IN THE SUPREME COURT OF THE STATE OF NEVADA

THE 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 No. 70586

District Court Case No. A-15-715577-J

ANSWERING BRIEF OF RESPONDENT EDUCATION SUPPORT EMPLOYEES ASSOCIATION

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that ESEA is an association with no parent corporations, and no publicly held company owns 10% or more of its stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Francis C. Flaherty (Nevada Bar No. 5303) and Sue S. Matuska (Nevada Bar No. 6051) are the only attorneys appearing for ESEA in this case, and no others are expected to appear in this Court in this case. The Dyer Lawrence Law Firm is the only law firm whose partners or associates have appeared for the party or amicus in the case or are expected to appear in this Court in this case.

Dated this 21st day of July, 2017.

By _____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.150. The district court entered a final Order Granting Education Support Employees Association's Petition for Judicial Review on May 17, 2016, and the State of Nevada, Local Government Employee-Management Relations Board's ("the Board") filed a timely Notice of Appeal. No other party to this matter filed an appeal. *See also* Education Support Employees Association's Reply to Appellant's Response to Order to Show Cause, filed herein on December 13, 2016, which lays out extensive argument in support of the Court's jurisdiction in this matter.

ROUTING STATEMENT

Nevada Rule of Appellate Procedure ("NRAP") 17 addresses which matters are retained in the Supreme Court and which matters are presumptively assigned to the Court of Appeals. Pursuant to NRAP 17(b)(4), "[a]dministrative agency appeals" that are not tax, water, or public utilities commission determinations, are presumptively assigned to the Court of Appeals. This matter is an appeal of an administrative agency. It is, therefore, presumptively assigned to the Court of Appeals.

It is not an election question case. The enunciation in NRAP 17(a)(3) that election questions are presumptively retained in the Supreme Court refers not to NRS chapter 288 representation elections involving unions, but to NRS chapters 293 and

293C, state or local elections involving the general public. This is so because it refers to "*ballot or* election questions." Ballot questions appear only in state or local elections involving the general public, not in representation elections held pursuant to NRS chapter 288.

It is an important case, but not a case of "statewide public importance," *see* NRAP 17(a)(14), as there has been no representation by the Board that there are any pending matters to which a determination on the particular issue of this case would apply. The Board does not appear to have sought a bill in the recently concluded legislative session to address the issue raised in this case. The issue has been the subject of litigation between these parties for more than 14 years. There is, therefore, nothing to indicate that it constitutes a case of "statewide public importance" that would, presumptively, be assigned to the Supreme Court. This administrative agency appeal should be assigned to and resolved by the Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does NRS 288.160(4) require that the outcome of representation elections be determined by a vote of a majority of all the employees in the particular bargaining unit or merely a majority of votes cast?

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2. Does the Board have the authority to "re-interpret" its regulation (NAC 288.110(10)(d)) in contravention of its enacting legislation (NRS 288.160(4)), as twice interpreted by the Nevada Supreme Court?

3. Did the Board violate the Administrative Procedure Act by adopting a new rule allowing it to determine the results of a representation election by a mere majority of the votes cast without following any of the procedures of NRS Chapter 233B.040 *et seq.*?

I. STATEMENT OF THE CASE

This appeal will again determine the appropriate standard to be applied by the Board to determine the recognized employee organization for local government employees when a representation election is conducted pursuant to NRS 288.160(4). At the outset, it is important to make clear that representation elections are not the same thing as general elections conducted pursuant to NRS chapter 293 *et seq.* A representation election occurs in the case where more than one employee organization is attempting to be the bargaining agent for a bargaining unit of local government employees or a local government employer declines to voluntarily recognize an employee organization that has complied with the requirements of NRS 288.160(1) and (2) to obtain recognition. In the case of an election between a rival employee organization and an incumbent employee organization, it is important to acknowledge that the incumbent would have previously proved its majority support by "present[ing] a verified membership list showing that it represents a majority of the employees in a bargaining unit." NRS 288.160(2). The only people who can vote in the representation election are the local government employees in the bargaining unit. The employee organization that is eventually recognized to bargain on their behalf has the authority to negotiate with their employer to produce a legally binding contract that sets such critically important aspects of the employees' lives as their

salary, their benefits, their sick leave and vacation. In a "political" (NRS 293) election, officials are elected who may enact and enforce laws and regulations that when later applied may or may not affect the persons who vote. It makes sense that the process for recognizing an employee organization that will exercise such control over these subjects would be deliberate and that the standard for recognition would be high, both at the time of initial recognition and at the point of a challenge by a rival.

In this case, the Education Support Employees Association ("ESEA") gained majority support and recognition as the bargaining agent for the support staff employees of the Clark County School District ("District") by submitting a verified membership list containing the signatures of a majority of all such employees. In 2002, International Brotherhood of Teamsters, Local 14 ("Local 14") challenged ESEA's majority support by petitioning the Board. It did not submit "representation" or "interest" cards showing how many employees supported it.

At an early juncture in this case, the Nevada Supreme Court held that "NRS 288.160(4) sets forth the criteria of resolving a majority status dispute" and that "the statute . . . plainly and unambiguously state[s] that to win an election, the employee organization must have 'a majority of the employees within the particular bargaining unit,'" and it specifically rejected the contention that an employee organization could

obtain recognition based on a mere majority of the votes cast. Joint Appendix ("JA"), First Volume ("I") at 47.[1] Finally and conclusively, the Supreme Court has said that "in the case of an unambiguous statute, the EMRB is required to follow the law regardless of result" and "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." I JA 47.

After following the Supreme Court's interpretation and directive for many years, the Board suddenly stopped deferring to the Nevada Legislature. In 2016, without any change in the law by the Legislature or in interpretation by the Supreme Court, the Board applied a mere majority-of-the-votes-case standard to a second runoff election between the parties to determine that Local 14 would displace ESEA and become the recognized bargaining agent, despite it having ***not*** received the vote of a majority of all the employees in the bargaining unit ("an outright majority").

ESEA challenged this determination and the district court agreed that the Board did not have authority to contravene the Supreme Court's interpretation of the relevant law and regulation. This appeal resulted and its resolution will determine whether, without obtaining a legislative change in the statute, the Board had the authority to contravene the Supreme Court's interpretation of the relevant law to

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[1] Hereafter, the Joint Appendix will be referred to as JA and the volume of the Joint Appendix will be noted beforehand with Roman numeral I or II, and the Batesstamped page number will be noted with the appropriate arabic number.

displace an incumbent organization, which had previously obtained signatures from an outright majority, and replace it with a rival organization that merely garnered more votes on "election day." Thus, this case concerns more than a dispute between two employee organizations. This case strikes at the core of the separation of powers among the executive, legislative and judicial branches.

II. STATEMENT OF THE FACTS

This dispute began nearly 15 years ago and has involved three trips to the Nevada Supreme Court before this appeal. Although the Board barely references the outcome of these trips in its statement of facts, they govern the outcome of this appeal, and ESEA will fully describe them in this statement.

A. The Board Orders a Representation Election between ESEA, Local 14 and "No Union."

In 2002, Local 14 sought to displace ESEA and become the recognized bargaining agent for the bargaining unit that was, and still is, represented by ESEA. After considering documents submitted by Local 14, the Board ordered and held a hearing. I JA at 1-2. The only "evidence" that was presented squarely on the issue of whether Local 14 rather than ESEA was supported by a majority of the local government employees in the bargaining unit, which at that time consisted of 10,386 employees (I JA 82), was the testimony of Local 14's representative Gary Mauger that Local 14 had obtained some 4,000 representation cards from the support staff

employees of the District. I JA 4-5. However, the cards were never counted or examined by the Board, and no comparison was ever made between the names on the putative cards and the names on a list of bargaining unit employees provided by the District. Nevertheless, the Board held that it had a "good faith doubt" pursuant to NRS 288.160(4) as to majority support. I JA 10. On September 24, 2002, the Board ordered that a representation election was necessary to ascertain whether Local 14 or ESEA had the support of a majority of employees in the bargaining unit. I JA 11.

B. The Parties Challenge the Board's Order.

On September 27, 2002, ESEA filed a petition for judicial review in district court challenging certain aspects of the Board's order. I JA 15-17. On January 23, 2003, the Board issued an order establishing the terms of the election. I JA 12-14. Among other things, that order interpreted the Board's own regulation, NAC 288.110(10)(d).[2] The order stated that in order for the Board to "certif[y] [an organization] as representing the unit," the election had to show "50% plus one of the employees in the bargaining unit" ("an outright majority") not merely a majority of those casting votes ("majority of votes cast") supported that organization. I JA 14.

