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 REPLY BRIEF

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Appellant State of Nevada, Local Government Employee-Management Relations Board ("EMRB" or "Board"), by and through its counsel, Adam Paul Laxalt, Attorney General, Gregory Zunino, Bureau Chief, and Donald Bordelove, Deputy Attorney General, hereby submits its Reply Brief.[1]

I. ARGUMENT

A. The Standard of Review Affords the Board "Great Deference"

ESEA argues that the "meaning" of NRS 288.160(4) and NAC 288.110 is a pure question of law and generally cites to *State Farm Mut. Auto Ins. Co.* as support for its argument. Answering Brief, at 16-17. The Supreme Court cited *State Farm* in its 2005 Order of Affirmance with a different analysis.[2]

The full quote from *State Farm* reads:

> When determining the validity of an administrative regulation, **courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing.** However, a court will not hesitate to **declare a regulation invalid** when the regulation violates the constitution, conflicts with existing statutory

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[1] In an abundance of caution, the Board notes that this Reply does not concede its jurisdictional challenge. As indicated in Appellant's November 30, 2016 Response to Order to Show Cause, the judgment in Case No. A-15-715577-J is void because the district court lacked jurisdiction over the subject matter of the dispute.

[2] The Court stated, "Additionally, we defer 'to an agency's interpretations of a statute that the agency is charged with enforcing." (JA, Vol. I, at 39), *citing State, Div. of Insurance v. State Farm*, 116. Nev. 290, 293, 995 P.2d 482, 485 (2000). "Therefore, this court's review is limited to determining whether there was 'substantial evidence in the record to support the agency determination' **or statutory interpretation**." (JA, at 39 (**emphasis** added)).

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, 485 (2000) (**emphasis added**). ESEA has not argued the regulation itself is invalid – just that the Board's construction is.

As indicated by the Supreme Court in 2005, a *de novo* standard of review does not apply here. The applicable standard flows from statutory limitations upon the district court's jurisdiction to review an agency decision. Courts do not have inherent appellate jurisdiction over administrative agencies. *Crane v. Continental Telephone Co. of California*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Instead, the ability to conduct judicial review is both created and constrained by the Administrative Procedure Act ("APA"), NRS Chapter 233B. The judicial review procedures in the APA provide the exclusive means for a court to review an administrative decision. NRS 233B.130(6).[3]

First, courts give "great deference" to an agency's interpretation of a statute or regulation that the agency is charged with enforcing. *Clark County School Dist. v. Local Govt. Employee-Mgmt. Rel. Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974) ("NRS 288.110 charges the board with that responsibility and great deference should be given to the agency's interpretation when it is within the

[3] Although ESEA ignores the separation of powers doctrine as it relates to the standard of review, ESEA argues that "[t]his case strikes at the core of the separation of powers among the... branches." Answering Brief, at 4.

language of the statute"); *City of Henderson v. Kilgore*, 121 Nev. 331, 337 n. 11, 131 P.3d 11, 15 (2006) (stating the same); *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 293, 995 P.2d at, 485 (see above); *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 369, 849 P.2d 343, 345 (1993) ("great deference should be given to the [EMRB's] interpretation when it is within the language of the statute"); *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012) (**emphasis** added) (reiterating that "this court gives deference to an agency's interpretation of its statutes **and** regulations 'if the interpretation is within the language of the statute.'").

The EMRB is "charged with the duty of administering" NRS 288, "is impliedly clothed with power to construe it as a necessary precedent to administrative action", and "[t]his court ... gives considerable deference to the EMRB's rulings." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071, 1076 (2011); *Elliot v. Resnick*, 114 Nev. 25, 32, n.1, 952 P.2d 961, 966 n.1 (1998) (noting the same); *see also Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842 (1983) (noting that "since an agency ... is impliedly clothed with the power to construe the statutes under which it operates, we are obliged to attach substantial weight to the agency's interpretation.").

