IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

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Appellant State of Nevada, Local Government Employee-Management Relations Board ("EMRB" or the "Board"), by and through its counsel, Adam Paul Laxalt, Attorney General, Gregory Zunino, Bureau Chief, and Donald Bordelove, Deputy Attorney General, hereby submits its Opening Brief.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.150. On May 17, 2016, the District Court entered a final Order Granting Education Support Employees Association's ("ESEA") Petition for Judicial Review. (Joint Appendix ("JA"), Vol. II, at 464-69). The Board filed a timely Notice of Appeal on June 9, 2016. (JA, Vol. II, at 470-71).

II. ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(3) as it regards election questions. This matter is also presumptively retained by Supreme Court pursuant to NRAP 17(a)(14) as it involves a question of statewide importance. NRS 288.160 and NAC 288.110 authorize the Board to conduct elections for the purpose of determining which employee organization, if any, will be considered the exclusive bargaining agent for public employees within bargaining units. This case has statewide public policy implications because it addresses the scope of the Board's authority to implement a standard for evaluating results of elections between competing public sector labor unions.

ESEA argues that the Board must evaluate the results of an election in reference to the number of potential voters as opposed to the total number of votes cast in the election. As the facts of this case demonstrate, ESEA argues for a standard that makes it virtually impossible for the employees within the bargaining unit to displace ESEA as their collective bargaining agent. Since the standard would be uniform in its application, this case has significant implications for public employees across the state.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does substantial evidence, namely the history and results of the several elections at issue in this case, support the Board's determination that International Brotherhood of Teamsters, Local 14 ("Local 14") is supported by a majority of the bargaining unit employees?

2. Was it clearly erroneous or an arbitrary abuse of discretion for the Board to conduct a final election by which the winner was declared, as is customary in virtually all elections, in reference to the majority of votes cast?

IV. STATEMENT OF THE CASE

This case arises from a roughly 14-year struggle between ESEA and Local 14 for control of a bargaining unit consisting of Clark County School District ("CCSD") employees.

In 2002, the EMRB concluded, following an evidentiary hearing, that a good faith doubt existed whether ESEA or Local 14 was supported by a majority of support staff employees of the CCSD. (JA, Vol. I, at 3-11). Based on that conclusion, the EMRB ordered an election pursuant to NRS 288.160(4). *Id*.

On January 20, 2016, following three elections, the Board declared that Local 14 "shall be the exclusive bargaining representative of the employees in the bargaining unit." (JA, Vol. I, at 191). On May 17, 2016, the District Court granted ESEA's Petition for Judicial Review and vacated the Board's 2016 Order. (JA, Vol. II, at 467-69).

V. STATEMENT OF FACTS

Based on the Board's 2002 conclusion that a good faith doubt existed as to which representative was supported by a majority of support staff employees of the CCSD, the Board ordered an election pursuant to NRS 288.160(4) to determine whether either employee organization, ESEA or Local 14, was supported by a majority of said bargaining unit. (JA, Vol. I, at 3-11). ESEA challenged the election on multiple grounds, all of which this Court rejected, explaining that "[s]ubstantial evidence supports the Board's decision that a good faith doubt existed and an election was justified." (JA, Vol. I, at 45).

Since its inception in 1969, the Board has implemented its statutes and regulations according to the premise that if a union received the majority of votes

cast in an election, the election demonstrated that the union had majority support. (JA, Vol. I, at 167). In 2003, the Board experimented with a novel and uncodified interpretation of NRS 288.160(4) and NAC 288.110(10)(d). Under this new rule, ESEA or Local 14 had to win votes from a majority of all potential voters regardless of voter participation (the "Supermajority Rule"). On review, the Supreme Court deferred to the Board's interpretation. (JA, Vol. I, at 47-48). All of this occurred before the initial election was held.

The Board held three rounds of voting in which employees were asked to choose between Local 14 and ESEA. Each time, Local 14 received more votes than ESEA. (JA, Vol. I, at 50, 162, 181-82). The initial election was held in 2006. There were 10,386 employees in the bargaining unit. Local 14 received 2,711 votes; ESEA received 1,932 votes; and "No Union" received 93 votes. (JA, Vol. I, at 50). As such, Local 14 won 57 percent of votes cast. After the initial election, the Board acknowledged that doubt remained about whether either union enjoyed majority support, but decided that it would not take any further steps because a runoff election under the same vote-counting rule would have the same inconclusive result. (JA, Vol. I, at 51-54). The District Court ordered the Board to hold a runoff election pursuant to NAC 288.110(7). (JA, Vol. I, at 62-63). The Supreme Court affirmed that ruling. (JA, Vol. I, at 82-83). As the EMRB had not revised its interpretation of the governing statute and regulation, the Court held that

the same majority of all voters rule applied to a mandatory runoff election. (JA, Vol. I, at 82).

