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. A715577

[PROPOSED] BRIEF OF AMICUS CURIAE INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14 IN SUPPORT OF APPELLANT EMPLOYEE MANAGEMENT RELATIONS BOARD'S REQUEST FOR REVERSAL OF THE DISTRICT COURT ORDER

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Introduction

International Brotherhood of Teamsters Local 14 ("Local 14") agrees with the position of Appellant Employee Management Relations Board ("the Board" or "EMRB"): the district court erred in granting Education Support Employees Association's ("ESEA") petition for judicial review. Through this brief, Local 14 provides additional argument in support of the Board's position.

Concise Statement

Pursuant to Nevada Rule of Appellate Procedure 29(d)(3), Local 14 provides this concise statement of its identity, interest in the case, and source of authority to file this brief.

Local 14 was a candidate in the election that is at issue in this case, and it won the election by an overwhelming margin: 81 percent. Local 14 was also a party in the district court and administrative proceedings underlying this case, and has been a party to all the prior proceedings involving elections between Local 14 and ESEA. Local 14's experience with this case has given Local 14 a detailed understanding of those proceedings and the law at issue in this case. This proposed brief is filed simultaneously with a motion for leave to file a brief as *amicus curiae.*

Summary of the Argument

Three elections have been held and, in each election. Local 14 won increasingly more votes than ESEA:

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

Despite the landslide in the final election, Local 14 did not get votes from a majority of potential voters because only about half of the potential voters voted in each election. The EMRB decided that Local 14 has the support of a majority of employees because it won each election. That decision was proper (and the District Court erred in vacating it) for the following reasons:

1. The election was not a referendum on Local 14 alone. NRS 288.160(4) authorizes, and the Board ordered, an election upon the question whether "any employee organization" has majority support. Since the election demonstrated that ESEA lacks majority support, it would have been irrational for the Board to let ESEA continue to serve as employees' exclusive representative.

2. Before the first election was held, this Court described NRS 288.160(4) as unambiguously requiring a "majority of all potential voters" standard. The Court relied on the Board's prediction that the majority of employees would cast

ballots and so requiring a union to win votes from a majority of all potential voters was a "workable" standard. The successive elections revealed that the Board was mistaken, as the Board itself has now acknowledged. Low voter turnout makes that standard dysfunctional. It also reveals an ambiguity in NRS 288.160(4): What happens if low voter turnout prevents either union from winning votes from a majority of potential voters?

3. NRS 288.160(4) does not tell the Board how to interpret election results or say what the Board is to do if a majority of employees fail to vote. As the administrative agency with authority to make rules governing recognition of employee organizations, NRS 288.110(1)(c), it was the Board's job to fill this gap.

4. The Board filled this gap by adopting a regulation that states that an employee organization will be the bargaining representative if the "election demonstrates that the employee organization is supported by a majority of employees." NAC 288.110(d)(10). The Board used the common inference that nonvoters support the choices of actual voters to conclude that the election demonstrated that Local 14 is supported by a majority of employees. Inferences are allowed, and substantial evidence – employees' votes – supports this conclusion.

5. It does not matter that the Board previously rejected that inference. Administrative agencies are permitted to change how they interpret their regulations (as well as the statutes they administer).

6. The Board's decision advances both policy objectives underlying NRS Chapter 288: employee self-determination and labor peace. Allowing ESEA to remain in place as the employees' exclusive bargaining representative even though most employees have rejected ESEA, would undermine both legislative objectives.

7. The Board's decision does not conflict with this Court's prior unpublished orders in this case because those orders reflect the Court's deference to the Board. But if the Court finds a conflict, then the conflicting orders should be overruled as creating an unworkable standard that undermines the Legislature's objective in allowing employees to choose their representatives.

Standard of Review

As the party that petitioned for judicial review of the Board's decision, ESEA bears the burden of proving that the Board's decision is invalid. NRS 233B.135(2).

This court "reviews an administrative agency's decision for an abuse of discretion." *Wynn Las Vegas v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1181 (2013). An agency abuses its discretion by making a decision that is arbitrary, is not supported by substantial evidence, or is affected by errors of law.

Nevada Serv. Employees Union v. Orr, 121 Nev. 675, 678, 119 P.3d 1259, 126 (2005); *Constr. Indus. Workers' Comp. Grp. v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id*.; *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). In addition, the court "defers to an agency's . . . conclusions of law, where those conclusions are closely related to the agency's view of the facts." *State v. Tatalovich*, 129 Nev. Adv. Op. 61, 309 P.3d 43, 44 (2013); *see also State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1119, 946 P.2d 179, 181 (1997).