Regarding questions of construction, the Ninth Circuit holds (quoting the United States Supreme Court) that "an agency's interpretation of its own

regulations controls unless it is 'plainly erroneous or inconsistent with the regulation[s].'" *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 717 (9th Cir. 1993), *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945).

There is no reasonable argument that the Board's construction of its own regulation is "plainly erroneous or inconsistent with the regulation" or not within the language. The regulation itself 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.[4] Furthermore, the enabling statute does not specifically identify the standard for conducting an election – it simply authorizes the Board to conduct an election if it has a good faith doubt as to whether an organization has majority support.[5]

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[4] *See also* discussion *infra* Section I.B. n. 7.

[5] For ease of reference, 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."

Second, while *de novo* review is appropriate for pure questions of law, an agency's legal conclusions are not considered pure questions of law when they are based upon a factual analysis that is within the scope of the agency's expertise. *Dep't of Motor Vehicles & Pub. Safety v. Jones-W. Ford, Inc.*, 114 Nev. 766, 772–73, 962 P.2d 624, 628 (1998) (holding that "while a reviewing court may decide pure questions of law without affording the agency any deference, 'the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference....'").

ESEA did not challenge the facial validity of the subject statute or regulation. Instead, the Board's decision was based on its analysis of the results of 3 separate elections demonstrating ESEA lost every vote by increasingly larger margins. Accordingly, "when an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference and [] will not [be disturbed] if supported by substantial evidence."[6] *Fathers & Sons & A Daughter Too v. Transp. Services Auth. of Nevada*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008).

To the extent that the Board's choice of an election standard was a conclusion of law, it was closely related to its view of the facts (each election

[6] ESEA concedes the Board had substantial evidence for its decision and does not challenge this aspect of the Board's Opening Brief. ESEA's Answering Brief, at 14.

produced progressively more definitive results demonstrating majority support). *See also* NAC 288.120 ("The Board may use the results of an election conducted pursuant to NAC 288.110 as additional information for its determination of a bargaining unit.").

"A 'pure legal question' is one 'that is not dependent upon, and must necessarily be resolved **without reference to any fact** in the case before the court. **An example might be a challenge to the facial validity of a statute.**" *Dep't of Motor Vehicles & Pub. Safety*, 114 Nev. at 772–73, 962 P.2d at 628 (**emphasis** added). Despite having summarily concluded that the Court is dealing with a "pure legal question", ESEA does not challenge the facial validity of the statute. Answering Brief, at 19. Moreover, the statute does not identify the applicable standard. As such, the question before the Court as to the standard for evaluating election results cannot be resolved in the absence of a detailed factual inquiry.

In summary, there are 4 potential standards of review (including a *de novo* review) – only 2 of which apply. ESEA argues not that the statute or regulation is invalid, only that the Board's construction of the regulation is invalid and/or in conflict with the statute. The standard of review that applies is that of "great deference" – courts generally give "great deference" to an agency's interpretation of a statute or regulation that the agency is charged with enforcing when it is within its language. *State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 293, 995 P.2d at

485; *Clark County School Dist.*, 90 Nev. at 446, 530 P.2d at 117; *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d at 761.

The Board's interpretation is within the language of the regulation as the regulation uses the word "demonstrate" as the operative term. Moreover, the Board's 'interpretation' of the statute is within its language as the statute simply provides for an election process, the implementation of which is left to the Board's discretion. In terms of the second applicable standard of review – the 9th Circuit (quoting the United States Supreme Court) holds that an agency's interpretation of its own regulations controls unless it is "plainly erroneous or inconsistent with the regulation". *Nevada Land Action Ass'n*, 8 F.3d at 717, *quoting Bowles*, 325 U.S. at 414, 65 S.Ct. at 1217. For the same reason, the Board's interpretation is neither plainly erroneous nor inconsistent with the regulation.