A runoff election was held in early 2015, and Local 14 won by a wider margin than in the initial election. Local 14 received 3,692 votes, while ESEA received 1,498 votes. (JA, Vol. I, at 162). Votes for Local 14 represented 71 percent of the ballots cast.

Following the runoff election, the Board concluded that its experimental interpretation of NRS 288.160(4) and NAC 288.110(10)(d) was unworkable: "The history of this case shows that the 'majority of the unit' standard is a failed experiment incapable of any meaningful practical application." (JA, Vol. I, at 168). The Board decided that it would revert to its original standard, hold a final round of voting, and determine the outcome based on a majority of votes cast. (JA, Vol. I, at 163-169).

The final election was held in late 2015, and Local 14 won even more votes. (JA, Vol. I, at 181-84). Local 14 received 4,349 votes, while ESEA received only 970 votes. *Id*. At the time of this election, the bargaining unit consisted of 11,578 employees. *Id*. Local 14 won 81 percent of the ballots cast.

VI. SUMMARY OF THE ARGUMENT

In 2003, the Board announced its adoption of the Supermajority Rule. In 2015, the Board expressly overruled its prior decision based on the substantial

evidence before it, prevailing labor law and election standards, and proper statutory interpretation. In doing so, the Board fulfilled its statutory duty and policy of promoting labor peace and stability. The Board also brought its elections back in line with prevailing labor law standards as well as those governing Nevada elections generally. The Board's interpretation of its own statute as codified in its regulation was not an arbitrary abuse of discretion and is consistent with and justifiable in light of the extensive history of elections in this case. With a single exception, the Board from its inception has used the majority of the votes cast standard with success. Having abruptly announced the application of the Supermajority Rule in 2003, a decision based on no discernible objective evidence and merely a cursory glance at the applicable regulation, the Board deviated from a long-standing practice of counting votes rather than potential voters.

The Board administers and enforces the provisions of the Local Government Employee-Management Relations Act ("EMRA"), codified at NRS 288.010 to NRS 288.280, inclusive. The Legislature specifically granted the Board authority to address and resolve labor disputes, including the authority "to make rules governing … [t]he recognition of employee organizations." NRS 288.110(1)(c). The EMRB conducts elections for this purpose and has, pursuant to the Administrative Procedures Act, formally codified the majority of the votes cast standard in its regulation, NAC 288.110(10). Indeed, the authority of the EMRB to

enact implementing regulations consistent with the EMRA is well established. The Board has now applied the plain language of its regulation requiring that the outcome of elections be evaluated according to whether they "demonstrate" majority support for an employee organization.

A central issue before this Court is whether the prior unpublished Nevada Supreme Court decisions in this case bind this appeal. Far from binding this appeal in favor of ESEA, the prior decisions of the Court actually support the Board's 2016 Order. The prior decisions were limited to a review of the Board's interpretive discretion and afforded deference to the Board despite its departure from a well-established reading of the governing statute and regulation. Furthermore, the parties failed to present to the Court the substantial evidence necessary to assist in its review – evidence which is now of record. Moreover, the prior decisions of the Court signal the Court's application of a deferential standard of review as to the Board's interpretation of the governing statute. Unfortunately, that interpretation prevailed despite the existence of an implementing regulation that is plain on its face and directly applicable to the facts of the case.

Finally, the election results revealed that NRS 288.160(4) may be rendered meaningless if not construed in light of a common sense election standard. No portion of the statute should be rendered meaningless nor should it be interpreted to produce an absurd or unreasonable result. The Board has a statutory duty to

carry out representation elections and thereby determine majority support for a representation option. NRS 288.160(4) gives the Board only one way of resolving good faith doubts in this regard: hold a secret ballot election. If NRS 288.160(4) is enforced as the Board construed it in 2003, the resulting election standard may produce unreasonable if not absurd results. Depending upon the circumstances of any given representation dispute, the Supermajority Rule may effectively trigger a forfeiture of the rights of employees to displace an entrenched and unpopular labor union. This is because it poses an insurmountable hurdle to change when even a small minority of the employees is disinclined to vote for one reason or another.