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[2] In 2003, the relevant language was contained in subsection (9)(d) of NAC 288.110. Today, that language, which has remained unchanged, is located in subsection (10)(d) of NAC 288.110.

On February 24, 2003, Local 14 cross-petitioned to challenge the outright majority requirement. I JA 18-26. After the district court (Judge David Wall) ruled on the petitions for judicial review, both sides appealed to the Nevada Supreme Court. I JA 27-36.

C. The Supreme Court Orders that NRS 288.160(4) and NAC 288.110 require an Outright Majority.

On December 21, 2005, the Supreme Court entered an Order of Affirmance rejecting both appeals and declaring that the plain language of NRS 288.160(4) ***and*** NAC 288.110 require an outright majority. ("2005 Order of Affirmance") I JA 37-49.

Specifically, the supreme court stated:

> [T]he 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."

I JA 47 (emphasis added). In fact, the supreme court ***specifically rejected*** the argument that NRS 288.160 or NAC 288.110 required a mere "majority of the employees who vote." I JA 47. Finally, the supreme court emphasized that "in the case of an unambiguous statute, *the EMRB is required to follow the law 'regardless of result'*" and "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." I JA 47-48. (emphasis added).

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D. The Representation Election is Held and No Party Receives an Outright Majority.

On April 20, 2006, the representation election was held and the Board determined that no employee organization received majority support in that election. Despite a motion by Local 14 to the Board that it declare that the "no union" option prevailed in the election, the Board certified the election results as reported by the Board's Commissioner and, on September 7, 2006, ordered that it had "exhausted its jurisdiction" and that all pending or future motions on the election were moot. I JA 50-54.

E. Local 14 Challenges the Board's Ruling on the Election Results.

On September 18, 2006, Local 14 filed a petition for judicial review seeking to set aside the Board's September 7, 2006, order and to compel the Board to issue a declaration that the "no union" ballot choice or Local 14 "won" the election. I JA 55-58. On April 4, 2007, the district court issued an order stating that the Board erred when it determined that it had exhausted its jurisdiction but made no determination as to how the Board was to proceed.[3] I JA 59-64. In response, the Board, on May 31, 2007, ordered that the previously certified election results stood and that those results

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[3] From the April 4, 2007, Order forward, at the district court level, this matter was handled exclusively by Department I of the Eighth Judicial District Court, the Honorable Kenneth Cory.

preserved the status quo of ESEA as the recognized and exclusive bargaining agent. I JA 65-67.

Local 14 filed another petition for judicial review (styled a "supplemental petition") on June 11, 2007, requesting the district court to order that "no union" or Local 14 be declared the winner, or, alternatively, that a runoff election be ordered pursuant to the Board's regulations. I JA 68-72. On January 16, 2008, the district court granted the petition in part by ordering that a runoff election be held and denied it in part. It also encouraged the parties to appeal the decision to the Nevada Supreme Court. I JA 73-78. On January 29, 2008, Local 14 appealed the denial to the Supreme Court. I JA 79-80.

F. The Supreme Court Orders a Runoff Election and Again Finds that the Outright Majority Standard Applies.

About two years later, the Supreme Court entered another Order of Affirmance, upholding the district court's conclusion that the regulations of the Board required a runoff election and reaffirming that the outright majority requirement would determine the results of the election. ("2009 Order of Affirmance") I JA 81-84.

Specifically, the supreme court 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.*

I JA 82 (emphasis added). The Supreme Court also stated that such standard applied to a runoff election and acknowledged that such election "may produce similar inconclusive results." I JA 83.

After the parties' own efforts to agree on a plan for the runoff election failed, the Board announced its intention to move forward under the same procedure that had governed the original election in 2006. I JA 86. Local 14 filed another petition for judicial review (styled a "second supplemental petition") and for writ of mandate with the district court seeking review of the Board's decision to use the same procedures in the runoff election. I JA 89-96.

After a stipulated stay was lifted, the Board approved a plan that called for the runoff election to be conducted pursuant to the same rules used for the original election, with new dates and locations. I JA 97-121. However on January 8, 2013, the district court granted Local 14's "second supplemental" petition for judicial review and directed the Board to come up with an election plan that was "reasonably calculated to produce a definitive result." I JA 125 (entire Order at I JA 122-26).

On March 1, 2013, the Board filed a Petition for a Writ of Mandamus or in the alternative for a Writ of Certiorari with the Nevada Supreme Court seeking an order that the district court be directed to dismiss and deny the petition for judicial review or for an order that said petition was void on the basis that the district court lacked

jurisdiction. I JA 127-54. On December 18, 2013, the Supreme Court granted the Board's petition, declaring that "[n]either 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." I JA 160 (entire Order at I JA 156-61).

G. The Runoff Election is Held; No Party Receives an Outright Majority

The runoff election was held approximately two years later by secret, mail-in ballot between January 5, 2015, and February 3, 2015. As in 2006, the runoff election resulted in no party receiving an affirmative vote from an outright majority. I JA 162. On February 17, 2015, the Board certified these results by issuance of the Order on Certification and Implications of Runoff Election Results ("the 2015 Board Order"), and declared that the results:

> do not justify removing ESEA in favor of Local 14 under the majority vote requirement imposed in the Supreme Court's 2009 order. As such ESEA will continue as the recognized bargaining agent.

I JA 164 (entire Order at I JA 163-72).

H. The Board Unlawfully "Re-Interprets" the Appropriate Standard for Determining Results of Representation Elections.

In this same 2015 Board Order, the Board then declared that it has discretionary or implied authority to order another runoff election that would be determined by a mere majority of the votes cast. Specifically, the Board declared that it somehow has a "statutory duty to hold elections and to resolve our good faith

doubts"[4] and that to do so it must "excise[] the cause of futility in this case and proceed[] under something different than the majority of the unit standard." I JA 166. Thus, without a change by the Legislature to the language in NRS 288.160(4) or any reinterpretation of that statute by the Nevada Supreme Court, the Board re-interpreted NAC 288.110(10)(d) to require only a majority of votes cast. I JA 168.

On March 19, 2015, ESEA petitioned the district court for judicial review of the 2015 Board Order and filed a Motion for Stay. I JA 173-78, and 179. Local 14 and the Board each filed an opposition to the Motion for Stay and the Board also filed a countermotion to dismiss the petition for judicial review, which ESEA opposed, but the district court granted on the basis that review of the 2015 Board Order would be a pre-election review of an election procedure and, therefore, would be in contravention of the Supreme Court's December 18, 2013, order. I JA 179. Although the district court granted the Board's motion to dismiss on the basis of that 2013 order, it did so without prejudice and with an express clarification that it was not "preclud[ing] ESEA from seeking judicial review at the conclusion of the election process." I JA 180.

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[4] Note that there is no "duty"; initial elections ordered by the Board are discretionary: "If the Board in good faith doubts . . . it *may* conduct an election." NRS 288.160(4) (emphasis added).

I. A Second Runoff Election is Held and Determined by the Unlawful Mere Majority-of-the-Votes-Cast Standard.

The unlawful, second, discretionary runoff election was held by secret, mail-in ballot between November 2, 2015, and December 5, 2015. I JA 181-84. As in the legal runoff election, no party received an affirmative vote from an outright majority, but Local 14 received a majority of the votes cast. I JA 184. ESEA filed with the Board a Complaint and Objection on the Board's conduct of the second, runoff election and on any determination of the results on the basis of the mere majority-of-the-votes-cast-standard. I JA 185-88. Specifically, the Complaint and Objection plead that, at the second runoff election, "Local 14 received a majority of the votes cast but again did not receive the vote of a majority of the bargaining unit" and that, therefore, any determination that Local 14 has the support of the bargaining unit was objectionable. I JA 186. On January 11, 2016, the Board, at a noticed public meeting, did not dispute ESEA's allegation that Local 14 failed to receive the vote of a majority of the bargaining unit but denied ESEA's Complaint and Objection, I JA 190, and ordered that, because Local 14 had received a majority of the votes cast at the second runoff election, it would be certified as the recognized bargaining agent thirty (30) days after the latter of: (1) the date of the written 2016 Board Order; or (2) Local 14's presentation to the District of the documents required by NRS 288.160(1). I JA 191. Counsel for ESEA made an oral motion that the Board stay its order

pending judicial review, but the Board denied that motion. The Board's actions at the January 11, 2016, were reduced to writing on January 20, 2016, in the 2016 Board Order. I JA 189-95.

