words, was it worth going forward without requiring Local 14 to put more on the table to convince the Board that, you know what, this --

THE COURT: Yeah.

MR. FLAHERTY: -- election is going to be worth it, --

THE COURT: Yeah.

MR. FLAHERTY: -- we might get something out of this. Okay.

THE COURT: Yeah.

MR. FLAHERTY: But -- so that's one point. Okay. The Board has control over that.

The other point I wanted to make in response to your inquiry is that: Yes, there's sometimes labor instability but the Board tries to manage it. The Board has a regulation, NAC 288.146, and this is -- the title of that recognition -- excuse me, the title of that regulation is: Withdrawal of recognition of organization upon petition by another employee organization.

And, so, what the Board's done there, Your Honor, is it's established what we call a window period. Okay? There are certain periods of time during which a rival

union can come to the Board, file the appropriate paperwork, and say we want to challenge that incumbent. Okay?

Now the Board has discretion. Okay? The Board has discretion in several scores there, Your Honor. First of all, the Board has discretion to say: No, you know, we don't -- they could say: Well, we don't think it's going to be worth it. We've been down this road before with elections. We know what's involved here. We don't think there's a realistic chance here, so the answer is no.

THE COURT: Do so in the name of labor stability.

MR. FLAHERTY: Yeah. On the other hand, let's suppose the Board required that challenger to produce interest cards from 50 percent plus one of the bargaining unit and the Board said: Ah, I think we're going to order an election. Okay? And the Board can do that, but the specific periods of time that the Board can do that so that we're not in a constant campaign state.

THE COURT: Yeah.

MR. FLAHERTY: But, unfortunately, in this case, we've been under constant campaign state since 2002.

Local 14 cited to several federal cases that talk about the authority of a board or an administrative agency to experiment, to change its mind. We know that the National Labor Relations Board often changes its mind. And

it cites a couple of U.S. Supreme Court cases, but the problem is that --

THE COURT: You're not suggesting that they always want to be politically correct, are you?

MR. FLAHERTY: I'm not suggesting that, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: I guess they have a right to change their mind and if it depends on who is in the White House, I guess that could just be a coincidence, Your Honor.

So, it cites U.S. Supreme Court case *Roberts*, but the problem with that is the U.S. Supreme Court didn't have NRS 288.160 subsection (4) in front of it. Okay? And then it also cites the *National Cable* case from the U.S. Supreme Court, but that case is actually very clear that if there's a judicial interpretation holding that a statute unambiguously forecloses the agency's interpretation and, therefore, contains no gap for the agency to fill, it displaces a conflicting agency construction. That's exactly what we have here, Your Honor. The EMRB can't attempt to fill in ambiguities when the Supreme Court's already said there's no gaps to fill.

The Board and Local 14 also argue the Supreme Court's guidance is not controlling because review was not de novo. Well it was de novo. I want to talk about what

the Court said in 2005. It said this:

In light of this plain and unambiguous language, referring to NRS 288.160 subsection (4), we will not disturb the EMRB's interpretation.

That's at page 2 of the 2005 decision and that's Exhibit 2 to our motion. There's -- I want to break that down, Your Honor, because there's really two parts to that. The first part is this: In light of this plain and unambiguous language, the Supreme Court looks at the language itself freshly, anew, de novo, and says this language was plain and unambiguous.

Having reached that conclusion, the Nevada Supreme Court says:

We will not disturb the EMRB's interpretation.

Importantly, Your Honor, contrary to any arguments by the Board or Local 14, the Court didn't say: We will defer to the EMRB's construction. Okay? It says:

> In light of our own conclusion that this language is plain and unambiguous, we're not going to disturb the EMRB's interpretation.

Notably, the Supreme Court cites *State Division of Insurance versus State Farm*, 116 Nevada 290. That decision plainly states that:

> Although courts generally defer to an agency's interpretation of a statute it's charged with

enforcing, a court will not hesitate to declare a regulation invalid when the regulation conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious.

The EMRB -- the Court did not defer to the EMRB in its 2005 decision. It says:

The EMRB is required to follow the law, regardless of results.

Because that interpretation was de novo and the Court said the language, and the regulation, and the statute were plain and unambiguous and required majority support to be determined by a majority of all of the members of the bargaining unit, not just those who vote, the Board no longer has a prerogative to experiment or change its mind. You know, the case went to --

THE COURT: You don't have to repeat it in each successive appellate order, huh?

MR. FLAHERTY: I'm sorry --

THE COURT: You're relying on the 2005 expression that it's de novo.

MR. FLAHERTY: Yes. Yes.

THE COURT: Yeah. And -- presumably, the 2009 doesn't say that.

MR. FLAHERTY: Well, what they say at the

beginning is they say --

THE COURT: Doesn't repeat it.

MR. FLAHERTY: Early on in the 2009 order, I believe, they say: We previously concluded in 2005 --

THE COURT: Okay.

MR. FLAHERTY: -- that this is what the statute requires.

THE COURT: Yeah.

MR. FLAHERTY: So I don't think --

THE COURT: All right.

MR. FLAHERTY: -- the Court felt compelled to undertake a new analysis, despite any arguments to the contrary from Local 14 at that point in time.

THE COURT: Okay.

MR. FLAHERTY: Now Local 14 has kind of latched onto a statement at the beginning of the 2005 order of affirmance where the Court said its review is limited to determining whether there was substantial evidence in the record to support the agency determination or statutory determination. Well, if you look at footnote 9 of the 2005 Supreme Court order, you see that Local 14's reliance is misplaced because the Court actually relied on two prior cases, *Christensen versus* -- *SIIS versus Christensen*, excuse me, but then it also relied on *State Farm*, which I just talked about. Well, *Christensen* did involve the

interpretation of a statute. It involved only a review of the record for substantial evidence or not as to whether asbestos exposure aggravated this worker's condition. Okay?

So, the Court was relying on *Christensen* in 2005 to say: The EMRB's conclusion that there was a good faith doubt is supported by substantial evidence. So, for statutory interpretation, the Court is relying on *State Farm*. And that's a well-established body of law here in Nevada, Your Honor.

And certainly the Court -- excuse me, the Board didn't have implied authority to order a second discretionary runoff election because the only situation in which the powers of administrative agency can be implied is whether necessary the agency's performance of its expressed statutory duties. That's *Henderson versus Kilgore*. The Board did not have a statutory duty to hold a first election. I mean, that was its option. Okay? Because they believed they had a good faith doubt and the Supreme Court ultimately concluded that was supported by substantial evidence.

Now in contrast, because of its own regulation, having said we find the results inconclusive, they then did have a duty to conduct that runoff election, but they fulfilled that duty, Your Honor. Okay? So there was no

requirement, okay, there was no requirement -- there's nothing -- there's no mandate that the Board has to fulfill that authorizes it to order another election, but, most importantly, to order another runoff election with a standard contrary to NRS 288.160 subsection (4) because the Supreme Court said twice: It doesn't matter what the results are, you've got to follow that statute.

Therefore, any approach -- any argument that the Board's approach was rational because it was consistent with decisions from other jurisdictions, it just simply doesn't help. I've said this before, 288.160 subsection (4) is different.

This is also ad hoc rule making, Your Honor. Local 14 has argued that this is a unique circumstance, it's really not going to happen again because the Board is no longer following its experimental interpretation of NAC 288.110. Okay? Well, the Board can't do that. The Board is -- the Board's stuck with 288.160 sub (4) and its interpretation of NAC 288.110 can't be contrary to that. It's been displaced. Any contrary construction has been displaced.

And this really -- this doesn't just affect these two parties. This is why this is ad hoc rule making. What the Board's done is without notice, without workshops, without public hearings, it's announced a new rule. Okay?

When we have an election and a runoff election and we think the results are inconclusive, we have the discretion -- it's this mandatory discretionary runoff election. Okay? Required discretionary runoff election, which are oxymoronic, Your Honor. We have this ability to do this second runoff election but we don't have to follow the rules in 288.160 sub (4). That's rule making, Your Honor, and that should be struck down and you have the jurisdiction to do that.

Your Honor, I -- based on, you know, prior appearances before the Board and here in front of you, I suspect that you're soon going to hear what you said in prior orders and, in fact, what you said in prior orders and prior remarks from the bench have helped drive --

THE COURT: They always come back to haunt me.

MR. FLAHERTY: Okay. They've helped drive what happened at the EMRB and I know you don't like hearing it so I'm going to start by telling you what you didn't say.

THE COURT: Okay.

MR. FLAHERTY: Okay. Okay.

THE COURT: All right.

MR. FLAHERTY: You didn't tell the Board that it could or should disregard two Supreme Court orders. Okay. You didn't tell the Board that it had a duty to resolve its doubt. Okay? In April of 2007 in your order, you said it

was within the EMRB's jurisdiction to resolve doubt in accordance with NRS and NAC 288, that their jurisdiction was not exhausted.

Okay? And the transcript prior to that order, you said the EMRB still had jurisdiction. Because remember, at this point, the Board had done the first election and they've said -- I think they said: We've exhausted our jurisdiction. And you were, I think, scratching your head, Your Honor, and saying: What do you mean you've exhausted your jurisdiction?

But you made no findings that the Board had to proceed in a certain fashion. You said:

> The EMRB must resolve the issue in accordance with its power and jurisdiction.

Okay? You didn't say they had to resolve their doubt; you said they had to resolve the issue.

And, of course, NAC 288.110 sub (7) was sitting right there saying: Once you label these election results as inconclusive your own regulation says you get to do a runoff. You said there's more the Board can do and it can't stop or it did. Again, NAC prohibited from stopping where it did.

You remanded to the Board with direction that they have further jurisdiction without any direction on how they were supposed exercise it.

THE COURT: And that was my mistake, eh?

MR. FLAHERTY: Well, it wasn't a mistake, Your Honor. You know, and I don't -- you know, this is a vigorously contested case, you know, and the parties are advocating to the best of their ability and Local 14 made some arguments based on your remarks and the Board was persuaded. Okay? But that doesn't mean the Board was right. In fact, the Board was wrong.

Your order in January 16th, 2008, you remanded to the Board and said: Look, you've got to conduct a runoff election. You know, that's what the regulation says.

January 31st, 2013, you said to the Board: Your order -- your election plan needs to be reasonably calculated to produce a definitive result.

Okay? And the reason I wanted to point that out to you is at various points in the pleadings it's been -- either in the pleadings or in prior arguments, it's been represented you told the Board that there had to be a plan calculated to produce a result. Okay? Well the reason I'm dwelling on the word reasonably is because it's a qualifier. It expresses the fact that the Board has limited authority. Okay? So reasonably is important because it wasn't reasonable to --

THE COURT: When you say limited authority, you mean limited by the statute as the Supreme Court has

entered?

MR. FLAHERTY: Precisely. So it certainly wasn't reasonable. It's not a reasonable calculation to ignore the Nevada Supreme Court to get a result. That's not allowed, Your Honor.

There was a January 8th, 2013 transcript where this was the one where you said the Legislature doesn't intend [indiscernible]. You said the EMRB has wide discretion, but it has to be something reasonably calculated to produce a definitive result.

You remanded to the EMRB to come up with a plan that it thinks is best and to explain it and, if I could speculate, Your Honor, I suspect that maybe your frustration or concern, might be the better word, is that the Board is just saying: We've exhausted our jurisdiction. They're just doing things and you're not understanding why they're doing it. And, so, you say: Go back, come up with an election plan, and explain what it's going to do. How -- you know, how this was reasonably calculated to produce a result. Okay?

And, in fact, counsel for ESEA at that point in time asked you a clarifying question and said: Your Honor, am I correct that there's nothing precluding the Board from proceeding forward with the plan that it already has? And you said: No, there isn't. But I think what you wanted

was an explanation as to how that plan was reasonably calculated.

And, in fact, that's what got us Nevada Supreme Court number three, but what's clear -- and the reason I went through that exercise, Your Honor, is because you never told the Board it had a duty to resolve all doubts. It doesn't have a duty to resolve all doubts. Its primary duty, its number one duty, head and shoulders above any other duty it might have, is labor stability, Your Honor.

Reading the Board's 2015 and 2016 orders as a whole, it's clear it was dissatisfied with the results of the first runoff election, which was correctly held pursuant to the Supreme Court orders and the provisions of NRS 288.110 (7) and NAC 288 -- excuse me. That should have been NAC 288.110 sub (7) and sub (10)(d) as well for that same regulation and the 2009 Supreme Court order.

So to address this dissatisfaction, the Board really engaged in semantic gymnastics to find a way to get around the runoff results and contrived the artifice that the Legislature through NRS 288.160 sub (4) required the Board to resolve its doubt by whatever means necessary to determine a winner. Okay? They then ordered this second runoff election which is somehow both discretionary and required and then let -- designated Local 14 as the new bargaining agent based on the results of that election even

though Local 14 didn't obtain votes from the majority of the bargaining unit.

So here's what the ESEA is asking you to do, Your Honor. We're asking you to find that the Board exceeded its jurisdiction and violated NRS 288.160 subsection (4) when it ordered the second discretionary runoff election, the results of which were to be determined by a majority of votes cast rather than the majority of the bargaining unit.

We're also asking you to find that the Board exceeded its jurisdiction and violated NRS 288.160 subsection (4) when it designated or certified Local 14 as the new bargaining agent in the wake of the second discretionary runoff election where although Local 14 obtained a majority of votes cast, it did not obtain votes of the majority of bargaining unit as required by NRS 288.160 subsection (4).

Also, Your Honor, we'd ask you to rule that to the extent that the Board concluded it had a duty to resolve all doubt, it erred as a matter of law.

And then, lastly, Your Honor, I have another one here. It's in red because I was going to be careful about it --

THE COURT: Because when you phrase it that way, it pushes you towards the majority of those who vote. Is that what you're saying?

MR. FLAHERTY: No. No. I think what it does is it helps to -- it help -- it addresses the conundrum, Your Honor. In other words, if you say to the Board, nothing in NRS 288.160 subsection (4) requires you to resolve all doubt, well that's the escape clause. I mean, the Board can breathe a sigh of relief and say: Oh, okay. Well, we had the election, we had the runoff election, and --

THE COURT: But if I'm hearing you correct, you think that the phraseology that I used in the previous order seemed to indicate that you must -- you can't just -- that you must resolve all doubt.

MR. FLAHERTY: Right. You never said that, Your Honor, but if you look at different things you said at different points, I can see how it was all put together, but you never said that. You know, you never said that, and that duty doesn't exist, and that's why I'm asking you -- the ESEA is asking you to make this finding.

And then the last one, Your Honor, and this one -- I offer this for your consideration, Your Honor. Okay? We already talked about the fact that ESEA cannot have it both ways. The Supreme Court orders are the law of the case, but if you thought there was latitude there, Your Honor, you could make a finding that to the extent the Board concluded that the results of the first runoff election were inconclusive and definite or not meaningful, it erred

as a matter of law.

THE COURT: Explain that one to me.

MR. FLAHERTY: Well, Your Honor, this gets to the whole notion of how we got here in the first place and I went through the numbers with the hypothetical bargaining unit of 1,000 employees. And, so, applying that here, in the first election, there were 10,386 employees in the bargaining unit. Okay? If you divide that by two and add one, for 50 percent plus one, you get 5,194. Okay? Now, in that election, ESEA got 1,932, Local 14 got 2,711, and no union got 93.

So, the Board, at that point, could have said: There's nothing inconclusive. Okay? Because even if we take the no union vote and add it to Local 14, that only gets us 2,804. And, in fact, even if we took the no union vote and the ESEA vote and added it to Local 14, we still don't get to 5,194. And it's been the same in all three elections. The Board made a point of this in its brief. I forget the precise numbers, but when you look at the total percentage of the bargaining unit that voted, it was 45 percent, 46 percent, 45 percent. We've never had half the bargaining unit vote. And so the Board could have said: Well, there's nothing inconclusive because, you know, nobody got a majority of the bargain -- no ballot option in any of these elections got a majority of the bargaining

unit plus one.

But, having said that, Your Honor, if you believe that the Nevada Supreme Court has said these are inconclusive results, we understand completely.

THE COURT: Okay.

MR. FLAHERTY: All right. Thank you.

THE COURT: Sounds reasonable. Doesn't it?

MS. MARTIN: Not very, Your Honor.

THE COURT: Not very. Okay.

MS. MARTIN: Good morning, Your Honor. Good morning. Still morning.

THE COURT: Oh, excuse me one second. Do you -- does anybody need a break?

All right. Go ahead.

MS. MARTIN: This is a day that my client, Teamsters Local 14 and the thousands of CCSD employees who have voted for Local 14 have been waiting for for a very, very long time.

I'm going to start with the issue of labor stability because the way it's been addressed by opposing counsel is not accurate. Collective bargaining in this country -- collect -- is unique, both in the federal system and in the Nevada system. Unique as opposed to the way collective bargaining works in other countries because we have a system of exclusive representation. In many other

countries, multiple unions represent a workforce, each representing whatever proportion of the workforce they represent. Here we have a system similar to democratic government where the winner takes all, the winner is the exclusive representative of the entire bargaining unit.

And, in fact, the Wagner Act, the National Labor Relations Act, was modeled after a theory of democratic government where you bring about stability by letting people participate in a democratic fashion and choose their representatives. Their exclusive representative will then represent the will of those people.

That's what the Federal National Labor Relations Act -- the underlying theory of the Federal National Labor Relations Act that allows collective bargaining through selection of representatives through a democratic vote is based on and that's what the Nevada law is based on. We have a system of exclusive representative and we have a statute that says over, and over, and over again the word majority.

Nowhere in NRS 288.160 do we see the word stability. That statute is all about letting employees choose their representative and letting the majority of representatives serve as the exclusive representative.

THE COURT: That's why I asked him, Mr. Flaherty, where -- what's the source for this notion and he pointed

to at least one case, as I recall, and I think there were more than the one. So what do you say? You disagree with that that --

MS. MARTIN: I said -- my response is that the notion of stability is -- it's undoubtedly true that collective bargaining laws are intended to produce stability but through the following mechanism. If we don't have collective bargaining at all, employees will be disgruntled because they have no voice and they may strike, they might disrupt operations in one way or another. So we let them have a voice through a democratic mechanism, through a vote and other means of choosing who represents them as the exclusive representative. But that representative has to represent them. We don't have stability just because we have one union in place that can never be displaced. That's not stability. Leaving ESEA in place will not make the 4,000 plus employees who voted for Teamsters be happy just because they're told by the EMRB or the -- or by this Court or the Nevada Supreme Court: Tough luck. That won't bring about stability. Employees will be just as disgruntled because they're unhappy with the representation that they've had for over a decade.

So stability --

THE COURT: What's wrong with the notion that the answer to that is what was described as prior to the '60s

where they had no union representation and that this -- allowing it even represented a change and that in doing so, the Legislature determined -- in putting the language in, the Legislature determined that this is as far as they were willing to go and logically you could say in the name of stability and just as logically you could say there were other factors that entered into it. So -- but, at any rate, what's wrong with that argument? It makes sense. Does it not?

MS. MARTIN: Well it makes -- but the language that the Legislature put in in NRS 288.160 refers to a majority in each of the subsections.

THE COURT: Yeah.

MS. MARTIN: And it talked -- but the overarching sort of purpose of this section of NRS 288 is to allow -- is to -- it governs how employees choose their representative.

THE COURT: Yeah.

MS. MARTIN: Subsections (1) and (2) relate to a situation where there is no representative and there's only one union that wants to come in and represent those employees. Subsection (3) relates to when the government -- local government employer chooses to evict, or decertify, remove an incumbent representative. And subsection (4) and (5) relate to the situation where there's two competing

representatives.

And the -- but all of the sections use the word majority. So they're all premised on this notion you bring about labor stability by allowing employees to choose.

So we're in the situation where the NRS 288.160 subsection (4) has interpreted in a specific way by the Nevada Supreme Court and we've had two elections that have produced inconclusive results. That's what the Supreme Court has said and then we're faced with what Your Honor has described, I think, as a conundrum. And, so, I want to make -- explain why I believe that conundrum can be resolved, consistent with how the EMRB did it, without conflicting with the -- or, you know, without disregarding the Supreme Court opinions.

THE COURT: Okay.

MS. MARTIN: But before I get to that --

THE COURT: In other words, supportive of what -- exactly what the EMRB said?

MS. MARTIN: Yeah. Before I get to that, I just want to make one point about -- one more point about labor stability because the EMRB, as the administrative agency that is the sort of policy making arm, right, that gets to figure out how to implement policy so that it furthers the objectives of the statute, has something to say about how we bring about labor stability and its opinion that's

pending on review here. And I'm on page 3 of that opinion. I'm going to read to you a portion of it. It says:

> The concept of stability and labor relations, which is a fundamental objective of the act, cannot be reconciled with an open-ended process of this sort.
>
> Referring to repeat elections under the same vote counting standard.
>
> Existing doubt as to majority support is not conducive to stability and labor relations and the basic premise of the election process or 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.

So, the EMRB sort of --

THE COURT: Is that -- isn't that just another way of saying we really need to resolve this issue once and for all?

MS. MARTIN: Yes. It's saying that we need to resolve this issue, not that we need to just say: Okay, we can't figure out how to resolve it so let's shove it under the rug and leave a dictator in place. It doesn't have majority support.

THE COURT: Ooh. Ooh, the dictator.

MS. MARTIN: And that may be a strong word, but

this is a union --

THE COURT: That's fair.

MS. MARTIN: -- that has --

THE COURT: He called you an oxymoron, I think, at one point, so a dictator is fair.

MS. MARTIN: I mean, it's fair to say that a union that has progressively gotten fewer and fewer votes and the most recent election, it received votes from less than 10 percent of the bargaining unit is not represented by a majority of those employees. It is not conducive to labor peace. So we have to -- and that's the conundrum I think that Your Honor identified.

So, Your Honor, when you provided a lay of the land at the start of this hearing, I think you broke the case issues into sort of two boxes, which I think are appropriate.

THE COURT: Yeah.

MS. MARTIN: And I'll sort of repeat how I understood them and then sort of make my comments from there. You said -- or I think one box is: Was the EMRB permitted or required to do something following the second election? Could it just abandon the process or was it required or permitted to do something? And, if so, then what?

And I -- if I understood Your Honor's sort of

tentative ruling at the start of the hearing correctly, we agree that the EMRB is permitted or required, and I don't know that we need to get into the distinction here, to do something. It can't just shove this under the rug and leave EMRB -- leave a union that got 970 voters in place and say it's --

THE COURT: Well, when you say --

MS. MARTIN: -- the majority representative.

THE COURT: When you say it was required to do something, you can't just leave the union, we only got 900 -- is that really what had to be the impetus of the Board to act? Why couldn't it simply be that the Board issued some opinion, and had the Board issued an opinion that was consistent with the lay of the land, -- if it had issued an opinion which recognized the Supreme Court mandate to follow, the statute as written, then that --

MS. MARTIN: I --

THE COURT: -- would have resolved it. It did not -- in other words, while they certainly may have and perhaps had to, or however you want to phrase it, do something, you didn't have to do something that seemed to conflict with the Supreme Court law. Didn't it?

MS. MARTIN: Let me address that in pieces.

THE COURT: Okay.

MS. MARTIN: Let me start with what the Board had

to do or could do --

THE COURT: Yeah.

MS. MARTIN: -- in terms of not just ignoring the situation --

THE COURT: All right.

MS. MARTIN: -- and then I'll address the method the Board chose to use.

So, let me start by saying that the Supreme Court opinions address the -- what was to happen in the first election, what was to happen in the second election. They don't address what happens after the second election if the runoff results -- the results of the runoff are inconclusive, nothing in either of those opinions tells us what happens next. And that's the situation that the EMRB is confronted with.

So, -- and that's really the question at the heart of this case. So I -- my first argument is to say that I don't believe the Supreme Court opinions control what happens here now at all because they don't tell us what happens after the second election. If we accept the premise that employees are represented by a union that is supported by the majority, they don't tell us what to do now when the election process that was held -- up until the second election did not produce a majority vote.

So, here's the situation of the EMRB after the

second election. The Local 14 had received more votes in the first election. Local 14 had received more votes in -- than in the second election and more votes that it received in the first election and the ESEA received less, but yet neither union received votes from a majority of all of the employees in the bargaining unit as -- I think as Mr. Flaherty said. The majority of employees just didn't vote.