VII. ARGUMENT

A. Standard of Review

The Nevada Supreme Court has recognized that it "… gives considerable deference to rulings by the Employee Management Relations Board." *Bisch v. Las Vegas Metro. Police Dep't.*,129 Nev. Adv. Op. 36, 302 P.3d 1108, 1112 (2013). This same level of deference applies in this case. "The function of this court in reviewing an administrative decision is identical to the district court's." *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997). The Supreme Court of Nevada reviews questions of fact to determine whether the agency's decision was clearly erroneous or an arbitrary abuse of discretion. NRS 233B.135(3)(e)-(f); *Local Gov't Employee-Mgmt. Relations Bd. v. Gen. Sales*

Drivers, Delivery and Helpers, Teamsters Local Union No. 14 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982); *Wynn Las Vegas v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1181 (2013).

Accordingly, an agency's conclusions of law, which are closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if supported by substantial evidence. *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993); *see also Elliot v. Resnick*, 114 Nev. 25, 32, n.1, 952 P.2d 961, 966 n.1 (1998) (stating that an agency's interpretation of a statute, which it has the duty to administer, is entitled to deference); *Fathers & Sons & A Daughter Too v. Transp. Services Auth. of Nevada*, 124 Nev. 254, 262, 182 P.3d 100, 106 (2008); *State v. Tatalovich*, 129 Nev. Adv. Op. 61, 309 P.3d 43, 44 (2013); *see also State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1119, 946 P.2d 179, 181 (1997). Substantial evidence is that which a reasonable mind might accept as adequate to support the agency's conclusions. *Sec'y of State v. Tretiak*, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001).

Therefore, the Court's review is limited to determining whether there was "substantial evidence in the record to support the agency determination." *State Indus. Ins. Sys. v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408, 409 (1990); *see State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d

482, 485 (2000). While courts may review purely legal questions, such as questions of statutory interpretation, the Court should still give due consideration to an agency's legal conclusions when they are closely related to factual issues, particularly when the agency has specialized knowledge or expertise in a given field. *See Int'l Game Tech. v. Second Judicial Dist. Court of Nevada*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006). It follows that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Clark County Sch. Dist. v. Local Govt. Employee-Mgmt. Rel. Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974).

B. The Court Should Defer to the Board's Interpretation of its Statute as Codified in Regulation.

1. The Board expressly overruled its prior decision in light of a complete factual record.

In 2015, based on the substantial evidence before it, the Board expressly overruled its prior experimental interpretation of its own regulation. (JA, Vol. I, at 168). This carefully reasoned opinion also included a detailed analysis of the Board's election standard since its inception in 1969, prevailing labor law standards, and proper statutory interpretation. (JA, Vol. I, at 165-68).

The Board rejected that NRS 288.160(4) requires it to engage in the futile act of holding successive runoff elections under the same unworkable standard for

assessing majority support. (JA, Vol. I, at 164-66). Neither union challenged this conclusion before the District Court. The Board then identified two options for bringing the matter to a conclusion: "[E]ither the Board concedes that its good faith doubt can never be resolved and closes this case, leaving the doubt forever unanswered; or else the Board excises the cause of futility in this case and proceeds under something different than the 'majority of the unit' standard." (JA, Vol. I, at 166).

To choose between these options, the Board turned to the mandate given it by the Legislature. The first option – abandoning the election process – was "not a viable option" as it would amount to an abdication of the Board's statutory duty:

> 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.

Id. In rejecting the first option, the Board considered how best to fulfill the statutory policy of promoting labor peace and stability:

> The concept of stability in labor relations, which is a fundamental objective of the Act, cannot be reconciled with an open-ended process of this sort. Existing doubt as to majority support is not conducive to stability in labor relations . . . . 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.

(JA, Vol. I, at 165). The Board chose the second option as a means to fulfill the Board's statutory duty. (JA, Vol. I, at 165-68). The Board executed that duty by reverting to its prior interpretation of NRS 288.160(4) as codified in NAC 288.110(10)(d).[1]

The Board explained that the Supermajority Rule failed twice to resolve its good faith doubt as to majority support in the subject bargaining unit and would not likely produce a satisfactory outcome at any point in the future. (JA, Vol. I, at 165-66). The Board found "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 election and to resolve our good faith doubts." (JA, Vol. I, at 166).

[1] "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).

The Board expressly adopted prevailing labor law standards and Nevada election standards:

> We now interpret this subsection as permitting the Board to infer majority support of the unit as whole based upon a majority of votes cast in accord with the well-recognized principle 'that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines the choice.' N.L.R.B v. Deutsch Co., 265 F.2d 473, 479 (9th Cir. 1959). Following the 'majority of votes cast standard will not only bring the Board in line with the prevailing standard in labor law, as stated in Deutsch Co., it will also bring the Board in line with Nevada's prevailing standard for elections in general, which bases election results on the number of votes cast. See Nev. Const. Art. 5 § 4.