The statute's function is to authorize the EMRB to conduct an election, while the regulation's function is to set the standard for evaluating election results. NRS 288.160(4) is a generic authorization to conduct elections. The statute does not state that the standard for conducting elections is the Supermajority Rule and that mathematical certainty is required. Although the regulation would arguably conflict with the statute if the statute were interpreted to require mathematical certainty, the statute contains no such provision, either express or implied. Consistent with the statute, the regulation provides the standard for conducting the

election – one that demonstrates a union is supported by a majority of the employees within the particular bargaining unit. Since the Board's standard for evaluating the 2015 election returns is within the language of the enabling statute and the implementing regulation, great deference should be given to its decision.

Alternatively, the court is not dealing with a pure question of law, namely a question that must necessarily be resolved without reference to the unique facts of the case. *Jones-W. Ford, Inc.*, 114 Nev. at 772–73, 962 P.2d at 628. Because the statute does not identify the standard for conducting an election, the regulation supplies the applicable standard which the Board applied based on the unique facts of this case. Having applied the standard in light of these facts, the Board's conclusions of law are entitled to deference and will not be disturbed if supported by substantial evidence. *Fathers & Sons & A Daughter Too*, 124 Nev. at 259, 182 P.3d at 104; *Clark County School Dist.*, 90 Nev. at 446, 530 P.2d at 117.

B. ESEA Misconstrues the Prior Supreme Court Orders, and the Board is not Forever Encased in a Straightjacket

While ESEA cites to snippets of the 2005 Order, a clear, complete, and logical reading demonstrates that deference was afforded to the Board, such that no black letter rules of law were announced by the Court. ESEA argues that if the Court had applied a deferential standard of review, as opposed to *de novo* review, they would not have stated that a party is required to follow the law regardless of

result. Answering Brief, at 21. A complete reading of the 2005 Order shows this to be a misrepresentation:

> Standard of review
> ... Typically, courts are free to decide pure legal questions without deference to the agency.... We review questions of fact to determine whether the agency's decision was clearly erroneous or an arbitrary abuse of discretion. Accordingly, an agency's conclusions of law, which are closely related to the agency's view of the facts, are entitled to deference....
>
> (JA, Vol. I, at 39).

After detailing the standard of review, the Court then applied that standard. The Court stated:

> **[N]either NRS 288.160 nor NAC 288.110 states that the employee organization seeking exclusive representation must have a majority of the employees who vote.** Rather, the statute **and** administrative code plainly and unambiguously state that to win an election, the employee organization must have 'a majority of the employees within the particular bargaining unit.' 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 fact, in the case of an unambiguous statute, the EMRB is required to follow the law 'regardless of result.' As such, **the EMRB appropriately held** that the election would be resolved by obtaining a majority 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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> (JA, Vol. I, at 47) (**emphasis** added).

The Court viewed the Supermajority Rule as a product of administrative rule making rather than the consequence of statutory language alone.

The Court laid out the standard of review to be followed (that of deference) and then explicitly deferred to the Board's decision indicating that it would "not disturb the EMRB's interpretation of NRS 288.160 **and** NAC 288.110".[7] The Court quoted the language (follow the law regardless of result) from *Randono v. CUNA Mut. Ins. Group.*, 106 Nev. 371, 374, 793 P.2d 1324, 1326 (1990). The Court in *Randono* stated that "where there is no ambiguity in a statute, there is no opportunity for **judicial construction** and the law must be followed regardless of result." *Id* (**emphasis** added). Moreover, directly thereafter, the Court clarified: "This means that if a statute clearly and unambiguously specifies the legislature's intended result, such result will prevail ...." *Id. See* discussion *infra* Section I.F. re legislative intent. Furthermore, that language is dicta and thus not controlling. *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) ("A statement in a case is dictum when it is 'unnecessary to a determination of the questions involve.'").

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[7] In an interesting comparison, the Court in 2005 noted, in dealing with the Contract bar doctrine, that "[i]n determining whether the letter constituted a challenge, the EMRB turned to the plain meaning of the word 'challenge'." (JA, Vol. I, at 40). The Court cited to Black's Law Dictionary to define "challenge". *Id.* The Court concluded that "the EMRB's interpretation that Local 14's letter represented a challenge is entitled to **great deference** since it is charged with enforcing this **regulation**." *Id* (**emphasis** added). So too here the Board used the standard definition for "demonstrate".