J. ESEA Challenges the Board's Unlawful "Re-Interpretation" of the Appropriate Standard for Determining Representation Election Results and the District Court Agrees.

On January 20, 2016, ESEA filed its petition for judicial review and motion to stay the 2016 Board Order with the district court. After staying the 2016 Board Order, the district court ultimately granted ESEA's petition for judicial review, vacating the 2016 Board Order. I JA 196-200. This appeal followed. II JA 470.

III. SUMMARY OF THE ARGUMENT

The Nevada Supreme Court has twice held in this same case involving these same parties that NRS 288.160(4) plainly and unambiguously requires that an employee organization (union) obtain votes from a majority of employees in the entire bargaining unit, not just a majority of those who vote in an election, to obtain recognition as the bargaining agent for that bargaining unit in a representation election. Contrary to the claim of the Board, the Supreme Court did not "defer" to the Board's former interpretation of NRS 288.160(4), thus somehow allowing the Board to "reinterpret" that statute. As early as 2005, the Nevada Supreme Court conducted a *de novo* review of the Board's decision, and it specifically rejected an argument by

Local 14 that the statute–NRS 288.160(4)–only requires a majority of employees who voted in the representation election to obtain recognition.

The Board's argument that its inference and conclusion of law that Local 14 enjoys "majority support" from the bargaining unit are supported by substantial evidence is of no consequence because inferences and evidence, substantial or otherwise, cannot overcome a clear legislative directive that an employee organization must obtain votes from a majority of the entire bargaining unit. Equally misplaced is the Board's reliance on cases arising under the laws of other states and the NLRA. In NRS 288.160, the Nevada Legislature has set forth a process for the initial recognition of employee organizations and the potential, subsequent withdrawal of such recognition by a local government employer with the Board's permission. It has also authorized, but did not require, the Board to conduct representation elections when it has a good faith doubt about whether an employee organization enjoys majority support; and relying on that authority, the Board "may" order an election upon initiation of a challenge by a rival union.

It is undisputed that to obtain initial recognition, an employee organization must present a verified membership list showing that it represents a majority of the employees in the entire bargaining unit. Given that the primary purpose of NRS Chapter 288 is labor stability, it would make no sense for the Legislature to require

a union to show support from a majority of the entire bargaining unit to gain initial recognition, but then allow a rival union to displace that incumbent with something less than a majority of the entire bargaining unit. Demonstrated, verifiable support from a majority of the entire bargaining unit is the *alpha* and *omega* for a union seeking to obtain recognition pursuant to NRS 288.160.

This Court's approach in this case is through the lens of "the law of the case" not *stare decisis*, but regardless of the lens through which the case is viewed, there is no reason to depart from the decisions of the Nevada Supreme Court in 2005 and 2009, in which the Supreme Court correctly indicated that the statute and the Board's companion regulation were plain and unambiguous, and that it would "defer to the Nevada Legislature" the question of whether the definition of a "majority" for purposes of NRS 288.160(4) should be changed. Thus the Board is precluded form "reinterpreting," "experimenting," engaging in an "evolutionary" approach or "changing its mind" regarding what the statute requires.

There are no "conflicting statutes" or "duties" in need of harmonization in this case. There is no "duty" in NRS 288.160 that the Board must conduct representation elections. Nor is "employee choice" a mandate for the Board. The one, clear, undisputed mandate for the Board under NRS Chapter 288 is labor stability, and the Board's actions in this case have been the antithesis of labor stability.

In the unlikely event this Court concludes that the Board has the regulatory authority to order that a rival union be recognized as a bargaining agent for a local government employee bargaining unit, thereby displacing an incumbent union, despite the fact that it has never obtained the vote of a majority of the entire bargaining unit, the Court should find that the Board must comply with the APA and amend its regulations before undertaking such action.

IV. ARGUMENT

A. Standard of Review; Issues of Statutory Interpretation are Reviewed *De Novo.*

The parties do ***not*** agree on the applicable standard of review in this appeal, and that standard is critical. The Board argues that the Supreme Court must defer to its re-interpretation of NRS 288.160(4) and NAC 288.110 because it has "supported" its re-interpretation with substantial evidence. But the Supreme Court's prior orders make clear that the meaning of NRS 288.160(4) and NAC 288.110 is a pure question of law to which this Court applies *de novo* review. Stated differently, a mountain of evidence is of no avail to the Board because it cannot contravene the language of the statute as twice interpreted by the Nevada Supreme Court.

The Supreme Court has made clear that "matters involving the construction of an administrative regulation are a question of law subject to independent appellate review" and that "a court will not hesitate to declare a regulation invalid when the

regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000); *see also City of Reno v. Building & Constr. Trades*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011) ("we decide 'pure legal questions without deference to an agency determination.'"). The Supreme Court has not hesitated to apply this rule to determinations made by the Board in the past. In *UMC Physician's v. Nevada Serv. Emp. Union*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008), although recognizing the general rule that courts "give deference to administrative body's conclusions of law when they are closely related to the facts," the Supreme Court went on to state "we independently review purely legal issues, including matters of statutory and regulatory interpretation." The Supreme Court, therefore, conducted a de novo review of the Board's interpretation of "who may file a complaint for the Board's review" pursuant to NRS 288.110 and 288.040 and determined that the Board's interpretation was "too limiting." In *City of Henderson v. Kilgore*, 122 Nev. 331, 131 P.3d 11 (2006) the Supreme Court considered whether the Board's adjudicatory authority pursuant to NRS chapter 288 included the power to issue preliminary injunctions. Without even mentioning the general rule of deference, the Supreme Court stated that this was a question of statutory interpretation, a question of law, and

that its review would be *de novo*. 122 Nev. at 334, 131 P.3d at 13. Applying that de novo review, the Supreme Court looked to the plain meaning of the statutes and held that the district court had erred by enforcing the Board's preliminary injunction. 122 Nev. at 337, 131 P.3d at15. [5]

Similarly, in this case, this Court must consider whether the Board's authority to conduct representation elections pursuant to NRS chapter 288 includes a power, not expressly set forth in statute, to apply a lower standard that conflicts with the plain language of the relevant statute for determination of the results of a "re-do" runoff election between the same parties to the original runoff election. *De novo* review, therefore, is the necessary standard of review for this appeal. This is a "pure

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[5] Similar to *UMC Physician's* and *Kilgore*, some of the cases cited by the Board, Appellant's Opening Brief ("AOB") at 9, stated the general rule of deference but then went on to determine that, where the agency's statutory interpretation was not within the language of the statute or otherwise conflicted, deference was ***not*** appropriate. *See State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1119, 946 P.2d 179, 181 (1997) (court did not defer to agency interpretation of statute governing apportionment of benefits for prior disabilities because when read in context of "the entire statutory scheme," such reading was, as a matter of law, in error); *State v. Tatalovich*, 129 Nev. __, 309 P.3d 43, 44 (129 Adv. Opn. No. 61 September 19, 2013) (court did not defer to agency's broad reading of phrase "engage in the business of" because when read in context of related statutory provisions such interpretation was not within the language).

legal question" that this Court must decide "without deference to [the] agency determination." *City of Reno v. Building & Constr. Trades*, 127 Nev.114 , 119, 251 P.3d 718, 721.

The Board cites to cases which stand for the general rule that a court gives deference to rulings of administrative agencies that are supported by substantial evidence and that agency conclusions of law, when closely related to the agency's view of the facts, are entitled to deference. AOB at 9-10, 26. Those cases, however, are distinguishable because the issue on appeal in those cases was the appropriateness of the particular agency's conclusions of law when applied to the facts.[6] The issue on appeal in this case is not whether the Board correctly weighed the evidence, *i.e.*, correctly counted the number of votes and/or determined whether they constituted more than 50% of the votes cast, or whether it correctly interpreted an ambiguous

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[6] *See Schepkoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993) (simple application of former NRS 616.270 (616B.612) to determine that substantial evidence supported the conclusion of law that employee was not acting within course and scope of his employment); *Elliot v. Resnick*, 114 Nev. 25, 32, n.1, 952 P.2d 961, 966 n.1 (1998) (court deferred to a local government on issue of whether a liquor license was legally transferred pursuant to the appropriate law); *Fathers & Sons & A Daughter Too v. Transp. Services Auth. of Nevada,* 124 Nev. 254, 262, 182 P.3d 100, 106 (2008) (application of NRS 706.386 to determine that agency's conclusion of who constituted "fully regulated motor carrier" was entitled to deference); *State Indus. Ins. Sys. v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408, 409 (1990) (substantial evidence supported agency's determination that employee's respiratory problems were not aggravated by employment-related asbestos.)

provision of NRS chapter 288 to create and apply a rule within the language of the statute. Rather, the issue on appeal in this case is whether the Board had the authority to interpret NRS 288.160(4) to create a rule that conflicts with the plain language of the statute.