(JA, Vol. I, at 167-68). Based on the substantial evidence before it, the prevailing standards in labor law as well as elections in general, and proper statutory interpretation, the Board correctly applied NRS 288.160(4) and NAC 288.110(10)(d) and concluded that the results of the 2015 election demonstrated majority support for Local 14. (JA, Vol. I, at 163-69).

This is in stark contrast to the Board's adoption of the Supermajority Rule in 2003, a decision made without objective evidence or any need for a change to the existing election standard as plainly set forth in NAC 288.110(10)(d). *See* (JA, Vol. I, at 13-14). Moreover, the Board misapplied the regulation in order to justify the change:

> Lastly, although 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 288.160(9)(d)[2] does provide 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 the unit.

Id. As is evident in the above passage, the Board considered no evidence whatsoever, basing its decision on a cursory and incomplete reading of its own regulation. In fact, the Board ignored the standards that it had used to conduct elections since its inception; the Board did not consider prevailing labor law and election standards; and the Board did not even quote or address the full text of the regulation (*i.e.* "[t]he election **demonstrates** that the employee organization is supported by a majority of the employees within a particular bargaining unit"). *See id*; NAC 288.110(10)(d) (**emphasis** added).

2. <u>It is the Board's function to fill gaps in the statutes it administers.</u>

NRS 288.160(4) does not provide a standard by which the outcome of an election is to be determined. The appropriate standard is best left to the Board's discretion. As a general matter, statutory "gaps may be filled in administratively" when there is "inadequate legislative expression[]." *State v. Rosenthal*, 93 Nev. 36, 43, 559 P.2d 830, 835 (1977); *see also Chevron U.S.A. Inc. v. Natural*

[2] In 2003, this regulation appeared at NAC 288.110(9)(d) and was subsequently renumbered.

Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) ("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.").

The Legislature specifically gave the Board authority in this area, stating that the Board "may make rules governing . . . [t]he recognition of employee organizations." NRS 288.110(1)(c). Therefore, the EMRB retains rulemaking authority to adopt and amend regulations governing the conduct of elections as they pertain to the recognition of employee organizations. Furthermore, the EMRB formally codified the majority of the votes cast standard in its regulation. The authority to adopt procedural rules for an election is set forth at NRS 288.110(1)(a), and is further affirmed by specific provisions of the Administrative Procedures Act, namely those set forth at NRS 233B.040(1):

> To the extent authorized by statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter the following regulations have the force of law….

Under the Administrative Procedures Act, an agency may promulgate regulations in order to establish rules of general applicability. This is exactly what the Board did when it promulgated NAC 288.110(10) pursuant to the authority of

NRS 288.110(1)(c).[3] The authority of the EMRB to enact implementing regulations consistent with the mandates of the EMRA is well established. As further detailed below, the Board has now applied the plain language of the regulation, and the Court should defer to the regulation itself. Under the statutory language, the EMRB has the authority to determine the metrics that are used to measure the majority support of a bargaining unit when conducting elections pursuant to NRS 288.110(1)(c).

3. Prior Nevada Supreme Court decisions do not bind this appeal

ESEA argued before the District Court that the prior Nevada Supreme Court's decisions in this matter bind this appeal and require the Supermajority Rule to be used in elections held by the Board. (JA, Vol. I, at 209). However, those prior decisions were limited to a review of the EMRB's decision to advance a novel interpretation of its own regulation. Additionally, the parties failed to present the Court with substantial evidence to assist in its review of the Board's creation of the Supermajority Rule (and, of course, the Court's review was limited to the record before it).[4] Fortunately, now the Court has the benefit of experience

[3] Of course, the standard for conducting elections by the Board when the regulation was adopted was that of the majority of the votes cast. *See* discussion *infra* Section VII.C.1.

[4] Moreover, on December 18, 2013, the Nevada Supreme Court issued another order in this dispute holding that courts lack the jurisdiction to conduct pre-election review of the Board's chosen election procedure. (JA, Vol. I, at 156-60). A

and the lessons learned from the Board's ill-advised experiment in 2003, not to mention a renewed focus on election standards and related principles of statutory interpretation.

As the Court stated in its December 21, 2005 Order of Affirmance, "we defer 'to an agency's interpretation of a statute that the agency is charged with enforcing.'" (JA, Vol. I, at 39). The Nevada Supreme Court explained the standard of review as follows:

> Additionally, we defer 'to an agency's interpretation of a statute that the agency is charged with enforcing.' Substantial evidence exists if a reasonable person could find adequate evidence to support the agency's conclusion. In making this determination, **the reviewing court is confined to the record before the agency**. Therefore, **this court's review is limited** to determine whether there was 'substantial evidence in the record to support the agency determination' or statutory interpretation.