Importantly, the 2005 Supreme Court Order at issue is void for lack of jurisdiction.[8] **It is undisputed that the 2005 decision was made before any actual elections were held**. Courts lack the jurisdiction to conduct pre-election review of the Board's chosen election procedure. (JA, Vol. I, at 156-60). Under a more recent order (the "2013 Order"), the 2005 Order is void because the 2013 Order unambiguously declared that that courts lack the jurisdiction to conduct pre-election review of the Board's chosen election procedure. (JA, Vol. I, at 156-60). A 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, the 2005 Order is void *ab initio* given that it purported to address the district court's pre-election judicial review. Because the Court did not resolve the 2005 matter on jurisdictional grounds, as it correctly did in 2013, the 2005 and 2009 Orders are not controlling.[9]

ESEA implies that when the Board adopted the Supermajority Rule, it made an interpretative ruling that forever binds it – asserting that this is a "re-do" of prior proceedings. Answering Brief, at 18. This mischaracterizes the nature of the current proceedings. When the Board adopted the Supermajority Rule in 2003, **no elections had occurred**. When the Board applied a different standard many years later, it did so based on new evidence. Fortunately, "[a]n administrative agency is

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[8] The Board noted this in its Opening Brief, at 16-17, yet ESEA did not respond.

[9] *See* discussion *infra* Section I.G. for discussion regarding the 2009 Order. *See also* Opening Brief, at 18-19.

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

The Board has provided more than a well-considered basis for the change: (1) the substantial evidence before it (the outcome of 3 elections, with each election producing more definitive results demonstrating majority support); (2) prevailing labor law and election standards; (3) proper regulatory and statutory interpretation; (4) the Board's historical application of a simple majority standard, including its application of the rule at the time of the regulation's enactment; (5) the absence of any objective evidence to support the adoption of the Supermajority Rule; and (6) the election results themselves, which revealed that NRS 288.160(4) is rendered meaningless or produces an unjust result when construed to require the application of an unstated election standard.

C. NRS 288 Provides Different Methods for Recognizing Bargaining Units

ESEA highlights NRS 288.160(2) as support for its position, essentially arguing that since ESEA demonstrated majority support in a certain manner, so too should Local 14. Answering Brief, at 27. However, this statutory subsection stands alone for a reason.

The Supreme Court noted this reason in 2005 in reaching its conclusion regarding verified lists:

> NRS 288.160(2) pertains to situations where only one employee organization requests recognition. Without any competitors, the employee organization may become the exclusive bargaining representative without the involvement of the EMRB.

(JA, Vol. I, at 43).

"Rather, when the majority status of an incumbent employee organization is challenged, NRS 288.160(4) requires only that the EMRB find a good faith doubt prior to ordering an election." (JA, Vol. I, at 44). The differences between subsections 2 and 4 are simple: one subsection applies to disputes over the control of an existing bargaining unit (and thus contemplates EMRB oversight), while the other subsection applies to undisputed decisions to organize a bargaining unit. As

this Court noted, NRS 288.160(2) pertains to situations without any competitors or oversight by the EMRB.[10]

ESEA also argues that a comparison to federal law is not appropriate, again, misinterpreting the Court's 2005 decision. The Court stated:

> Local 14 also argues that the EMRB's decision conflicts with election laws contained within the ... NLRA .... **When interpreting statutes, however, administrative agencies are not bound by stare decisis or dissimilar statues.**
>
> (JA, Vol. I, at 48 (**emphasis** added)).

The Court concluded that "the NRLA is **not binding on the EMRB**". (JA, Vol. I, at 48 (**emphasis** added)). As evident, the Court stated that the Board was not bound to follow the NLRA, not that it couldn't. This is well established. *See Weiner v. Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 832 (2005) ("We have held that precedent interpreting the federal statutes is persuasive in interpreting the EMRA.").