So the -- there were -- just as a pure matter of law, there were three options available to the EMRB. The EMRB could have continued to do the same thing over and over again, hold the same election under the same ineffective vote counting standard over and over again and maybe it would have led to conclusive results. Local 14 is getting more and more votes each time. So, maybe if we go on this trend, Local 14 will get to a super majority but neither union has said the EMRB should continue to hold the same election over and over again. Both unions agree that something different should happen third time around.

The ESEA says, do nothing, essentially. Aband -- and when I say do nothing, I mean abandon the election process. Leave ESEA in place. Local 14 says: No, the Board had to come up with another mechanism for determining what a majority of employees wants because that's what will bring about labor stability; that EMRB had to do something different -- come up with some other method to carry out

its mandate of ensuring that a majority of employees choose their representative and we have labor stability because employees have, essentially, democracy in the work place.

So, ESEA -- let's start with what ESEA says. ESEA says, you know, do nothing, leave ESEA in place. I will argue that -- and I'm going to lay out my argument that it would be contrary to NRS 288.160 subsection (4), contrary to the statute, contrary to the Supreme Court orders, and, yes, as counsel has pointed out, contrary to this Court's orders in this case.

THE COURT: Here we go again.

MS. MARTIN: What's that?

THE COURT: There we go again.

MS. MARTIN: Well we'll start --

THE COURT: My comments.

MS. MARTIN: -- with the statute and the Supreme Court.

THE COURT: My comments come back to haunt me.

MS. MARTIN: I don't think so. I think they're very helpful and they've been helpful to the EMRB in the process of this case.

So, NRS 288.160 subsection (4), and I'm going to read it because I think that the language is very important. It says:

If the --

THE COURT: Excuse me just one second here.

MS. MARTIN: And I have an extra copy, Your Honor, if that would be helpful.

THE COURT: Yeah. That would be easier than sorting through all of these --

MS. MARTIN: May I approach?

THE COURT: Yes, please. Thank you. 288.160.

MS. MARTIN: Yep. And I'm at subsection (4) which is the subsection that this case entail -- involves.

It says: If the Board in good faith doubts whether any employee organization is supported by a majority of the local government employees in the particular bargaining unit, it may conduct an election by secret ballot upon the question.

So, it says: Whether any employee organization is supported by a majority of the employees. It doesn't say: Have a referendum on the challenging union, on the rival union, and if the -- it doesn't say: Have an up or down vote on Local 14 in this case and if Local 14 doesn't prevail on that up or down vote abandon the process. It says: Have an election to decide whether either union, any union, has a majority support. That's what the mandate of the statute is.

And the way the EMRB carried out the election reflects this. Local 14 wasn't the only choice on the

ballot. It wasn't: Do you want Local 14 or not, yes or no? It was, initially: Local 14 versus ESEA versus no union. And then in the runoff: Local 14 versus ESEA. ESEA was always on the ballot. This was always a competitive election between two unions.

So, what we know from the results, what is, you know, beyond dispute, is that that election did not show that ESEA has majority support. We have -- we can't ignore that fact, which is what ESEA would like us to do at this point, is like us, and that was the point of my opposing counsel's comments about: Let's pretend -- let's look back and see if the EMRB shouldn't have ordered this election to begin with because we'd like to pretend that this process never started, but it did and we have the election. The Supreme Court said that the EMRB was correct to hold this election and we have the results of this election so we know -- if we believe that 288.160 subsection (4) means what it says, then we can't accept the EMRB -- ESEA remains the representative because it doesn't have a majority support under that vote counting standard.

THE COURT: Well it doesn't have majority support of those who voted.

MS. MARTIN: That's correct and that's the standard the Supreme Court said to use in those first two elections. It said to use a majority of all the bargaining

unit, all potential voters, and it -- there's nothing that says: Well, let's assume that all the employees that didn't vote support ESEA. There's nothing that supports that notion.

THE COURT: Well doesn't that also assume there's nothing that the Board could do which would produce or is more likely to produce a vote of all of the -- or closer to a vote of all of the unit?

MS. MARTIN: Well --

THE COURT: What if they -- oh here comes my comments, but -- I am not suggesting or prescribing something, I'm just thinking. Perhaps there's some way the Board could do an election in which significantly more vote than did vote. Would that not then comply with what I'm leaning towards saying is the letter of the law?

MS. MARTIN: Well, Your Honor, let me answer your question this way. After the -- when the second election was ordered, and the Supreme Court -- after the Supreme Court's second opinion when the Supreme Court said: Use the same voting standard. The EMRB then said: Okay, we're going to use the same election plan we used previously. And Local 14 said: That doesn't make sense. If we're going to use the same -- if we're going to have the same voting counting standard, let's come up with a different election plan that's reasonably calculated -- this is the

language: Reasonably calculated to produce a definitive result.

THE COURT: This is them saying it's not their fault.

MS. MARTIN: And so -- actually, it's a little bit more complex than that.

THE COURT: Oh.

MS. MARTIN: So that was our argument and we came up with some ideas on how to do that and we presented them to the EMRB and the EMRB talked to the ESEA about it and the ESEA said: Absolutely no.

THE COURT: Okay.

MS. MARTIN: And the EMRB said: Well, look, we don't want to have more petitions for judicial review, so we're not going to do something different because ESEA will file a petition for judicial review. So we'll do the same thing.

Well, unfortunately, that led us to file a petition for judicial review and we were here, you know, before the second election was held, after it had been ordered by this Court and the Supreme Court, but before the second election was held and we said: Let's not have the same election plan if we have to meet the same standard. Let's do something that gets more voters out to the polls. Let's do something that holds more voters.

And Your Honor agreed with us and Your Honor said: The EMRB is obligated -- you're not going to tell the EMRB what to do, but their obligated to do something that's reasonably calculated to produce a definitive result. And just holding a bare sort of send out the ballot, see what comes back, isn't enough.

Well, the EMRB -- so Your Honor made that order. The EMRB took it up to the Supreme Court on a writ and the Supreme Court essentially said, we're not going to review this before the election happens, which I think is a signal that the Supreme Court wanted to see these results to figure out what to do next. Right? That it wasn't good to just march down the same path, but, in any event, that's my speculation.

But the -- so there is. Yes. There are other election methods of holding elections that could be used to bring more voters out of the woodwork. There could be -- we had proposed two things, if I recall correctly, after the second election. We had proposed electronic voting, which sometimes makes voting easier than someone having to go down to the post office and dropping off a ballot. And we had also proposed a rolling election which is used in some shareholder elections when there's a quorum requirement, which voting just remains open until there's a number of employees vote.

THE COURT: If they set it up so on payday, you don't get paid unless you vote.

MS. MARTIN: That might encourage people to vote for sure. But it -- there are a number of ways. For instance, the EMRB, when it wants to encourage voter turnout, what it does is it holds elections in the workplace but on payday when more employees are likely to show up to get their paychecks. So there are ways to encourage more voter turnout.

But what Your Honor said was: Come up with a system that's reasonably calculated to produce a definitive result, but I'm not going to tell you how to do that. And, so, when we went back to the drawing board for the third election, that's what the EMRB did. It came up with a system that would produce a definitive result. It came up with a new vote counting method and --

THE COURT: Remind me what the new vote counting method was.

MS. MARTIN: The new vote counting was to use the same voting counting method that occurs, as you pointed out, in every other election in this country and in our democratical -- in our governmental --

THE COURT: Yes.

MS. MARTIN: -- elections and in other labor relations elections.

THE COURT: So what they did was use the same method and simply reinterpret the controlling statute?

MS. MARTIN: Well, let me get back to that then because I don't believe it's a reinterpretation of the controlling statute.

THE COURT: Okay.

MS. MARTIN: Because the statute doesn't -- you know, the statute and the Supreme Court opinion say: Have an up and down election between two unions, the two competing unions, and they don't -- the statute doesn't say, and the Supreme Court opinions don't say, what to do if that election doesn't produce a conclusive result. And nothing in the statute or the regulation, as I read it, ties the EMRB's hands and says: You can't do it in a particular way.

Let me read you some quotes from the Supreme Court opinion, the first Supreme Court opinion, on this question of what the elections that were held were about. On page 7 of this -- this is the 2005 decision:

> NRS 288.160 subsection (4) establishes a method of determining which organization is supported by a majority of the bargaining unit.

Again, --

THE COURT: I'm sorry. Did you say page 5?

MS. MARTIN: Page 7.

THE COURT: 7. Okay. All right.

MS. MARTIN: Are you ready?

THE COURT: Yeah.

MS. MARTIN: And so it says: NRS 288.160 subsection (4) establishes a method of determining which organization is supported by a majority of the bargaining unit.

So it doesn't say whether the rival union or the challenging union is supported, it says which organization.

On page 9, it says: The EMRB determined that a good faith doubt existed as to whether Local 14 or ESEA had majority status.

So that's the question for the election, whether either of those unions had a majority status.

And, again, on page 10, it's referring to the EMRB's order that was on review in that case:

The order states that the EMRB will require either ESEA or Local 14 to obtain a majority of the bargaining unit employee votes before it will recognize it as CCD -- CCSCs -- CCSD's exclusive bargaining representative.

So, it makes clear that this is not --

THE COURT: You want to be clear now because you're reading towards the language that I find fairly binding and that's on page 10, where you left off:

Plain and unambiguous language.

MS. MARTIN: It does have that language about the statute being plain and unambiguous and I -- and let me respond to that now.

THE COURT: Okay.

MS. MARTIN: Well, again, I made the point. It doesn't tell us what to do next.

Here's what -- this case has been up to the Supreme Court three times. Every time -- there were multiple issues, with exception of the writ petition which was solely about the District Court's jurisdiction. But so each time -- each of the first two times there were multiple issues before the Court and on every single occasion, the Court essentially adopted the EMRB's view of the statute and the regulations, the view of the law, with one exception. And that exception was when the EMRB tried to abandon the election process after the first election and it tried -- if Your Honor will recall, two different times and Your Honor said no two different times after the first election. First time you said we don't have jurisdiction and Your Honor: No, you do have jurisdiction and sent it back to them. And then it said exactly what counsel is arguing should be said here: Inconclusive results should mean that we just shouldn't keep doing the same thing over and over again and let's give up. And Your Honor said: No, you can't give up.

And, yes, I'm paraphrasing. I don't think Your Honor expected a close textual reading of your quotes, so I'm going to paraphrase them.

And, so, that was the only time the Supreme Court disregarded or didn't defer. Whether it used the term of plain and unambiguous or not, it didn't defer to the EMRB's ruling. Every other ruling that was of the EMRB that was appealed in this case, the Supreme Court affirmed the EMRB. The only time it didn't was when the EMRB tried to walk away from this election process.

THE COURT: Okay.

MS. MARTIN: So, yes. The decision contains this language of plain and unambiguous but it only got there after the EMRB made this initial decision to adopt this election process.

I -- so, before this election, between ESEA and Local 14, the EMRB had held every single election the EMRB had held over -- since the 1960s and the days of Al Bramlet, right, every single election the EMRB held, it held it -- an election under the regular system, you know, simple majority produces a winner. And this was the first time and the Supreme Court said: Yeah, the EMRB is right. I think we can wonder whether the Supreme Court would have reached a different conclusion if the EMRB had adopted -- followed its normal vote counting standard and ESEA was the

-- seeking review of that, whether the Supreme Court would have said: Yeah, the EMRB is right. I think that's probably the case. That's obviously my speculation. It has the language plain and unambiguous.

But let's then look at other ways that one might deal with that language, given the conundrum, because if there weren't this conundrum -- look, if ESEA had gotten the majority of votes, we wouldn't have this conundrum.

THE COURT: Sure.

MS. MARTIN: And we could all say: Okay, well let's -- well we don't necessarily agree with the process but there's not really this conundrum, but we do have this --

THE COURT: Why wouldn't we? Couldn't Local 14 have taken the position that ESEA did then -- I mean, that ESEA does now and say: You know, just because you've got a majority in this election doesn't decide it. We must hold an election that, you know, fulfills the mandate and the statute, the clear and unambiguous language that says it must be a majority of the bargaining unit. I mean, wouldn't -- couldn't they have just --

MS. MARTIN: Well --

THE COURT: -- have taken that position?

MS. MARTIN: Well the -- the position that we're in is that the EMRB essentially followed the directions of

this Court to come up with a different system after the second election and -- but this Court's guidance that it wasn't going to tell the EMRB how to do that. So the EMRB did that.

But we have this conundrum. So we have to figure out how to deal with the Supreme Court opinions and what to do now because we want labor stability and labor stability only comes about when employees have are -- have democracy in the workplace, which they don't have right now and they haven't had for 14 years. Right?

You know, just as a little tangent, we all remember during the Bush v. Gore election in 2000 when it took us maybe, I don't know, 40 or 50 days, to figure out who are president was and how the whole nation was on the edge of their seats and it felt like a very uncomfortable position to be in when our election didn't produce --

THE COURT: We learned -- the fate of the --

MS. MARTIN: We didn't know who our --

THE COURT: -- nation relied upon chads.

MS. MARTIN: Right. And we didn't know it would happen and that was 50 days. Here we have 14 years.

THE COURT: Yeah.

MS. MARTIN: That doesn't bring about stability.

THE COURT: I agree.

MS. MARTIN: I can guarantee you those 4,000

employees, if there's an order saying you're stuck with ESEA and there's no way you can ever displace them, that's not going to lead those 4,000 employees to say: Oh, great, let's be happy at work. They're unhappy with their representation. They don't feel like they're getting adequate representation. Right? That's what leads to revolutions in other countries.

So, let's talk about how we deal with the Supreme Court's orders.

THE COURT: Okay.

MS. MARTIN: The Supreme Court order -- there's a number of things to point out about it. First of all, as I pointed out, --

THE COURT: And you're talking about the last order?

MS. MARTIN: I'm talking about both of the orders.

THE COURT: Okay. All right.

MS. MARTIN: Not the order on the writ petition but the two orders, one from 2005 and the 2008 or '9 --

THE COURT: '9.

MS. MARTIN: Whatever.

THE COURT: Yeah. Okay.

MS. MARTIN: So, a couple of things are worth noting. I pointed out, in all respects except one, the EMRB adopted -- or the Supreme Court adopted the EMRB's

view of things. Second, neither of those opinions were published. And that's important because --

THE COURT: Yeah.

MS. MARTIN: -- if the Supreme Court is trying to adopt a definitive interpretation of a statute or a regulation that will bind future parties, it publishes its opinions. When it issues an opinion that's not published, it's essentially saying: No one has to follow this opinion except the parties.

THE COURT: And you don't buy into the law of the case argument?

MS. MARTIN: Well then I'm going to get to the next -- so that is the only argument. That's the only real argument the ESEA has for why those opinions, if you read them as ESEA does, and, again, I don't believe they tell us what happens now, but if you read them as some sort of definitive interpretation about any election vote counting standard, even the third election, post-runoff election, all ESEA's got is the law of the case doctrine. That's all it's got. And the law of the case doctrine is not an inflexible doctrine and it's not a doctrine that's -- that only -- the exceptions to that doctrine are not ones that can only be invoked by the Supreme Court.

So there are three established exceptions to the Supreme -- to the law of the case doctrine that exist in

courts around -- courts around this country has adopted, both the federal courts and state courts. One applies where there's intervening decision from a superior court and that is the one that the Supreme Court explicitly -- the Nevada Supreme Court explicitly adopted in the *Shoe* [phonetic] case. That's not relevant here. There's not an intervening Supreme Court case that we're relying on. There's been no Supreme Court cases on this statute inter -- you know, I think, ever, but certainly not intervening.

So that's not at issue. And by that, that's the statute, the relevant subsection of the statute, I should say.

There are two other exceptions that sometimes are sort of overlapping. One is where following the law of the case would work a manifest injustice. That's the standard. And the other is where the -- there's sort of new evidence or new facts or new events that lead the Court to revisit its earlier ruling.

And in the *Shoe* [phonetic] case, the Supreme -- the Nevada Supreme Court has not -- did not --

THE COURT: Meaning the issuing Court to reevaluate.

MS. MARTIN: Well let's get into that.

THE COURT: Okay.

MS. MARTIN: So the *Shoe* [phonetic] Court did not

adopt those -- explicitly adopt those exceptions because that wasn't the case before it. It adopted a different exception. So to say that the *Shoe* [phonetic] Court didn't adopt those exceptions is sort of beside the point because the Court adopted a different exception that was more appropriate to the facts before it, the case before it. But the *Shoe* [phonetic] Court did, and in language we quoted in our brief, acknowledged those exceptions and acknowledged that they're viable under Nevada law.

So then the question is: Which court can find that one of those exceptions apply? Is it only the Supreme Court that can decide that applying the rule of the prior decisions of the Supreme Court would work a manifest injustice or that new facts, or new evidence, new information, lead the Court to apply the rules differently? You know, the argument that only the Supreme Court can do that is -- was made for the first time, not even in counsel's Reply brief, made for the first time here today. I would be happy for the opportunity to go and find some case law to provide to Your Honor that those exceptions can be applied by lower courts.

THE COURT: Okay. Yeah, I don't think it's really necessary. I think I would have to accept that our Supreme Court, as all of our courts, wants to do justice under the law and that a District Court, if it really was convinced,

could do an opinion, obviously try to make a bulletproof opinion, that would reason why the inflexibility rule is paramount in a particular given instance. So, I mean, any time a District Court does that, it's coming out from under the turtle shell and sticking its neck out, but there's no avoiding doing that in this kind of a case because we're you're now, as you pointed out, 14 years into this and many visits up and down the ladder of justice and with still no definitive result.

So, it fairly is a situation that fairly beckons to a court, I think, you know -- oh, this is going to come back to haunt me, I know it, --

MS. MARTIN: And --

THE COURT: -- to do the right decision under the law and let the consequences follow. Let the chips fall where they may.

MS. MARTIN: I think that's right and I would say two things about it. I think that's the situation the EMRB confronted -- found itself confronted with in January 2015 and what led the EMRB to say: Okay, we're not just going to say, you know, we're bureaucrats and we just march down the same path when it's failing. We're going to stick our necks out and do something that makes sense that does justice for these employees who our agency is charged with the responsibility of respecting --

THE COURT: And --

MS. MARTIN: -- the votes of.

THE COURT: -- what was it that they stuck their necks out and did?

MS. MARTIN: They --

THE COURT: In order to --

MS. MARTIN: The EMRB said: Our prior interpretation of this statute -- of this regulation is nonfunctional. They called it a failed experiment. They acknowledged it was an experiment used only in this case. They acknowledged that it failed. It was a good faith effort and it failed and they said: We're going to do something different here.

THE COURT: Would that not be parallel at least to -- what was it? The president of many years past, who some regard was a villain, and his people say that that's no longer operational? I mean, in other words, you just changed the rules as you go along, but --

MS. MARTIN: Well I don't --

THE COURT: Which you can do, I'm not saying you can't, but still it has to be within the parameters of the statute and not just -- you could say, you know, the clear reading of the statute, but, in this case, the thing -- the problem I have in agreeing with you is that it's the statute as already interpreted by the Supreme Court.

That's what gives me pause.

MS. MARTIN: And what I can say in response to that is that we know, from both the language of the statute and the language of the 2005 Supreme Court opinion, that this is not a referendum on local 5 [phonetic]. It's a competitive election between two unions and under that standard that the Supreme Court has had to apply, there is no winner and so we're in this never -- you know, this vacuum and that --

THE COURT: But is it really under that standard or is it under the implementation, the attempted implementation of that standard, there is no clear winner?

MS. MARTIN: Well, I don't know that I see the difference.

THE COURT: Well, is it that doing it the way that the law provides will not provide a clear winner, therefore you must do something else, or is the appropriate rule, and in this case the appropriate guidance for the EMRB, that adopting a different way of carrying out the election, but still maintaining the -- whatever you want to call it. Maintaining the -- I'll say the straightforward maxim that the Supreme Court is feeling. In other words, you change the way you do the election, you don't change the way you interpret the results under the law.

MS. MARTIN: The EMRB --

THE COURT: In contravention of past decisions.

MS. MARTIN: The EMRB could have done that but it didn't do that.

THE COURT: Right.

MS. MARTIN: And so the question is: Do we now want to have a fourth election? I think --

THE COURT: And what I'm being told is they didn't do that because they were second guessing my prior comments, which gives me great --

MS. MARTIN: I don't know that's correct. I think --

THE COURT: -- guilt.

MS. MARTIN: I certainly don't want guilt and the Supreme Court -- what I said is that your prior comments said that the EMRB has discretion and the EMRB chose to exercise the discretion in that way and I would also then say it's not unreasonable given that, one, how elections, -- as Your Honor pointed out, that's how elections operate in many, many, many circumstances and are considered the democratic and to respect the will of the voters; two, it's how the EMRB has operated in every other election its run in the whole, you know, 50 or so years that the statute has been around -- I guess it's 46, 1969. That's the way it's operated.

So, what the EMRB did is said: We tried this. It

didn't work. We're going to find a different method. And, yeah, there could be a different method of running the election versus a different method of interpreting the results, but I believe there's two ways of looking at the Supreme Court opinions. One is that --

THE COURT: Okay.

MS. MARTIN: -- they didn't -- don't say what happens now.

THE COURT: Okay.

MS. MARTIN: What happens in the third election and they have to. We can't just shove it under the rug.

THE COURT: Okay.

MS. MARTIN: And the EMRB decided: This is the way to bring about labor stability, which is what the EMRB's mandate is. I think we all agree. It's to respect the will of the voters and bring about labor stability and the will of the employees. And, third, we have this manifest injustice exception. Manifest injustice combined with when there's new facts or new evidence or something new that the decision maker knows that didn't know making the initial decision. And that's a --

THE COURT: What are the new facts? What's the new facts or evidence?

MS. MARTIN: The new facts are the two -- the first two elections didn't produce enough votes to work and

that's an important thing because the --

THE COURT: And therefore it can't be done.

MS. MARTIN: It can't be done. And that's why the -- you know, when the EMRB was here arguing, different counsel for the EMRB, because, again, we've been on it for 14 years.

THE COURT: Yeah.

MS. MARTIN: But I remember in the first case, both -- before Judge Wall and before the Supreme Court, EMRB's counsel, Diana Hedgess [phonetic], said: Don't worry. They'll get the voters out.

THE COURT: Yeah.

MS. MARTIN: I -- we know --

THE COURT: Yeah.

MS. MARTIN: We know -- this is our job. We know how this works. We're the experts and --

THE COURT: Yeah.

MS. MARTIN: -- we know they'll turn out the voters. And that might be a reasonable thing to say when you have a unit of 50 employees or 60 employees because you can go, --

THE COURT: Yeah.

MS. MARTIN: -- you know, to each person's house and say: Come on, you've got to vote. You can't do that with 11,000 workers.

THE COURT: Yeah.

MS. MARTIN: It's just -- in two or three weeks that there was balloting, that's just impossible.

So, --

THE COURT: Do these 11,000 workers all work every day? Do they show up for work? I mean, you know, subject to those that are on vacation or sick?

MS. MARTIN: I don't know that -- I think so but I'm not certain to that.

THE COURT: Okay.

MS. MARTIN: That -- I think that they're all regular employees. They're not, you know, subject to someone who might be on leave or something like that, they're all regular --

THE COURT: That might --

MS. MARTIN: -- employees.

THE COURT: They might have some positions that work shifts around the clock, I suppose.

MS. MARTIN: Yeah. It's not -- certainly a school district isn't like --

THE COURT: Yeah.

MS. MARTIN: -- hotels and, you know, that they're not open 24/7 but there's --

THE COURT: Yeah.

MS. MARTIN: -- certainly different shifts and

people -- you know, another problem with just even turning people out by going to their homes is this is a Nevada -- you know, Las Vegas is a very transient residential community in the sense that people move often compared to other communities. And, so, addresses aren't always as reliable as they might be in another sort of -- another town. But that's sort of an aside.

So, we have this manifest injustice standard, which is a -- it's a high bar. Right? That language is strong language.

THE COURT: Yeah.

MS. MARTIN: But the job is to do justice for the employees who voted and if this were a close election, if ESEA had won, but if it were close, if E -- if Local 14 had won by a tiny margin, we might be in a different situation but that's not where we are. And, so, we have to -- we can't -- I believe the only clear wrong result here is if we say let's just pretend this never happened or let's just leave ESEA in place.

I also believe that labor stability would be served by bringing this to a conclusion sooner rather than later. So, while one can always look at what the EMRB did or what anyone did, any argument that any of us made, and say: You could have made -- fine-tuned it a little more, you could do it a little better, that will drag the process

out. So, what --

THE COURT: Sort of like second guessing what the District Court did in front of the Supreme Court, is to drag it out.