Id. (**emphasis** added). After noting the proper standard of review, the Nevada Supreme Court held:

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

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judgment is void if a court lacks jurisdiction to enter the judgment. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). Thus, under the more recent 2013 Nevada Supreme Court Order, the 2005 Order is void *ab initio* due to its upholding of the district court's pre-election judicial review. Unfortunately, the parties failed to file a similar petition for writ of mandamus prior to the 2005 Order.

(JA, Vol. I, at 47-48). (**emphasis** added).

The Court clearly viewed the Supermajority Rule as having been the product of administrative rule making rather than the consequence of statutory language alone.[5] Since that time, the EMRB has expressly overruled its prior interpretation based, in part, on the substantial evidence presented before it. (JA, Vol. I, at 163-69). The Court is now presented with an entirely new agency decision that has facts and evidence to recommend it. Moreover, in the 2009 Order of Affirmance, the Court implicitly adopted the reasoning of the 2005 Order of Affirmance (wherein it applied a deferential standard of review) – though the real issue in that matter concerned the Board's authority to order a runoff election and not how to evaluate the outcome of the election. (JA, Vol. I, at 82-83). The Court stated that "[i]n a previous order … involving the same parties, we determined" this issue. (JA, Vol. I, at 82). The 2009 Order explained as follows:

> When a competing employee organization seeks recognition, NRS 288.160(4) permits the EMRB to conduct an election to determine 'which employee organization is supported by a majority of the local government employees in a particular bargaining unit.' To win an

[5] The Court did include an additional line stating that "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." (JA, Vol. I, at 48). The Legislature has spoken as to whether the definition of a majority votes should be changed. It has done so in NRS 288.110(1)(c) by delegating the authority to make that decision to the discretion of the Board. The legislative input into whether or not the standard should be changed is an integral part of the administrative rulemaking process as further detailed above. NRS 233B.067.

> election and thus be considered the exclusive representative employee organization, the election must 'demonstrate that the employee organization is supported by a majority of employees within the particular bargaining unit.' NAC 288.110(10)(d).

(JA, Vol. I, at 81-82). Under this analytical approach, the statute's function is to authorize the EMRB to conduct an election, while the regulation's function is to set the standard by which an organization must "win an election" and thereby assume control of a bargaining unit. By identifying the regulation as the source of the standard for evaluating the outcome, the Court incorporated in its ruling a comprehensive and harmonious view of the entire election process and history. By this view, the EMRB promulgates regulations in order to establish rules of general applicability and exercises its discretion under NRS 288.110(1)(c) to implement the best approach for conducting elections.

In summary, the Court's prior orders do not bind this current appeal and, indeed, support the subject Board Order under review. As noted above, the Court had no evidence in the previous cases to inform its analysis of the election process. This is no longer the case insofar as the Board has issued a thoughtful, well-reasoned decision supported not only by substantial evidence, but by principles of statutory interpretation and prevailing labor law standards.

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C. The Board's Interpretation of its Statute was not an Arbitrary Abuse of Discretion and is Supported by Substantial Evidence.

1. The Board's practiced method of conducting elections according to prevailing election standards supports the Board's interpretation.

Although the Board adopted the Supermajority Rule in 2003, it has applied the rule in connection with these proceedings only, and since 2003, the Board has conducted no elections other than those at issue in this case. Otherwise, the Board has from its inception used the familiar and widely practiced majority of the votes cast standard. (JA, Vol. I, at 167); *See, e.g.*, *Laborers' Int'l Union, Local 169 v. Washoe Med. Ctr.*, Item No. 1, EMRB Case No. 1 (1970); *Stationary Engineers, Local 39 v. Airport Auth. of Washoe County*, Item No. 133, EMRB Case No. A1-045349 (1982); *Elko Gen. Hosp. v. Elko County Employees Ass'n*, Item No. 312, EMRB Case No. A1-045537 (1993); *City of Mesquite & Teamsters, Local 14*, Item No. 434, EMRB Case No. A1-045644 (1998); *Int'l Union of Operating Engineers, Local No. 3 v. Mount Grant Gen. Hosp.*, Item No. 473, EMRB Case No. A1-045683 (2000).

This standard consistently achieved just results and thereby allowed the Board to fulfill its statutory duty to address and resolve labor representation disputes. During the span between 1969 and 2003, the legislature took no action to

overturn the Board's interpretation of NRS 288.160(4) as permitting the use of a standard whereby the winner of an election is determined by a majority of the persons voting in the election. Since the Board undeniably construed the law as permitting the application of a majority of the votes cast standard, the legislature, through its inaction prior to 2003, acquiesced in the EMRB's interpretation of NRS 288.160(4). *Summa Corp. v. State Gaming Control Bd.*, 98 Nev. 390, 392, 649 P.2d 1363, 1365 (1982) (holding that "[w]here, as here, the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent."). Since the current dispute over election practices has been the subject of ongoing litigation, the legislative silence since 2003 is not indicative of a policy preference for one standard over another.