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[10] ESEA states it presented a verified membership list when it was recognized. Answering Brief, at 2. ESEA does not cite any support for this assertion. "Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the appendix...." NRAP 28(e)(1). The Court's "review is limited to the record before the administrative body." *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008). ESEA's recognition occurred over forty years ago. (JA, Vol. I, at 208). Thus, the verified list is not indicative of current majority support even if it could be considered by the Court under its rules of appellate procedure.

The EMRA is modeled after the NLRA and the intent of the EMRA is to apply the governing principles of the NRLA to Nevada's local government employees. Accordingly, this Court has repeatedly looked to NLRA related precedent when interpreting and applying the EMRA. Opening Brief, at 21-22.

Indeed, the Board did not argue the statutes are exactly the same. Opening Brief, at 22-23 (stating that the wording of the applicable federal statute "is substantially the same...."). The Board was not required to follow federal precedent in this case; however, said precedent provided further support and persuasive authority for the Board's decision.

D. Legislative Intervention is not Required

ESEA argues that legislative action provides the only recourse for the CCSD employees who have been neglected by the ESEA. The Court presumes the Legislature acted with full knowledge of existing statutes related to the same subject, and since the EMRA was modeled after the NLRA, the Legislature is presumed to have adopted the same standards governing elections. Opening Brief, at 23-24. ESEA has not shown anything in the legislative history to suggest otherwise. NRS 288.160(4) does not provide an election standard, leaving implementation to the discretion of the Board. 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).

Moreover, the Legislature specifically conferred its legislative power to the Board pursuant to NRS 288.110(1)(c). The EMRB formally codified the simple majority standard in its regulation. NRS 233B.040(1) ("regulations have the force of law").

Furthermore, from 1969 to 2003, the Legislature took no action to overturn the Board's interpretation of NRS 288.160(4) and thus 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 "such acquiescence indicates the interpretation is consistent with legislative intent.").

In counter, ESEA argues that certain assembly bills bolster its position that elections must be governed by the Supermajority Rule. Answering Brief, at 31-32 n. 12. Those bills are just that, bills – they were not pronouncements by the Nevada Legislature on the proper course of action, and ESEA has introduced no evidence, let alone admissible evidence, to the contrary. These bills failed for a host of unknown reasons. That other parties unsuccessfully tried to advance legislation has no bearing or probative value here.

ESEA requests this Court to take judicial notice "of material" from the Nevada Legislature. Answering Brief, at 32 n. 12. "A judge or court shall take judicial notice if requested by a party **and supplied with the necessary information**." NRS 47.150(2) (**emphasis** added). Inexplicably, ESEA has failed to offer any "material" in its favor. *See Berrum v. Otto*, 127 Nev. 372, 380 n. 7,

255 P.3d 1269, 1274 (2011) (holding that "neither party provided this court with this document, so we decline to take judicial notice of the State Board's written decision, and we do not address the Treasurer's argument on this point."). Moreover, "[a] judicially noticed fact must be: ... (b) capable of accurate and ready determination by resort to the sources whose accuracy cannot be reasonably questioned...." NRS 47.130(b). ESEA only refers to vague "materials" and so this determination cannot be made nor contradicted. Per *Berrum*, the Court should deny ESEA's request and decline to address its argument on this point. *Berrum*, 127 Nev. at 380 n. 7, 255 P.3d at 1274 n. 7.[11] ESEA argues the same regarding proposed amendments to regulations. Answering Brief, at 50 n. 18. For the same reasons, these are irrelevant and the Court should deny the request.

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[11] ESEA appears to argue the Court should base its decision on the Legislature's failure to amend NRS 288.160(4) in response to the Court's 2005 decision (*see* Answering Brief, at 31-32), yet ESEA failed to present any admissible evidence, let alone the required "overwhelming evidence of [legislative] acquiescence." *Solid Waste Agency of N. Cook Cty. V. Army Corps of Engineers*, 531 U.S. 159, 169 n. 5 (2001); *see also Rapanos v. United States*, 547 U.S. 715, 750 (2006); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation...."). Moreover, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver, N.A.* 511 U.S. at 187; *see also Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132, 95 S. Ct. 335, 353 (1974) ("post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage.").