Issues pertaining to statutory construction are reviewed *de novo*, *Dutchess Bus. Servs., Inc. v. Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008); but the Court "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the statute's or regulation's language." *Wynn Las Vegas*, 129 Nev. Adv. Op. 78, 311 P.3d at 1182; *Dutchess Bus. Servs.*, 129 Nev. at 709, 191 P.3d at 1165. "An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Clark County School Dist. v. Local Government EMRB*, 90 Nev. 442, 445, 530 P.2d 114, 117 (1975). Accordingly, "great deference should be given to the agency's interpretation when it is within the language of the statute." *Id.* In addition, "great weight should be given to an

agency's interpretation of its own regulations." *Helms v. State, Div. of Environmental Protection,* 109 Nev. 310, 313-14, 849 P.2d 279, 282 (1993).

Argument

A. The Board's conclusion that the majority of bargaining unit employees support Local 14 is entitled to deference.

1. NRS 288.160(4) does not tell the Board what to do following an inconclusive runoff election.

Nevada's local government collective bargaining law provides only a barebones framework for how the Board is to resolve disputes about which of two competing unions a majority of employees support. It says 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." NRS 288.160(4) (emphasis added). Thus, the statute contains three components. It requires a threshold determination whether the Board has a "good faith doubt." It establishes that the method for resolving that doubt is a secret-ballot election. It explains that the purpose of that election is to answer the question whether *any* employee organization has majority support.

This Court's prior orders in this case do not prevent it from deferring to the Board's decision about how to bring the election process to a conclusion. Those decisions do not explain what the Board is to do if neither union receives votes

from a majority of employees in the bargaining unit. In fact, the Court specifically declined ESEA's request to modify the Board's initial election order and convert the election into a referendum on Local 14 alone:

> ESEA claims that if an election occurs, it may have to undergo recertification by the EMRB. Yet, the EMRB's order of January 23, 2003, merely sets forth the guidelines for an election. Further, the order states that the EMRB will require either ESEA or Local 14 to obtain a majority of the bargaining unit employee votes before it will recognize it as CCSD's exclusive bargaining unit representative. ESEA has not carried its burden of proving that "it is probable [that] future harm will occur." Accordingly, we hold that ESEA's objections concerning the EMRB's January 23, 2003, order are not ripe for review.

Joint Appendix ("JA") 46. In the District Court, ESEA ignored this passage and hinged its argument on the Court's unremarkable statement that "in the case of an unambiguous statute, the Board is required to follow the law, regardless of the result."[1] JA 11. That statement does not answer the question here: what does the law require when neither union receives votes from a majority of employees in the unit?

[1] ESEA treats this statement like a Rorschach inkblot test onto which it can project its own arguments. In a prior submission to this Court, ESEA, pointing to this sentence, falsely stated that the Court decided that NRS 288.160(4) "require[s] an affirmative vote from a majority of all of the members of the bargaining unit *to displace an incumbent union*." ESEA Opposition to Motion for Appeal to be Expedited, at 2 (emphasis added) (Sup. Ct. Doc. No. 16-27418). That misrepresents the Court's decision, and any similar distortions in ESEA's answering brief should be disregarded.

No one – not even ESEA -- can reasonably dispute that the election resolved the Board's doubt about ESEA's support. Each election demonstrated that ESEA lacks majority support. ESEA received only 41 percent of the votes cast in the first election, 29 percent of the votes cast in the second election and 19 percent of the votes cast in the final election. JA 50, 162, 194-95. Substantial evidence supports that conclusion. Leaving ESEA in place as the exclusive bargaining representative even though the election demonstrated repeatedly and unambiguously that the majority of employees do not want to be represented by ESEA would have been arbitrary. It is not a path that the Board could take.[2]

ESEA will argue that the Board should disregard the overwhelming evidence that ESEA lacks majority support because Local 14 did not meet the "votes from a majority of the unit" standard. The flaw in this argument is that the election was not a referendum on Local 14 alone. NRS 288.160(4) authorizes the Board to hold elections "upon the question" "whether any employee organization" has majority support. For this reason, in each round of voting, ESEA appeared as a choice on the ballot. The ballots asked, "Do you wish to be represented for the