Moreover, in the decision to abandon its 2003 experiment, the Board has once again affirmed prevailing labor law standards as well as the standard that governs Nevada elections generally. The EMRA is modeled after the National Labor Relations Act ("NLRA"). *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993); *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Rel. Bd.*, 127 Nev. 631, 639, 261 P.3d 1071, 1076 (2011). This Court has recognized that the intent of the EMRA is to apply the governing principles of the NLRA to Nevada's local

government employees. *Weiner v. Beatty*, 121 Nev. 243, 248-49, 116 P.3d 829, 832 (2005). In fact, the Court has repeatedly looked to precedent concerning the NLRA in order to interpret and apply the EMRB. *See, e.g.*, *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Rel. Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) (applying NLRB precedent to consider the EMRA's statute of limitations); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002) (applying NLRB's limited deferral doctrine to the EMRB); *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 449, 49 P.3d 651, 654 (2002) (looking to NLRB's jurisdiction over unfair labor practices to determine extent of EMRB's jurisdiction); *Truckee Meadows*, 109 Nev. at 372-377, 849 P.2d at 347-50 (approving the EMRB's use of the significantly-related test to determine mandatory subjects of bargaining); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) (approving NLRB's *Wright Line* balance-shifting test to claims arising out of conduct that is protected by the EMRA).

Indeed, under the NLRA, Section 9(a), the wording of the applicable federal statute is substantially the same as the language of state law as it relates to the conduct of elections (*i.e.* representation by an employee organization is based upon the choice of "… the majority of the employees in a unit…" 29 U.S.C. § 159(a). *See also* 29 U.S.C. § 159(e)(1) ("…the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization

and to the employer"); *compare* NAC 288.110(10) ("majority of the employees within the particular bargaining unit"); NRS 288.160(4) (the Board "may conduct an election by secret ballot" in such unit).[6] Not surprisingly, the federal courts have held that the appropriate standard for such elections is the majority of the votes cast. *Virginian Railway Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560 (1937); *N.L.R.B. v. Deutsch Co.*, 265 F.2d 473, 479 (9th Cir. 1959) (explaining that "[i]t has repeatedly been held under well recognized rules attending elections that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting").

The Court presumes that the Legislature acts with full knowledge of the existing statutes relating to the same subject. *City of Boulder City. v. Gen'l Sales Drivers and Helpers, Intern. Broth. of Teamsters, Local* 14, 101 Nev. 117, 119, 694 P.2d 498, 500 (1985) (looking to federal statutes relating to the subject of arbitration in order to interpret an EMRA provision concerning arbitration). The standard used under the NLRA represents a pragmatic approach to conducting an

[6] Of note: when the EMRA was enacted in 1969, the bill was specifically changed from its original draft in order to authorize the EMRB to conduct secret ballot elections to determine whether an organization would represent a given bargaining unit. *See* Minutes of Meeting of the Assembly Committee on Government Affairs, 55th Leg. April 15, 1969; Journal of the Assembly 55th Leg. at 1012 (Nev. Apr. 18, 1969 (changing proposed procedure in representation disputes from an appeal hearing to a secret ballot election)). This is similar to section 9 of the NLRA which authorized the NLRB to conduct secret ballot elections to determine representation questions in a bargaining unit. 29 U.S.C. § 159(e)(1).

election and provides for a just resolution of representation contests in a manner consistent with the provisions of NRS 288.160(4) and NAC 288.110(10). Since the EMRA was modeled after the NLRA, the Legislature is presumed to have adopted the same standards governing elections as are applied to labor disputes governed by federal labor law. Nothing in the legislative history of NRS 288.160 suggests otherwise.

2. The language of all applicable statutes in this case support the Board's interpretation.

NRS 288.160(4) provides, "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." The EMRB is entitled to utilize its specialized knowledge, experience and technical competence when evaluating the evidence before it. NRS 233B.123(5). "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." *Clark County Sch. Dist.*, 90 Nev. at 446, 530 P.2d at 117. Here, it is undisputed that the EMRB has correctly construed NRS 288.160(4) as a generic authorization to conduct elections. The manner of conducting any given election is left to the Board's discretion. Since the Board's standard for evaluating the 2015 election returns is clearly within the language of both the governing

statute and the implementing regulation, great deference should be given to its decision to certify Local 14 as the employee organization having the support of a majority of the members of the CCSD bargaining unit. *Id*.