E. The Board did not Engage in *Ad Hoc* Rulemaking

(1) defines a regulation as a rule "of general applicability which effectuates or interprets law or policy...." The APA also specifically excludes certain agency statements, directives and rulings, and ESEA predictably ignores those exclusions. NRS 233B.038(2) provides that the term does not include a declaratory ruling or an agency decision or finding in a contested case. NRS 233B.038(2)(b), (e). The statute specifically carves out these instances for good reason – the Board's ruling here is not of general applicability and instead is based on a specific set of facts.

A "contested case" "means a proceeding ... in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing ...." NRS 233B.032. The Board determined the legal rights of the parties, and the parties had multiple opportunities for hearings. *See also* Answering Brief, at 4 (noting that "[a]fter considering documents submitted by Local 14, the Board ordered and held a hearing."), at 12 (noting "ESEA filed with the Board a Complaint and Objection", and the Board held a meeting). Indeed, the numerous orders issued demonstrate this point.

In 2002, Local 14 filed an application for order convening an administrative hearing. (JA, Vol. I, at 3). The Board noted that a hearing was conducted on September 19 and 20, 2002. *Id.* In 2016, ESEA filed a Complaint and Objection

to the second runoff, and the Board held a meeting. JA, Vol. I, at 185-91. As such, the Board's Order was not a regulation and thus not *ad hoc* rulemaking.

Moreover, declaratory, decisional, advisory, and fact-specific interpretive rulings are not regulations under NRS Chapter 233B. *Dunning v. Nevada State Bd. of Physical Therapy Examiners*, No. 67322, 2016 WL 3033742, unpublished disposition, at *2 (Nev. May 26, 2016), *citing* NRS 233B.038(2)(b), (e), (f), and (h). NRAP 36(c)(3). The Court in *Dunning* stated, "[f]or example, 'an interpretive ruling is merely a statement of how the agency **construes a statute or a regulation according to the specific facts before it.**" *Id* (**emphasis** added).

Consistent with *Dunning*, the Board noted that the "list of prior election decisions by this Board... stands in stark contrast to the experience of this case." (JA, Vol. I, at 167). The Board concluded that "[t]he history of this case" showed that the Supermajority Rule failed to produce a just result. (JA, Vol. I, at 168). Informed by the evidence, the Board's Order was an interpretative ruling, not a regulation, and in no way purported to govern future cases. ESEA agrees when it argues this case does not represent one of statewide public importance. Answering Brief, at ii (stating "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.").

ESEA cites to a snippet of the Board's Order stating "[w]e now interpret this subsection as permitting the Board to infer majority support....". That snippet actually undermines ESEA's contention, as it specifically states the Board is "permitted", not required. Moreover, the phrase "[w]e now interpret" indicates action taken in the present with respect to the specific facts of this case, most importantly the evolving election results. In *Dunning*, the Court said the policy "plainly applies to every physical therapist...." *Dunning*, 2016 WL 3033742, at *3. The Board's Order cannot be said to "plainly" apply to all local government employers, employees, and employee organization. If that were the case, every single decision would arguably be *ad hoc* rulemaking simply because it has some persuasive precedential value. *See also* JA, Vol. I, at 48 (stating that "when interpreting statutes, however, administrative agencies are not bound by stare decisis....").

Furthermore, the formalities of rulemaking are not required when an agency merely attempts to enforce or implement the requirements of an existing statute. *K-Mart Corporation v. SIIS*, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985).

Finally, if the Board's Order is deemed *ad hoc* rulemaking, then its order creating the Supermajority Rule in the first place must necessarily be the same.

The Supermajority Rule must then be declared void, and the Board ordered to adopt the simple majority rule per the APA.[12] Answering Brief, at 16.

F. Legislative Intent Supports the Simple Majority Rule

Oddly, ESEA argues that legislative intent supports the Supermajority Rule (yet primarily refers to the assembly bills noted above). Preliminarily, "[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 Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293–94, 995 P.2d 482, 485 (2000). However, where a statute has no plain meaning, a court should consult other sources such as legislative history, legislative intent and analogous statutory provisions. *Id.* The statute is clear – it does not provide for a standard to conduct elections.