[2] ESEA has asserted that the Board could not use a different method of conducting the election to increase voter turnout unless it consented. *See, e.g.*, ESEA's Opposition to Motion for Appeal to be Expedited, at 6 (Sup. Ct. Doc. No. 16-27418). ESEA also refused to consent to a different method. JA 86, 92.

purposes of collective bargaining by" followed by each union's name.[3] *See, e.g.*, JA 109. If the Board held the election to determine only whether Local 14 had majority support, then the ballot would have asked employees whether they wished to be represented by Local 14, followed by a choice between "yes" or "no."[4]

2. The election results revealed that NRS 288.160(4) is ambiguous and would be unworkable if interpreted to require a union to receive votes from a majority of all employees.

There are two ways that a statute may be ambiguous: it may be "capable of being understood in two or more senses by reasonably informed persons" or it may be "one that otherwise does not speak to the issue before the court." *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007); *see also Dykema v. Dell Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016). NRS 288.160(4) is ambiguous in both ways.

[3] In the initial election, employees also had the option to vote for "nonunion", but that option received less than 100 votes so it was eliminated in the subsequent elections.

[4] Prior proceedings in this case support this analysis. NAC 288.110(7) requires runoff elections when an initial election's "results are inconclusive." If NRS 288.160(4) authorized an up-or-down referendum on the union seeking to displace the incumbent, then results would always be conclusive, and a runoff would never be necessary. But following the initial election, this Court ordered the Board to hold a runoff election because the results – in which neither Local 14 nor ESEA received votes from a majority of all employees – were inconclusive. JA 82-83.

Before the initial election between Local 14 and ESEA was held, this Court concluded that NRS 288.160(4)'s phrase "majority of local government employees in a particular bargaining unit" was unambiguous. If voter turnout had been greater and a majority of employees had voted for one ballot option, then it may have remained so. It is now clear that NRS 288.160(4) "does not speak to the issue" that is now before the Court: how the doubt about majority support is to be resolved in the face of low voter turnout.

Before the facts are developed, it can be difficult to determine whether a statute is unambiguous. *See, e.g., Egan v. Chambers,* 129 Nev. Adv. Op. 25, 299 P.3d 364, 367 (2013) (overruling prior decision because Court's reading "reveals no statutory ambiguity as previously suggested"). This Court has recognized that statutory language that appears to be unambiguous when considered in one factual context is not always so. For example, "when two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and we will attempt to reconcile the statutes." *Fierle v. Perez,* 125 Nev. 728, 735, 219 P.3d 906, 910-911 (2009). In another case, the Court disregarded statutory language that it described as "unambiguous" in order to "advance the primary goal" of the statute and avoid a conflict that the case before it revealed. *Szydel v. Markman,* 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005); *see also Clark County School Dist.*, 90 Nev. at 445, 530 P.2d at 117

(upholding the Board's interpretation of NRS 288 because it avoided rendering one provision a nullity); *Tate v. State Bd. Of Medical Examiners*, 131 Nev. Adv. Op. 67, 356 P.3d 506, 508 (2015) ("Words in a statute should be accorded their plain meaning unless doing so would be contrary to the spirit of the statute."); *Schleining v. Cap One, Inc.*, 130 Nev. Adv. Op. 36, 326 P.3d 4,7 (2014) (rejecting literal interpretation of statute due to the "potential for such absurd results"); *State v. Friend*, 118 Nev. 115, 120-21, 40 P.3d 436, 439 (2002) (same).

The election between Local 14 and ESEA demonstrated a conflict within NRS 288.160(4). NRS 288.160(4) gives the Board one way of resolving good faith doubt about which union has support from a majority of employees: hold a secret ballot election on that question. But if NRS 288.160(4)'s phrase "majority of . . . . employees in a particular bargaining unit" is interpreted now as the Supreme Court did in 2005 and the majority of employees fail to vote, then elections under NRS 288.160(4) will be incapable of producing a result. *Cf. Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448-49, 254 P.3d 636, 639-40 (2011) (rejecting interpretation that would create impracticable requirements). Adhering to this interpretation would undermine the overarching purpose as expressed in the statute: that disputes should be resolved by elections. "Provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of the statute and accordance with the general purpose of the statute and

should not be read to produce unreasonable or absurd results." *State v. Harris*, 131 Nev. Adv. Op. 56, 355 P.3d 791, 792 (2015) (citing *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)); *see also Tatalovich*, 129 Nev. Adv. Op. 61, 309 P.3d at 44 ("In construing a statute, this court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results."); *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 434-35, 117 P.3d 182, 192 (2005) (same). This is because "the legislature is presumed to have intended a logical result, rather than an absurd or unreasonable one." *Double Diamond v. Second Jud. Dist. Ct.*, 131 Nev. Adv. Op. 57, 354 P.3d 641, 644 (2015).