MS. MARTIN: So, where we're at is that we know that we have these Supreme Court opinions that have this language of plain and unambiguous and that's, you know, what ESEA's got here and it's got the law of the case doctrine, but this doctrine has exceptions which apply in Nevada. And there's a manifest injustice exception and we have very, very compelling facts here.

THE COURT: Okay.

MS. MARTIN: And compelling facts that the EMRB did not know and the Supreme Court did not know when those first two decisions were issued.

THE COURT: Did not know when they were issued?

MS. MARTIN: Did not know how many people would turn out and vote.

THE COURT: Oh.

MS. MARTIN: And how they would vote.

THE COURT: Okay.

MS. MARTIN: It did not know that the majority would not vote at all. It did not know that a majority would not vote for any particular union and it did not know the extreme disparity in votes that each of the unions got.

So that's where we are.

So, I want to respond to a few more comments that counsel for ESEA made, just to sort of clean up what's before the Court and make sure there's no --

THE COURT: Some of the misconceptions --

MS. MARTIN: Some of the misconceptions.

THE COURT: -- strewn into the record.

MS. MARTIN: So, counsel said Nevada's collective bargaining law is different because Nevada's a right to work state. That has absolutely no bearing on the election process. Nevada is a right to work state. Other states aren't right to work states. The federal law allows states to choose. It doesn't preempt state right to work laws in private sector elections. Right to work, it simply means employees can choose whether or not to be members or pay dues to a union. That's all it means. It has no bearing on the process for choosing an exclusive representative.

So, it's neither here nor there. It's a red herring, if you will.

THE COURT: What about when choosing which federal cases to apply to Nevada? Would it make more sense to use those cases that develop from right to work states than it would non-right to work states?

MS. MARTIN: No. It makes -- that would make absolutely no sense and here's why. Because the law of

elections to choose union representatives is federal law. It comes under Section 9 of the Nation Labor Relations Act, 29 USC 159, and the way that agency process works is there's a decision by that administrative agency that can be reviewed -- so to sort of secure this [indiscernible], but it doesn't -- it jumps over the District Court and goes directly the Federal Courts of Appeals.

So, we have decisions by the administrative agency, reviewed by the Federal Courts of Appeals, which, again, like, for instance, the Ninth Circuit, there's right to work states in the Ninth Circuit and there's non-right --

THE COURT: I see.

MS. MARTIN: -- to work states.

THE COURT: Yeah.

MS. MARTIN: And none --

THE COURT: Yeah.

MS. MARTIN: -- of those decisions say, now would it be logical to say, that there's a different rule for, say Nevada than California in terms of how we count the votes. There's no disconnect.

THE COURT: Yeah.

MS. MARTIN: It's as if counsel has plucked one --

THE COURT: It's an issue that has nothing to do with -- as you said, nothing to do with it.

MS. MARTIN: Nothing whatsoever. Nothing whatsoever.

And the federal law is uniform. This isn't something that the Supreme Court has every taken up because the federal circuits are all consistent. No court, neither the NLRB, the Federal National Labor Relations Board, nor any Federal Court of Appeals reviewing the National Labor Relations Board has ever taken issue with the standard adopted by the NLRB in terms of vote counting.

So, that's as to the right to work comment by opposing counsel. Opposing counsel also made a number of comments of the role of administrative agencies and the role of the administrative agencies in changing their minds and we have in our brief quotations from several Supreme Court opinions about this rule of administrative law and the rule isn't one that's designed to allow administrative agencies to act arbitrarily or to, you know, change their minds with political wins when a new president appoints new members of that agency to change their minds. It's designed to allow the law to develop in a rational faction -- fashion, responding to new facts, new events, what the agency learns, the expertise the agency develops.

And that's precisely what we have here. We have an agency that said, for the first time in 2002: Let's try something new here. And then it tried it. And now it

said: That doesn't work and we've got to do something else to bring this process to conclusion, to bring about labor stability. That's what the EMRB said in its opinion.

So that is exactly why we have administrative agencies that have, you know, specialization, expertise in certain areas, that focus on these areas, and we don't throw all these issues of labor relations or whatever other areas agencies deal with to -- directly to the courts. We allow agencies to come in and focus and develop procedures that operate effectively.

So, I think it's important to remember that the EMRB is not acting arbitrarily when it's changing the standard here or changing its position on how to bring about conclusive results.

That's all the comments I have, Your Honor.

THE COURT: Okay.

MS. MARTIN: Let me just say that obviously what we're seeking is that the Petition for Judicial Review be denied entirely and that Local 14 then become the -- you know, that the EMRB order go into effect and Local 14 become the exclusive bargaining representative given the vote of -- that occurred in January. No, last November/December. That is our request. Obviously, there's these two parts of the case that Your Honor has identified. One is whether the EMRB can or must do

something following the second election and, two, if the EMRB appropriately exercised its discretion in deciding what to do. If the answer to that question were to be no, then a remand would be appropriate rather than a, you know, flat-out decision of, you know, nothing more happens.

So, thank you.

THE COURT: What says the EMRB?

MR. ZUNINO: Your Honor, if I may, I'll be brief. I think that both counsel in this case have really done a fine job of arguing the different points. What I would suggest is that each has been immersed in the history of this case and the procedural history of this case for a very long time such that their arguments draw heavily upon what went on in the past or what was said in the past and I'm going to take a different attack.

What I will say, at the risk of perhaps sounding flippant, is that the Nevada Supreme Court, in spite of their decision or conclusion that this statutory language or regulatory language is clear and unambiguous, reached an outcome that is inconsistent with or contrary to the plain language of the statute and the regulation. You know, and I would point first to the statute --

THE COURT: Isn't that an argument that should be made to the United States Supreme Court?

MR. ZUNINO: It is, Your Honor. And I suspect

that it will be made, but I would submit to you that you have the discretion --

THE COURT: To head that off.

MR. ZUNINO: -- to make a decision in this case that comports with the law and I think that an erroneous legal conclusion is, by definition, a manifest injustice. And I would submit to you that you have that discretion.

With regard to the statute and the statutory provisions in question, Mr. Flaherty has said that the Legislature set a high bar. What the Legislature did was set a high bar for the employer to withdraw recognition. That provision that talks about a majority of the support of the bargaining unit applies specifically to the employer. It says nothing about the EMRB. The statute goes onto say that the EMRB has the discretion if the employer can't work things out to conduct an election. The regulation, in turn, implements the EMRB's discretion or authority to conduct and election and it does not, as has been represented in the past, require that the election produce mathematical certainty. It simply doesn't require that. It says that the election -- you know, before a change can take place, before a new bargaining agent can be installed, the election must demonstrate that a majority of the employees support the challenger versus the incumbent and that's precisely what this election does. It

demonstrates, I think, to a near mathematical certainty, not an absolute mathematical certainty, but it demonstrates to a near mathematical certainty that Teamsters does in fact enjoy a majority support among this bargaining unit and that, I would submit, is all that is required of any election process.

And the EMRB was well within its discretion to evaluate the results of this election, the third election in the series, and say: You know what? We think that the Teamsters is the right organization to represent this bargaining unit based upon not only this third election but every election that's preceded it.

THE COURT: Did the Board provide a rationale for why the election conducted this way does, in fact, reflect the majority of the entire -- or all of the employees in question?

MR. ZUNINO: They -- I -- they did not articulate. You know, they didn't go through and do a statistical analysis and say this is a large sample for statistical purposes and, therefore, we can reasonably draw the conclusion that the majority supports teamsters, but I think that's the common sense approach to this and I think that can be, you know, extrapolated from the decision and everything that went on prior to that.

THE COURT: You don't view that as providing a

sort of a gap in the decisional process that one sort of has to just step across or leap across?

MR. ZUNINO: No. Because I --

THE COURT: In other words it's enough to say: Well, you know, that's a common sense thing and three times we've done this, three times it's the majority of those that votes the same, therefore it's fair to assume that all of the employees feel this way?

MR. ZUNINO: I think that the election speaks for itself. The results of the election speak for themselves and, in a nutshell, it is, I think, eminently reasonable to draw the inference based upon the election that the majority of folks within this bargaining unit support teamsters. I think that's really the only reasonable conclusion that one can draw.

THE COURT: Okay. And it's so reasonable that to adhere to the Supreme Court language would be a manifest injustice?

MR. ZUNINO: In light of what's happened, I think absolutely it would be a manifest injustice. And I think what was originally characterized as an interpretation by the Board, an interpretation of this regulation was, in fact, not interpretation in the sense that it didn't comport with the plain text or language of the regulation. It was far afield from the plain text of the regulation,

but I don't think that it was necessarily --

THE COURT: This result, you say?

MR. ZUNINO: Well I don't think it was necessarily in violation --

THE COURT: Oh.

MR. ZUNINO: -- of the regulation. I think that the Board itself had -- certainly had the discretion to require that the election produce mathematical certainty, 100 percent certainty. They had that discretion but they didn't have to do that and I think that was where these proceedings kind of took a wrong turn, where everybody, you know, started to focus on: Well, does this regulation require that the election produce mathematical certainty? And, indeed, it does not.

THE COURT: So you -- obviously you don't buy into petitioner's argument that the Legislature determined that labor certainty or stability rests upon putting that little requirement in there, that unlike other situation -- unlike every other election we do in this country, practically, this had to --

MR. ZUNINO: I disagree with the proposition that election stability is synonymous with the status quo. And as Ms. Martin indicated, I think that change in the long-term tends to promote stability, if the change is warranted.

THE COURT: Stops the agitation.

MR. ZUNINO: Absolutely. I think long -- it may create some instability in the short-term but it promotes long-term stability.

THE COURT: It's like quitting rubbing a sore on the skin and lets it heal. Okay.

MR. ZUNINO: So that's -- I know we've taken a lot of your time and that's, you know, -- my argument in a nutshell, I think the other attorneys have done a good job of fleshing out all of the other issues that --

THE COURT: All right.

MR. ZUNINO: -- derive from the procedure.

THE COURT: Okay. Thank you. Mr. Flaherty, last shot.

MR. FLAHERTY: Okay, Your Honor.

Your Honor, I think Local 14 -- well, let me start with EMRB's remarks actually.

THE COURT: Start with EMRB you said?

MR. FLAHERTY: Pardon me?

THE COURT: Did you say start with the EMRB?

MR. FLAHERTY: I think -- I was going to talk about Local 14's remarks, but I've decided I'll start with the remarks from counsel for the Board.

THE COURT: Very good.

MR. FLAHERTY: So, essentially, the Board's

argument here is the Nevada Supreme Court's got this wrong and you need to correct them, Your Honor. That's the Board's argument. The Board's also arguing that it's not bound by NRS 288.160 sub (4) as interpreted by the Nevada Supreme Court, despite the fact that the Board -- excuse me, that the Court specifically said that the Board was required to follow law regardless of the result. That's what the Court said in 2005.

The Board's also arguing that there's no requirement for mathematical certainty. Well, to the contrary, Your Honor, the Nevada Legislature requires 50 percent plus one of the bargaining unit. Okay? It doesn't allow for inferences and that's the problem with a lot of the case -- a lot of the arguments being made by the Board and Local 14 are these inferences. The Nevada Legislature has set a high bar. It doesn't want inferences. For initial recognition, they want a verified membership list showing members of the majority of the entire bargaining unit. For a representation election, to gain recognition, whether it's a representation election to determine initial recognition or an effort by a rival to displace an incumbent, the only way you gain recognition is a majority of votes from the entire bargaining unit.

Now, -- so there is a fact -- a requirement for mathematical certainty, but, as I've stated earlier,

there's no requirement that there's a certainty that there's doubt -- there's no further doubt, that all doubt has to be resolved. And that brings us back to labor stability and some of the arguments made by Local 14. Much of those arguments are policy arguments, Your Honor. The Nevada Supreme Court itself explained that it was going to defer to the Nevada Legislature. That's our policy making body regarding whether or not the definition of majority support in the context of 288.160 sub (4) for should be changed.

Now I would not dispute -- ESEA would not dispute that one component of labor stability could be employee happiness, but that doesn't mean that the way you achieve labor stability is by always making employees happy and if a bunch of employees show up at an EMRB meeting, you've got to give them an election and make them happy. That's what -- that's not what it means. I mean, there's two sides to that coin. Labor stability is for the benefit of the employees but it's also for the benefit of the employer and the taxpayers and, in this case, the parents and students of the Clark County School District.

So labor stability can't be just simply boiled down to: We have some sort of a popularity contest and the employees get what they want. The Nevada Legislature has set the bar higher. Okay? And it's not conducive to labor

-- the regime proposed by Local 14 and the Board is not conducive to labor stability because it doesn't make sense. Why would the Legislature require an employee organization to have support of a majority of the entire bargaining unit, okay, to gain recognition, just to get your foot in the door, to get across this high bar, and then you become the bargaining agent, but then if a competitor -- a competitor can come along and with something less than a majority of the bargaining unit, take it away from you. Okay?

Well, so if that's the new standard now -- well, so now the party that just lost, right, so ESEA could come back and say: We want an election. And now maybe -- now maybe the shoe's on the other foot and ESEA outpolls Local 14, okay, but it doesn't get a majority of the bargaining unit. Well, per the Board, we've got to switch over. And then this keeps on going and maybe SCIU shows up, you know, or maybe the Operating Engineers show up. Who knows. It's not labor stability.

It's supposed to be tough. It's supposed to move slowly. There can be change, you know. I mean, there could be another election. Okay? I mean, someday Local 14 may get this bargaining unit, but this particular election needs to be over, Your Honor. That's labor stability.

And the problem with much of the arguments is this

idea of inferring support from these numbers. Okay? And we heard some talk about manifest injustice. Well, the last time we were here, Your Honor, Local 14 provided you with some data. Okay? Local 14 did a public records request at the Clark County School District and found out that as of September 15th, 2015, ESEA had 4,729 dues paying members. And there's an asterisk on that exhibit because these are just the members who paid via payroll deductions. Some members can pay in a lump sum. There's different ways to pay.

Now, -- well wouldn't it be a manifest injustice to divest those 4,729 employees of their selected union representative? Okay? These people didn't just vote. These people are setting aside money every paycheck and they're giving it to ESEA. And if you do the math, as of September 15th, 2015, the ESEA had 380 more dues paying members than employees who voted for Local 14 in the second runoff election. Okay. So where's the manifest injustice? That's the manifest injustice. Okay?

And ESEA's numbers are like that despite this 14 years of banging and bashing, this battle, okay, which has not been labor stability. And that's the problem with these inferences, Your Honor. They want you to draw -- they're asking you to draw inferences. The Nevada -- excuse me. The Nevada Legislature doesn't want inferences.

It wants verified majority support and the way you get that in election is the majority of the votes cast. It's not throwing this thing under the rug to say if the election is over. Okay? The Board thought it had a good faith doubt. Okay? It had the election. It had the runoff election. Local 14 didn't obtain votes from the majority of the bargaining unit. The election is over. If Local 14 wants to come back another time during the window period in accordance with the Board's regulation, it can do that. That's not throwing this thing under the rug, Your Honor.

THE COURT: Okay. Remind me how window -- when's the window open?

MR. FLAHERTY: Okay. So the window is based on the expiration of the contract. So, ESEA and the Clark County School District negotiate labor contracts. Okay? And the window is -- there's actually two windows. Okay? One window opens -- I don't have -- actually I have the regulation here, Your Honor. The window opens 242 days before the expiration of the existing labor agreement and ends 212 days before the expiration of the labor agreement. And to simplify that, Your Honor, if your contract expires on June 30th, the window opens the November 1st prior and it closes the November 30th. And then there's a second window. So that's one window period.

And then there's a second window period that opens

-- let's use ESEA. ESEA has to notify the Clark County School District that it wants to negotiate a successor agreement. Okay? It has to do that by a date certain. Okay? When ESEA provides the District with that notice, the window opens again.

THE COURT: Right.

MR. FLAHERTY: And then when the parties commence negotiations, the window closes again. That's a much more variable window, Your Honor. And the -- that is all subject to what we call the three-year maximum. So, suppose ESEA and the Clark County School District negotiated a 10-year contract. Okay? That doesn't mean the window doesn't open until nine years from now in November. Okay? There's a three-year maximum.

So if you negotiated, for example, a four or a five-year contract, that window's going to open in some November in three years.

THE COURT: Three years.

MR. FLAHERTY: Okay. And that's all part of the labor stability scheme that the Board put in place, that regulation.

And, again, I think I already spoke to the point about whether or not this was a referendum argument, a competing election. We talked about the system the Board put in place. It gained recognition by verified majority

support. The only way you're going to lose that is if somebody demonstrates conclusively in the context of an election that by a vote of majority of the entire bargaining unit that you're going to lose majority support.

Your Honor, we were talking about manifest injustice. The other point is analogizing to a summary judgment standard. There is no new material facts here, Your Honor. And to the contrary, the Nevada Supreme Court was aware in 2009 of the election results from 2005. It was aware of the fact that the majority of the bargaining unit didn't even vote. So there's nothing new here, Your Honor.

I guess the last thing I would say is I hope I didn't call any confusion -- cause any confusion with my reference to Nevada being a right to work state. That was just an illustration to the fact that Nevada is different and the more important point I made there was, after I got past the right to work part, is NRS 288.160 subsection (4) is different. That isn't the way it is in the National Labor Relations Act. That isn't the way it is in many of the states relied upon by Local 14.

Thank you.

THE COURT: All right.

MS. MARTIN: Your Honor, may I just -- I know it's unusual, but can I make a few last points in response to

the new comments that were made for the first time in rebuttal?

THE COURT: All right. You may and then he gets to finish off because it's his motion.

MS. MARTIN: I will be very brief. And, Your Honor, as the EMRB, whether there's any rationale for using the vote -- I'll call it the vote counting standard it used in the third election, and I'm referring to page 5 of the EMRB's order from I think it was January 2015. And it says, discussing the regulation:

> We now interpret this subsection as permitting the Board to infer majority support of the unit as a whole based on a majority of votes cast in accordance with the well-recognized principle that those not participating in the election must be presumed to assent to the will of the majority of those voting so that the majority determines -- so that such majority determines the choice.

So that -- that's the rationale for using the vote counting standard it used. It's the rationale that supports the democratic elections.

THE COURT: Okay.

MS. MARTIN: Second point is that with respect to EM -- we did submit a declaration in connection with our response to this motion, the Petition for Judicial Review,

about ESEA's dues paying membership and we submitted it because ESEA made a suggestion in its brief that since the School District had not withdrawn recognition, it must have majority support notwithstanding the lack of votes it got. And it said the School District would know because the School District knows who pays dues from deductions made to employees' paychecks. So we -- that's why we submitted that evidence.

Obviously the number of employees who pay dues does -- employees who pay dues to ESEA do not necessarily support ESEA. Employees pay dues to the union that represents them. There's many, many employees, supporters of teamsters, who want union representation. They're union -- they want to have a union and they pay dues to the union that they have, their exclusive representation. The argument would be like saying, well, I pay taxes to our government, although I don't support our government, I pay taxes to it because that's the government we have, therefore I must support it.

You know, it -- I can support a candidate that doesn't win but I'm still a member of the --

THE COURT: Yeah.

MS. MARTIN: -- constituency that supports -- that is represented by the government.

Last point is that the window period that counsel

referred to in the regulation is a window period that's -- that premise that there's a bar to competitive elections at certain periods in time during -- essentially during collective bargaining agreements with the exception of certain windows is a concept that's adopted from the NRLB. It's a concept called the Contract Bar. When the EMRB adopted it, it quoted the NRLB, the federal opinions, and it said: yes, we want stability. So you can't just have an election any time you want but you can have an election at least once every three years. This has been going on since 2012, 14 years, we've only had three elections. So the argument that these three elections are so destabilizing is contradicted by the very theory of the window period that you can have elections every three years.

THE COURT: Okay.

MS. MARTIN: And I would just, on a further point, suggest that bringing this process to the conclusion so the employees have the union they want representing them might not lead to being -- having petitions for elections every window period, which is what the statute and the regulations allow.

THE COURT: Sure.

MR. FLAHERTY: Your Honor, I guess the only thing I'd say in response to that is Local 14 made the point that

someone paying dues did not necessarily equate with them supporting the ESEA. Well, again, that's an inference, Your Honor, and we're not having inferences, Your Honor. The Nevada Legislature wants verified demonstrable majority support. The fact that the Clark County School District has not withdrawn recognition despite the fact that ESEA [indiscernible] to that point as of September 15th, 2015, I explained that in our prior appearance that if the District announced it was going to try to decertify ESEA, the ESEA is probably going to go out and sign up some members and they might get more than that. So it's all just kind of speculation, but it's all consistent with labor stability. That's why the employer is not required to withdraw support. The employer is authorized to ask the Board for permission.

So this statutory scheme is not about inferences. It is about mathematical certainty when it comes to a representation election. It's got to be 50 percent plus one of the entire bargaining unit. The Petition for Judicial Review should be granted, Your Honor.

THE COURT: Okay. Thank you. Thank you all. This has been, for the Court, a stimulating discussion and a stimulating -- I haven't had it 14 years but the Court has had it, but we're not here for stimulation. We're here so that a bunch of folks can know how the process works for

determining a union so there can be not just labor stability but sort of orderly process within the statutory framework, all of which is to say I would be tempted based on some of the arguments that were made here to take this under submission and take another look at some of the authorities that have been highlighted here in the argument, but there's too much countervailing that.

All of these folks are here and they need to know, and they need to know today, and I really don't think I'm going to get any wiser if I take this under submission and then do my own written order. So I believe it's important to rule here and now from the bench.

I am influenced by the argument of Local 14 about manifest injustice. All of those arguments find some resonance in me, no doubt because of the sequitous path that has led me to this point, some of which Mr. Pitaro has joined in. We often, in the criminal cases, are talking about people's constitutional rights. We are often talking about doing justice and it's sort of a vague term but it is -- it's what compels one in one's heart to take a certain action, I suppose.

Notwithstanding being touched by the argument about manifest injustice, I persist in the notion that I cannot get around the Supreme Court's decision that seemed to indicate that it has to be the way the statute is

written. It is extremely difficult for all of these various parties to try and use this process. It's a very cumbersome process to try and arrive at what passes for justice, but to arrive at a process that's known -- understand -- understood and everybody can simply play by those rules and find out where they stand. You have not only the employer and the employees, then you superimpose the two unions over that, and then you superimpose the EMRB over them, and then you superimpose not one but at least two courts and maybe three and it becomes a very cumbersome process.

I believe that the law is written in such a way and the Supreme Court's opinions on this very matter are written in such a way that the Court is to consider itself to be, perhaps as the EMRB, sort of a scaffolding around the competing unions. And it is this Court's view that I should not -- well, it's not this Court's view. It's ever present in the law regarding petitions for judicial review that the Court not monkey too much with what the agency has determined. It is only when the Court sees that not only has the Supreme Court spoken out seemingly against what the EMRB did, at least as I view it, but it has done so in the context of this very case. I accept the ESEA's argument that this is -- does present law of the case and I have to say that notwithstanding the compelling argument about

manifest injustice, this is not a case where I feel that it's this Court's best function to step out in the rights of compelling opinion trying to persuade the Supreme Court that they were wrong and they created a manifest injustice, if there is manifest injustice. In this case, I believe that answer will have to come from the Supreme Court.

It's just as difficult for this Court as it is Local 14 and, indeed, even now the EMRB, to seem to sacrifice the democratic process of voting to some rigid, seemingly technical requirement in the law as interpreted by the Supreme Court that says: But it must be a majority of the unit, not just a representative sample.

But I am persuaded by Mr. Flaherty's argument that labor stability played an important role in the creation of this statutory framework by our Legislature and whether they're right or wrong, the Supreme Court spoke in 2005 and, you know, you could almost implicitly read into that an invitation to the Legislature to review this process and see if they really want to continue to make such a high standard for a change of representation of unions, but the Legislature has not taken up that challenge. It is for them to determine. It's for the Supreme Court to determine how to interpret this law. I think my best function is to adhere to the interpretation of the Supreme Court on this very point and have to tell the EMRB that while I maintain

my previous orders, that they do have jurisdiction, and that they do have a lot of discretion, and they may act in accordance with that discretion, that it is circumscribed by the law itself regarding this point on majority of the unit, not majority of those who vote, as written and as interpreted by the Supreme Court in this very case. I don't see that I have the discretion to upset that card.