In addition, the Board also argues that the Supreme Court, in the 2005 Order of Affirmance, applied the general rule of deference to the Board's "old" interpretation and that, therefore, the Board can now adopt a "new" interpretation as long as it is "supported" by substantial evidence. AOB at 16-19. The Board quotes the passage in the 2005 Order of Affirmance where the Supreme Court stated "we will not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110" as somehow being evidence of the Supreme Court's "deference." However, the legal authority cited by the Supreme Court for this statement, *State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000), clearly states that "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." *Id.* Furthermore, directly after this statement in the 2005 Order of Affirmance, the Supreme Court went on to state that "the EMRB is *required to follow the law 'regardless of result,'*" and "we will defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." I JA 47-48 (emphasis added). It is

clear, therefore, that the Supreme Court did not simply defer to the Board's interpretation of NRS 288.160. It declared that NRS 288.160(4) "plainly and unambiguously state[s] that to win an election, the employee organization must have 'a majority of the employees within the particular bargaining unit.'" I JA 47. Thus, it is clear that the Supreme Court's interpretation of NRS 288.160(4) was its own and *de novo*. It did not first consider NAC 288.110(10)(d) and agree that it was within the language of NRS 288.160(4). It did not determine that NRS 288.160(4) had more than one possible meaning and then defer to the Board's interpretation as being consistent with one of those. Rather, the Order plainly states that "in the case of an unambiguous statute, the EMRB is *required to follow the law 'regardless of result.'*" I JA 47 (emphasis added). If the Supreme Court were merely deferring to the Board's interpretation because it was supported by substantial evidence, it would not have included this statement. It is the fact that the law ***is*** plain and unambiguous that requires the Board to follow the law "regardless of result" and leaves no latitude for the Board to "re-interpret" the law. The Supreme Court applied a *de novo* standard in 2005.

A *de novo* review requires that a court examine the language for itself and interpret its meaning for itself, and "[w]here the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for

construction, and the courts are not permitted to search for its meaning beyond the statute itself." *State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485; *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010) (*quoting Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998)).

B. Adherence to the *De Novo* Standard of Review Compels the Conclusion that NRS 288.160(4) and NAC 288.110(10)(d) are Plain and Unambiguous and Require the Vote of a Majority of all the Employees of the Bargaining Unit.

1. The Language is Plain and Unambiguous.

If the Board has a good faith doubt whether "any employee organization is supported by a *majority of the local government employees in a particular bargaining unit*," NRS 288.160(4) gives the Board the authority, but not a mandate, to conduct an election to determine the existence of that support "by a *majority of the local government employees in [the] particular bargaining unit.*" NRS 288.160(4) (emphasis added).[7] Thus, the plain language of NRS 288.160(4) ***authorizes*** but does ***not mandate*** the Board to hold an election as a means of determining that an employee organization has the requisite support of the members it represents or

[7] In full, subsection 4 of NRS 288.160 provides that "[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." (Emphasis added).

desires to represent, and sets the standard of a "*majority of the local government employees in [the] particular bargaining unit.*" NRS 288.160(4) (emphasis added). A representation election that shows any fewer votes for a rival employee organization is simply not deemed to be indicative of majority support.

NAC 288.110(10)(d) similarly, provides that "[a]n employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if: . . . [t]he election demonstrates that the employee organization is *supported by a majority of the employees within the particular bargaining unit.*" (Emphasis added). Thus, NRS 288.160 and NAC 288.110, use almost the exact same language as each other, referring to a majority of the employees in the unit, not to a majority of the employees who vote. The language of both provisions, therefore, is plain and unambiguous. *See* 2005 Order of Affirmance I JA 47; 2009 Order of Affirmance I JA 82.

Although most of the Board's opening brief is devoted to the argument that the Board should have latitude to determine the appropriate election standard for representation elections and that it can and has changed its mind about that appropriate standard, AOB at 20-24, at one point it switches to the argument that NAC 288.110(10)(d) is plain and has only one meaning. AOB at 25-26. Since the language of this section of NAC has not been amended since this case began, an

argument that it has only one meaning would mean the Board ***cannot*** change its mind unless, as discussed ***infra***, it does so through a lawfully adopted regulation to amend and change that language. No such amendment, to its own regulation, has been made by the Board.

In making the argument that NAC 288.110(10)(d) is plain, the Board dwells on the word "demonstrates." It cites Merriam-Webster, for the definition of "prove something by showing an example of it" and concludes that the use of the word "demonstrates" excludes the use of the outright majority standard. AOB at 25. The Board does not explain how the use of an outright majority would ***not*** "show an example" of majority support. Additionally, and more to the point, this one plain meaning argument that the Board puts forth for the first time in this appeal is in direct contravention of the Supreme Court's 2005 and 2009 interpretation of this very same section.

2. The Legislative Intent supports the Plain and Unambiguous Language.

Even if NRS 288.160(4) of NAC 288.110 were not plain and unambiguous, and resort to examination of legislative intent were necessary, such examination would also support the conclusion that a majority of all employees in the bargaining unit is required. To determine legislative intent, courts examine the whole act, its object and its scope. *Nevada Power Co. v. Public Service Comm'n*, 102 Nev.

1, 4, 711 P.2d 867, 869 (1986); *see also Kisorin USA, Inc.* 127 Nev. 144, 254 P.3d 636 (2011) (*quoting Cromer v. Wilson*, 126 Nev. 106, 110, 225 P.3d 788, 790 (2010)) (courts have "a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."); *Public Employees' Benefits Prog. v. Las Vegas Metropolitan Police Dep't*, 124 Nev. 138, 147, 179 P. 3d 542, 548 (2008) ("When a statute is ambiguous . . . we may look to reason and public policy to determine what the Legislature intended.").

NRS 288.230 documents the Legislature's conclusion that labor peace and stability in local government employment is vital to the people of this State. *See Clark County Classroom Teachers Ass'n v. Clark County Sch. Dist.*, 91 Nev. 143, 145, 532 P.2d 1032, 1033 (1975) ("labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education.") (*quoting Local 858 of AFT v. School Dist. No. 1*, 314 F.Supp. 1069, 1077 (D. Colo. 1970)). NRS 288.160, read as a whole shows that the Nevada Legislature, set out a fair and orderly process for recognizing the exclusive bargaining agent and for removing or replacing a bargaining agent. Pursuant to NRS chapter 288, an employee organization may initially become the

recognized and exclusive bargaining agent by presenting to the local government employer: (a) a copy of its constitution and bylaws, if any; (b) a roster of its officers, if any, and representatives; and (c) a pledge in writing not to strike, and a verified membership list showing that it represents ***a majority of the employees in the bargaining unit***. NRS 288.160(1) and (2). There are certain limited criteria under which the employer, with permission of the Board, may withdraw such recognition. NRS 288.160(3). A rival employee organization seeking to displace the incumbent organization may attempt to do so by following the procedures established by the Board in NAC 288.146, essentially arguing there is "doubt" regarding majority support. If for any reason the Board concludes it has a "good faith doubt" as to "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." NRS 288.160(4) (emphasis added).[8] Pursuant to its own regulation, NAC 288.110(10)(d), the Board determines the results of such an election based on a demonstration that the "employee organization is supported by *a majority of the employees within the particular bargaining unit.*" (Emphasis added). Also for such elections, the Nevada Supreme Court has twice held that both

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[8] Finally, NRS 288.160(5) provides that without Board involvement, parties may agree to hold an election to "determine whether an employee organization represents the majority of . . . employees in a bargaining unit."

NRS 288.160(4) and NAC 288.110(10)(d) require a majority vote of all the employees in the bargaining unit, not just a majority of votes cast, and has stated that it will defer to the Nevada Legislature to change this standard.

Thus, whether it is seeking initial recognition as the recognized bargaining agent or it is seeking to displace a rival, incumbent employee organization, an employee organization (union) must show that it is supported by a majority of the employees in the bargaining unit, not just those who may vote in a representation election. Demonstrated, verifiable support of a majority of employees of the entire bargaining unit is *the alpha and the omega* for a union seeking to be seated as the recognized bargaining agent.