NRS 288.110(1)(d) states that "[t]he Board may make rules governing … [t]he determination of bargaining units." NAC 288.120 (**emphasis** added) provides that "**[t]he Board may use the results of an election conducted pursuant to NAC 288.110 as additional information for its determination of a bargaining unit.**" As discussed above, the NLRA supports the Board's interpretation of the EMRA as authorizing the use of the majority of the votes cast standard.

Moreover, the plain language of NAC 288.110(10) supports this conclusion. The regulation states that "[a]n employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit [when]. . . [t]he election **demonstrates** that the employee organization is supported by a majority of the employees within a particular bargaining unit." NAC 288.110(10)(d) (**emphasis** added). To "demonstrate" is to "prove something by showing an example of it." Merriam-Webster On-Line Dictionary, http://www.merriam-webstercom/dictionary /demonstrate. Proof by "demonstration" is not the equivalent of proof to a mathematical certainty.

Furthermore, NRS 288.160(4) could easily have specified the use of a computational standard based upon the number of potential voters as opposed to the number of actual voters. Of course, this would have been a significant departure from prevailing labor law standards as well as election standards in general. In fact, NAC 288.110(10) plainly, clearly, and unmistakably states that an election need only "demonstrate" that the employee organization is supported by a majority of the members of the bargaining unit. By this standard, the election results give rise to an inference that may then serve as the foundation for the Board's decision to recognize an employee organization as the exclusive agent for a bargaining unit.

3. Substantial evidence supports the Board's conclusion.

As previously discussed, an agency's conclusions of law, when closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence. *Schepcoff*, 109 Nev. at 325, 849 P.2d at 273 (1993); *Elliot* 114 Nev. at 32, n.1, 952 P.2d at 966 n.1; *Fathers & Sons & A Daughter Too*, 124 Nev. at 262, 182 P.3d at 106. The Board made an informed decision based upon substantial evidence, and the Court now reviews that decision in light of three separate elections, each of which was more conclusive than the last. (JA, Vol. I, at 50, 162, 163-69, 181-82).

When the Board decided that Local 14 enjoys the support of a majority of the members of the bargaining unit, the Board made a factual finding about what the election demonstrated and how it resolved the doubt that gave rise to the call for an election. Having considered the votes cast by voting employees, the Board drew a reasonable inference about nonvoters' support: that they assented to the will of the voters. A reasonable mind would consider that evidence as adequate to support the Board's conclusion. *Cf. Wright v. State, Dep't of Motor Vehicles,* 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (substantial evidence may be inferred from the lack of certain evidence). Substantial evidence supports the Board's finding that Local 14 enjoys majority support. Conversely, there was no evidence in 2003 to support the Board's adoption of the Supermajority Rule.

4. The election results revealed that NRS 288.160(4) would be rendered meaningless if interpreted to require a union to receive votes from a majority of all employees.

No portion of a statute should be rendered meaningless nor should it be interpreted to produce an absurd or unreasonable result. *City of Reno v. Building & Const. Trades Council of Northern Nevada*, 251. P.3d 718, 722 (2011); *see, e.g.*, *Swift & Co. v. Wickman*, 382 U.S. 111, 116 (1965) (stating that when a prior decision creates unworkable consequences, it may be overruled). The EMRB's ability to hold an election under a standard that will actually produce a meaningful

result is essential to carrying out its statutory duty to hold elections and to resolve good faith doubt pursuant to NRS 288.160(4) and NAC 288.110(10). Having deviated in 2003 from standard election practices, the EMRB was unable to fulfill its statutory duty to resolve representation disputes for the benefit of the employees in the CCSD bargaining unit. When mounting evidence demonstrated that the 2003 standard was impractical, that it was in fact an impediment to the Board's performance of its statutory obligations, the Board reinstated the proper standard based upon a plain reading of NAC 288.110(10).

"An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991). Given the demands of the changing circumstances in this case, it was necessary for the EMRB to revisit the language of NRS 288.160(4) and NAC 288.110(10) in view of the substantial evidence of record.

Indeed, the Board's decision in this case is consistent with the plain language of NRS 288.160(4) and NAC 288.110(10). To the extent that either is ambiguous, the Board has correctly interpreted them in light of the applicable public policy considerations and the substantial evidence of record. There are two ways that a statute may be ambiguous: it may be "capable of being understood in two or more senses by reasonably informed persons" or it may be "one that

otherwise does not speak to the issue before the court." *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007).