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[12] Assuming the simple majority standard "plainly" applies to all those under the Board's jurisdiction, the rule now sets the standard for determining majority support and exclusive representation. If the appropriate standard is not clearly dictated, the Court must defer to the Board's interpretation of its regulation as applied to the facts of this case. As the Court has noted, "We are loathe to commit the board, which has been charged by the legislature with the duty to administer the act regulating public employee collective bargaining in this state, to any particular policy course not clearly dictated by the terms of the statute itself." *Local Gov't Employee-Mgmt. Relations Bd. v. Gen. Sales Drivers, Delivery and Helpers*, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982). Since the Supermajority Rule is not "clearly dictated by the terms of the statute itself," the Court should be "loathe to commit the board" to a policy course of requiring mathematical certainty in elections to determine the exclusive agent for local government employees.

In any event, as the Board noted, the concept of stability in labor relations is fundamental to the EMRA and existing doubt as to majority support is not conducive to stability in labor relations. (JA, Vol. I, at 165); *see also Truckee Meadows Fire Prot. Dist.*, 109 Nev. at 375, 849 P.2d at 349 (noting "one of the primary purposes of the NLRA is labor relations peace").

As a result of the elections at issue here, the majority has spoken 3 times that they are dissatisfied with ESEA's representation (if in fact it may even be called "representation"). The current situation is clearly not the equivalent of "labor relations peace". ESEA speculates that voter "fatigue" might have played a role. Answering Brief, at 27-28 n.9. However, in each election, it is undisputed that more employees voted in total, which suggests precisely the opposite. This argument also conflicts with NAC 288.146(1), which permits elections to be held every 3 years. It is undisputed that in the roughly 15 years since this case began, only 3 elections have been held.

As to the standard for conducting elections, the statute itself suggests the intent to delegate that decision to the Board. The Supermajority Rule is an aberration from labor standards, standards that the Legislature explicitly modeled in its enactment of NRS 288, and the lack of any legislative reference to the rule undercuts ESEA's position in this case. Since there are no such references, one may logically infer that either (a) the use of the simple majority standard was

intended because of its prevalence (and conversely the lack of any use of the Supermajority Rule), or (b) the adoption of a standard was delegated to the Board because of its specialized skills and knowledge.

Finally, analogous statutory provisions support the simple majority approach. Opening Brief, at 21-22; *see also* discussion *supra* Section I.C.[13] Furthermore, the Board's regulation has the force of law, was enacted by the Board pursuant to its grant of legislative authority, and may therefore be evaluated in light of evidence concerning the drafters' intent. Since the simple majority standard was used by the Board at the time of the regulation's enactment, one may

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[13] ESEA argues the NLRA does not have an analogue in NRS 288.160(1)'s provision for recognition by presentation of a membership list. *See* Answering Brief, at 29-30. This is inaccurate. Under the NLRA, a union may be recognized if it presents a membership list or other documents showing that it represents a majority of employees. *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 739-40 (1961) ("... he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards."); *Lamons Gasket Co.*, 357 NLRB 739, 742 (2011) ("voluntary recognition has been woven into the very fabric of the Act since its inception."); *MGM Grand Hotel, Inc.*, 329 NLRB 464, 466 (1999) ("It is a long-established Board policy to promote voluntary recognition...."). This is often referred to as a "card check" or "voluntary recognition". ESEA cites 29 U.S.C. § 159(c)(1)(A)(i) (sic - 29 U.S.C. § 129(c)(1)(A)(i)) but that section describes the prerequisite for an NLRB election (*i.e.*, the showing of interest), not for voluntary recognition through a card check. *See also* NRLB, *Conduct Elections*, https://www.nlrb.gov/what-we-do/conduct-elections (last visited July 31, 2017) (noting that "[i]n addition to NLRB-conducted elections, federal law provides employees a second path to choose a representative: They may persuade an employer to voluntarily recognize a union after showing majority support by signed authorization cards or other means.").

reasonably infer that the Board intended to codify that very standard. Moreover, at that time, the Supermajority Rule had never been considered, must less used in practice.