I don't do the process any favors if I throw out what seems to have been determined by our Supreme Court in this case. If the objective of the courts is to try and bring this to a close, then I think that the proper role for this Court is to simply apply what I view to be the law of the case and the specific holding of the Supreme Court and leave it for the Supreme Court if they want to change their view of the statute or if they want to accept a manifest injustice argument or any of the other several arguments that were advanced by Local 14 for altering their interpretation of the statute.

It is a difficult standard. It is a high standard, but it's not for this Court to change it. That's my view. If I depart from that, -- well, I think I've said it. I don't need to say it anymore.

Any questions about what the Court means?

MS. MARTIN: Yes, Your Honor. Is the decision to -- Your Honor drew the distinction in earlier comments

between whether the EMRB had discretion to --

THE COURT: Yes.

MS. MARTIN: -- run the election in a different manner and is --

THE COURT: Yes.

MS. MARTIN: -- it a decision to remand or not?

THE COURT: Yes. Thank you. I do adhere to that notion that the law is designed to give to the EMRB a broad discretion within the statutory limits and that I do not accept the ESEA's argument here that the EMRB is -- has its hands tied and it has to simply accept the status quo and move on. It's up to the EMRB to make its own determination within its discretion of whether this is an instance in which they feel the law allows and that justice demands, that they hold yet another election. It's up to them to make that determination and I do not tie their hands.

Does that answer your --

MS. MARTIN: So I think the order will say that the case is remanded to the --

THE COURT: Yes.

MS. MARTIN: -- EMRB? Okay.

THE COURT: Thanks for keeping me on track.

MS. MARTIN: Well I just wanted to make sure we --

THE COURT: That's a way of saying that the case is remanded to the EMRB for their further action on

determination or interpretation.

Does that leave any questions? I wanted to thank all of the people that have patiently sat through a long morning and part of an afternoon just to get to the point of hearing what this Court says. I really appreciate the involvement, the dedication of these people. It reminds the Court of who the Court needs to keep in mind when it issues decisions. It's not the lawyers that stand there and can take one side one day and another side the next day in different cases. It is these people who are dramatically affected by whatever the Court decides. Whether you're happy with this result or you're unhappy with this result, I appreciate you being here. Thank you.

If there's nothing further, that will conclude this hearing. Thank you all.

MR. ZUNINO: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 12:51 P.M.

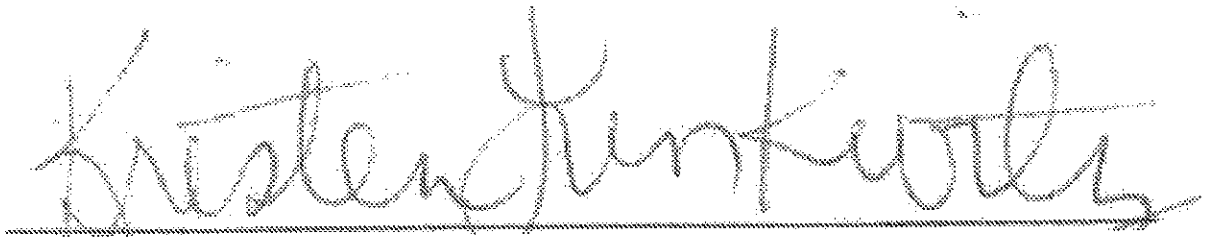
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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INDEPENDENT TRANSCRIBER

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CLERK OF THE COURT

NOE
FRANCIS C. FLAHERTY
Nevada Bar No. 5303
SUE S. MATUSKA
Nevada Bar No. 6051
DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896 telephone
(775) 885-8728 facsimile
fflaherty@dyerlawrence.com

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No. A-15-715577-J

Dept. No. I

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on May 17, 2016, the Court in the above-entitled matter entered its Order Granting Petition for Judicial Review. A true and correct copy of the Order is attached hereto as Exhibit 1 and incorporated herein by reference.

DATED this 17th day of May, 2016.

DYER, LAWRENCE, FLAHERTY
DONALDSON & PRUNTY

Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRCP 5(b) that I am an employee of DYER, LAWRENCE, FLAHERTY, DONALDSON AND PRUNTY and that on the 17th day of May, 2016, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW** to be deposited in the U.S. Mail, first-class postage prepaid and to be sent electronically to each of the following:

EMRB
2501 East Sahara Avenue, Suite 203
Las Vegas, Nevada 89104

emrb@business.nevada.gov
Bsnyder@business.nevada.gov

Kristin L. Martin,Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 Commerce Street, Suite A-1
Las Vegas, NV 89102

klm@dcbsf.com

S. Scott Greenberg, Esq.
Office of General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146

sgreenberg@interact.ccsd.net

Gregory L. Zunino, Esq.
Bureau Chief
Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701

gzunino@ag.nv.gov

Donald J. Bordelove
Deputy Attorney General
Attorney General's Office
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101-1068

dbordelove@ag.ng.gov

Debora McEachin

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

EXHIBIT 1

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

EXHIBIT 1

ORDR
FRANCIS C. FLAHERTY
Nevada Bar No. 5303
SUE S. MATUSKA
Nevada Bar No. 6051
DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896 telephone
(775) 885-8728 facsimile
fflaherty@dyerlawrence.com

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No. A-15-715577-J

Dept. No. I

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

Petitioner Education Support Employees Association's ("ESEA") Petition for Judicial Review, filed January 20, 2016, came before the Court on April 20, 2016. Respondent State of Nevada, Local Government Employee-Management Relations Board ("the Board") and the International Brotherhood of Teamsters, Local 14 ("Local 14") filed separate oppositions. ESEA was represented by Francis C. Flaherty, Esq., who appeared before the Court. Local 14 was represented by Kristin L. Martin, Esq. and Thomas Pitaro, Esq., and the Board was represented by Gregory Zunino, Esq., Bureau Chief of the Office of Attorney General, who all appeared before the

Court. The Clark County School District ("the District") is represented by S. Scott Greenberg, Esq., who did not file a responsive pleading or appear before the Court at this particular hearing.

The Petition for Judicial Review challenged the Board's 2016 Board Order wherein the Board certified the results of a second runoff representation election between ESEA and Local 14 based on a majority-of-the-votes-cast standard and declared that Local 14 would become the recognized bargaining agent of the support staff employees of the District. ESEA argued that the Board had no authority to hold such second runoff election to be determined by a majority of the votes cast because of two prior Nevada Supreme Court Orders in this case.[1] Local 14 and the Board argued that the Supreme Court orders are not controlling, do not limit the EMRB's discretion to resolve the good-faith doubt about whether ESEA or Local 14 has majority support that caused the EMRB to order an election, and that exceptions, including for "manifest injustice", to the law of the case doctrine apply.

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[1] *See Education Support Employees Ass'n. v. Employee-Management Relations Board*, Docket Nos. 42315/42338 (December 21, 2005) ("2005 Order"); *International Brotherhood of Teamsters, Local 14 v. Education Support Employees Ass'n.*, Docket No. 51010 (December 21, 2009) ("2009 Order").

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

Having considered the pleadings and arguments of counsel presented at the April 20, 2016, hearing, IT IS HEREBY ORDERED:

1. The Petition for Judicial Review is GRANTED, and the 2016 Board Order is VACATED.

2. The matter is remanded to the Board to make the determination as to what, if any, further action is appropriate.

DATED this 4 day of May, 2016.

DISTRICT COURT JUDGE

Submitted by:
DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY

By: */s/ Francis C. Flaherty*
Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051
Attorneys for Petitioner

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

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CLERK OF THE COURT

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

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

DISTRICT COURT

CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Petitioner, v. STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14; and CLARK COUNTY SCHOOL DISTRICT Respondents.	Case No.: A-15-715577-J Dept. No.: I

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Respondent STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD hereby appeals to the Nevada Supreme Court from the final order entered in this action on the 17th day of May, 2016

and served by mail on or about May 17, 2016.

DATED this 9th day of June, 2016

ADAM PAUL LAXALT
Attorney General

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

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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 June, 2016, I served the foregoing Notice of Appeal by serving a copy via Wiznet Electronic Service to the following:

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

Kristin Martin, Esq.
McCracken Stemmerman & Hoslberry
1630 S. Commerce St.
Las Vegas, Nevada 89102
klm@dcbsf.com

Scott Greenberg, Esq.
Clark County School District
5100 W. Sahara Avenue
Las Vegas, Nevada 89146
sgreenberg@interact.ccsd.net

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

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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-13-715577-J

JOINT APPENDIX – VOLUME II

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*

Case No. 70586

INDEX TO APPELLANT'S APPENDIX

Appellant, STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, by and through its undersigned attorneys, Attorney General ADAM PAUL LAXALT; Chief Deputy Attorney General GREGORY L. ZUNINO; Deputy Attorney General DONALD J. BORDELOVE, hereby submits this JOINT APPENDIX as follows:

Order Denying Petition for Judicial Review Filed by the Education Support Employees Association and by the International Brotherhood of Teamsters filed 10/29/03	I	027-028
Order Granting Countermotion to Dismiss filed 06/08/15	I	179-180
Order Granting Petition filed 12/18/13	I	156-161
Order Item No. 520C dated 09/19/02	I	001-002
Order Item No. 520F dated 01/23/03	I	012-014
Order Item No. 520I	I	053-054
Order Item No. 520J	I	065-067
Order Item No. 520K	I	085-086
Order Item No. 520M dated 10/24/12	I	097-098
Order Item No. 520Q	I	163-169
Order Item No. 520T filed 01/20/16	I	189-191
Order of Affirmance filed 12/21/05	I	037-049
Order of Affirmance filed 12/21/09	I	081-084
Petition for Judicial Review filed 01/20/16	I	196-200
Petition for Judicial Review filed 03/19/15	I	173-178
Petition for Judicial Review filed 09/18/06 (IBT 14)	I	055-058
Petition for Judicial Review filed 09/27/02	I	015-017
Petition for Writ of Mandamus or in the Alternative for Writ of Certiorari filed 01/03/13	I	130-154

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Tally of Ballots filed 02/05/15	I	172
Tally of Ballots filed 12/07/15	I	181-184
Transcript of Proceedings filed 04/26/16	II	335-463
Written Notice of Entry of Order filed 10/30/03	I	029-030

Dated: October 18, 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 18th day of October, 2016 I served the foregoing **Joint Appendix – Volume II** 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

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CLERK OF THE COURT

OPPS

Kristin L. Martin, SBN 7807
McCRACKEN, STEMERMAN & HOLSBERRY
1630 S. Commerce Street
Las Vegas, NV 89102
Tel: (702) 386-5107
Fax: (702) 386-9848
klm@dcbsf.com

Attorneys for International
Brotherhood of Teamsters Local 14

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization,

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No.: A-15-715577-J

Dept. No.: 1

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S OPPOSITION TO THE PETITION FOR JUDICIAL REVIEW

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 judges of this court may evaluate possible disqualification or recusal.

International Brotherhood of Teamsters Local 14 has no parent corporation and no corporations own any stock in Local 14. McCracken, Stemerman, & Holsberry is the only law firm that has appeared or is expected to appear for Local 14 in this case.

/s/ Kristin L Martin
Kristin L. Martin, SBN 7807
Attorneys for *International Brotherhood of Teamsters Local 14*

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TABLE OF AUTHORITIES

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Cases

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Statement of the Issues

1. The Employee Management Relations Board ("EMRB") held two elections to determine whether either Education Support Employees Association ("ESEA") or Teamsters Local 14 ("Local 14") had majority support. Would it have been arbitrary and capricious for the EMRB to have abandoned that election process and left ESEA in place after ESEA was overwhelmingly rejected by the voters in both elections?

2. Did the EMRB properly exercise its discretion when it decided to resolve any doubt about which union a majority of employees support by holding a third election?

3. The results of the third election were 970 votes for ESEA to 4,349 votes for Local 14. Based on those results, was it rational for the EMRB to decide that Local 14 has more support than ESEA and that employees who did not vote assented to will of employees who voted?

Statement of the Case

A. A good faith doubt exists about whether ESEA or Local 14 has majority support.

In 2002, the EMRB concluded following an evidentiary hearing that "a good faith doubt exists whether ESEA or Teamsters [Local] 14 or any other employee organization is supported by a majority of employees" in the CCSD

bargaining unit." Administrative Record filed April 23, 2012 in Case No. A528346 and on March 2, 2016 in this case ("AR") 111. Based on that conclusion, the EMRB ordered an election pursuant to NRS 288.160(4) "to determine which employee organization, if any, is supported by a majority of the CCSD employees in this bargaining unit." AR 112. ESEA challenged the election order on multiple grounds, all of which the Nevada Supreme Court rejected: "Substantial evidence supports the EMRB's decision that a good faith doubt existed and an election was justified." Addendum to the Administrative Record, filed April 20, 2012 in Case No. A528346 and April 1, 2016 in this case ("Adden. to AR") 277.

B. The First Election

1. The EMRB adopted an experimental interpretation of its regulation.

NAC 288.110 states that "An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if: . . . (d) The election demonstrates that the employee organization is supported by a majority of the employees within the particular bargaining unit." NAC 288.110(10)(d).[1] The EMRB interpreted that provision to mean that, in

[1] At the time, this regulation appeared at NAC 288.110(9)(d).

order to prevail in the election that it had ordered, ESEA or Local 14 had to win votes from a majority of all potential voters regardless of how many votes were cast:

> [A]lthough the Legislature does not appear to have specifically addressed whether the majority is of "votes cast" or "of members of the bargaining unit" in NRS 288.160(4), NAC 288.110(9)(d) does provide a clear interpretation that a majority of the employees within the particular "bargaining unit" is required. Consequently, the Board will require the votes of a 50% plus one of the employees in the bargaining unit to be obtained by an organization before it will be certified as representing that unit.

AR 120-21. On review, the Supreme Court deferred to the EMRB's interpretation of the regulation, and also stated in *dictum* in its unpublished opinion that NRS 288.160(4)'s reference to "a majority of the local government employees in the particular bargaining unit" also means a majority of all employees, not just those who vote. Adden. AR 279-80.

2. Local 14 won the overwhelming majority of votes cast.

When the election was held, less than half of all potential voters cast ballots. At the time of the election, there were 10,386 employees in the bargaining unit. A total of 4,797 ballots were cast, of which 2,711 ballots were cast for Local 14; 1,932 ballots were cast for ESEA; and 93 ballots were cast for "No Union." Adden. AR 378. While neither union received votes from a majority of all potential voters, Local 14 won 57 percent of votes cast.

C. The Second Election

1. This Court decided that NRS 288.160(4) requires the EMRB to exercise its discretion to decide how to resolve the doubt about whether ESEA or Local 14 has majority support.

After the first election, the EMRB certified the election results and then declared that its jurisdiction was exhausted. AR 161-64. When Local 14 petitioned for judicial review, the District Court remanded to the EMRB with instructions to exercise its authority to determine whether the majority of CCSD employees support ESEA:

> The Petition for Judicial Review if GRANTED because the EMRB erred in deciding that its jurisdiction was exhausted. The EMRB decided that a good faith doubt exists as to whether any employee organization enjoys the majority support of CCSD employees in the bargaining unit currently represented by ESEA, and ordered and conducted an election pursuant to NRS 288.160(4) to resolve that doubt. Having done so, it was within the EMRB's jurisdiction to resolve that doubt [in] accordance with the relevant provisions of NRS Chapter 288 and NAC Chapter 288. The EMRB was in error when it decided that its jurisdiction was exhausted after it tallied and certified the number of votes that each option on the election ballot received. The Court makes no finding that the EMRB has to proceeding in a certain fashion. The Court hereby remands this case to the EMRB for further proceedings in accordance with this Order.

Adden. AR 292. The District Court explained its decision as follows:

> In a nutshell my view comes to this. Having exercised its discretion given to it under the statute to determine whether it believes there's a good-faith doubt whether any employee organization is supported by a majority of the local government employees, having done that and sort of stepped into the breach, if you will, having recognized a

question or an issue, it is not only within the jurisdiction of the board to take some action to resolve that, that doubt, in accordance with the various provisions of NRS 288 and NAC 288, it is error to then say, well, we simply have no jurisdiction and to say we've exhausted jurisdiction. And that is particularly the case B or illustrated in a situation such as we have here where the union, in this case, ESEA, not only did not get a majority of votes of all those that were employees, which would come as no shock because neither union did, but there was another union on the ballot that got more votes.

What does it mean? I don't know, but I believe that the Board not only – well, I believe that the Board does have jurisdiction to take further steps to resolve this in accordance with its legislative mandate.

I make no other finding. I make no finding that the Board has to proceed in a certain fashion. I make no finding that the Board has to – I make no finding where I would, in effect, step into the shoes of the Board. I simply find that there is more under the statute that the Board can, and not only can, but should do in order to resolve the question which it, itself, has raised.

Adden. AR 284-85.

On remand, the EMRB acknowledged that the doubt remained about whether either union enjoyed majority support, but decided that it would not take any steps to resolve that doubt because a runoff election under the same vote-counting rule would have the same inconclusive result. AR 166. Since the EMRB did not exercise its discretion to craft a method for resolving the doubt, this Court ordered the EMRB to hold a runoff election pursuant to NAC 288.110(7). Adden. AR 354-55. The Supreme Court affirmed this ruling, and

also held that the same majority of all potential voters rule is applicable to a mandatory runoff election under NAC 288.110(7). Adden. AR 378-79.

2. The District Court directed the EMRB to come up with an election plan that is reasonably calculated to produce a conclusive result.

Next, the EMRB decided to use the same election plan to conduct the runoff election, instead of changing the rules to encourage voter participation. The District Court remanded the matter to the EMRB "to adopt an election plan for the runoff election between Local 14 and ESEA that is reasonably calculated to produce a definitive result." Adden. AR 382. The District Court explained its reasoning as follows:

> I must reject any notion that the Legislature intended, or for that matter continues to intend that vain acts be done, that an election be proposed that does not – is not reasonably calculated to produce a definitive result to end the question. I therefore conclude that one must conclude that the EMRB has all discretion and power to form in its election plans, election plans that have the objective to provide and arrive at a definitive result.
>
> However, I find that EMRB has all discretion to determine what is – what plan is reasonably calculated to do that. I accept the argument of Mr. Davis that different elections call for different measures to be taken. And the Board must be given the discretion and the power to formulate its plan – plans with that in mind.
>
> I find the -- the reason I am essentially granting the Petition for Judicial Review is because it seems to me that the EMRB has taken the position that its hands are tied. . . .

> I do not believe that the Supreme Court intended to say, unless the parties agree on a plan, you're limited to anything other than, as I have said, I believe that a Supreme Court's intention, I don't -- however I interpret the law, I'm hoping, is in conformity with the way the Supreme Court does, that the intention behind the law is to give the EMRB a wide latitude of discretion, except that it must be for a plan which is reasonably calculated to produce a result.

Adden. AR 385-86.

The Supreme Court did not review the District Court's ruling. Instead, it vacated the District Court's order for lack of jurisdiction, holding that neither NRS 288.160(4) nor NRS 233B.130 permit pre-election review of the election procedure selected by the EMRB. Adden. AR 393-95.

3. Local 14 won the second election by an even wider margin than it won the first election.

The second election was held in early 2015. Of 5,255 votes cast, 3,692 votes (representing 71 percent) were cast for Local 14. In contrast, ESEA received only 1,498 votes. AR 468. Compared with the first election, Local 14 received 981 more votes and ESEA received 434 fewer votes.

D. The Third Election

1. The EMRB exercised its discretion to order a third election to resolve any remaining doubt.

Following the second election, the EMRB acknowledged the experimental and dysfunctional nature of the vote-counting rule adopted only for this election:

"The history of this case shows that the 'majority of the unit' standard is a failed experiment incapable of any meaningful practical application." AR 474. The EMRB did not attempt to abandon the process as it did after the first election. Instead, consistent with the District Court's repeated instructions to the EMRB to take steps to resolve the doubt and to devise an election plan that is reasonably calculated to produce conclusive results, 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:

> 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 has 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.

AR 474. In contrast to the summary orders the EMRB issued following the first election and leading up to the second election, this order contains extensive reasoning.

The EMRB first explained why it concluded that NAC 288.110(7) does not *require* it to hold another runoff election:

> An interpretation of NAC 288.110(7) as requiring additional mandatory elections would entail the same majority vote counting standards be use 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.

AR 471. Next, the EMRB explained why the policy objectives undergirding the statute support a different rule:

> 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).

AR 471. Finally, the EMRB laid out the remaining options available to it:

> 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.

AR 472.

Having concluded (as this Court previously explained) that NRS 288.160(4) does not permit it to leave unresolved the doubt about whether ESEA or Local 14 has majority support, the EMRB decided that it would exercise its discretion to resolve that doubt by holding an election that is not mandated by NAC 288.110(7) and determine the outcome based on a majority of votes cast. The EMRB expressly overruled its prior order in this case in which it interpreted NAC 288.110(10)(d) to require the majority of all potential voters to vote, and gave two reasons for doing so. First, holding a second runoff election under that rule would be unlikely to produce conclusive results because it did not accomplish that in the first two elections. Second, the EMRB used a "majority of votes cast" standard in competitive elections between other unions, and those elections produced meaningful results. Anticipating ESEA's argument in this petition for judicial review, the EMRB explained why the Supreme Court's order did not preclude it from doing so: "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." AR 474.

2. Local 14 won even more votes in the third election.

The third election was held in late 2015. A total of 5,319 employees voted. This time, Local 14 won 4,349 votes (representing 81 percent), while ESEA won only 970 votes. AR 630. On January 20, 2016, the EMRB declared that Local 14 "shall be the exclusive bargaining representative of the employees in the bargaining unit." AR 625-26

Summary of the Argument

For fourteen years, thousands of employees of the Clark County School District have been trying to change their bargaining representative. NRS 288.160 gives them the right to do so, but their effort has been hamstrung because in 2002, the EMRB adopted a new, experimental rule that required them to secure votes from a majority of all potential voters, even though a majority of employees do not vote. Three elections have been held. Each time, Local 14 not only received many more votes than ESEA, but Local 14 also received more votes than it did in the preceding election and ESEA received less. Local 14 won the final election by 81 percent. The results of each election are as follows:

	Local 14	ESEA
First Election	2,711	1,932
Second Election	3,692	1,498
Third Election	4,349	970

ESEA's claim that a legal regime premised on majority support gives it, and not Local 14, the right to represent the School District employees belies basic common sense.

Following the third election, the EMRB had three options available to it: continue to hold successive runoff elections, using the same method of determining the outcome; leave ESEA in power despite voters' overwhelming rejection of it; or employ a new method of determining which union enjoys majority support. The EMRB opted for the only rational path: it employed a new method that was capable of producing conclusive results. In a model of reasoned decision-making, the EMRB acknowledged that the vote-counting rule it adopted and used only in this case was a "failed experiment." Based on the results of the third election, the EMRB ordered the School District to recognize Local 14.

The EMRB's decision to determine the third election's outcome based on a majority of votes cast was within the EMRB's discretion. Neither the statute nor the governing regulation make clear what the EMRB was to do when the result of

a runoff election are inconclusive. Thus, the EMRB had to fill that gap in the statute and regulations. That decision is entitled to deference. The EMRB's decision not to leave ESEA in power and to instead use a functional method of resolving whatever doubt that remained after the first two elections is rational, consistent with this Court's prior rulings and entitled to judicial deference. This Court has previously decided that the EMRB may not abandon the election process even though the "majority of all potential voters" standard produced inconclusive results; and that the EMRB has discretion to devise an election plan that is capable of producing conclusive results.

The Supreme Court's prior decisions in this case do not preclude this approach. Like the statute and regulation, those decisions do not tell the EMRB what to do if the runoff election produced inconclusive results. The decisions are entirely silent on that question.

There are other reasons why the Supreme Court's decisions do bind the EMRB in this circumstance. After discussing the meaning of NRS 288.160(4) in *dictum*, the Court deferred to the EMRB's interpretation of NAC 288.110. The EMRB is allowed to change its interpretation of a regulation. The Court did not publish the decisions, giving them no precedential value. All that ESEA is left with is the law of the case doctrine, and that doctrine is not inflexible. An exception exists when new facts emerge at later stages of the case and adhering to

the prior decision would result in manifest injustice. Disregarding the votes of over 80 percent of voters would certainly be a manifest injustice.

ESEA's other arguments about why it should remain the representative conflict with the basic principle underlying Nevada's collective bargaining law: that employees are to be represented by the union with majority support.