NRS 288.160(4) is also capable of being understood by reasonably informed persons in different ways. The entire subsection says:

> 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.

This might mean, as the Court decided in 2005, that a majority of employees must vote for a union for that union to be supported by a majority of the employees. Or it might mean that the Board is to determine the outcome in the normal way that election outcomes are determined: by deeming the candidate that receives a majority of votes the election's winner. A third possible meaning is simply that if the Board doubts which union a majority of employees support, the Board can hold

an election on that question. In other words, the statute says nothing about how the Board is to determine the outcome of that election.

"Reasonably informed persons" could read NRS 288.160(4) differently than the Court did in 2005. The key phrase – "majority of the local government employees in the particular bargaining unit" – also appears in the federal National Labor Relations Act. Section 9(a) of that law refers to "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of employees in a unit." 29 U.S.C. § 159(a) (emphasis added). That statute also provides a system of secret-ballot elections to resolve "question[s] of representation" – i.e., whether is union has the support of a majority of employees within the meaning of § 9(a). See 29 U.S.C. § 159(c). The federal courts have uniformly decided that § 9(a) is satisfied – i.e., that a union has been selected "by the majority of employees in a unit" -- when a union receives the majority of votes cast in an NLRB-conducted election.[5] This is not to say that NRS 288.160(4) is

[5] *See, e.g., NLRB v. Singleton Packing Co.*, 418 F.2d 275, 279 (5th Cir. 1969) ("§ 9 does not expressly provide what sort of majority shall control the result of an election" but "the general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote"); *NLRB v. Deutsch Co.*, 265 F.2d 473, 479 (9th Cir. 1959) ("It has repeatedly been held under well recognized rules attending elections that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting so that such majority determines the choice."); *NLRB v. Standard Lime & Stone Co.*, 149 F.2d 435, 437-38 (4th Cir. 1945) ("The statute requires that bargaining representatives be selected by the majority of the employees . . . The statute makes

identical in all respects to the federal labor law. But it plainly demonstrates that "reasonably informed persons" can reach different conclusions about what the phrase "majority of local government employees in the particular bargaining unit" means in the context of an election to determine majority support.

3. It is the Board's function to fill gaps in the statute it administers.

NRS 288.160(4) does not explain how the Board is to resolve the question whether any union has the support of the majority of bargaining unit employees when a majority of employees do not vote for either union. Deciding how to do so is left to the Board's discretion. This is black-letter administrative law: When

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no provision for a quorum nor for the participation of any definite proportion of the employees in the election."); *NLRB v. Central Dispensary & Emergency Hosp.*, 145 F.2d 852, 853-54 (D.C. Cir. 1945) (rejecting argument that "the language of the Act referring to representatives selected for the purposes of collective bargaining 'by the majority of the employees in a unit appropriate for such purposes excludes an election by a minority"). *Cf. Lemco Constr. Inc.*, 283 NLRB 459, 460 (1987) ("[E]lection results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining. The law does not compel any employee to vote, and the law should not permit that right, to refrain from voting, to defeat an otherwise valid election. . . . In political elections, voters who absent themselves from the polls are presumed to assent to the will of the majority of those voting. Similarly, when a Board election is met with indifference, it must be assumed that the majority of eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation.").

there is "inadequate legislative expression[]" "gaps may be filled in administratively." *State v. Rosenthal*, 93 Nev. 36, 43, 559 P.2d 830, 835 (1977); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). The Legislature specifically gave the Board authority in this area, mandating that the Board "may make rules governing . . . [t]he recognition of employee organizations." NRS 288.110(1)(c).