The high standards that the Legislature has set in NRS 288.160(1) and (2) for an employee organization to obtain recognition and the limitations set forth in subsection 3 regarding a local government employer's ability to withdraw recognition serve the legislative goal of preserving labor stability. It would be inconsistent and contrary to such reason and public policy to allow a rival employee organization to unseat an incumbent organization based on a mere majority of votes cast by those that are willing and able to participate in a particular election.[9] This is particularly so in

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[9] The inconsistency and, indeed, absurdity of the application of such a rule is even more pronounced in the situation of this case where the Board has held election after election involving the same parties. It is fair to ask what impact, the

a state like Nevada where the rival employee organization is ***not*** required to make any particular showing of support, through interest cards, signatures on petitions or otherwise, before such an election may be ordered.[10] Therefore, the statute, read as a whole, as well as reason and public policy also support the conclusion that NRS

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inevitable confusion and fatigue among the "voters" in the bargaining unit has had on the results of these elections. In short, the Board's actions have been antithetical to preserving labor stability.

[10] Nevada is in the minority in this approach. Most states that allow for public sector collective bargaining require a rival or intervening organization to provide evidence of some level of employee support before such an election will even be ordered (usually around 20-30%). Such showing of support is usually required to be evidenced by items such as notarized membership lists, membership cards, signed petitions or dated statements of interest that are kept confidential by the relevant public employee board (EMRB counterpart). See *e.g.* ALASKA STAT § 23.40.100(a)(1)(B) (2017); CAL. GOV. CODE § 3544.1(b) (2017); CONN. GEN. STAT § 5-275 (2017); DEL. CODE ANN. tit. 19, §§ 1310,1311(b) (2017); FLA. STAT. ch. 447-307 & 308 (2017); HAW. REV. STAT. § 89-7 (2017); 115 ILL. COMP. STAT. § 5/7(c)(1) (2015); IND. CODE ANN. §§ 20-290502, 20-29-5-3 (2017); IOWA CODE §§ 20.14(5)(a), 20.15 (2017); KAN. STATE. ANN. § 75-4327(d)(2017); KY. REV. STAT. ANN. § 345.060 (2017); ME. REV. STAT. ANN. tit. 26 § 967(2) (2017); MASS. GEN. LAWS ch. 150E, § 4 (2017) and MASS. REGS. CODE 456 § 14.05 (2017); MICH. COMP. LAWS ANN. § 423.212(a) (2017); MINN. STAT. § 179a.12 (2017); MO. CODE REGS. ANN. TITLE 8, § csr 40-2.030 (2017); NEB. REV. STAT § 48-838(3) (2017); N.H. REV. STAT. ANN. § 273-A:10 (2017); N.J. ADMIN. CODE tit. 19, §§ 11-1.2, 11-1.3 (2017); N.M. STAT. ANN. § 10-7E-16(C) (2017); OHIO REV. CODE ANN. § 4117.07(A)(1) (2017); OR. REV. STAT § 243.682(1)(b)(B)(2017); PA. STAT. ANN. tit. 43 § 1101.603(c) (2017); S.D. ADMIN. R. 47:02:02:04.01 (2017); TENN. CODE ANN. § 49-5-605 (2017); VT. STAT. ANN. tit. 21 § 1724(a)(1) (2017); WASH. ADMIN. CODE § 391-25-110 (2017); WIS. STAT. § 111.83(6) (2017).

288.160(4) requires that any representation election held pursuant thereto requires the affirmative vote of a majority of all the employees in the bargaining unit.

On a final note regarding legislative intent, a comparison to federal law is not an appropriate source for Legislative intent for NRS 288.160(4). In 2005, the Nevada Supreme Court advised the parties that the National Labor Relations Act (NLRA) was not controlling in this matter and that the text of that statute and NRS 288.160 were dissimilar. 1 JA 48. Yet both the Board and Local 14 perseverate in citing the NLRA and cases arising thereunder for the proposition that the Board's erroneous departure from the plain and unambiguous text of NRS 288.160(4) is somehow okay or necessary to bring Nevada in line with "prevailing labor law standards." AOB at 21. On this point, ESEA would echo what the Nevada Supreme Court has already concluded and add that the NLRA is also inapposite as persuasive or policy authority because the process differs from that set forth in NRS 288.160 for both initial recognition and a challenge to the incumbent.

Whereas Nevada requires an employee organization to present "a verified membership list showing that it represents a majority of the bargaining unit" to obtain initial recognition, the NLRA merely requires "a substantial number of employees" to initiate the process. *Compare* NRS 288.160(2) *with* 29 U.S.C. § 129(c)(1)(A)(i). Correspondingly, as correctly interpreted by the Nevada Supreme Court, NRS

288.160(4) "require[s] 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" to displace an incumbent (1 JA 81-82), but the NLRA only requires "a substantial number of employees" for a rival union to initiate an election challenging the incumbent. 29 U.S.C. § 129(c)(1)(A)(ii). Thus, there is nothing surprising about the NLRB deciding elections based on a majority of the votes cast because congress has not set the NLRA recognition bar as high as the Nevada Legislature has in NRS 288.160. It would make no sense for the Nevada Legislature to require verified support from a majority of the employees in the bargaining unit for initial recognition, but then allow a rival employee organization to displace an incumbent based on a mere majority of the votes cast—that would not promote labor stability.

3. The Supreme Court 2005 and 2009 Orders Interpret and Confirm the Plain Language and the Meaning supported by Legislative Intent.

As discussed, the Supreme Court has already determined that NRS 288.160(4), as well as NAC 288.110(10)(d), are plain and unambiguous; it has made this determination not once, but twice! The Supreme Court, in its 2005 Order of Affirmance interpreted both NRS 288.160(4) ***and*** NAC 288.110(10)(d) and stated:

> [T]he 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."

I JA 47 (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'" and "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." I JA 47-48. The Supreme Court's deference to the Nevada Legislature makes

clear that it was not deferring to the Board. Rather, the Supreme Court drew a road map for the Board, and the next stop on the Board's route, if it desired to change the standard, was the Legislature.[11]

Notably, likely at Local 14's behest, the Legislature has considered bills proposing to adopt a mere majority-of-the-votes-cast standard for deciding the outcome of representation elections, and it has consistently rejected these attempts. In 2003, 2005 and 2007, measures were introduced, two of which were actually

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[11] The Board acknowledges the Supreme Court's statement that it will defer to the Nevada Legislature, AOB at 15, n.5, but responds with the preposterous assertion that NRS 288.110(1)(c) which gives the Board general authority to make rules governing recognition of employee organizations, but which existed long before the appeal that resulted in the 2005 Order of Affirmance, is the Legislature's directive on whether the election standard should be changed. This argument barely merits a response, but a statute that was already in place when the Supreme Court announced that ***is was the Legislature's purview to change the standard*** cannot be a change by the Legislature in reaction to the Supreme Court's decision in 2005.

proposed to be effective ***retroactively*** to apply to this dispute,[12] but ***every such attempt was unsuccessful***, and so the Legislature has unequivocally reaffirmed the Supreme Court's finding that an outright majority is required.[13] Even more striking is the fact that since this appeal was filed, another legislative session has commenced and adjourned and no bills were introduced that attempted to amend NRS 288.160!

Again, the Supreme Court reaffirmed this position in its 2009 Order of Affirmance regarding the issue of conducting the 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.*

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[12] Since the contest between ESEA and Local 14 began and twice since the Supreme Court's 2005 interpretation that NRS 288.160(4) requires an outright majority, several bills have been introduced to relax the standard but the Nevada Legislature has declined to do so, indicating its approval of the outright majority standard. *See* AB 545 (2003); AB 568 (2005) and AB 337 (2007). Pursuant to NRS 47.130 and 47.150, ESEA requests that the Court take judicial notice of material from the Nevada Legislature. When statutory language that has been interpreted by the highest court remains unchanged, it is presumed that the legislature approves of that interpretation. *See Northern Nevada Ass'n of Injured Workers v. Nevada State Indus. Ins. Sys.*, 107 Nev. 108, 112, 807 P.2d 728, 730 (1991).

[13] The Board's assertion that the "legislative silence since 2003 is not indicative of a policy preference for one standard over another," AOB at 21, is completely unsupported by any legal authority, and, as shown in the previous footnote, is incorrect. The Legislature has not been silent; it has "spoken" by rejecting at least two bills that could have adopted or authorized the interpretation the Board now desires.