Argument

A. The Standard of Review.

This case involves the EMRB's decision about how to fill a gap left by the relevant statute and regulation. Courts "defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the statute's or regulation's language." *Wynn Las Vegas v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1182 (2013). As the petitioner, ESEA bears the burden of proving that the EMRB's decision is invalid. NRS 233B.135(2).

B. The case is about how – not whether – the EMRB may determine which union has majority support.

1. NRS Chapter 288 requires recognition of the union with majority support.

There is no dispute that Nevada's local government collective bargaining law is built on a policy of requiring unions to have majority support in order to be recognized as the exclusive bargaining representative. NRS 288.160(2) (requiring

a verified membership list when a union is voluntarily recognized); NRS 288.160(3)(c) (authorizing an employer to withdraw recognition from a union that ceases to be supported by a majority of employees); NRS 288.160(4) (authorizing the EMRB to hold elections when it doubts which union has majority support). The central question in this case is *how* the EMRB might measure employees' preferences.

It is also undisputed that the initial and runoff elections between Local 14 and ESEA did not – and could not – produce conclusive results because they were conducted under a "majority of all potential voters" standard. Those elections demonstrated that the "majority of all potential voters" standard is not a viable way of determining majority support for the simple reason that not enough employees participate. The EMRB was then left with two options: leave ESEA in place as the employees' representative, or use another method to gauge which union has majority support.[2] Leaving ESEA in place would have conflicted with the basic tenet of the statute: that employees are to be represented by the union that has majority support. The successive elections demonstrated that ESEA, not only lacked majority support, but also had much less support than Local 14. The final election demonstrated this in stark terms: the vote tally was 4,349 to 970.

[2] The EMRB could have engaged in the futile act of holding successive runoff elections under the same nonfunctional standard, but reasonably interpreted NAC 288.110(7) as not requiring it to do so. AR 470-71.

The only option left for the EMRB was to devise a different method for determining majority support.

2. The EMRB's decision how to resolve its initial doubt about whether ESEA or Local 14 has majority support is entitled to deference.

At the hearing on ESEA's motion for a stay, the Court asked whether there were any other options available to the EMRB. It was, of course, possible for the EMRB to devise another method of gauging majority support. For example, the EMRB could have conducted a "rolling election" by continuing to solicit ballots until one union received votes from a majority of all potential voters, as Local 14 advocated after the second election. But as this Court explained in response to Local 14's argument at that time, while the EMRB must take steps to resolve the doubt that triggered the election process and those steps must be calculated to produce a definitive result, the choice of method to use is left to the EMRB's discretion. *See* Adden. AR 284-85 (explaining that "it is not only within the jurisdiction of the Board to take some action to resolve that, that doubt, in accordance with the various provisions of NRS 288 and NAC 288, it is error rot say, well, we simply have no jurisdiction"); Adden. AR 385-86. ("[T]he intention behind the law is to give the EMRB a wide latitude of discretion, except that it must be for a plan that is reasonably calculated to produce a result.").

NRS 288.160 does not provide the EMRB with explicit direction about how to resolve the doubt that remained following the runoff election, but filling gaps in a statute is the classic function of an administration agency: "The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Since the EMRB has announced through a detailed and well-reasoned decision how it will do so, the EMRB's decision is entitled to judicial deference.

ESEA asserts that the EMRB could not bring the election process to a conclusion by conducting a third election because a statutory provision does not expressly authorize it to do so. As a general matter, administrative agencies lack implied power, but there is an exception to that rule when such power is essential to carrying out the agency's express duties. *City of Henderson v. Kilgore*, 122 Nev. 331, 334-35, 131 P.3d 11, 13 (2006). Authority is essential and may be implied if authority expressly granted to the agency "would be meaningless without the authority." *Clark County Sch. Dist. v. Clark County Classroom Teachers Ass'n*, 115 Nev. 98, 99, 977 P.2d 1008, 1011 (1999) (upholding implied power to issue subpoenas as necessary to the express power to hold evidentiary

hearings).[3] Here, NRS 288.160(4) expressly authorizes the EMRB to hold secret-ballot elections to determine which of two competing unions a majority of employees support. NRS 288.160(4) "would be meaningless" if the EMRB could not resolve the doubt that exists by conducting an election that will have meaningful results.

3. It is rational to decide that the majority of votes cast represent the will of all potential voters.

The EMRB's decision to rely on the majority of votes cast to determine the will of nonvoters is rational. It is not an original approach. That method of deciding elections is used in most, if not all, government elections in the United States and Nevada. It also applies in private sector union representation elections conducted by the National Labor Relations Board. The NLRB explained the rational:

> [E]lection results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining. The law does not compel any employee to vote, and the law should not permit that right, to refrain from voting, to defeat an otherwise valid election. . . . In political elections,

[3] The case on which ESEA relies to argue that EMRB has no implied powers -- *Sadler v. Bd. of Comm'rs of Eureka Cty.*, 15 Nev. 39 (1880) – was decided more than 135 years ago, and long before the development of administrative agencies.

> voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation.

Lemco Constr. Inc., 283 NLRB 459, 460 (1987). Federal courts have unhelp this rational. *See, e.g., NLRB v. Singleton Packing Co.*, 418 F.2d 275, 279 (5th Cir. 1969) ("[T]he general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote."); *NLRB v. Deutsch Co.*, 265 F.2d 473, 479 (9th Cir. 1959) ("It has repeatedly been held under well recognized rules attending elections 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."); *NLRB v. Standard Lime & Stone Co.*, 149 F.2d 435, 438 (4th Cir. 1945) ("[I]t would be as absurd to hold that collective bargaining is defeated because a majority of employees fail to participate in an election of representatives as it would be to hold that the people of a municipality are without officers to represent them because a majority of the qualified voters do not participate in an election held to choose such officers.").

C. The Supreme Court's orders do not preclude the EMRB from using a "majority of votes cast" standard at this stage of the election process.

1. The Supreme Court did not decide what would happen if the runoff election produced inconclusive results.

ESEA argues that the Supreme Court's characterization of NRS 288.160(4) as "plain and unambiguous" precludes the EMRB from ever determining the outcome of any election based on the majority of all votes cast. But the decisions address only the initial and runoff elecctions. Nothing in either Supreme Court decision says what the EMRB must do if, as ultimately occurred here, the runoff election produced inconclusive results.

2. The Supreme Court deferred to the EMRB's interpretation of NAC 288.110.

In *ESEA*, the Supreme Court concluded that it would "not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110." Adden. AR 280. The Court's conclusion reflects the proper deference to an administrative agency's interpretation of its governing regulations. *See Wynn Las Vegas*, 311 P.3d at 1182.

The Court made a factual mistake in stating that it would "not disturb the EMRB's interpretation of NRS 288.160" because the EMRB did not purport to interpret NRS 288.160. This is clear from the EMRB's decisions. When the EMRB announced in 2003 that it would determine the outcome of the election

between ESEA and Local 14 based on the majority of all potential voters, the EMRB relied exclusively on NAC 288.110:

> [A]lthough the Legislature does not appear to have specifically addressed whether the majority is of "votes cast" or "of members of the bargaining unit" in NRS 288.160(4), NAC 288.110(9)(d) does provide clear interpretation that a majority of the employees within the particular "bargaining unit" is required.

AR 120-21.

This statement by the EMRB is important because it defines the issue before the Supreme Court in *ESEA*. A statement that is "unnecessary to a determination of the questions involved" is *dictum* that does not control future decisions. *Argentena Consolidated Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009). Since the Court affirmed the EMRB's order, the Court's independent interpretation of NRS 288.160(4) was unnecessary to its decision. Indeed, the Court acknowledged that its review was "limited to determining whether there was substantial evidence in the record to support the agency determination or statutory interpretation." Adden. AR 271.

ESEA misunderstands this issue. If the Supreme Court had *reversed* the EMRB's interpretation of the regulation by concluding that that EMRB's interpretation was inconsistent with the statute, the Court's interpretation of the statute would not have been *dictum*. That is what Local 14 asked the Court to do,

but the Court declined. Since the Court *affirmed* the EMRB's interpretation of the regulation, the Court's discussion of the statute was unnecessary to the decision.

3. Even if the Supreme Court's interpretation of NRS 288.160(4) were not *dictum*, it would not preclude use of a different standard here.

The law of the case doctrine applies only "when an appellate court states a principle or rule of law necessary to a decision." *Hsu v. County of* Clark, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). As explained above, interpretation of NRS 288.160(4) was unnecessary to the Court's decision to affirm the EMRB's order. Moreover, there are exceptions to the law of the case doctrine. "[I]n some instances, equitable considerations justify a departure from the law of the case doctrine." *Id.* In *Hsu*, the Court acknowledged that federal and state courts have adopted exceptions to the law of the case doctrine when "subsequent proceedings produce substantially new or different evidence" or when "the prior decision was clearly erroneous and would result in manifest injustice if enforced." *Id.* at 630, 173 P.3d at 729 (citing cases at fns. 17, 19 and 20). Although the *Hsu* Court formally adopted only one of these exceptions (that which was applicable to the case before it), the Court did not reject the other exceptions. Rather, the Court explained that it had previously recognized and applied the "manifest injustice" exception:

> Although this court has never explicitly adopted any formal exceptions to the law of the case doctrine, in *Clem v. State*, we implicitly acknowledged the possibility of exceptions to the law of the case, stating that "[w]e will depart from our prior holdings only where we determine that they are so clearly erroneous that continued adherence to them would work a manifest injustice." Similarly, in *Leslie v. Warden*, we actually revisited our decision upholding a death penalty sentence when we determined that failure to do so "would amount to a fundamental miscarriage of justice."

123 Nev. at 631-31, 173 P.3d at 729.

Here, the repeated failure of the experimental vote-counting standard that the EMRB adopted at an earlier stage of this case presents new evidence that justifies reconsideration of the decision. Denying the School District employees the ability to be represented by the union they overwhelmingly prefer, just because many of their coworkers do not vote, is clearly wrong. If the "manifest injustice" exception applies anywhere, it applies here.

4. Even if the Supreme Court's interpretation of NRS 288.160(4) were not *dictum*, it would not bind the EMRB in future elections between ESEA and Local 14.

Importantly, *ESEA* and *Teamsters* are not published decisions so that they have no precedential value. Nev. Sup. Ct. R. 123 ("An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel . . . ."). As the EMRB explained, this case reflects the only occasion in which the EMRB

ever used the "majority of all potential voters" standard to determine the outcome of an election under NRS 288.160(4). AR 473. In every other election in the past and in every election in the future, the EMRB will use the normal "majority of all votes cast" standard, including in any future election between Local 14 and ESEA.[4]

5. The EMRB has discretion to address the ambiguity created by the successive elections with inconclusive results.

A basic rule of statutory interpretation is that seemingly unambiguous statutory language may be disregarded when applying the unambiguous meaning creates a conflict with another statutory provision or objective: "When two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and we will attempt to reconcile the statutes." *Fierle v. Perez*, 125 Nev. 728, 735, 219 P.3d 906, 910-911 (2009) (citing *Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005)). *Cf. Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 250 (1970) ("Statutory interpretation requires more than concentration upon isolated words; rather consideration must be given to the total corpus of pertinent law and the

[4] For this reason, the Legislature's failure to amend NRS 288.160(4) in response to the Supreme Court's decisions means little. There is no need for the Legislature to amend a statute to overturn a judicial decision that has no precedential value and that has been recanted by the administrative agency that adopted it.

policies that inspired ostensible inconsistent provisions."). In *Szydel*, the Nevada Supreme Court disregarded statutory language that it described as "unambiguous" in order to "advance the primary goal" of the statute and avoid a conflict that the case before it revealed. 121 Nev. at 457.

The Supreme Court specifically applied this principle to its deferential review of an EMRB decision in *Clark County School Dist. v. Local Government EMRB*, 90 Nev. 442, 445, 530 P.2d 114, 117 (1975). There, the Court affirmed the EMRB's interpretation of NRS 288 because it avoided rendering one provision a nullity. The Court explained that harmonizing statutory language is the EMRB's function:

> A precise determination of the distinctions between Section 1 as subtracted by Section 2 cannot be divined. That is the function of the EMRB. Unless the board should act arbitrarily, unreasonably or capriciously beyond administrative boundaries the courts must give credence to the findings of the board. An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action. Indeed, NRS 288.110 charges the board with that responsibility and great deference should be given to the agency's interpretation when it is within the language of the statute.

Id. (internal citations omitted).

The election process between Local 14 and ESEA revealed a conflict between the aspirational goal of resolving doubt under NRS 288.160(4) based on ballots cast by a majority of all potential voters, the practical reality that most

people do not vote, and the fundamental legislative objective of ensuring labor peace by allowing employees to choose their representative. As the expert administrative agency, it was the EMRB's duty to resolve this conflict.

It does not matter that previously in this election process, the EMRB decided to experiment with the "majority of all potential voters" standard. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB v. Local 103, Int'l Assn. of Iron Workers*, 434 U.S. 335, 351 (1978); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy."); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision-making. Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.").

All that is necessary is that the agency supply a "well-considered basis for the change." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

This is true even if the rule discarded by the agency had previously been endorsed by a reviewing court. *National Cable & Telecommunications Assn. v. Brand X Internet Svcs.*, 545 U.S. 967, 982-83 (2005). The principle that an agency can change its mind is essential to a vibrant process of administrative law development. The alternative "would lead to the ossification of large portions of our statutory law by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither the *Chevron* doctrine nor the doctrine of *stare decisis* requires these haphazard results." *Id.* at 983 (internal citation omitted).

D. The EMRB's order does not violate rulemaking requirements

The Administrative Procedure Act's rulemaking requirements apply only to "regulations" and not to "an agency decision or finding in a contested case." NRS 233B.038(2)(e). An "interpretative ruling" in which "the agency construes a statute or regulation according to the specific facts before it" is not a regulation. *Labor Commissioner v. Littlefield*, 123 Nev. 35, 40, 153 P.3d 26, 29 (2007); *see also K-Mart Corp. v. SIIS*, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985) (holding that rulemaking procedures did not apply to "the agency's pronouncement of how

the statute operated in a specific context. There is no reason to require the formalities of rulemaking whenever an agency undertakes to enforce or implement the necessary requirements of an existing statute."). That is what the EMRB did here. Faced with an initial election and a runoff election that did not produce conclusive results, the EMRB decided how it would resolve the doubt about which union represents a majority of employees. This was a unique circumstance which will probably never arise again because the EMRB no longer follows its experimental interpretation of NAC 288.110 as requiring votes from a majority of all potential voters.

E. The EMRB was not required to abandon the election process.

Since the Supreme Court's decisions do not prohibit the EMRB from using a different vote-counting method in the third election, ESEA is left to arguing that the EMRB was required to leave it in power, even though ESEA plainly lacks majority support. ESEA asks this Court to turn the principle of majority support that undergirds collective bargaining into a farce.

ESEA says that since Local 14 did not win the initial and runoff elections by an outright majority, the EMRB should have concluded that ESEA continued to enjoy majority support and abandoned the election process. But the initial and runoff elections that the EMRB held were not referenda on Local 14. They were competitive elections between Local 14 and ESEA. The text of NRS 288.160(4)

makes this clear. It authorizes the Board to conduct an election "upon the question" whether "any employee organization is supported by a majority" of the employees. The Supreme Court acknowledged this, stating that neither Local 14 nor ESEA won the first election and a runoff might produce similarly inconclusive results. Adden. AR 378-79.

ESEA points to the word "may" in NRS 288.160(4) and argues that the permissive verb means that the EMRB does not have to do anything even when there is a good faith doubt that the incumbent union enjoys majority support. This Court rejected that argument after the first election. A better interpretation of the permissive "may" is that it gives the EMRB discretion to decide *how* to resolve the doubt. The EMRB may hold an election under the "majority of all potential voters" standard or it may resolve the doubt in a different manner.

ESEA also asserts that NRS 288.160 prohibits a union from representing a bargaining unit in the absence of express evidence that a majority of employees support the union. That is incorrect. For example, as an alternative to an EMRB-ordered election, "[t]he parties may agree in writing, without appealing to the Board, to hold a representative election to determine whether an employee organization represents the majority of the local government employees in a bargaining unit." NRS 288.160(5). The outcome of such an election may be determined based on the majority of votes cast. Adden. AR 379 & n.2.

This argument is not a good one for ESEA to make because there is no express evidence that ESEA has majority support. ESEA says the EMRB should have relied on its unsubstantiated assertion that over forty years ago it presented a verified membership list showing that it represented a majority of bargaining unit employees. Since most or all of the employees employed by the School District forty years ago almost certainly are no longer employed, that is not express evidence that ESEA ever represented a majority of the current bargaining unit employees or that ESEA currently enjoys employees' support.

Characterizing employees as its "book of business", ESEA suggests – without any evidence – that a majority of employees currently pay dues to ESEA through paycheck deductions. In fact, as of September 2015, fewer than a majority – 4,729 out of 11,574 – did so. Supp. Martin Dec., Exh. B.[5] Even this number is probably not reflective of ESEA's support because Nevada law gives employees an incentive to remain members of the incumbent union even if they would prefer that another union represent them. An incumbent union has exclusive bargaining rights and may charge nonmember employees within its bargaining unit fees for individual representation in grievances, hearings and

[5] Nor is the fact that the School District refrained from withdrawing recognition from ESEA legally meaningful. An employer may, but is not required to, withdraw recognition from a union that lacks majority support. *See* NRS 288.160(3)(c).

arbitrations. *Cone v. Nevada Svc. Employees Union*, 116 Nev. 473 (2000). That is what the EMRB explained at an earlier stage of this case. AR 111 ("It is not unusual or inconsistent for employees to stay with the incumbent employee organization while indicating an interest in associating and/or joining a new organization as they do not want to lose the effectiveness of their representation, if necessary, by the incumbent employee organization and they did not wish to alienate that organization should it remain as their bargaining representative.").

Finally, ESEA recycles other arguments it made unsuccessfully at prior stages of this case. No new facts warrant reconsideration of those arguments now. It is beyond dispute that a good faith doubt exists whether ESEA or Local 14 has majority support among the CCSD employees. The EMRB held a fact-finding hearing and concluded that it had such doubt. The Supreme Court affirmed that conclusion as supported by substantial evidence. Adden. AR 276-77. It is irrelevant that other states require a "showing of interest" from 20 to 30 percent of potential voters before an election is held because NRS 288.160(4) requires a greater showing: that a good faith doubt exists. Moreover, the showing of interest requirement is merely an administrative tool to determine whether there is sufficient interest in the election to make it worth spending resources. *Cf.* 29 U.S.C. § 159(c)(1) (stating "the Board shall investigate [a decertification] petition and if it has reasonable cause to believe that a question of representation affecting

commerce exists shall provide for an appropriate hearing upon due notice."); 29 C.F.R. § 102.65(a) (authorizing Regional Director to hold an election "if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees"). Local 14 presented over 4,000 cards to the EMRB before the first election but the EMRB declined (due to lack of resources) to check the signatures on those cards. AR 111. Since then, three elections have demonstrated that Local 14 has much more support than ESEA. That the EMRB was justified in doubting whether ESEA has majority support is not seriously open to question.

Conclusion

For all of the foregoing reasons, ESEA's petition for judicial review should be denied.

Dated April 1, 2016

Respectfully submitted,

/s/ Kristin L. Martin
KRISTIN L. MARTIN

Attorneys for International Brotherhood of Teamsters Local 14

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, version 10 in Times New Roman, font size 14.

2. I further certify this brief complies with the page – or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionally spaced, has a typeface of 14 points or more, and contains 9006 words.

3. Finally, I hereby certify that I have read this appellate 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 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 number 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

Dated this 1st day of April, 2016

/s/ Kristin L Martin
Kristin L. Martin, SBN 7807

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 1, 2016, the foregoing INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S OPPOSITION TO THE PETITION FOR JUDICIAL REVIEW; DECLARATION OF KRISTIN L. MARTIN IN SUPPORT OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S OPPOSITION TO THE MOTION FOR STAY in Case No.: A-15-715577-J and ADDENDUM TO ADMINISTRATIVE RECORD VOLUME THREE has been filed through the Wiz-Net Electronic filing system of the Eighth Judicial District Court, Clark County, Nevada. The foregoing will be sent via U.S. First Class Mail and sent electronically to the interested parties in this action as follows:

S. Scott Greenberg, Esq.
Office of General Counsel
Clark County School District
5100 W. Sahara Avenue
Las Vegas, NV 89146

sgreenberg@interact.ccsd.net

Greg Zunino, Esq.
Nevada Attorney General
Scott Davis, Esq. Deputy Attorney General
555 E. Washington Avenue #3900
Las Vegas, NV 89101

sdavis@ag.nv.gov

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

fflaherty@dyerlawrence.com
smatuska@dyerlawrence.com

Dated: April 1, 2016

Tejal Naik

CERTIFICATE OF SERVICE

STAT
Kristin L. Martin, SBN 7807
McCRACKEN, STEMERMAN & HOLSBERRY
1630 S. Commerce Street
Las Vegas, NV 89102
Tel: (702) 386-5107
Fax: (702) 386-9848
klm@dcbsf.com

Attorneys for International Brotherhood of Teamsters Local 14

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization,

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No.: A-15-715577-J

Dept. No.: 1

DECLARATION OF KRISTIN L. MARTIN IN SUPPORT OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S OPPPOSITION TO THE PETITION FOR JUDICIAL REVIEW

I, Kristin L. Martin, declare:

1. I am counsel for International Brotherhood of Teamsters Local 14 in this matter and a member in good standing of the State Bar of Nevada. I have personal knowledge of the following facts, and if called, could and would testify competently thereto.

2. In 2015, I made a public records act request to the Clark County School District for the number of employees represented by Education Support Employees Association ("ESEA") and the number who pay dues to ESEA through dues deductions. Attached hereto as Exhibit A is a true and correct copy of the an email I received on or about September 21, 2015 from Cindy Smith-Johnson of the Clark County School District Office of the General Counsel responding to my request. Attached hereto as Exhibit B is a true and correct copy of the document that was attached to Ms. Smith-Johnson's email message. Exhibit B reflects that as of September 21, 2015, ESEA represented 11,574 employees, but only 4,729 paid dues to ESEA though paycheck deductions.

I declare under penalty of perjury under the laws of Nevada that the foregoing is true and correct.

Executed on this 1st day of April 2016 at San Francisco, California.

/s/ Kristin L. Martin
KRISTIN L. MARTIN
Attorneys for International Brotherhood of Teamsters Local 14

Exhibit A

Kristin Martin

From: Cynthia Smith-Johnson <csmith-johnson@interact.ccsd.net>
Sent: Monday, September 21, 2015 11:28 AM
To: Kristin Martin
Cc: Dinh Luong
Subject: PRR: ESEA Union Data
Attachments: PRR-Support Staff information.092115.pdf

Ms. Martin,

As required by NRS 239.0107, attached you will find documentation responsive to the remaining portion of the request for total number of bargaining unit employees in each "job family" who pay dues to ESEA.

Thank you.

Cindy Smith-Johnson
Public Records Request
Office of the General Counsel
publicrecordrequest@interact.ccsd.net
702-799-5865

Exhibit B

CLARK COUNTY SCHOOL DISTRICT - HUMAN RESOURCES UNIT
2015-16 SUPPORT STAFF TOTALS as of 9/21/15

Job Family	Support Staff with Deductions*	Total Support Staff
Administrative/Clerical/Secretarial	659	1923
Broadcast/Communications	14	49
Business/Finance	28	165
Food Service	298	633
Information Systems	140	396
Para-Professionals/Aides/Assistant	1923	4462
Police Services	18	38
Service/Operations Workers	695	1664
Transportation	771	1726
Skilled Trades/Technicians	165	466
Visual/Printed Communications	18	52
Grand Total	**4729**	**11574**

*Union dues can be paid directly to union. This total only reflects those that have requested dues to be deducted from CCSD payroll.
**Full and Part time Support Staff only. No temps or subs.