4. The Board's decision to use an inference to determine what election results "demonstrate" is entitled to deference.

After the initial and runoff elections failed to produce conclusive results, the Board had to decide what to do next. The Board explained its decision in a lengthy and carefully-reasoned opinion. JA 163-69. The Board has summarized its decision on pages 10 to 12 of its Brief to this Court. Based on that reasoning, the Board concluded that it could fulfill "its statutory duty to hold elections and to resolve [its] good faith doubt" by reverting to its prior interpretation of NAC 288.110(10)(d).[6] That regulation states:

> An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election,

[6] When the Board adopted the experimental interpretation of NAC 288.110(9)(d), the Board made clear that it was interpreting the regulations. JA 13-14.

> if: . . . The election demonstrates that the employee organization is supported by a majority of the employees within the particular bargaining unit.

Between 1969 and 2002, the Board inferred which union had majority support from the votes actually cast. For the first and only time in this case, the Board implemented the regulation differently, requiring a majority of employees to vote for a union. JA 167. This was a novel interpretation of what it takes for an election to "demonstrate" majority support. Since that proved unworkable, the Board decided that it would resume using an inference to determine which union nonvoters support:

> We now interpret [NAC 288.110(10)(d)] as permitting the Board to infer majority support of the unit as a whole based upon a majority of votes cast in accord with the well-recognized principle that that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting so that such majority determines the choice.

JA 167. In other words, if the majority of votes cast are for a particular union, the election "demonstrates" that a majority of employees support that union.

It does not matter that the Board previously interpreted NAC 288.110(10)(d) differently. "In Nevada, administrative agencies are not bound by *stare decisis*" and [an agency] does not abuse its discretion by failing to follow a prior decision. *Motor Cargo v. Public Svc. Comm. of Nevada*, 180 Nev. 335, 337, 830 P.2d 1328, 1330 (1992); *See also State, Dep't of Taxation v. Chrysler Grp. LLC*, 129 Nev.

Adv. Op. 29, 300 P.3d 713, 717 n.3 (2013) (same); *Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997) ("[N]o binding effect is given to prior administrative determinations.").[7]

This rule comports with federal administrative law. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB v. Local 103, Int'l Assn. of Iron Workers*, 434 U.S. 335, 351 (1978); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy."); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive

[7] ESEA might argue that the EMRB was required to use rulemaking procedures before changing its interpretation of NAC 288.110(10)(d). That argument would not have any merit. Just as the Board was not required to use a rulemaking process when in 2002 it revised its interpretation of NAC 288.110(10)(d) in ESEA's favor, it was not required to do so when it reverted to the original interpretation. This Court has repeatedly "held that 'there is no reason to require the formalities of rulemaking whenever an agency undertakes to enforce or implement the necessary requirements of an existing statute.'" *State, Dept. of Taxation v. Chrysler Group LLC*, 129 Nev. Adv. Op. 29, 300 P.3d 713, 717 (2013) (quoting *K-Mart Corp. v. SIIS*, 101 Nev. 12, 693 P.2d 562, 565 (1985)).

the nature of administrative decision-making. Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."). All that is necessary is that the agency supply a "well-considered basis for the change." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). The Board issued a well-reasoned opinion, explaining why it reverted to its prior and longstanding interpretation of NAC 288.110(10)(d).

5. Substantial evidence supports the Board's conclusion that Local 14 has majority support.

When the Board decided that the majority of bargaining unit employees support Local 14, the Board made a factual finding about what the election "demonstrated" and how that resolved the doubt that caused the Board to order the election. The Board considered the votes that employees cast and drew a reasonable inference about nonvoters' support: that they assented to the will of the voters. A reasonable mind would consider that evidence as adequate to support the Board's conclusion. *Cf. Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (substantial evidence may be inferred from the lack of certain evidence). The Board's finding that Local 14 has majority support is supported by substantial evidence.

6. The Board's decision fulfills the Legislature's objectives in enacting the local government collective bargaining law.

When a statute is ambiguous, "[t]he meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it." *Nelson*, 123 Nev. at 224, 163 P.3d at 425.

Two policy objectives undergird NRS Chapter 288. The Legislature wanted to prevent the disruption of government services that results from labor discord. *Cf. Clark County School Dist.*, 90 Nev. at 449, 530 P.2d at 119 (observing that there is a public interest in "peace and harmony in the academic community"). The statute advances this objective by making strikes illegal, see NRS 288.230; providing a variety of remedies for illegal strikes, see NRS 288.240-288.260; and requiring a union to pledge not to strike before the union may be recognized. *See* NRS 288.160(1). The other policy prioritizes employee self-determination by allowing employees to choose the union that represents them. See NRS 288.160(2) (requiring a verified membership list when a union is voluntarily recognized); NRS 288.160(3)(c) (authorizing an employer to withdraw recognition from a union that ceases to be supported by a majority of employees); NRS 288.160(4) (authorizing the Board to hold elections when it doubts which union has majority support).