G. Exceptions Apply to the Law of the Case Doctrine

The Board's 2016 Order is consistent with this Court's prior decisions. To the extent the Court disagrees, it should revisit the prior rulings. Contrary to ESEA's contentions, the Court's discretion in this case is not constrained by its prior decisions.

There are "three specific exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, ... or (3) the prior decision was clearly erroneous and would result in a manifest injustice if enforced." *Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007). "In addition to the federal courts, many state courts have adopted these three exceptions to the law of the case doctrine. While the remaining states have not clearly embraced all of these specific exceptions, most recognize that **a court is not absolutely bound** by the law of the case and embrace at least one or more of these exceptions, or allow departure from prior decisions if enforcement of the previous decision would cause an **unjust result**." *Hsu*, 123 Nev. at 631, 173 P.3d at 729 (**emphasis** added).

In terms of the first exception (subsequent proceedings produce substantially new or different evidence), ESEA notes that "it has been more than a decade since the Supreme Court's 2005 Order of Affirmance." *See* Answering Brief, at 34. However, much has changed in over a decade. It is undisputed that when the Court issued its Order in 2005, the parties presented to it absolutely no evidence (tellingly, the Supreme Court in 2013 ordered that pre-election review should not have even occurred). The subsequent proceedings have undeniably produced substantially new or different evidence. As such, it is appropriate for the Court to revisit its decision.

In terms of the third exception (that the prior decision was clearly erroneous and would result in manifest injustice or unjust result), the prior decisions are void for lack of jurisdiction to conduct a pre-election review. As such, the decisions are clearly erroneous. Moreover, the manifest injustice or unjust result is apparent - denying the CCSD employees representation by the entity for which they have overwhelmingly expressed their preference and forcing them to be controlled by another. *See also* discussion *supra* Section I.F.

Furthermore, 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). 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.

The regulation itself would also be rendered meaningless and superfluous if NRS 288.160(4) were construed to require the application of the Supermajority Rule. If the stature were so construed, the regulation would add nothing to the statute; in fact it would contradict the statute in its use of the word "demonstrate" as the operative verb. Properly construed, the regulation allows for the use of the simple majority rule as a standard for demonstrating that the union is supported by a majority of the employees within the particular bargaining unit. As long as "demonstrate" is given its ordinary meaning, there can be no denying that the elections demonstrated to an increasing degree of certainty that Local 14 was supported by a majority of the CCSD employees. Given the now virtual certainty that CCSD employees overwhelmingly favor Local 14 over ESEA, it would contradict the regulation to retain the *status quo*.

Finally, the 2009 Order simply referred to its ruling in 2005 regarding the current issue, and it is undisputed that the real issue in 2005 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); Opening Brief, at 18-19. "In order for the law-of-

the-case-doctrine to apply, the appellate court must actually address **and** decide the issue explicitly or by necessary implication." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (**emphasis** added); *Recontrust Co. v. Zhang, 130 Nev. Adv. Op. 1*, 317 P.3d 814, 818 (2014) ("A position that has been assumed without decision for purposes of resolving another issue is not the law of the case" and "reference in the decision of a prior appeal in the same case ... was descriptive not dispositive and did not establish law of the case"); *Estate of Adams By & Through Adams v. Fallini*, 132 Nev. Adv. Op. 81, 386 P.3d 621, 624 (2016) (this rule is similar to issue preclusion which requires the issues to be identical); *Fergason v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 597 (2015) ("A significant corollary to the doctrine is that dicta have no preclusive effect."). The Court's Order in 2009 did not actually address and decide the issue before the Court now and, as such, does not establish the law of the case.

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II. 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 15th day of August, 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 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 6,999 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.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 15th day of August, 2017 I served the foregoing Appellant's Reply Brief via Eflex Electronic Service to the following:

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