ADDM
Kristin L. Martin, SBN 7807
McCRACKEN, STEMERMAN & HOLSBERRY
1630 S. Commerce Street
Las Vegas, NV 89102
Tel: (702) 386-5107
Fax: (702) 386-9848
klm@dcbsf.com
Attorneys for International Brotherhood of Teamsters Local 14

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization,

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No.: A-15-715577-J

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ADDENDUM TO ADMINISTRATIVE RECORD

VOLUME THREE

(TRANSCRIPTS OF ARGUMENT AND ORDERS OF THE DISTRICT COURT AND THE NEVADA SUPREME COURT)

Index Addendum to Administrative Record, Volume Three

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381-382	Order (District Court, filed January 31, 2013)
383-390	Transcript Proceedings (District Court, filed January 28, 2013)
391-396	Order Granting Petition (Supreme Court, filed December 18, 2013)

ORDR
Kristin L. Martin, SBN 7807
Andrew J. Kahn, SBN 3751
McCRACKEN, STEMERMAN & HOLSBERRY
1630 S. Commerce Street
Las Vegas, NV 89102
Tel: (702) 386-5107
Fax: (702) 386-9848
klm@dcbsf.com
ajk@dcbsf.com

Attorneys for International Brotherhood of Teamsters Local 14

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization,

Petitioner,

v.

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, a Nevada nonprofit corporation; STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

CASE NO.: 06A528346

ORDER

//

//

//

Petitioner International Brotherhood of Teamsters Local 14's Second Supplemental Petition for Judicial Review came for hearing in Department 1 of this Court at 10:00 a.m. on January 8, 2013. Appearing for Petitioner International Brotherhood of Teamsters Local 14 ("Local 14") was Kristin L. Martin of McCracken, Stemerman & Holsberry. Appearing for Respondent State of Nevada Local Government Employee-Management Relations Board ("EMRB") was Nevada Attorney General by Deputy Attorney General Scott Davis. Appearing for Respondent Education Support Employees Association ("ESEA") was Michael Dyer of Dyer, Lawrence, Penrose, Flaherty & Donaldson.

The Petition for Judicial Review is GRANTED. This matter is remanded to the EMRB to adopt an election plan for the runoff election between Local 14 and ESEA that is reasonably calculated to produce a definitive result.

IT IS SO ORDERED.

Dated this 21 day of January, 2013.

Hon. Kenneth C. Cory
District Court Judge

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Plaintiff, vs. EDUCATION SUPPORT EMPLOYEES ASSOCIATION, et al., Defendants.	CASE NO. A-528346 DEPT. I TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

HEARING ON PETITION FOR JUDICIAL REVIEW

TUESDAY, JANUARY 8, 2013

APPEARANCES:

FOR THE PLAINTIFF:	KRISTIN MARTIN, ESQ.
FOR EDUCATION SUPPORT EMPLOYEES ASSN.:	MICHAEL WAYNE DYER, ESQ.
FOR NEVADA LOCAL GOV EMPL-MGMT RELATIONS B:	SCOTT R. DAVIS, ESQ. Attorney General's Office

COURT RECORDER:	TRANSCRIPTION BY:
BEVERLY SIGURNIK District Court	VERBATIM DIGITAL REPORTING, LLC Englewood, CO 80110 (303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, TUESDAY, JANUARY 8, 2012, 10:44 A.M.

THE CLERK: Page 7, International Brotherhood of Teamsters versus Education Support Employees Association, Case No. A-6 -- I'm sorry, A-528346.

MR. DAVIS: Good morning, Your Honor.

MS. MARTIN: Good morning, Your Honor.

THE COURT: Did we get our appearances?

MS. MARTIN: Kristin Martin of McCracken Stemerman & Holsberry for the International Brotherhood of Teamsters Local 14.

THE COURT: Okay.

MR. DAVIS: Good morning, Your Honor. Scott Davis from the Attorney General's Office on behalf of the EMRB.

THE COURT: Okay.

MR. DYER: Your Honor, Mike Dyer, with Dyer Lawrence Law Firm, on behalf of ESEA.

THE COURT: Okay. All right.

So, the question is, why should we dictate to the EMRB how they should -- whether they should do it for a set period or leave it open?

MS. MARTIN: The reason why -- well, there are two issues. One is, is the EMRB's decision adequate. Does it explain -- is the reason it gave for the decision it reached, about to reject Local 14's proposed election plan, and adopt the same election plan that was used in the first election, is

MR. DYER: Well, just for the record, that's not what I represented. What I said is, the Supreme Court has approved the majority vote requirement --

THE COURT: Okay.

MR. DYER: -- two times.

THE COURT: Well, I think our record is protected now.

My decision is based on the following observations and conclusions.

I find that I must reject any notion that the legislature intended, or for that matter continues to intend that vain acts be done. That an election be proposed that does not -- is not reasonably calculated to produce a definitive result to end the question.

I therefore conclude that one must conclude that the EMRB has all discretion and power to form in its election plans, election plans that have that objective to provide and to arrive at a definitive result.

However, I find that EMRB has all discretion to determine what is -- what plan is reasonably calculated to do that. I accept the argument of Mr. Davis that different elections call for different measures to be taken. And the board must be given the discretion and the power to formulate its plan -- plans with that in mind.

I find that the -- the reason I am essentially

granting the Petition for Judicial Review is because it seems to me that the EMRB has taken the position that its hands are tied.

In the argument, I guess it was, the -- when it gets down to explaining -- the closest that comes to explaining what the plan was in the part that says -- and I'm sorry, I can't give you the exact page reference for this, because I don't -- my briefing doesn't include the original brief. But at one point it says, "Having considered the above, it is hereby Ordered that International Brotherhood of Teamsters Local No. 14's Motion to Approve the Election Plan is denied, the proposed election plan not being an agreed-upon plan. See Nevada Supreme Court Order dated December 21st, 2009."

I do not agree with the interpretation of the Supreme Court's Ruling and Order as being one that ties the hand of the EMRB. If I'm wrong in this, it is probably on that very point. I do not believe that the Supreme Court intended to say, unless the parties agree on a plan, you're limited to anything other than, as I have said, I believe that a Supreme Court's intention, I don't -- however I interpret the law, I'm hoping, is in conformity with the way the Supreme Court does, that the intention behind the law is to give the EMRB a wide latitude of discretion, except that it must be for a plan which is reasonably calculated to produce a result.

And that it's not enough to say, you know, any old

election. And I recognize I'm grossly abusing the argument put forward by Mr. Dyer on behalf of the Union as to what they -- as to the reasons why it's okay if you don't get a result.

I can conceive of situations where you might not be able to get a result. But it seems to me the legislature wouldn't have passed this law if it didn't intend for the EMRB to use its experience, its expertise, and its broad powers and discretion to achieve the result of getting some kind of a fair approximation of the intent of the membership, or desires of the membership.

And it's up to the EMRB to determine how you achieve that. But I don't think it's okay for the EMRB to say, well, our hands are tied. We can't do it. I think that in itself amounts to an abuse of its discretion. I think that the EMRB is required to use its discretion and to -- as the Local 14 has argued, to then just simply state what it's -- the reasons why.

Because only in that fashion can a court later determine whether or not it has, indeed, complied. Perhaps this has resulted because of the intervention and meddling of the courts, because to the extent that the EMRB felt constrained to -- constrained by the Supreme Court's Order, and to even how much discretion it could use, then that's unfortunate. But as I said, I don't think that that -- it was the intention of the Supreme Court to constrain the EMRB.

It would not make sense to me to say, and you cannot use your discretion, unless somebody pointed out that, you know, something they did was, itself, an abuse of that discretion. But in the first instance, which this really is. I mean, we're revisiting a circumstance. You know, it's an ongoing thing, I recognize. But each time of setting up the plan for the election should be an advent which allows the EMRB to use its plentiful expertise and experience and discretion, notwithstanding its rather puny size of its staff as has been pointed out.

And that's the best I can do. Any questions about what the meaning of that is?

MR. DYER: I do, Your Honor.

THE COURT: Okay.

MR. DYER: If I understand correctly, what you're doing is you're remanding it to the EMRB.

THE COURT: Yes.

MR. DYER: You're telling the EMRB that they must come up with an election plan and explain their rationale as to why they came up with that plan and their reasoning in doing so.

THE COURT: Yes.

MR. DYER: You're not prohibiting them -- you're not directing them to adopt any particular plan.

THE COURT: That is correct.

MR. DYER: And you're not prohibiting them from even adopting the plan that they have --

THE COURT: That is correct.

MR. DYER: -- they have adopted.

THE COURT: That is correct.

MR. DYER: Thank you.

THE COURT: I agree with Mr. Davis's argument that the intention of the law is to -- this is one of those areas where the intention of the law is to give -- try to apply the expertise of a body to a -- to a recurring issue and let them develop the best means to address those issues. And that a court should them be somewhat hesitant to go trampling in, for all the reasons that we usually point to in judicial -- Petitions for Judicial Review.

And as -- insofar as the mandamus is concerned, I think I should probably just deny it at this point. I don't -- I don't think it's -- it fits the circumstance. So, I deny it. All right?

You'll prepare the Order?

MS. MARTIN: Yes, Your Honor.

THE COURT: All right. And you'll circulate it?

MS. MARTIN: I will.

THE COURT: Okay. Thank you all.

MR. DAVIS: Thank you, Your Honor.

MR. DYER: Thank you, Judge.

And thanks to your staff.

(Proceeding concluded at 12:29 p.m.)

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE, DISTRICT JUDGE,
Respondents,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14; EDUCATION SUPPORT EMPLOYEES ASSOCIATION; AND CLARK COUNTY SCHOOL DISTRICT,
Real Parties in Interest.

No. 62719

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER GRANTING PETITION

This is a petition for a writ of mandamus, or in the alternative, for a writ of certiorari to vacate a district court's order. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

A district court reviewed an administrative agency's chosen election procedure prior to the election's commencement. Dissatisfied with the agency's choice, the court instructed the agency to adopt a procedure that was reasonably calculated to produce a definitive result. We conclude

13-38404

that the district court lacked jurisdiction to conduct a pre-election review of the agency's chosen election procedure.

FACTS

The Local Government-Employee Management Board (EMRB) held a representative election to determine whether the International Brotherhood of Teamsters, Local 14 (Local 14), or the Education Support Employees Association would be recognized as the bargaining agent for the Clark County School District's non-certified employees' bargaining unit. The EMRB determined that the election's results were inconclusive and planned to hold a runoff election.

Local 14 objected to the EMRB's chosen procedure for the runoff election, and proposed a different method; but, the EMRB denied it. Local 14 then filed a petition for judicial review of the EMRB's chosen election procedure. The district court granted the petition and remanded the case to the EMRB to develop an election procedure that was reasonably calculated to produce a definitive result.

The EMRB claims that the district court lacked jurisdiction to consider a pre-election petition for judicial review and now seeks a writ of mandamus, or in the alternative, of certiorari to vacate the district court's order.

DISCUSSION

A writ of mandamus is available only when the petitioner does not have a plain, speedy and adequate remedy at law. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Here, writ relief is appropriate because the EMRB cannot appeal the district court's remand order. The district court's order did not

constitute a final judgment because the remand did not dispose of the case's underlying issue. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Consequently, the district court's order is not appealable. *See State, Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 424 (1993). Thus, the EMRB does not have an adequate remedy at law and mandamus relief is appropriate. *See Haley v. Eighth Judicial Dist. Court*, 128 Nev. ___, ___, 273 P.3d 855, 858 (2012).

District courts can review an administrative agency's decision only when a statutory provision expressly allows it. *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) (citing *Lakeview Vill., Inc. v. Bd. of Cnty. Comm'rs*, 659 P.2d 187, 192 (Kan. 1983)). Local 14 asserts that NRS 288.160(4) and NRS 233B.130 allowed the district court to review the EMRB's decision. Thus, we must review these statutes to determine if either one expressly authorizes a district court to conduct a pre-election review of an administrative agency's election procedure.

Under NRS 288.160(4),

> [i]f the Board in good faith doubts whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot upon the question. Subject to judicial review, the decision of the Board is binding upon the local government employer and all employee organizations involved.

NRS 288.160(4) did not give the district court the authority to review the EMRB's election plan. The statute authorizes the district court to determine whether the EMRB had a good faith doubt as to whether a majority of the bargaining unit's members supported a particular employee organization. However, the statute does not expressly provide the district court the power to conduct a pre-election review of the EMRB's

election procedure. Thus, the district court could not have reviewed the EMRB's election procedure under NRS 288.160(4).

> Under NRS 233B.130,
>
> 1. Any party who is:
>
> (a) Identified as a party of record by an agency in an administrative proceeding; and
>
> (b) Aggrieved by a final decision in a contested case,
>
> is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.

Local 14 is an aggrieved party, but the EMRB's chosen election procedure does not constitute a final decision. Choosing the election's procedure is an intermediate step in the election process. Only the EMRB's determination of the election's results would constitute a final decision. Thus, under NRS 233B.130, the district court could have conducted a pre-election review of the EMRB's election procedure only if this matter qualified as a contested case and a judicial review of the EMRB's determination of the election's results would not have provided Local 14 with an adequate remedy.

NRS 233B.130 did not provide the district court the power to review the EMRB's election procedure. This matter is not a contested case because the controlling regulations do not require notice and an opportunity for a hearing at which the parties can present evidence supporting their respective arguments. *See* NRS 233B.032 (defining a

"contested case"); *see also Citizens for Honest & Responsible Gov't v. Sec'y of State*, 116 Nev. 939, 951-52, 11 P.3d 121, 129 (2000). Specifically, NAC 288.110 governs runoff elections, and it does not require a district court to hold a hearing to address a party's pre-election challenges. Rather, the regulation provides an opportunity for a hearing only after the election has concluded. Additionally, judicial review of the EMRB's decision concerning the election's results would provide Local 14 with an adequate remedy. Thus, judicial review of the EMRB's chosen election method under NRS 233B.130 is improper.

Neither NRS 288.160(4) nor NRS 233B.130 vested the district court with the authority to conduct a pre-election review of the EMRB's chosen election procedure. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting Local 14's petition for judicial review.

Gibbons, J.

Douglas, J.

Saitta, J.

cc: Hon. Kenneth C. Cory, District Judge
Attorney General/Las Vegas
Clark County School District Legal Department
Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty
McCracken, Stemerman & Holsberry
Eighth District Court Clerk

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CLERK OF THE COURT

OPPS
ADAM PAUL LAXALT
Attorney General
GREGORY L. ZUNINO
Bureau Chief
Nevada Bar No. 4805
Bureau of Business and State Services
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1237
Fax: (775) 684-1180
E-mail: gzunino@ag.nv.gov
Attorneys for Respondent State of Nevada, Local Government Employee-Management Relations Board (EMRB)

DISTRICT COURT
CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization,

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

Case No: A-15-715577-J

Dept. No: I

Hearing Date: April 20, 2016

Hearing Time: 9:00 a.m.

RESPONDENT EMPLOYEE-MANAGEMENT RELATIONS BOARD'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW

Respondent, State of Nevada, Local Government Employee-Management Relations Board (EMRB), by and through its attorneys, Adam Paul Laxalt, Attorney General of the State of Nevada, and Gregory L. Zunino, Chief Deputy Attorney General, hereby files its Reply Memorandum of Points and Authorities in Opposition to the Petition for Judicial Review as filed by the Education Support Employees Association (ESEA) on January 20, 2016. The Petition for Judicial Review concerns the EMRB's Order of January 20, 2016, wherein the EMRB

determined that the International Brotherhood of Teamsters, Local 14 (Local 14) is entitled to act as the exclusive bargaining agent for certain persons employed by the Clark County School District (CCSD).

Attorney General's Office
100 N. Carson St. • Carson City, NV 89701

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Attorney General's Office
100 N. Carson St. • Carson City, NV 89701

TABLE OF AUTHORITIES

PAGE NO.

Attorney General's Office
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I. JURISDICTION

The Court has jurisdiction over this matter pursuant to NRS 288.130 and NRS 233B.130(1). The EMRB's final Order was issued on January 20, 2016. ESEA timely filed its Petition for Judicial Review on January 20, 2016.

II. ISSUES PRESENTED FOR REVIEW

Following an election conducted pursuant to NRS 288.160 and NAC 288.110(10), must the EMRB perpetuate the *status quo* unless the election returns conclusively establish that the challenger is supported by a majority of eligible voters, as opposed to a majority of those who actually cast votes in the election?

III. STATEMENT OF THE CASE

By its petition for judicial review, ESEA challenges the decision by the EMRB to certify and affirm the results of an election at which Local 14 was duly elected to succeed ESEA as the collective bargaining agent for members of the non-teacher support staff in the classified service of the CCSD. ESEA argues that it is entitled to represent the bargaining unit so long as Local 14 is unable to secure the votes of a majority of the bargaining unit's full membership (as opposed to a majority of the votes cast at the election).

IV. STATEMENT OF FACTS

The classified employees of the CCSD comprise a bargaining unit of 11,578 persons (SAR 00632-00633). The election at issue in this case was the third in a series of elections involving an ongoing struggle between ESEA and Local 14 for control of the bargaining unit. This power struggle dates back to 2002, when the EMRB agreed with Local 14 that there were grounds to hold an election (AR 00104-00112).[1]

At the first election, held in 2003, Local 14 received 57% of the 4,797 votes cast. At that time, the bargaining unit consisted of 10,386 employees. Despite this decisive victory by Local 14, the EMRB declined to recognize that Local 14 enjoyed the support of a majority of the bargaining unit (AR 00191-00193). Since 54% of the employees in the bargaining unit had not

[1] Citations to the Administrative Record, as filed on April 20, 2012, are designated "AR" followed by the applicable page number(s). Citations to the Supplement to Administrative Record, as filed on March 2, 2016, are designated "SAR" followed by the applicable page number(s).

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turned out for the election, the EMRB affirmed the status quo, leaving ESEA in place as the bargaining agent. In this regard, the EMRB had determined prior to the election that in order to replace ESEA, Local 14 would have to secure the votes of a majority of the bargaining unit's full membership of 10,386 employees (AR 00119-00121).

ESEA and Local 14 litigated the results of the first election and the EMRB's decision to leave ESEA in place as the bargaining agent for CCSD's classified employees. The litigation commenced at the district court level when ESEA and Local 14 filed a petition and cross-petition for judicial review challenging the EMRB's jurisdiction to hold an election and its resulting decision to affirm the status quo. The litigation resulted in two unpublished decisions by the Nevada Supreme Court. The first decision was issued on December 21, 2005 (AR 00177-00189). The second decision was issued on December 21, 2009 (AR 00196-00199). The case was ultimately remanded to the EMRB with instructions to hold a run-off election.

In the run-off election, held in early 2015, Local 14 received 71% of the 5,255 votes cast (SAR 00468). Although the size of the bargaining unit had not grown appreciably since the first election, the EMRB once again expressed reservations about the extent to which the full membership of the bargaining unit supported Local 14 (SAR 00469-00475). Accordingly, the EMRB ordered a second run-off election at which the winner was to be determined by a majority of the votes cast, as opposed to a majority of the full membership of the bargaining unit (SAR 00518-00524).

In late 2015, the EMRB held the second run-off election. At the second run-off election, Local 14 received 81% of the 5,319 votes cast (SAR 00619-00620). The vote count for Local 14 represents 37.5% of the bargaining unit's full membership. This represents an overwhelming victory for Local 14 given that 54% of the bargaining unit did turn out for the election. Assuming the nonvoters had turned out for the election, Local 14 would have had to secure a mere 23% of these votes in order to win the election under the standard proposed by ESEA.

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V. SUMMARY OF ARGUMENT

From a statistical standpoint, ESEA cannot reasonably argue that it enjoys a majority of the support of the full membership of the bargaining unit. In fact, the results from each of the three elections derive from a statistically valid sample of potential voters. Under any reasonable sample methodology, Local 14 is the overwhelming favorite among members of the bargaining unit.

In summary, there is no basis in fact to preserve the status quo with regard to the representation of CCSD's classified employees. Whether ESEA continues to act as the bargaining agent for these employees depends upon this Court's willingness to adopt ESEA's careless reading of NAC 288.110. Although the members of the EMRB initially adopted a similarly careless reading of NAC 288.110, the current members of the EMRB correctly reevaluated the meaning and import of the provision in light of the statute to which the regulation owes its existence, not to mention the plain language of the regulation itself.

In other words, the EMRB interpreted NAC 288.110 in the proper context and according to its plain language, recognizing that Local 14 has earned its rightful place as the bargaining agent for CCSD's classified employees. The EMRB's decision to certify the results of the second run-off election must be affirmed as an appropriate exercise of the EMRB's statutory discretion.

VI. STANDARD OF REVIEW

This case concerns the proper interpretation of NRS 288.160 and NAC 288.110. On a petition for judicial review, questions of statutory interpretation are reviewed by the district court *de novo*. *Williams v. United Parcel Service*, __Nev.__, 302 P.3d 1144, 1147 (2013). However, the district court should generally afford deference to an agency's interpretation of the statutes and regulations that the agency is charged with enforcing. *Clark County School District v. Local Government Employee Management Relations Board*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974). Here, EMRB is charged with enforcing NRS 288.160 and NAC 288.110. Therefore, the Court should afford deference to the EMRB's interpretation as memorialized in its Order dated January 20, 2016.

/ / / / /

Attorney General's Office
100 N. Carson St. • Carson City, NV 89701

VII. ARGUMENT

A. The Plain Language of NAC 288.110 Contemplates an Election at Which a Winner is Declared in Reference to the Number of Votes Cast.

As discussed below, NAC 288.110 must be construed in context. More specifically, a regulation must be construed in light of the plain and unambiguous language of controlling statutes. *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Furthermore, "[i]t is a fundamental rule of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000)(citations and internal quotations omitted).

In this case, when NAC 288.110 is construed in light of the context provided by NRS 288.160, there can be no doubt that the EMRB enjoys the discretion to declare the winner of an election between competing public sector labor unions in reference to the number of votes cast at the election rather than the number of eligible voters. Furthermore, even when context is completely stripped away, the plain language of NAC 288.110 establishes that the EMRB enjoys such discretion.

Substantive rules promulgated by way of regulations have the force and effect of laws. *State Board of Equalization v. Sierra Pacific Power Co.*, 97 Nev. 461, 463, 634 P.2d 461, 464 (1981). Regulations must, therefore, be construed according to their plain language, just as statutes must be construed according to their plain language. In other words, the words of a regulation must be given their plain and ordinary meaning. *Public Agency Compensation Trust (PACT) v. Blake*, __Nev.__, 265 P.3d 694, 696 (2011).

NAC 288.110 establishes a substantive rule of law, namely a rule concerning the recognition of employee organizations under NRS 288.160. According to NAC 288.110(10), an employee organization is entitled to official recognition when an election conducted by the EMRB "demonstrates" that the organization enjoys the support of a majority of the members of a bargaining unit. To "demonstrate" is to "prove something by showing an example of it." Merriam-Webster On-Line Dictionary, http://www.merriam-webster.com/dictionary/demonstrate.

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Indeed, an election is universally understood to be a sample or example of the whole. Rarely if ever, particularly in the United States, are elections attended by the entire universe of potential voters. To suggest that NAC 288.110 requires an election to be more than a representative sample of the whole is to ignore the ordinary meaning of the word "demonstrate." Here, the EMRB correctly determined that the second run-off election was an appropriate demonstration of support for Local 14.

B. The EMRB Enjoys Broad Statutory Authority to Resolve Labor Disputes.

NAC 288.110 is a product of NRS 288.160. In other words, NAC 288.110 implements the provisions of NRS 288.160 in regards to the resolution of disputes between public sector labor unions. Public sector labor unions are referred to as "employee organizations." NRS 288.040. Under NRS 288.160, a local government employer such as CCSD is expressly empowered by statute to confer official recognition upon an employee organization. NRS 288.160. This recognition gives the organization the right to act as the exclusive bargaining agent for a bargaining unit consisting of local government employees. NRS 288.160(2).

The EMRB derives its authority to address labor disputes from chapter 288 of NRS. Although the EMRB does not possess the power to enforce its orders in the manner of a district court, the EMRB does possess broad powers to adjudicate labor disputes and resolve related matters involving local government employees, employers, and employee organizations. *See City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006).

A local government employer may withdraw its recognition of an employee organization for a number of reasons, including the reason that the organization is not "supported by a majority of the local government employees in the bargaining unit for which it is recognized." NRS 288.160(3)(c). When there is doubt concerning the extent to which an organization enjoys the support of a majority its members, the EMRB may conduct an election upon the question. NRS 288.160(4). The EMRB has promulgated a regulation regarding the consequence of such an election. NAC 288.110 provides in pertinent part as follows:

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> An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if:
> (a) Challenged ballots are insufficient in number to affect the results;
> (b) No runoff election is to be held;
> (c) No timely objections are filed; and
> (d) The election *demonstrates* that the employee organization is supported by a majority of the employees within the particular bargaining unit.