These objectives complement one another. By giving employees the right to representation, the statute enhances the prospects for labor peace. But collective

bargaining can bring labor peace to the workplace only if employees can choose and accept the union that represents them. Moreover, even without strikes, there can be labor disruption. Disgruntled employees are less productive than employees who have a voice about their terms and conditions of employment.

The facts here demonstrate this point well. ESEA can pledge not to strike but since it represents only a fraction of the bargaining unit employees, ESEA's pledge has limited value. Employees voted for Local 14 in a landslide and experience the current situation as disenfranchisement. Denying thousands of employees representation by Local 14 and allowing ESEA to remain the representative can only lead to increased discontent in the schools.

ESEA may respond, as it argued in the District Court, that allowing it to remain the representative enhances labor stability, but that is true only in the sense that government by dictatorship entails less change at the top than does democracy. It does not mean that labor relations are more stable or peaceful. Denying employees representation by Local 14 now would not prevent employees from continuing to try to displace ESEA. Unions are permitted to petition for elections to replace the incumbent representative during window periods that open every three years. *See* NAC 288.146. The outcome of the three successive elections – with increasingly more employees voting for Local 14 and fewer employees voting

for ESEA – makes it very likely that this long-running quest to displace ESEA will not end.

The Board has concluded that its experimental "majority of employees in the unit" voting standard impedes rather than advances the prospects for labor peace and stability. JA 165. That conclusion by the expert agency is entitled to deference.

B. If the Court concludes that the Board's decision conflicts with its prior decisions in this case, then the Court should overrule its prior decisions.

The Board believes that its decision does not conflict with this Court's prior decisions in this case, as it explained on pages 29-30 of its Brief. But if this Court disagrees, then overruling one or both of those decisions is warranted.

"Mere disagreement" with a prior decision does not justify disregarding the doctrine of *stare decisis*, but this Court does not "adhere to the doctrine so stridently that the 'law is forever encased in a straight-jacket.'" *Armenta–Carpio v. State*, 129 Nev. Adv. Op. 54, 306 P.3d 395, 398 (2013) (quoting *Adam v. State*, 127 Nev. Adv. Op. 601, 604, 261 P.3d 1063, 1065 (2011)). Rather, the Court will overrule "governing decisions" that "prove to be unworkable or are badly reasoned," *Harris v. State*, 130 Nev. Adv. Op. 47, 329 P.3d 619, 623 (2014); or that "are shown to be unsound in principle." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007); *see also Egan v. Chambers*, 129 Nev. Adv. Op. 79, 299 P.3d 364, 367 (2013); *State v. Lloyd*, 129 Nev. Adv. Op.

79, 312 P.3d 467, 474 (2013); *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008). When that is the case, "depart[ing] from the doctrine of *stare decisis*" is justified "to avoid the perpetuation of that error." *Armenta–Carpio*, 306 P.3d at 398. Put simply, the Court will fix mistakes that come to light as new cases or fact-patterns are presented to it.

The exception to *stare decisis* applies here. Interpreting NRS 288.160(4) to require that a union receive votes from a majority of all potential voters, regardless of how few cast ballots, makes the statute unworkable. NRS 288.160(4) directs the Board to hold elections "upon the question" "whether any employee organization is supported by a majority of employees." A vote-counting system that makes it impossible in practice for the election to produce results is unworkable. It replaces a statutory scheme intended to allow employees self-determination with one that entrenches an employee organization that lacks employee support.

The Court reviewed and enforced the Board's adoption of the experimental "votes from majority of the unit" rule before the initial election was held.[8] At that time, there was no evidence about how many employees would actually vote. At oral argument, the Board's counsel told the Court that enough employees would

[8] The Court has since made clear that the pre-election decision was premature. The third time this case was before the Court, the Court decided that the district court does not have jurisdiction to review the Board's election orders before the election is held. JA 159-60.

vote so that the election would produce conclusive results. *See* Exhibit B to Local 14's Req. for Jud. Notice. In the absence of any evidence, it was proper for the Court to rely on the Board's prediction, as the Board is the expert administrative agency. Indeed, the Court said that it was deferring to the Board: "[W]e will not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110." JA 48. The successive elections now show that the Board was mistaken, as the Board itself concluded: "It is obvious that the 'majority of the unit' standard is incapable of answering our good faith doubt whether any organization enjoys majority support in this case." JA 166.