I JA 82 (emphasis added). It also "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." I JA 83. The Supreme Court came to this conclusion despite expressly acknowledging "that a runoff election *may produce similar inconclusive results*." I JA 83 (emphasis added). By acknowledging this possibility of an inconclusive result, the Supreme Court foreclosed the interpretation which the Board boldly, arbitrarily and capriciously made and executed in its 2016 Board Order–that the Board somehow has a "duty" to apply a different standard that would produce a "definitive answer to the question of [its] good faith doubt." I JA 168 (2015 Board Order which is adopted by reference in the 2016 Board Order) .

Thus, when it comes to determining the results when a rival organization has challenged the incumbent employee organization and a representation election occurs (and certainly to determine the results of this dispute), the Board's express statutory duty, as interpreted twice by the Nevada Supreme Court, is to require "support from a majority of all of the members of the bargaining unit and not just a majority of those who vote" even if it produces an "inconclusive result."

C. The Supreme Court 2005 and 2009 Orders are the Law of the Case.

To issue the 2005 and 2009 orders described above, the Supreme Court ruled upon and interpreted the very statute and regulation pursuant to which the Board had

acted. The Supreme Court made the essential and necessary holding on the correct interpretation of NRS 288.160(4) and NAC 288.110(10)(d). As such, these orders are the "law of the case" on this issue for this appeal. The law of the case doctrine provides 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). The law of the case doctrine "'is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest.'" *Id.* (*quoting U.S. v. Real Property Located at Incline Village*, 976 F. Supp. 1327 (D. Nev. 1997)).

1. This Appeal is part of the Continuous Lawsuit and is Controlled by the Earlier Orders of the Nevada Supreme Court.

Although it has been more than a decade since the Supreme Court's 2005 Order of Affirmance, this case between the Board, ESEA and Local 14, is still progressing, and the law of the case must be followed. The 2005 and 2009 Orders of Affirmance plainly stated the appropriate standard for determining the results of a representation election, and, therefore, were "intended to put [the] particular matter to rest." The Board, therefore, had no authority to simply deem such orders to have

been inappropriate, inaccurate or entered "in deference" to the Board and, therefore, proceed in a different direction. The law of the case doctrine bound the Board and the district court and there is no reason to depart from the law of the case now.

2. No Exceptions to the Law of the Case Doctrine Apply.

Although, in the *Hsu* case, the Supreme Court adopted ***an*** exception to the law of the case doctrine for the situation where there has been a "change in the law by . . . a judicial ruling entitled to deference," *id.* at 632, 173 P.3d at 730, that has not occurred here. The *Hsu* court defined a "judicial ruling entitled to deference" to be 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. Moreover, since 2009, Legislature has not substantively changed the law.

Contrary to the Board's assertion, the *Hsu* court did not, additionally, "explain that it had previously recognized and applied the 'manifest injustice' exception" to the law of the case doctrine. *See* AOB at 30-31. The *Hsu* court stated that it had "implicitly acknowledged the possibility of exceptions to the law of the case" when prior holdings were "clearly erroneous" ***and*** "would work a manifest injustice" or a "fundamental miscarriage of justice." *Hsu*, 123 Nev. at 631, 173 P.3d at 729 (*citing Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003); *Leslie v. Warden*, 118

Nev. 773, 780, 59 P.3d 440, 445 (2002)). However, it did not retroactively determine that such exceptions had been applied in those cases. Indeed, in *Clem*, the Supreme Court found that the appellant's claims were "precluded by the law of the case" so, clearly, no exception was adopted or applied. 119 Nev. at 620, 81 P.3d at 525. In *Leslie,* the "law of the case doctrine" was not even mentioned, much less addressed. Under the high stakes circumstance of determining whether a death sentence had been appropriate, the Supreme Court reconsidered the propriety of the application of one of the aggravators which had lead to the death sentence. The Supreme Court did so because it "conclude[d] that [its] refusal to consider the issue would result in a fundamental miscarriage of justice," stating that a "fundamental miscarriage of justice can be demonstrated by a showing that the defendant 'is actually innocent of the crime or is ineligible for the death penalty.'" 118 Nev. at 780, 59 P.3d at 445. Again, the term "law of the case" was not even used in *Leslie.*

Even if the *Hsu* court had actually adopted the manifest injustice exception, the facts of this case do not warrant its application. First and foremost, to apply such exception, the initial determination would have to be that the prior holding was "clearly erroneous." *Hsu*, 122 Nev. at 631, 173 P.3d at 729. The 2005 and 2009 Supreme Court orders are not erroneous, let alone clearly erroneous. In fact, the Board really does not argue that they are at all erroneous. It only argues (erroneously)

that they were based on deference to the Board's interpretation of the relevant statute and regulation. AOB 16-19. Second, in *Leslie,* the Court defined "fundamental miscarriage of justice" as "a showing that the defendant 'is actually innocent of the crime or is ineligible for the death penalty.'" 118 Nev. at 780, 59 P.3d at 445. Absent such an extreme potential outcome, courts have declined to find a potential manifest injustice that would warrant a departure from the law of the case doctrine. *See Vanleeuwen v. Keyuan Petrochemicals, Inc.*, 2013 U.S. Dist. LEXIS 72683 (C.D. Cal., May 9, 2013) (no manifest injustice where court adhered to law of the case on the ruling on an earlier motion to dismiss (by a different defendant) which allowed action to go forward dealing with millions in potential damages based on failed disclosures to the SEC); *United States v. Alexander*, 106 F.3d 874 (9th Cir. 1997) (no manifest injustice would have resulted from adhering to law of the case that defendant's confession was suppressed even though conviction of defendant would be reversed).

Here, no person's life is at stake. The result that a state agency will be required to follow the plain statutory language that it is charged with enforcing and with orders of the Supreme Court to which it is subject is not an injustice of any magnitude, much less a manifest injustice. The result that the Board will have to seek "relief" from the Legislature, as this Court told it to do back in 2005, if it desires to use a mere

majority-of-the-votes-case-standard is not an injustice, much less a manifest injustice. The fact that some support staff employees of the Clark County School District may not get the employee organization that they desire at this time is also not an injustice because there will always, inevitably be some employees who are unhappy with their union, but pursuant to NRS 288.140(1) such employees can be "heard" by choosing not to be a member. Regarding the employees, it bears pointing out that the Board does not represent the employees. The only role it plays here is to appropriately exercise its authority pursuant to NRS 288.160(4). The Supreme Court, in December of 2005, told the Board that its role is to apply the outright majority standard "regardless of result" and that the Supreme Court would defer to the Legislature to change that standard. It is absurd to claim that even though more than ten years have passed since the 2005 Order of Affirmance, with only one bill (AB 337 (2007)) subsequently being introduced in the Legislature to change that standard, the Board would somehow now experience a manifest injustice if it is not able to depart from that standard.[14] It is plain to be seen that no injustice, much less a manifest injustice, would have occurred by the simple adherence to the law of the case in the dispute

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[14] *Cf. Harris v. State*, 130 Nev. __, 329 P.3d 619, 622 (130 Nev. Adv. Op. 47 June 12, 2014) (declaring consideration of equitable doctrine of laches as necessary in determining whether a defendant has shown "manifest injustice" that would permit withdrawal of a plea after sentencing).

between these parties. NRS 288.160(4) and NAC 288.110(10)(d) have a plain meaning that the Board must follow "regardless of result."

There also is not new or different evidence that warrants departing from the prior 2005 and 2009 Orders of Affirmance. The Board makes much of the fact that a third election has been held and that Local 14 received more votes than ESEA and more votes than it received in the prior elections. However, this is really the same factual scenario, *i.e.*, two competing employee organizations were on the ballot in a representation election and neither received an outright majority, and in none of the three elections in this case has a majority of the employees in the bargaining unit ever even voted. I JA 50, 82, 164, 181, 183-84. The Board argues that the Legislature must have meant for it to be able to resolve such a situation despite these results. This is really the same argument made by Local 14 in the appeal that resulted in the 2005 Order of Affirmance.[15] Thus, these are substantially the same facts and the same arguments, and they do not warrant a departure from the law of the case doctrine. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) ("The doctrine of the law

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[15] Notably, at that time, the Board argued against Local 14's position on the need to change the election standard. I JA 37-49. The fact that the Board was a respondent in that appeal is not material to the applicability of the law of the case doctrine. *See Vanleeuwen v. Keyuan Petrochemicals, Inc.*, 2013 U.S. Dist. LEXIS 72683 (C.D. Cal., May 9, 2013) (the fact that the law of the case doctrine is used "against" a different party than in the previous decision does not necessarily mean a manifest injustice is involved).

of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.").