NAC 288.110(10) (Emphasis added).

Here, the election undeniably "demonstrates" that Local 14 is supported by a majority of the members of the employees within the bargaining unit. While it is not a mathematical certainty that Local 14 enjoys the support of a majority of the members within the bargaining unit, the results of the election establish a high probability, in fact a near certainty, that Local 14 enjoys the support of a majority of the members. This is all that NRS 288.160 and NAC 288.110 demand of the election process - namely a reasonable demonstration of majority support for Local 14, not a mathematical certainty of majority support for Local 14.

C. NRS 288.160 Does Not Limit the EMRB's Discretion to Evaluate Election Results.

As discussed above, the EMRB is empowered by statute to conduct elections when it appears that the members of a bargaining unit would be better served by a new employee organization. NRS 288.160(4). In deciding whether to hold an election, the EMRB is bound by a duty to evaluate in good faith the facts and circumstances that potentially warrant the replacement of the existing employee organization. NRS 288.160(4) states, "If the Board in *good faith* doubts whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot upon the question" (emphasis added).

The reference to "good faith" in NRS 288.160 indicates that the EMRB has considerable discretion to evaluate the relevant facts and circumstances surrounding a request for an election. NRS 288.160 does not, by contrast, place specific limitations upon the conduct of an election. In fact, the only specific limitation upon the EMRB is the requirement to conduct the election by secret ballot.

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Furthermore, the only references in the statute to majority rule appear at NRS 288.160(2) and NRS 288.160 (3)(c). These provisions address the duties and responsibilities of the local government employer, not the EMRB. NRS 288.160(2) requires that the local government employer recognize an employee organization upon a "showing that it represents a majority of the employees in a bargaining unit . . ." while NRS 288.160(3)(c) authorizes the local government employer to withdraw recognition when the organization "[c]eases to be supported by a majority of the local government employees in the bargaining unit for which it is recognized." Neither provision places limitations upon the EMRB in deciding whether to certify election results or declare a winner.

In summary, the provisions of NRS 288.160 are plain and unambiguous. Under specified circumstances, they authorize local government employers to recognize and withdraw their recognition of employee organizations. They also empower the EMRB to conduct elections when there are reasonable questions about the level of support that an organization may enjoy among its members. Other than the requirement to conduct elections by secret ballot, NRS 288.160 does not impose rules or restrictions on the election process or the certification of election results.

When a statute is plain and unambiguous, the text of the statute governs its construction. *Falcke v. Douglas County*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000). The courts are not permitted to search beyond the text of the statute to ascertain unspecified rules, restrictions or limitations, particularly when none are fairly implied by the text of the statute itself. *Id*. In this case, NRS 288.160 is plain on its face, and does not suggest or imply that elections conducted by the EMRB must produce mathematical certainty.

D. NAC 288.110 Should Not Be Construed to Impose Limitations Not Found in NRS 288.160.

As noted above, NAC 288.110 authorizes the EMRB to hold elections for the purposes stated in NRS 288.160. Pursuant to NAC 288.110(10), the EMRB must confer official recognition upon an employee organization when the election demonstrates that the organization enjoys the support of the majority of the members of a bargaining unit. This does not mean that

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the EMRB must refrain from declaring a winner when there is only a moderate turnout for the election. So long as the election demonstrates that the organization enjoys the support of a majority of the members of the bargaining unit, the EMRB is within its discretion to declare a winner. In this case, the election demonstrates to a near certainty that Local 14 enjoys the support of a majority of the members of the bargaining unit.

To construe the regulation to require 100% certainty is to undermine the manifest purpose of NRS 288.160. A regulation must be consistent with the purposes of the statute that it implements. *State, Division of Insurance v. State Farm Mutual Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). When regulations undermine legislative intent, they are invalid. *Id.* The manifest purpose of NRS 288.160 is to give the EMRB considerable discretion to decide whether to hold an election. The statute gives the EMRB considerable discretion insofar as it directs the EMRB to exercise "good faith" when making the decision to hold an election. *See* NRS 288.160(4).

There is no reason to presume that in promulgating NAC 288.110, the EMRB relinquished its statutory discretion to declare the winner of an election that the EMRB has, in good faith, decided to conduct. If the EMRB has the discretion to hold the election, certainly it has the discretion to evaluate, in good faith, the results of the election. In fact, this is precisely why NAC 288.110 characterizes the election as a "demonstration" of support for one organization or another.

As a practical matter, every election is a demonstration of support for one candidate or another. However, elections rarely if ever produce mathematical certainty. Accordingly, the text of NAC 288.110 is not reasonably construed to require mathematical certainty. To the contrary, it is most reasonably construed as a directive to the EMRB to attribute consequences to the outcome of the election.

In this regard, the relevant portion of the regulation states that an "*employee organization will be considered* the exclusive bargaining agent for employees within a bargaining unit . . . *if . . . the election demonstrates* that the employee organization is supported by a majority of the employees within the particular bargaining unit." NAC 288.110(10) (emphasis added). On its

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face, the text of this provision addresses the consequences of the election, not the conduct of the election, the counting of votes, or the process of declaring a winner. In other words, the regulation conveys the simple message that the recognition of the organization is contingent upon the outcome of the election. ESEA reads between the lines of the regulation to extract a rule governing the election process. This construction of the regulation runs contrary to the statute from which the regulation springs.

E. The Law of the Case Doctrine is Inapplicable.

The Nevada Supreme Court has twice addressed this dispute by way of unpublished decisions, the first on December 21, 2005 (AR 00177-00189), and the second on December 21, 2009 (AR 00196-00199). In each instance, the fundamental question presented was whether the EMRB had properly exercised its discretion to order an election. In neither instance was the election imminent or on the cusp of proceeding.

As a preliminary matter, an unpublished decision "does not establish mandatory precedent except in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case." NRAP 36(c)(2), as amended by ADKT 504. Although this matter is arguably at a subsequent stage of the earlier proceedings, the conduct of the proposed election, and the required procedures for counting votes and declaring a winner at the conclusion of the election, were procedural questions not properly before the Court in 2005 and 2009.

While the Court addressed these procedural questions at the request of one or more of the parties, the Court's statements concerning the conduct of the election and required election procedures were *dicta*. In other words, as of the date of each decision by the Court, the open questions concerning voter participation and vote counting were committed by statute to the sound discretion of the EMRB.

Given that the EMRB is charged with the responsibility, pursuant to NRS 288.160 and NAC 288.110(10), to evaluate whether election returns "demonstrate" majority support for an employee organization, the significance of any forthcoming election returns was a matter to be decided in the first instance by the EMRB. In crafting a rule that effectively required a near

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perfect voter turnout for Local 14 to prevail in the election, the Court usurped the discretionary function of the EMRB. Since the election had yet to be held, the level of participation had yet to be determined, and the votes had yet to be counted, the Court's intervention in procedural matters was premature.

"A statement in a case is *dictum* when it is unnecessary to a determination of the questions involved." *Argenta Consolidated Mining Co. v. Jolly Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009)(citations and internal quotations omitted). Accordingly, it has no binding precedential value. *Id.* As they pertained to election procedures, the Courts statements in 2005 and 2009 were *dicta* and therefore have no application under the law of the case doctrine.

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). However, it is applicable only when the prior ruling was necessary to the decision. *Id.* In other words, the doctrine has no application to *dicta*. The Court's statements in 2005 and 2009 were *dicta* insofar as they purported to establish rules of procedure for the counting of votes and the evaluation of voter turnout. Consequently, they have no application to the current proceedings.

VIII. CONCLUSION

NRS 288.160 gives the EMRB the discretion to conduct an election for the purpose of resolving a dispute between public sector labor unions regarding the control of a bargaining unit. NAC 288.110(10) gives the EMRB the discretion to declare a winner of the election based upon its evaluation of the election returns and the level of voter participation. Neither NRS 288.160 nor NAC 288.110 requires that the election produce absolute mathematical certainty as to the level of support enjoyed by the winner among the full membership of the bargaining unit. In this case, the second run-off election demonstrates to a near mathematical certainty that Local 14 enjoys the support of a majority of the bargaining unit's full membership. Consequently, the EMRB properly determined that Local 14 is entitled to act as the bargaining agent for the bargaining unit currently controlled by ESEA.

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Therefore, ESEA's Petition for Judicial Review should be denied.

Date this 1st day of April, 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
GREGORY L. ZUNINO
Bureau Chief
Bureau of Business and State Services
Respondent State of Nevada,
Local Government Employee-Management
Relations Board (EMRB)

Attorney General's Office
100 N. Carson St. • Carson City, NV 89701

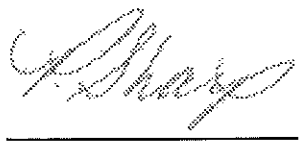
CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on the 1st day of April 2016, I filed and served the forgoing "Respondent Employee-Management Relations Board's Reply Memorandum of Points and Authorities in Opposition to Petition for Judicial Review" with the Clerk of the Court using the electronic filing system.

Further I certify that some of the participants in the case are not registered electronic filing system users and that I served a true and correct copy of the document on the following party by United States Mail, postage prepaid:

Francis C. Flaherty, Esquire
Sue S. Matuska, Esquire
Dyer, Lawrence, Flaherty, et al.
2805 Mountain St.
Carson City, NV 89703

Kristin L. Martin, Esquire
McCracken, Stemerman, et al.
1630 Commerce St., Ste A-1
Las Vegas, NV 89102



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RPLY
FRANCIS C. FLAHERTY
Nevada Bar No. 5303
SUE S. MATUSKA
Nevada Bar No. 6051
DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896 telephone
(775) 885-8728 facsimile
fflaherty@dyerlawrence.com

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, an employee organization

Petitioner,

vs.

STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, an agency of the State of Nevada; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14, an employee organization; and CLARK COUNTY SCHOOL DISTRICT, a county school district,

Respondents.

/

Case No. A-15-715577-J

Dept. No. 1

Hearing Date: April 20, 2016

Time: 9:00 a.m.

REPLY IN SUPPORT OF PETITIONER'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Date of Hearing: April 20, 2016
Time of Hearing: 9:00 a.m.

COMES NOW Petitioner, EDUCATION SUPPORT EMPLOYEES ASSOCIATION ("ESEA"), by and through its undersigned counsel and files this Reply in Support of its Opening Memorandum of Points and Authorities in Support of its Petition for Judicial Review. This Reply

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is based on the following memorandum of points and authorities and all the other pleadings and papers on file herein.

DATED this 8th day of April, 2016

DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY

By: _____
Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051
Attorneys for Plaintiff

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

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Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

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Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

INTRODUCTION

In this matter, the State of Nevada, Local Government Employee-Management Relations Board ("the Board") has attempted to avoid the effect of two Nevada Supreme Court orders and apply its own incorrect version of state and regulatory law on representation elections held pursuant to NRS 288.160(4). International Brotherhood of Teamsters, Local 14 ("Local 14") supports the Board's efforts to violate these supreme court orders interpreting NRS 288.160 and an administrative regulation, NAC 288.110, because it believes the result will be its displacement of ESEA as the recognized bargaining agent for the support staff employees of the Clark County School District ("the District"). Local 14 and the Board, therefore, have filed opposition memoranda to ESEA's supporting memorandum on its petition for judicial review.

In these pleadings, the parties state the issues for this Court's review differently, but in their totality, the pleadings make clear that the only issue that this Court needs to answer is: has the Board violated NRS 288.160(4) and NAC 288.110(10)(d)? The answer to this question will address the Board's pejorative characterization of the issue as "must the EMRB perpetuate the *status quo*" (Board Opp. at 1) and Local 14's characterization of the issue as only whether the Board has acted rationally. Local 14 Opp. at 1.

Fortunately, the Nevada Supreme Court has twice interpreted NRS 288.160(4) and NAC 288.110(10)(d) and declared their meaning. These sections provide the standard for determining the results of representation elections held to determine the recognized bargaining agent for local government employees, and the court held in 2005, and again in 2009, that they require an employee organization to receive an affirmative vote from a majority of all the employees of a particular bargaining unit, and not just of those who vote, to be declared the recognized bargaining agent or to displace an incumbent bargaining agent. Petitioner's Motion for Stay ("Stay Motion"), Exhibit ("Ex.") 2 and 3. Further, in these 2005 and 2009 orders, the court stated that this meaning is "plain and unambiguous" and that the Board is required to follow it "regardless of result." Stay Motion, Ex. 2 at 11. The supreme court even "tied its own hands" by stating that **it** would defer to the Nevada Legislature to change the standard if the Legislature saw fit. *Id.* at 12. The Board, however, has not shown such restraint.

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2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

After conducting two representation elections between ESEA and Local 14 and correctly applying the above-described standard to determine that ESEA remained as the recognized bargaining agent, the Board then simply ignored those supreme court orders, ignored basic notions of separation of powers between branches of government, and ignored the Administrative Procedure Act by adopting a new rule, conducting a second runoff election between ESEA and Local 14 and determining the results by the majority-of-the-votes-cast standard that the supreme court has twice rejected.

ARGUMENT

I. This Matter is Controlled by the Supreme Court 2005 and 2009 Orders Which Are the Law of the Case and Declare that NRS 288.160 and NAC 288.110 Plainly and Unambiguously Require an Affirmative Vote from a Majority of all the Employees of a Bargaining Unit.

As the statement of facts in ESEA's opening memorandum discusses at length, the litigation between ESEA, Local 14 and the Board has twice resulted in appeals to the supreme court that produced orders interpreting NRS 288.160(4) and NAC 288.110(10)(d).[1] In its 2005 Order of Affirmance, the supreme court stated:

> [T]he statute [NRS 288.160(4)] *and* administrative code [NAC 288.110(10)(d)] [2] plainly and unambiguously state that to win an election, the employee organization must have "a majority of the employees within the particular bargaining unit."

Stay Motion, Ex. 2 at 11(emphasis added). Further, the supreme court stated that because this was a "case of an unambiguous statute, the *EMRB is required to follow the law 'regardless of result.'*" *Id.* (emphasis added). Regarding its own authority, the supreme court stated that "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." *Id.* at 11-12.

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[1] There was also a writ proceeding before the supreme court regarding this Court's jurisdiction to conduct a pre-election review of a Board election order.

[2] The regulation quoted in the supreme courts' orders is NAC 288.110(9)(d), but the unchanged language is now located in NAC 288.110(10)(d).

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2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

The supreme court reaffirmed this position in its 2009 Order of Affirmance regarding the issue of conducting the first runoff election when it stated:

> [T]he language of NRS 288.160 *and* NAC 288.110 are plain and unambiguous and require 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.*

Stay Motion, Ex. 3 at 2 (emphasis added). Further, it specifically "conclude[d] that NRS 288.160(4)'s and NAC 288.110(10)(d)'s majority-vote requirement is equally applicable to the runoff election." *Id.* at 3. The supreme concluded by stating that "[w]e recognize that a runoff election may produce similar inconclusive results." *Id.*

A. The Supreme Court's Interpretation of NRS 288.160(4) was Necessary to its Orders.

Local 14 and the Board baldly assert that the above-quoted holdings from the supreme court's 2005 and 2009 orders, at least as to the meaning of NRS 288.160(4), were merely *dicta*. Local 14 Opp. at 20-21; Board Opp. at 10. A court's statements are *dicta* when they are "unnecessary to a determination of the questions involved." *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009). Local 14 argues that because the Board's adoption of the majority-of-all-employees-of-the-bargaining-unit standard in its 2003 order[3] was premised upon its interpretation of NAC 288.110, and not NRS 288.160(4), the Board's interpretation of that regulation solely "defined the issue before the supreme court" in 2005. *See* Local 14 Opp. at 21. Thus, per Local 14's argument, the Board order somehow had the effect of restraining the Nevada Supreme Court from fulfilling its constitutional function and from considering the very statute that enabled NAC 288.110–an absurd proposition at best.

No such shackles were placed on the court when it ruled on Local 14's appeal of the 2003 Board Order. Local 14 had squarely placed the issue of the meaning of the provisions of NRS chapter 288 before the court. The 2005 Order makes this clear when it states that "[*c*]*ontrary to Local 14's contention*, neither NRS 288.160 nor NAC 288.110 states that the employee organization seeking exclusive representation must have a majority of the employees who vote." Stay Motion,

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[3] The 2003 Board Order was the subject of the appeal that resulted in the 2005 Supreme Court Order. *See* Administrative Record 119-121.

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(775) 885-1896

Ex. 2 at 11 (emphasis added). Because the court was addressing Local 14's "contention," the court was compelled to interpret both NRS 288.160 and NAC 288.110, and it concluded that "the statute and administrative code plainly and unambiguously state that to win an election, the employee organization must have a 'majority of the employees within the particular bargaining unit.'" *Id.*

Furthermore, NRS 288.160(4) which governs the determination of bargaining agents through representation elections is the enabling statute for NAC 288.110(10)(d) which addresses the determination of the results of such elections. Thus, notwithstanding how the parties presented the issues back in 2005, the supreme court clearly was compelled to consider the meaning of NRS 288.160(4) to determine the meaning of NAC 288.110(10)(d). The fact that the court ultimately determined that the Board's interpretation of NAC 288.110 was within the "plain and unambiguous" language of NRS 288.160(4) does not compel the conclusion that the interpretation of the statute was not necessary to the court's interpretation of NAC 288.110. On the contrary, even the "simple" conclusion that the Board's interpretation of NAC 288.110 was within the language of NRS 288.160(4) required the interpretation of NRS 288.160(4); it was necessary to the "question involved."

Furthermore, in the 2005 order, the supreme court also addressed Local 14's contention that the Board had erred by not applying case law interpreting provisions of the National Labor Relations Act, the Railway Labor Act and other states' election laws that endorsed a simple majority-of-the-votes-cast standard. To rule on this, the court compared the language of NRS 288.160 (as was necessary), to the relevant provisions of the federal and state laws, and determined that its language was different and, therefore, not controlled or informed by such case law. Stay Motion, Ex. 2 at 12 ("the election provisions contained within NRS 288.160 and NAC 288.110 are different from those contained within the NLRA and the RLA."). Finally, by declaring in the 2005 Order that it would "defer to the Nevada Legislature as to whether the definition of a majority vote should be changed," the court made clear that the meaning of the statute was essential. The interpretation of such meaning, therefore, was in no way *dicta*. In short, it was absolutely "necessary to a determination of the questions involved" for the court to interpret NRS 288.160(4).

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(775) 885-1896

The Board, without citation to authority, also argues that the supreme court orders are not the law of the case because "as of the date of each decision," the Board had discretion and the "Court usurped the discretionary function of the EMRB." Board Opp. at 9-10. Once again, the Board fails to respect and honor the separation of powers between the branches of government. The Board exercised its discretion back in 2003, that decision was challenged at the district court level and later in the supreme court. The court ruled and interpreted the very statute pursuant to which the Board had acted. The Board cannot more than a decade later simply deem such order to have been inappropriate and, therefore, proceed in a different direction. It is not the supreme court that has "usurped the discretion" of the Board here; it is the Board who has usurped the power of the legislative and judicial branches of Nevada government.

B. The Supreme Court's Necessary Interpretation of NRS 288.160(4) is the Law of the Case.

As an essential and necessary holding to the 2005 and 2009 orders, the supreme court's interpretation of NRS 288.160(4) and NAC 288.110(10)(d) is the "law of the case" in this matter and, therefore, absolutely controls the determination of the second runoff election. The Nevada Supreme Court has plainly held that:

> [w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and *must be followed throughout its subsequent progress*, both in the lower court and upon subsequent appeal.

Hsu v. County of Clark, 123 Nev. 625, 629-30,173 P.3d 724, 728 (2007) (emphasis added). Although the court has adopted an exception to the "law of the case" doctrine, such exception does not apply here because there has not been a "change in the law by . . . a judicial ruling entitled to deference." *Id.* at 632. A "judicial ruling entitled to deference" is a decision by the highest court in the state. *Id.* Here, the highest court in the state has not substantively changed the law. In fact, between 2005 and 2009, the highest court in the state held firm and stated that the law had not changed, nor has the Legislature changed the law since 2009.

Contrary to Local 14's assertion, *see* Local 14 Opp. at 22-23, the *Hsu* court did not adopt the other exceptions that it noted other jurisdictions had adopted (*see Hsu*, 123 Nev. at 630) but even if it had, they do not apply here. The fact that no party received an affirmative vote from a majority

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(775) 885-1896

of all the employees of the bargaining unit in the second runoff election is not "new or different evidence" because the supreme court's 2009 Order anticipated this very possibility at the same time it held that standard was required, and it is not an injustice of any kind, much less a "manifest injustice," to follow the law as written by the Legislature and interpreted twice by the highest court in the state. By the rule enunciated in *Hsu*, the law of the case doctrine applies here and no exceptions allow any deviation.

C. The Unpublished Nature of the Supreme Court's Orders is Irrelevant.

Because the 2005 and 2009 orders provide the law of the case, it is of no consequence that those orders were not published. When unpublished orders are "relevant under the doctrine of law of the case," the rule that they are not precedential does not apply. Former Nev. Sup. Ct. R. ("SCR") 123. Further, Nevada Rule of Appellate Procedure 36 now provides that an unpublished order establishes mandatory precedent "in a subsequent stage of a case in which the unpublished disposition was entered." NRAP 36, as amended by ADKT 0504 (repealing and replacing SCR 123), available at http://nvbar.org/wp-content/uploads/ADKT%200504.pdf. Despite its assertion to the contrary in its Opposition, the Board itself has previously acknowledged that the unpublished Nevada Supreme Court decisions in this matter are the law of the case. In its opposition to ESEA's previous petition for judicial review, filed with the Court on March 19, 2015, the Board cited former SCR 123 and stated "[t]his unpulished order [Order Granting Writ Petition, No. 62719, December 18, 2013] is precedent in this case under the doctrine of law of the case." Board's April 6, 2015, Opposition to Motion for Stay and Countermotion to Dismiss at 14, n.3.

II. The Board has No Discretion to Disregard Unambiguous Language or to "Fill in Gaps" or "Change its Mind" to Disregard Unambiguous Language.

The law of the case in this matter is that only the Nevada Legislature can change the plain and unambiguous standard set forth in NRS 288.160(4). Stay Motion, Ex. 2 at 12. The Board, therefore, cannot. *See Commission on Ethics v. Hardy*, 125 Nev. 285, 293, 212 P.3d 1098 (2009) (an executive branch agency violates the separation of powers doctrine if it encroaches on the Legislature's constitutionally committed function). The supreme court recognized this and the Board and Local 14 must recognize this as well.

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2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

The fact that the first runoff election apparently did not produce a "result" that made the Board "comfortable" does not clothe the Board with new powers not given to it in statute, nor does it authorize it to violate the supreme court Orders.[4] Unlike the supreme court itself, the Board cannot, as Local 14 argues, disregard "seemingly unambiguous language" to "advance the primary goal of the statute and avoid a conflict that the case before it revealed." Local 14 Opp. at 24-26. The Board is merely a state agency. It is not a court interpreting various conflicting statutes, as was the situation in the cases cited by Local 14 (*Fierle v. Perez*, 125 Nev. 728, 735, 219 P.3d 906 (2009), *overruled in part by Egan v. Chambers*, ___ Nev. ___, 299 P.3d 364, 367 (129 Nev. Adv. Rep. 25, April 25, 2013); *Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200 (2005); *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 250 (1970)). Local 14 Opp. at 24. The Board is not the Legislature, endowed with the constitutional authority to amend a statute.

Even acting in its rightful role as a state agency, this case does not involve conflicting statutes that the Board must "reconcile" or "harmonize." *See* Local 14 Opp. at 25. The only thing that Local 14 identifies as "conflicting" is its characterization of NRS 288.160(4) as the "aspirational goal of resolving doubt" vs. the "fundamental legislative objective of ensuring labor peace by allowing employees to choose their representative."[5] Local 14 Opp. at 25-26. The Board does not and cannot identify another statute that conflicts with NRS 288.160(4). Where a statute is plain, even the courts will "look no further than unambiguous, plain statutory language." *Richardson Constr. v. Clark County. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21 (2007); *Szydel*, 121 Nev. at 453 ("[t]his court will not look beyond the plain language of the statute."). Therefore, the Board, as well, may "look no further than [the] unambiguous, plain statutory language" of NRS 288.160(4). It may not ignore that language and look to its own contrived characterization of the purpose behind that section.