There are other reasons why *stare decisis* is not an important consideration in this case. The Court did not publish its prior decisions in this case so they have no precedential value. Nev. R. App. P. 36(c)(2) ("An unpublished disposition, which publicly available, does not establish mandatory precedent except in a subsequent state of a case in which the unpublished disposition was entered . . . .").[9] This case represents the only occasion in which the Board ever used the "majority of employees in the unit" standard to determine the outcome of an election under NRS 288.160(4). JA 167. In every other election in the past and in

[9] For this reason, the Legislature's failure to amend NRS 288.160(4) in response to the Court's decisions means little. There is no need for the Legislature to amend a statute to overturn a judicial decision that has no precedential value.

every election in the future, the Board will use the normal "majority of all votes cast" standard. No one – not even ESEA -- has relied to their detriment on the experimental standard. *See Badger v. Eighth Judicial Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89, 98 (2016) (dissenting opinion of J. Pickering) (observing that *stare decisis* is of lesser importance to recent decisions that have not induced reliance). If anything, ESEA benefited from the Board's experiment. If the Board had not experimented with a different election standard, Local 14 would have replaced ESEA as the employees' representative in 2006 following the initial election when Local 14 won 57 percent of the votes cast.

Conclusion

For all of the foregoing reasons, Local 14 supports with the Board's position that the District Court erred when it granted ESEA's petition for judicial review and vacated the Board's 2016 Order.

Dated: September 15, 2017

McCRACKEN STEMERMAN & HOLSBERRY, LLP

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

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 proportionately spaced typeface using Times New Roman in Microsoft Word 2013. I further certify that this brief complies with the type-volume limitations 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 6,008 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 15, 2017

McCRACKEN STEMERMAN & HOLSBERRY, LLP

/s/ Kristin L. Martin
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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. A715577

RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S MOTION FOR RECONSIDERATION OF ORDER STRIKING BRIEF OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE AMICUS BRIEF

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Pursuant to Nevada Rule of Appellate Procedure 27(b), International Brotherhood of Teamsters Local 14 respectfully requests that the Court reconsider its order dated September 13, 2017 striking Local 14's answering brief. In the alternative, pursuant to Nevada Rule of Appellate Procedure 29(a), Local 14 requests that it be permitted to file its brief as *amicus curiae.*

Background

This appeal stems from a long-running dispute between Local 14 and Education Support Employees Association ("ESEA") about which union represents Clark County School District's support staff. The Employee Management Relations Board ("EMRB") has held three elections, and each time more votes were cast for Local 14 than for ESEA. The EMRB certified the results of the most recent election, and ordered the School District to recognize Local 14 as the employees' representative. That is the order on review in this case.

ESEA filed a petition for judicial review of that order in the district court, which the district court granted in part, remanding the case to the EMRB to decide "what, if any, further action is appropriate." Local 14 was one of the respondents to that petition because it was a party to the EMRB proceeding. *See* NRS 233B.130(2)(a) (defining as "respondents" to a petition for judicial review all parties to the administrative proceeding, regardless of what position the party might take in response to the petition).

The EMRB appealed from that order, and because Local 14 was a party to the district court case, it is also a party to this appeal. Since Local 14 did not file a separate appeal, it was formally designated as a respondent. The question for this Court is how Local 14 may explain its view of this case to the Court.

Argument

A. Request for Reconsideration of Order Striking Local 14's Brief

By order dated July 27, 2016, this Court gave Local 14 permission to "file an answering brief conceding district court error," but specified that Local 14 could not seek to alter the judgment. The Court has, in its September 13, 2016 order, interpreted the earlier order as permitting Local 14 to state only that it concedes district court error, without explaining why the district court erred.

Local 14 requests that the Court reconsider this interpretation because it conflicts with Nevada Rule of Appellate Procedure 28's requirement that all briefs contain an argument. More precisely, a respondent's brief *must* contain the following sections:

> (9) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief and which must not merely repeat the argument headings;
>
> (10) the argument, which must contain:
> (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

> (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

Nev. R. App. P. 28(a); *see also* Nev. R. App. P. 28(b) (respondent's brief "shall confirm to the requirements of Rule 28(a)(1)-(10) and (12)"). The Court's July 27, 2016 order did not excuse Local 14 from including these required sections, and Local 14 would have risked sanctions by filing a brief without an argument. *See* Nev. R. App. P. 28(j) ("Briefs that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions.").