3. The Unpublished Nature of the 2005 and 2009 Orders of Affirmance Does not Affect their Precedential Value as the Law of the Case.

Finally, it is of no consequence to the law of the case doctrine, that the 2005 and 2009 Orders of Affirmance were not published. NRAP 36 provides that an unpublished order 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, as amended by ADKT 0504 (repealing and replacing former SCR 123). These unpublished orders involve the exact same parties as those parties named in this appeal, were entered in an earlier stage of the same case and establish the law of the case.

4. The Elements that Warrant a Deviation from Stare Decisis are Not Present.

The doctrine of *stare decisis* is not applicable here because the parties are the same today as they were when the 2005 and 2009 Orders of Affirmance were issued. The doctrine of law of the case, which is an "intra-litigation *stare decisis*," *see Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.,* 2015 Del. Ch. LEXIS 237 at 20-21 (Ct. of Chancery, September 10, 2015), is the applicable doctrine.

Nevertheless, application of the cases that the Board cites as justifying a departure from the doctrine of *stare decisis*, does not result in a compelling reason to do so. To justify a departure from the doctrine of *stare decisis*, the cited cases speak of "governing decisions" that "prove to be unworkable or are badly reasoned." *Armenta-Carpio v. State*, 129 Nev. __, 306 P.3d 395, 398 (129 Nev. Adv. Op. 54 July 25, 2013); *Harris v. State*,130 Nev. __, 329 P.3d 619, 623 (130 Nev. Adv. Op. 47 June 12, 2014). The Supreme Court has elaborated on this principle utilizing standards such as: where the earlier decision "went beyond answering the limited question," "was clearly erroneous," or "was not based on strong public policy," *Armenta-Carpio*, 129 Nev. at __, 306 P.3d at 398; *State v. Lloyd*, 129 Nev. __ , 312 P.3d 467, 474 (129 Nev. Adv. Op. 79 October 31, 2013). These standards do not apply to this case. The issue of the interpretation of NRS 288.160(4) was squarely before the Supreme Court for the appeals that resulted in the 2005 and 2009 Orders of Affirmance, and there is absolutely no basis for declaring them to have been "clearly erroneous" as they were based on a strict, plain reading of the language enacted by the Legislature. Finally, despite the Board's more recent view (which is diametrically opposed to its view up until 2015) about what will serve the public policy behind NRS chapter 288, it is clear that the Supreme Court considered "strong public policy" when it rendered its 2005 and 2009 Orders of Affirmance. It rendered

reasoned decisions that examined NRS 288.160 as a whole. It considered the fact that the Legislature enacted plain and unambiguous language that made its intent clear. I JA 47. It considered the role of an administrative agency in the face of unambiguous statutory language and concluded that in such a situation the administrative agency must "follow the law regardless of result." *Id.* In fact, in one of the cases cited by the Board for deviation from the doctrine of *stare decisis*, the Supreme Court actually determined that the Court should deviate so that it could reverse what had been an expansive view of language that was and should have been declared to have been plain. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 174 P.3d 734, 744 (2007). Whether analyzed under the law of the case doctrine or *stare decisis*, no grounds for departing from the 2005 and 2009 Orders of Affirmance apply here.[16]

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[16] If this Court is inclined to revisit any part of the prior holdings in this case, it should re-examine the premise that any of the three elections were inconclusive. To the contrary each election conclusively established that Local 14 had failed to obtain the vote of a majority of the bargaining unit to displace ESEA. Even the very first election was conclusive on this point because although that ballot had three choices (ESEA, Local 14, No Union), a majority of the bargaining unit did not even vote, as was the case in all three elections. Thus, even if all the votes cast in that first election were allotted to Local 14, it would still have failed to obtain an outright majority. I JA 50, 82, 164, 181, 183-84.

D. Because the Supreme Court 2005 and 2009 Orders are the Law of the Case, the Board Must Follow them Regardless of Result, and There is Nothing for the Board to Interpret, Fill-In or "Re-Interpret."

The remainder of the Board's opening brief addresses case law that supports the general rule(s) that an administrative agency has the authority to interpret and, as appropriate, to fill-in gaps in the statutes that govern it and even to change its mind as to how to fill-in such gaps, as long as supported by substantial evidence. AOB at 12-16, 25-30. The Board cites to the general rules that agencies may fill-in gaps administratively when there is an "inadequate legislative expression" and may construe statutes which they are required to enforce. AOB at 14-15, and 24 (*citing State v. Rosenthal*, 93 Nev. 36, 43, 559 P.2d 830, 835 (1977) and *Chevron U.S.A. Inv. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984)). Although these general rules are valid, they do not apply in this case because where a statute is plain, 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, 23 (2007); *Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202 (2005) ("[t]his court will not look beyond the plain language of the statute."). The holding of *Chevron* has similarly been limited by a subsequent decision of the U.S. Supreme Court to clarify that a "judicial interpretation holding that a statute *unambiguously* forecloses the agency's interpretation, and therefore contains no gap

for the agency to fill, displaces a conflicting agency construction." *National Cable & Telecommunications Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 983, 125 S. Ct. 2688, 2700 (2005) (emphasis added). Here, the Nevada Supreme Court has explicitly held that NRS 288.160(4) is unambiguous. I JA 47; I JA 82. Therefore, its interpretation "displaces a conflicting agency construction." 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.

Nor may the Board "change its mind" on how to enforce a statute in a way that has the effect of disregarding that unambiguous language. The Board argues that it may use "an evolutional approach" and change its mind as long as it supplies a "well-considered basis for the change." AOB at 12, n.1 (*citing, among others, Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356, 109 S. Ct. 1835, 1849 (1989)). Although ESEA's research has revealed no guidance for what constitutes a "well-considered basis," what is clear is that in *Robertson*, the federal agency adopted a regulation through the federal rule-making process, which would have surely included public comment, meetings on the proposed change, etc. Here, the Board did not engage in any such process. It simply took a 180 degree turn, and went from one

interpretation to another, albeit with a seven page order attached.[17] The other federal cases cited by the Board, AOB at 12, n.1, are similarly unpersuasive because they did not involve an intervening decision by the highest court with jurisdiction that interpreted the relevant statute as foreclosing the "change of mind" that the agency made. The Nevada Supreme Court, by its own *de novo* review, interpreted NRS 288.160(4) to require a majority-of-all-employees-in-the-bargaining-unit, and declared that it is the Legislature's role to change this standard, ***not*** the Board's. The Board, therefore, has no authority to "change its mind," and any "evolution" will have to occur at the Legislature.

The Board makes much of the putative fact that the (correct) voting standard it announced in its January 23, 2003 Order (I JA 12) was somehow "experimental," but an examination of that order reveals that it is completely devoid of any discussions of "experimentation," or any discussion of a different, existing standard requiring only a majority of the votes cast. In fact, throughout the long history of this

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[17] As to the assertion that the Board's "re-interpretation" of NAC 288.110(10)(d) is merely a return to a previous, long-standing interpretation, the EMRB decisions cited by the Board (AOB at 20) do not discuss a basis for use of the mere majority-of-the-votes-cast standard. Rather, they simply declare a "winner" based on such standard. Indeed, it appears that the only decisions of the Board wherein the standard was discussed are the two orders referenced in this case, the Board's January 23, 2003, order adopting the outright majority standard and the Board's February 17, 2015, order putatively reversing that 2003 order.

case, the notion that the Board's correct decision in 2003 was somehow experimental did not emerge until 12 years later in the 2015 Board Order, wherein the Board announced it would conduct a "discretionary," second run-off election to be determined by a majority of votes cast. I JA 168. But by that point in time, the Nevada Supreme Court had twice announced that NRS 288.160(4) plainly and unambiguously required a majority vote of the entire bargaining unit, not just the votes cast, for an employee organization such as Local 14 to obtain recognition. Thus, "experimentation," "evolution" or "changing its mind" were no longer options for the Board.

Finally, the general authority of NRS 288.110(1)(a), (c) and (d), raised by the Board, AOB at 15-16, and 29, is irrelevant because these provisions existed before the Supreme Court's 2005 and 2009 Orders of Affirmance, and because they provide only general rulemaking authority. Although not referenced much in the prior stages of this litigation, the Board relies heavily on the general grant of authority in NRS 288.110(1)(c) which provides, in pertinent part, that "[t]he Board may make rules governing . . . recognition of employee organizations." However, the fact that the Legislature gave the Board such general rulemaking authority does not mean that it can contradict a governing statute. The reference to NRS 288.110(1)(d) which allows the Board to make rules governing "[t]he determination of bargaining units" is

certainly of no assistance to the Board, as determination of bargaining units pertains to determining the appropriate job families that should be included in a bargaining unit after the relevant local government employees have chosen to be represented by an employee organization. It does not pertain to the selection of that employee organization as the recognized bargaining agent, or otherwise to determining if an employee organization is supported by a majority of the employees.