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[4] In fact, all three elections here produced a "conclusive result," *i.e.*, Local 14 failed to obtain votes from a majority of the bargaining unit.

[5] ESEA does not dispute that a fundamental objective of NRS 288 is labor peace. Beyond that, the so-called aspirational goal and "objective" of allowing employees to choose are mere creations of the Board and Local 14 and certainly not a "primary goal of the statute."

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Nor may the Board attempt to "fill in the gaps" of an unambiguous statute or "change its mind" on how to enforce a statute in a way that has the effect of disregarding that unambiguous language, as advocated by Local 14. Local 14 Opp. at 17. The Board cannot attempt to "fill in" ambiguities when the supreme court has already determined that there are no ambiguities "to fill."[6] *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("a judicial precedent holding that a statute unambiguously forecloses the agency's interpretation and therefore contains no gaps for the agency to fill, displaces a conflicting agency construction"). The Nevada Supreme Court determined, by its own *de novo* review and interpretation of NRS 288.160(4) that it was unambiguous and that the correct and only standard to be applied to determine results of representation elections, including runoff elections, is the majority-of-all-employees-in-the-bargaining-unit standard, and that it is the Legislature's role to change this standard, not the Board's.

III. The Board has No Implied Power to Conduct a Second, Discretionary Runoff Election and Determine the Results by a Different Standard than the One Set Forth in the Plain and Unambiguous Language of NRS 288.160 and NAC 288.110.

Virtually admitting its violation of NRS 288.160, the Board's main justification for its actions is that it can "imply" its own powers. However, the only situation in which powers of an administrative agency can be implied is where they are necessary to the agency's performance of express statutory duties. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11 (2006). The Board was under an obligation to hold the first runoff election per its own regulation, an order from this Court and the supreme court's 2009 Order. But in its 2009 order, the supreme court acknowledged the possibility that the first runoff may produce an "inconclusive" result. Thus, the supreme court explicitly limited the Board's statutory and regulatory duties regarding a runoff

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[6] Because of the plain language of NRS 288.160(4) that unambiguously forecloses the Board's attempt to "fill in gaps," its citation to federal case law referencing application of a mere majority-of-the-votes-cast standard in representation elections is irrelevant. *See* Local 14 Opp. at 18. It is irrelevant because of the plain language of NRS 288.160 and the supreme court's interpretation of it; and, it is irrelevant because the National Labor Relations Act, which was the subject of those cases, does not contain the plain and unambiguous language of NRS 288.160(4). As such, cases interpreting it on this point are plainly distinguishable. Contrary to Local 14's assertion, therefore, there is nothing "rational" about applying the holdings of these cases here in Nevada.

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Carson City, Nevada 89703
(775) 885-1896

between these parties. It left no open "implications" from which unstated duties or powers could arise. Thus, the Board's theory, stated in its 2015 Board Order, that it has a duty to order a second, discretionary runoff election to address the lack of a "meaningful result," Stay Motion, Ex. 5 at 4[7], cannot succeed because the supreme court has already recognized the possibility of that result in interpreting the Board's duty pursuant to NAC 288.110. The supreme court declared the Board's duty as being the duty to hold a runoff election even if it produced an inconclusive result and so no implied powers are required to accomplish its duty.

Without an implied power, any characterization of the Board's actions as "rational" and consistent with federal and other state laws is not only irrelevant, it is arbitrary and capricious. Local 14 Opp. at 18-19. The supreme court made this clear in its 2005 Order when it stated that agencies "are not bound by . . . dissimilar statutes or compelled to accept any policy arguments 'in the face of an unambiguous, controlling statute.'" Stay Motion, Ex. 2. The supreme court has declared NRS 288.160(4) to be such an unambiguous statute and, thus, policy arguments on trends in other jurisdictions have no place here.

IV. The Board has Engaged in *Ad Hoc* Rulemaking by Ordering and Conducting the Second, Discretionary Runoff Election and Determining the Results by a Majority-of-the-Votes-Cast Standard.

An agency rule, standard, directive or statement of general applicability that effectuates or interprets law or policy must be adopted pursuant to the rulemaking process of chapter 233B of NRS. NRS 233B.038, and 233B.0395 to 233B.120, inclusive. NAC 288.110(10)(d) was a validly adopted regulation that interpreted NRS 288.160(4). In 2003, the Board interpreted and later applied NAC 288.110(10)(d). The supreme court, in its 2005 and 2009 Orders, agreed with that interpretation and **itself interpreted** NRS 288.160(4). Thus, the Board is not in a position to merely re-interpret that regulation. If it desires a new rule to deal with what it describes as a lack of a "meaningful result" that may arise when a first runoff election does not produce a party that received the necessary majority vote, it must adopt that rule pursuant to the Administrative Procedure Act.

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[7] Stay Motion, Ex. 5 is also found at Administrative Record ("AR"), Supp. 469-78.

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By announcing that when 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) . . . to conduct a discretionary second runoff election," *see* Stay Motion, Ex. 5 at 4-5, the Board did much more than re-interpret NAC 288.110(10)(d). The Board, without notice and hearings, created a whole new, third tier of the representation election process that can be triggered whenever a union challenges an incumbent union and a majority of the members of the bargaining unit do not vote for either union in the initial election or the runoff election. Local 14's reference to this being a "unique circumstance" is irrelevant and incorrect because it is premised on the incorrect notion that the Board "no longer follows its experimental interpretation of NAC 288.110." Local 14 Opp. at 28. But, the Board has no power to choose not to follow its 2003 interpretation of NAC 288.110 because the Nevada Supreme Court has twice declared that to be the interpretation that is compelled by NRS 288.160(4). Thus, to do so would be to encroach on the Legislature's constitutional authority and to violate the supreme court's Orders, both in violation of the separation of powers doctrine. The Board has engaged in *ad hoc* rulemaking, which must be declared void.

CONCLUSION

The Board, as a state agency that was a party to both the Nevada Supreme Court's 2005 and 2009 Orders of Affirmance, is required to abide by the interpretations of the unambiguous governing statute and regulation in such orders as the "law of the case." The basis for ESEA's petition for judicial review is that the Board, by way of its 2016 Board Order (AR, Supp. 625-31), is now endeavoring to resolve Local 14's efforts to displace ESEA in a manner that disregards these supreme court Orders. The Board's efforts, as well as Local 14's, to distinguish its actions taken in the 2016 Board Order from the effect of these supreme court Orders utterly fail. The Board's actions were in violation of NRS 288.160(4), in violation of supreme court orders, in excess of its statutory authority and otherwise affected by other error of law and, thus,

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2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

arbitrary and capricious under NRS 233B.130. ESEA's petition for judicial review, therefore, should be granted.

RESPECTFULLY SUBMITTED, this 8th day of April, 2016.

DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY

By: _____
Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051
Attorneys for Petitioner

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing Reply in Support of Petitioner's Opening Memorandum of Points and Authorities in Support of Petition for Judicial Review, 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of April, 2016.

DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY

By: _____
Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051
Attorneys for Petitioner

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in this case:

X Document does not contain the social security number of any person

-OR-

__ Document contains the social security number of a person as required by:

__ A specific state or federal law, to wit:

_____
(State specific state or federal law)

-or-

__ For the administration of a public program

-or-

__ For an application for a federal or state grant

-or-

__ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: April 8, 2016

_____
Francis C. Flaherty
Sue S. Matuska
Attorneys for Petitioners

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRCP 5(b) that I am an employee of DYER, LAWRENCE, FLAHERTY, DONALDSON AND PRUNTY and that on the 8th day of April, 2016, I caused a true and correct copy of the foregoing Reply in Support of Petitioner's Opening Memorandum of Points and Authorities in Support of Petition for Judicial Review to be deposited in the U.S. Mail, first-class postage prepaid and to be sent electronically to each of the following:

EMRB
2501 East Sahara Avenue, Suite 203
Las Vegas, Nevada 89104

emrb@business.nv.gov
Bsnyder@business.nv.gov

Kristin L. Martin, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 Commerce Street, Suite A-1
Las Vegas, NV 89102

klm@dcbsf.com

S. Scott Greenberg, Esq.
Office of General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146

sgreenberg@interact.ccsd.net

Gregory L. Zunino
Bureau Chief
Attorney General's Office
100 N. Carson Street
Carson City, NV 89701

gzunino@ag.nv.gov

Scott R. Davis, Esq.
Deputy Attorney General
Attorney General's Office
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101-1068

sdavis@ag.nv.gov

Debora McEachin

Dyer, Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896

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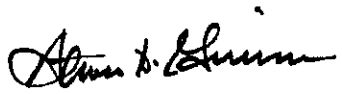

CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EDUCATION SUPPORT EMPLOYEES ASSOCIATION,	)	CASE NO. A-15-715577
Petitioner,	)	DEPT. NO. I
vs.	)	**Transcript of Proceedings**
NEVADA LOCAL GOVERNMENT EMPLOYEE MANAGEMENT RELATIONS BOARD,	)	
Respondent.	)	

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

EDUCATION SUPPORT FOR EMPLOYEES ASSOCIATION'S PETITION FOR JUDICIAL REVIEW

WEDNESDAY, APRIL 20, 2016

APPEARANCES:

For the Petitioner: FRANCIS C. FLAHERTY, ESQ.

For Teamsters Local 14: KRISTIN L. MARTIN, ESQ.
THOMAS F. PITARO, ESQ.

For the Respondent: GREGORY L. ZUNINO, ESQ.

RECORDED BY: LISA LIZOTTE, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

WEDNESDAY, APRIL 20, 2016 AT 10:31 A.M.

THE CLERK: *Education Support Employees Association versus Nevada Local Government Employee*, case number H -- I'm sorry, A715577.

MR. PITARO: [Indiscernible] went to the restroom. She'll be right back.

THE COURT: Okay. So we need to wait for that -- we need to wait for them to come back. Right?

MR. PITARO: Yeah, she'll be -- she's momentarily.

THE COURT: Okay. If she's not right outside the door, what we'll do is call some other cases and get rid of them. I don't see them coming back. We'll have to ask you guys to let us know when you're all here. Okay? Give us the hi sign and we'll call you right up.

THE CLERK: There's nothing else.

THE COURT: Huh?

THE CLERK: There's nothing else to call.

THE COURT: Oh, there's nothing else. I take it back. You mean all these people are here for this? Geez. I thought for a minute it was one of these school day at court deals and then I took a look at the maturity of our group and decided that probably wasn't it.

[Pause in proceedings]

THE COURT: Will counsel enter your appearances,

please?

MR. FLAHERTY: Good morning, Your Honor. Frank Flaherty here on behalf of the ESA, the Education Support Employees Association.

THE COURT: Good morning.

MS. MARTIN: Kristin Martin from McCracken, Stemerman, and Holsberry representing Teamsters Local 14. With me is Tom Pitaro, who has been assisting my firm on this case.

THE COURT: I see. Good morning.

MR. PITARO: Good morning.

THE COURT: I have been wondering all morning what case you're on, Mr. Pitaro. I looked to see if your name was on the calendar and --

MR. ZUNINO: Your Honor, I'm Greg Zunino. I'm with the Office of the Attorney General and I'm here on behalf of Employee Management Relations Board.

THE COURT: Okay. Do you guys want the lay of the land or do you just want to go at it?

MR. FLAHERTY: Sure, Your Honor.

THE COURT: To this point, and as I've indicated earlier today, just because I say lay of the land as the way I am thinking, I am often -- have my mind changed by arguments, oral arguments which show me things in a different light and they may change my mind. To this

point, -- let me get my notes here.

To this point, it's -- it seems to me that the petition on behalf of ESEA must be granted. I just -- I have too much trouble getting around the wording of the Supreme Court in their rulings to believe that when they say it's a clear statute and you must, you know, abide by the intent of the statute, that the EMRB can say: Well, we've got a new approach, we've got a new idea, and we don't think we have to do it.

I think that the EMRB has, and is supposed to have, a lot of discretion in how they implement this and any statutes and I think that even the Supreme Court's rulings seem to at least hint at that, that they think the EMRB has a lot of discretion in it. But I don't think that that means that the Supreme Court says: And you can disregard what we're ruling in this order.

Because I believe that the EMRB is supposed to have a lot of discretion, I don't go so far as to say that they are powerless to hold a second or a third election if they determine, in their discretion, that that's necessary. In other words, I don't think that the Supreme Court intended that we'd wind up with a conundrum, for lack of a better word. Not only were you wrong, but you can't fix it. I don't think the Supreme Court intended that. I think the language in the statute that says that they --

and I don't recall the exact language of it, but the provision that says that they can hold a second one is broad enough that it could be -- probably should be interpreted to mean that the EMRB, under appropriate circumstances according to its discretion, can take action to make a determination.

So, that's the lay of the land. Do you want to argue?

MR. FLAHERTY: Yes, I do, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: Well, Your Honor, let's start by talking about the issues here. There's substantial disagreement among the parties regarding what the issues properly are before you.

THE COURT: Okay.

MR. FLAHERTY: The Board has pejoratively framed the issue as, must the Board perpetuate the status quo, as if labor stability, the Board's primary issue, was not important in this case. Local 14 essentially signs onto that issue by suggesting that it would have been arbitrary and capricious for the Board to maintain labor stability by leaving ESA in place as the recognized bargaining agent. Local 14 also wants to argue that the Board how -- the Board somehow exercised proper discretion when it decided to resolve any doubt. Okay? But the reality is the Board

abused its discretion by ignoring the Nevada Supreme Court which ruled on this twice already, Your Honor.

And in both of those cases, the Supreme Court specifically rejected the notion that because the results might not be meaningful, conclusive, whatever you want to phrase it as, Your Honor, in both of those cases, the Nevada Supreme Court says you have to follow the legislative mandate of 288.160 subsection (4) which is a majority of the entire bargaining unit, not just a majority of those who vote.

And Local 14 also wants to pose the issue as whether the Board's inference of majority support was rational and it relies on authority from the National Relations Labor Act and other states' union election laws, but the problem here is the Nevada Legislature has been very specific. You have to have -- it set a higher bar here, Your Honor. It's the majority of the entire bargaining unit, therefore, any inference based on something lesser than that is simply not permissible. It's a little bit like horseshoes and hand grenades, Your Honor.

THE COURT: Doesn't that make it pretty unworkable?

MR. FLAHERTY: No. It doesn't, Your Honor. And I want to talk about the conundrum.

THE COURT: Okay.

MR. FLAHERTY: Well, I'm going to talk about the conundrum that you raised, but --

THE COURT: Okay.

MR. FLAHERTY: -- let's talk about what the obvious primary issue here is: Did the Board violate 288.160 subsection (4) of NRS? And it did. And, also, did it engage in ad hoc rule making, which it also did.

But now to the conundrum. Okay. We've talked about NRS 288.160 subsection (4) a lot and I've talked before about the other subsections of 288.160 and I want to do that again in the context of the conundrum that you've raised. So subsections (1) and (2) of NRS 288.160, they apply when an employee organization is seeking initial recognition. They go to the employer with certain documents, you know, constitution and bylaws, a list of their officers, a pledge not to strike, but critical in this step is they have to prevent -- they have to present a verified membership list showing that they have membership of the majority of the entire bargaining unit.

And this is an important point, Your Honor. They can't come to the employer or to the Board and say: This membership list represents a majority of the people we asked to join. That doesn't cut it. Okay? It's got to be a majority of the entire bargaining unit or there's no recognition.

Then in subsection (3), it sets for the various reasons that a local government employer can go to the Board and say: Hey, we want permission to withdraw recognition from this union. And one of those reasons is they're no longer supported by a majority of the entire bargaining unit. Okay?

And let's -- and the entire bargaining unit, again, is not some lesser standard and let's just leap right in there under subsection (4). So, let's say the Board says, pursuant to this request from subsection (3); Well, gee, you know, you've raised a good question here. We have a good faith doubt.

Okay? We're in subsection (4) now. Now the Board doesn't have to conduct an election because the statute is very clear that if it has a good faith doubt, it may conduct an election, okay, but let's suppose the Board says: Well, you know, we have a good faith doubt. We're going to go ahead and have an election. And the choices on the ballot are going to be union or no union. Okay?

And, so, even if no union gets more votes than union, okay, if no union does not get a majority if the entire bargaining unit to vote in favor of not having a union, then if there in fact is a union already in place, it stays in place. That's what labor stability is all about.

At one point in time, ESA was recognized based on verifiable, demonstrated majority support. Okay? That recognition doesn't go away unless and until the ESA says: We don't want to represent the union anymore. Okay? But more likely it doesn't go away unless and until the employer says: We don't think there's sufficient support. We don't think there's a majority support. Or a rival union comes in and says: We don't think there's majority support. We think we have majority support.

But when the Board says, okay, we have a good faith doubt, we're going to order an election, whether it's the no union vote or the rival union, the only way that they get to displace that incumbent is by getting votes from a majority of the entire bargaining unit.

And then all subsection (5) says, Your Honor, is without involving the Board, the parties can agree: Hey, -- two unions can say: Hey, we want to have an election, okay, to see which one of us is going to represent this unit. Okay? And then at some point, the Board would likely become involved, but nothing in subsection (5) authorizes the parties or even the Board, for that matter, to deviate from the high bar the Nevada Legislature has set. Nevada is different, Your Honor.

THE COURT: Are you talking about subsection (5) of 288.160?

MR. FLAHERTY: I am, Your Honor.

THE COURT: Okay.

MR. FLAHERTY: I am.

So, Nevada is different. Nevada is a right to work state. Okay? And some of these other states, some of these other jurisdictions that you're seeing cases from, people can be compelled to pay union dues. People can be compelled to call -- to pay what's called an agency fee, to help the union to fray the costs of representing nonmembers. You can't do that here in Nevada.

So, the Nevada Legislature starts the bar high there and then it goes a step further and it says to local government employers, you know, you don't have to recognize someone who hasn't demonstrated verifiable majority support. And if at some point in time you don't think they enjoy that majority support, you have the option, but not the duty -- you have the option of trying to withdraw that support with permission from the Board. So there's really not a conundrum here, Your Honor. Okay.

Now, ESA cannot have it both ways. I know that, Your Honor. Those two Supreme Court decisions are the law of the case. Absolutely. And I defer to you, Your Honor, -- of course, I have to defer to you, but if you look at that second Supreme Court decision from 2009 and you say that based on the recitation in that opinion you believe

this particular fact pattern was squarely before the Supreme Court in the sense that the question of whether or not the results were inconclusive were squarely before the Supreme Court, then that's the law of the case and we're stuck with it.

On the other hand, if you think there's latitude in there, you could look at this and you could look at the numbers in this case, Your Honor. And a good way to do that is let's start with a hypothetical bargaining unit of 1,000 employees. Okay? If we've got 1,000 employees, we've got no union. Okay? Two unions, Union A and Union B, approach the employer and they present a verified membership list saying -- showing they represent a majority of the bargaining unit. And, so, the employer is scratching its head and say: Wait a minute. The math doesn't add up. How can they both have the majority of the bargaining unit? And maybe the employer has other reasons to not want either union in place. So the whole thing winds up in front of the Board. The Board says: You know, we've got a good faith doubt. We've got discretion. Yeah, let's have an election. Union A gets 400 votes. Union B gets 300 votes. And no union gets 150 votes.

Well, there's two ways to look at that, Your Honor. The Board could look at that and said: Well, the statute plainly and unambiguously says it's got to be the

majority of the entire bargaining unit. None of these three options got votes -- none of them got 501 votes, therefore none of these options prevails and so it's the status quo. And the status quo is: There's no union here. Okay?

Now the other way the Board could look at that is the Board could look at that and say: Well, you know, the top two vote getters were Union A and Union B, you know, and let's have a runoff election to see what happens with all those no union votes. Okay? So we have a runoff election and, in this hypothetical, all of those 150 no union votes, they migrate to Union B. So now the score is 400 for A and 450 for B. Still, we're not going to get a union because we don't have 501 votes for A or B, status quo. On the other hand, if the Board does that runoff and all of those no union votes migrate to Union A, well now Union A has got 650 -- no 550, excuse me. So now Union A will become the recognized bargaining agent.

So there's really no conundrum here because the Legislature's entire objective in Chapter 288 is labor stability. Okay? That's why the bar is so high.

N ow, again, Your Honor, ESA can't have it both ways. If you think the 2009 order of affirmance from the Nevada Supreme Court precludes that construction or that interpretation, then we're stuck with that. And you're not

stuck with it, Your Honor. As you pointed out many times, this is really the Board's responsibility. They've got to sort this out, but of course what you've made very clear is they can only sort it out within the jurisdiction that's granted them by the Nevada Constitution and by the Nevada Legislature in this case, NRS 288.160 subsection (4).

I don't think I need to recite the quotes from the Nevada Supreme Court cases again other than in both cases the Court said that both the statute and the administrative code were plain and unambiguous. In the first case, in 2005, it went on to add that:

> In a case of an unambiguous case, the EMRB is required to follow the law regardless of result.

Okay? So, all along the parties have been arguing -- well, not the parties. Local 14 has been arguing all along: This is an unworkable standard. We're not getting the majority of the bargaining unit to vote for anybody. The Supreme Court's like: We hear what you're saying but we're not the Legislature. We defer to the Nevada Legislature. The Board, EMRB, you've got to follow the law regardless of the result.

And then in 2009, the majority vote is equally applicable in the runoff election. Okay? It certainly can't be argued, Your Honor, that those two cases are not the law of the case and they're certainly not dicta. And,

in fact, citing Supreme Court Rule 123, the EMRB successfully argued to you in May of last year that the law of the case required you to dismiss ESEA's prior Petition for Judicial Review and you did that. And, so, I think the EMRB is judicially estopped from standing here in front of you today and telling you that the Supreme Court's orders are not the law of the case.

It's always been the same EMRB case number, A1045735. The significance of that is that was the EMRB case number the first time this was in District Court in front of Judge Wall, all of the times in front of you, all three trips to the United States -- excuse me, to the Nevada Supreme Court. Let's not make more trouble here. To the Nevada Supreme Court. And it's still the case number today.

Now, Local 14 is trying to rely on the *Shoe* [phonetic] case from the Nevada Supreme Court to say that: Wait a minute, the law of the case shouldn't apply here. And since the last time we were here, Local 14 was drilled down a little bit more and in the *Shoe* [phonetic] case the Nevada Supreme Court is citing *Clem versus State*, another Nevada Supreme Court case. And there's a quote from *Clem* in the *Shoe* [phonetic] case and this is what the quote says. Open quotes:

We will depart from our prior holdings only where

we determine that they are so clearly erroneous that continued adherence to them would work manifest injustice.

I think, Your Honor, that you picked up that I emphasized the word we in that quote. It appeared twice. The word we in that quote refers to the Nevada Supreme Court.

THE COURT: And not to me.

MR. FLAHERTY: Yeah, not to you. I was going to say not to the EMRB, Your Honor, but, yes, it doesn't --

THE COURT: Oh, okay.

MR. FLAHERTY: -- apply to you either.

THE COURT: Okay.

MR. FLAHERTY: Okay?

THE COURT: Okay.

MR. FLAHERTY: So, after considering the specific exceptions adopted by federal and other state courts, the Nevada Supreme Court only adopted one. Okay? Now Local 14 wants to argue, because the Supreme Court said we impliedly recognize exceptions to the law of the case doctrine in a prior decision, that somehow that threw open all of the exceptions but the Nevada Supreme Court was very specific. They only adopted one and that is when there's been -- when the controlling law of the state is substantively changed during the pendency of a remanded matter, at trial or an

appeal, the courts of the state will apply the change and do substantial justice.

In other words, the doctrine of the law of the case should not apply where in the interval between the two appeals of the case there's been a change in the law by a judicial ruling entitled to deference. We haven't had a change in the law, Your Honor. There's nothing different between -- as we stand here right now and as we stood here or as when the case was before the Nevada Supreme Court and it issued its 2009 decision. We had two runoff elections since then and in both of those runoff elections, Local 14 outpolled ESEA, but that's the same result we had in the very first election and all three elections Local 14 failed to obtain votes from the majority of the bargaining unit, the high bar established by the Nevada Legislature.

Also, contrary to Local 14's decisions or assertion, rather, the Supreme Court decisions, the key points that are controlling here, Your Honor, they're not dicta. Local 14 itself presented the issue squarely to the Nevada Supreme Court. And this is what the Nevada Supreme Court had to say in 2005 and here's the open quote:

> Local 14 argues that the EMRB erred in interpreting NRS 288.160 and NAC 288.110. It is stating that a majority status election is won by a majority of all members in the bargaining unit instead