Assuming that NRS 288.160(4) is ambiguous, the ambiguity arguably derives not from what the statute says but from what it omits. In this regard, the statute fails to identify any standards governing elections, other than to say that they must be conducted "by secret ballot." Although NRS 288.160(4) contemplates governance by majority rule, it does not speak to the issue that is before the Court: how the doubt about majority support is to be resolved in the face of moderate to low voter turnout.

However, NRS 288.110(1)(d) does speak to this issue indirectly insofar as it states that "[t]he Board may make rules governing. . . "[t]he determination of bargaining units." This is a broad directive to the Board to promulgate rules as necessary or appropriate to define the rights and responsibilities of bargaining units, their members, and their representatives. The rule at issue in this case is NAC 288.110(10). As authorized by NAC 288.110(10), the Board concluded that the results of the 2015 election demonstrate majority support for Local 14, thus resolving a disputed issue concerning the representation of the bargaining unit. The decision is consistent with the plain language of NAC 288.110(10), the Board's election decisions prior to 2003, as well as prevailing election standards. If NRS 288.160(4) were construed as a limitation upon the Board's ability to

resolve representation disputes except through an election with near perfect voter participation, disaffected employees within large bargaining units would have no practical means by which to displace an unresponsive and unpopular public union representative. This would be an unreasonable if not absurd result. At a minimum, it is contrary to the EMRA's public policy objective of promoting labor stability over labor strife.

D. It Would Be a Manifest Injustice to Allow ESEA to Remain as the Employees' Bargaining Agent.

As discussed above, the Board's 2016 Order is consistent with this Court's prior decisions. Furthermore, those prior decisions are without precedential value because they are unpublished. Nev. R. App. P. 36(c)(2) ("An unpublished disposition, while publicly available, does not establish mandatory precedent except in a subsequent state of a case in which the unpublished disposition was entered . . . ."). Although the law of the case doctrine would ordinarily require the incorporation of the prior decisions as they relate to these proceedings, 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." *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007). 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.'

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

Here, the repeated failure of the experimental vote-counting standard that the Board adopted at an earlier stage of this case presents new evidence that justifies reconsideration of the decision. To deny the CCSD employees representation by the union for which they have overwhelmingly expressed their preference would be to perpetrate an injustice. In short, those who chose not to vote would effectively be afforded a veto power over the selection of a new union representative. Although the "manifest injustice" should be invoked sparingly, it clearly applies in this context.

As a final matter, even if the prior decisions had been published, it would be appropriate to depart from the doctrine of *stare decisis*, thus recognizing that the prior decisions are erroneous to the extent that may be construed as setting forth a legally conclusive and inflexible reading of NRS 288.160(4) and NAC 288.110(10). Fortunately, the Court does not "adhere to the doctrine so stridently that the 'law is forever encased in a straight-jacket.'" *Armenta–Carpio v. State,* 129 Nev. Adv. Op. 54, 306 P.3d 395, 398 (2013) (quoting *Adam v. State,* 127 Nev. Adv. Op. 601, 604, 261 P.3d 1063, 1065 (2011)). Rather, the Court will overrule "governing decisions" that "prove to be unworkable or are badly reasoned," *Harris v. State,* 130 Nev. Adv. Op. 47, 329 P.3d 619, 623 (2014), or that "are shown to be unsound in principle." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007); *see also Egan v. Chambers,* 129 Nev. Adv. Op. 79, 299 P.3d 364, 367 (2013); *State v. Lloyd*, 312 P.3d 467, 474 (2013). *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008). When a decision is unworkable or unsound in principle, "depart[ing] from the doctrine of *stare decisis*" is justified "to avoid the perpetuation of that error." *Armenta–Carpio*, 306 P.3d at 398. Put simply, the Court will fix mistakes that come to light as new cases or fact-patterns are presented to it.

The exception to *stare decisis* would apply here. Interpreting NRS 288.160(4) to require that a union receive votes from a majority of all potential

voters, regardless of how few cast ballots, makes the statute unworkable. As to "whether any employee organization is supported by a majority of employees," NRS 288.160(4) directs the Board to hold elections "upon the question." A vote-counting system that makes it practically impossible for the election to produce results is unworkable. It replaces a statutory scheme premised on employee self-determination with one that entrenches an employee organization in a position of power even when customary election practices demonstrate that the organization is disfavored by the overwhelming majority of its employees.

VIII. CONCLUSION

For all the foregoing reasons, Appellant State of Nevada, Local Government Employee-Management Relations Board respectfully requests that the Court reverse the District Court order granting ESEA's Petition for Judicial Review.

DATED this 19th day of October, 2016

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CERTIFICATE OF COMPLIANCE

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 type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2013. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 8,548 words. 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, 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 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.

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