E. The Board Engaged in *Ad Hoc* Rulemaking.

Even if this Court were to determine that the Board had some authority to interpret, fill-in or "re-interpret" NRS 288.160(4) or NAC 288.110(10)(d), it is clear that the method by which it did so in this case violated the Nevada Administrative Procedure Act ("the APA"). The Board's statement in its 2015 Board Order that:

> where it appears that a discretionary runoff election will produce meaningful results that will resolve this Board's good faith doubt, it is within our authority under both NRS 288.160(4) and NAC 288.110(7), as well as our implied authority, to conduct a discretionary second runoff election.
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> NAC 288.110(10)(d) states that the Board will deem an organization to be the exclusive bargaining agent if the election demonstrates that the organization is ". . .supported by a majority of employees within the particular bargaining unit." We now interpret this subsection as permitting the Board to infer majority support of the unit as a whole based upon a majority of votes cast . . . .

is a directive for the purpose of effectuating its statutory duties. I JA 166-67. As such, it is rule making. NRS 233B.010. A "regulation" is subject to the APA and must be adopted pursuant thereto, not pursuant to an order of the Board that is made without notice to the general public, without workshops and without review by the Legislative Counsel pursuant to NRS 233B.040 *et seq.* "The APA was adopted to establish minimum procedural requirements, such as notice and hearing, for all rule making by non-exempt state government agencies." *State Farm Mut. v. Comm'r of Ins.*, 114 Nev. 535, 543, 958 P.2d 733, 738 (1998). "The notice and hearing requirements are not mere technicalities; they are essential to the adoption of valid rules and regulations." *Id.* (*citing Public Serv. Comm'n v. Southwest Gas*, 99 Nev. 268, 662 P.2d 624 (1983) stressing the importance of following the APA).

Specifically, NRS 233B.038 defines a "regulation" to mean:

> (a) An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;
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> (b) A proposed regulation;
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> (c) The amendment or repeal of a prior regulation; and
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> (d) The general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.

"An agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided in the statute and how it proposes

to administer the statute." *K-Mart Corp. v. SIIS*, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985). In *K-Mart Corp. v. SIIS*, the Supreme Court held that SIIS' application of a statutory formula to determine assessments "was simply the agency's pronouncement of how the statute operated in a specific context" and therefore did not require the formalities of rule making. *Id.* at 17, 693 P.2d at 565. However, regarding rulings SIIS made on lump sum payments and offsets, the Supreme Court held that these matters "were not necessarily required by statute" and, therefore, could not be a simple pronouncement of the operation of a statute. *Id.* Further, the Supreme Court took note of an existing regulation in which SIIS addressed a similar "offset" rule and emphasized that the fact that the agency already had adopted, pursuant to the APA, a regulation with a similar rule "belie[d] the System's contention that rulemaking was not necessary in this instance." *Id.* at 17-18, 693 P.2d at 565. Finally, the supreme court stated that the "System's decision to require a lump sum payment . . . and to permit offsets against the employer's experience dividends is a statement of general applicability which effectuates law or policy." *Id.* at 18, 693 P.2d at 565 (*citing* NRS 233B.038). Thus, the Supreme Court held that both the decision to require a lump sum payment and the rule on offsets were invalid because they were not made in compliance with the procedures for adoption of regulations pursuant to NRS 233B.040 *et seq.*

Similar to SIIS' actions in *K-Mart v. SIIS*, the Board's declarations and actions regarding a second discretionary runoff election and the standard by which it was determined in the 2016 Board Order are not required by statute. As previously stated, the statutes do not address runoff elections at all but merely authorize, not require, the Board to hold an initial election if it has a "good faith doubt" as to majority representation.

Further, and also similar to SIIS' actions in *K-Mart v. SIIS*, the Board's previous adoption of regulations, NAC 288.110(7), addressing runoff elections and NRS 288.110(10)(d) addressing the standard for determining majority support "belie[] its contention that rulemaking is not necessary in this instance." In fact, only a few months after issuing its 2015Board Order, the Board proposed a regulation to amend NAC 288.110(7) to change the standard for determining the results of representation elections to a majority-of-the-votes-cast standard, evidencing the Board's belief that rule making is necessary for application of such a standard. *See* R025-15I, available at http://www.leg.state.nv.us/register/2015Register/R025-15I.pdf.[18] Because the 2016 Board Order (which incorporates the 2015 Board Order

[18] In fact the Board has on two other occasions attempted to change the rules as to representation elections and has done so by following the rulemaking procedures of NRS 233B.060 and 233B.061. In 2013, it proposed an amendment to NAC 288.110(7) to change the requirement that "the Board will conduct a runoff election" in the event of inconclusive results, to an authorization that "the

by reference) was enforcement of a "rule" which was not made in compliance with the procedures for adoption of regulations pursuant to NRS 233B.040 *et seq.*, it is clearly invalid.

Additionally, in *State Farm Mut. v. Comm'r of Ins.*, 114 Nev. 535, 544, 958 P.2d 733, 738 (1998) the Supreme Court held that "interpretations" which are really "statement[s] of general applicability that effectuated agency policy" must be adopted pursuant to the rule making procedures in the APA. *Id.* at 544, 958 P.2d at 738. The Supreme Court also provided the following parentheticals as examples of where the court "has not hesitated to invalidate agency actions in which the agency was formulating a rule or policy of general application and not merely making an interpretive ruling according to the facts before it": *Las Vegas Transit v. Las Vegas Strip Trolley*, 105 Nev. 575, 780 P.2d 1145 (1989) (agency's adoption of new definition of "trolley" should have been subject to formal rule making proceeding); *State Bd. of Equal. v. Sierra Pac. Power,* 97 Nev. 461, 634 P.2d 461 (1981) (agency

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Board may conduct a runoff election." *See* R043-13P, available at http://www.leg.state.nv.us/register/2013Register/R043-13P.pdf (although ultimately this amendment was not included in the adopted version of R043-13). Further, in 2008, it proposed a new regulation providing for an entirely different process for determining the representative of local government employees when a rival organization challenges the incumbent organization's majority status. *See* R062-08I, available at http://www.leg.state.nv.us/register/2008Register/R062-08I.pdf. (R062-08I was ultimately not adopted). Again, pursuant to NRS 47.130 and 47.150, ESEA requests that the Court take judicial notice of this material.

should have complied with procedural rule making requirements in adopting new method or formula for calculating property taxes).

Finally, the supreme court has held that if the decision of an agency impacts the rights of others not involved in the proceeding it is more akin to a regulation. *Southern Nev. Op. Eng'rs Contract Compliance Trust v. Johnson*, 121 Nev. 523, 529-30, 119 P.3d 720, 725 (2005). Here, the Board has not simply determined the rights of ESEA and Local 14. It has made an interpretation of general applicability to be applied in all representation elections going forward and a declaration that impacts the rights of others, without notice, without workshops and without public hearings. There is no question that the 2015 Board Order and the actions taken pursuant to it in the 2016 Board Order violate the APA, and for this reason alone must be declared void.

V. CONCLUSION

The Board grossly exceeded its authority in this case when it ordered that Local 14 should be recognized as the bargaining agent even though it had repeatedly failed to obtain the vote of a majority of the bargaining unit. The Nevada Supreme Court has twice found in this very case that NRS 288.160(4) requires that Local 14 obtain the vote of a majority of the entire bargaining unit, not just a majority of those employees who may vote, to displace ESEA as the bargaining agent. The Supreme

Court also made clear that it was up to the Nevada Legislature, not a court, and certainly not the Board, to change the definition of a "majority" for purposes of NRS 288.160(4). The district court's order in this case (II JA 464-69) should be affirmed and ESEA respectfully urges this Court to do so.

RESPECTFULLY SUBMITTED this 21st day of July, 2017.

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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 Word Percect in Times New Roman in 14 point font. 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 13,596 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, 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

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of July, 2017

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, the undersigned hereby certifies that I am an employee of the Dyer Lawrence Law Firm and that on the 21st day of July, 2017, I served a true and correct copy of the **Education Support Employees Association's Answering Brief** by electronic mail to each of the following:

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