Allowing Local 14 to explain why it does not seek to alter the district court's judgment is also consistent with the reasoning of *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994). In that case, the Court adopted the common-sense rule that when one party has filed an appeal, a respondent to that appeal does not need to file a separate appeal in order to support a favorable district court judgment on alternate grounds. A separate appeal is unnecessary because the original appeal put the district court's judgment before the court. The same rationale applies in this case, even though Local opposes an unfavorable judgment. The EMRB has filed an appeal so this case is properly before the Court. The EMRB seeks to alter the district court's judgment so the question whether to do so is also properly before this Court. Local 14 simply desires to present arguments in

support of the EMRB's appeal. It does not seek any action from this Court. The Court's rules do not preclude arguments in support of reversal by anyone other than an appellant. This is what *amicus curiae* are specifically permitted to do: support the EMRB's position that district court judgment should be reversed. *See* Nev. R. App. P. 29(d) (stating that *amicus* brief must state "whether the brief supports affirmance or reversal").

While Local 14 could have filed a separate appeal, that would not have served any purpose and would waste judicial resources. Local 14 is a party to this appeal, and does not ask the Court to do anything.[1] In this regard, this case is different from an appeal from an ordinary civil suit with multiple defendants. In that scenario, each losing defendant must file a separate appeal so that the appellate court will have jurisdiction to award the relief that defendant seeks, e.g., reversal of a judgment against that defendant. Local 14 does not seek any relief specific to it. Local 14 simply wants to argue in support of the EMRB's position.[2]

[1] In this regard, this case is different from an appeal from an ordinary civil suit with multiple defendants. In that scenario, each losing defendant must file a separate appeal so that the appellate court will have jurisdiction to award the relief that defendant seeks, e.g., reversal of a judgment against that defendant.

[2] The order striking Local 14's brief gives Local 14 eleven days to file a brief without any argument. Because that deadline will come before the Court rules on this request for reconsideration, Local 14 will file the revised brief with the expectation that it will be withdrawn if the Court grants Local 14's motion for reconsideration and reinstates Local 14's original brief.

B. Motion for Leave to File *Amicus* Brief

In the alternative, Local 14 requests leave to file its brief as an *amicus curiae*. *See* Nev. R. App. P. 29(a), (c). A copy of the brief that Local 14 seeks to file is filed conditionally with this motion, as required by Nevada Rule of Appellate Procedure 29(c).

Local 14 has an exceedingly strong interest in serving as an *amicus*. It was a candidate in the election that is at issue in this case, and it won the election by an overwhelming margin: 81 percent. Local 14 was also a party in the district court and administrative proceedings underlying this case, and has been a party to all the prior proceedings involving elections between Local 14 and Education Support Employees Association. An *amicus* brief from Local 14 is desirable if Local 14 is not permitted to present its arguments in its answering brief because Local 14's experience with this case has given Local 14 a detailed understanding of those proceedings and the law at issue in this case. Rule 29 does not prohibit a party from serving as *amicus*.

The Court has discretion to allow Local 14 to file an *amicus* brief at this time. *See* Nev. R. App. P. 29(f) ("The court may grant leave for later filing, specifying the time within which an opposing party may answer."); *see also* Nev. R. App. P. 2 (authorizing court, "for good cause" to "suspend any provision of these Rules in a particular case and order proceedings as the court directs"); Nev.

R. App. P. 26(b)(1)(A) ("For good cause, the court may extend the time prescribed by these Rules . . . or may permit an act to be done after that time expires."). Allowing Local 14 to file its brief now, even though the ordinary time for filing has passed, would be fair. Local 14 did not seek leave to file an *amicus* brief earlier because it understood the Court's July 27, 2016 order to permit it to do exactly what an *amicus* does: present an argument in support of affirmance or reversal. *See* Nev. R. App. P. 28(d). As explained above, this interpretation of the Court's July 27, 2016 order, together with Nevada Rule of Appellate Procedure 28, was a reasonable interpretation of that order.

Late filing will not prejudice the other parties. Local 14's proposed *amicus* brief contains the same argument and summary of argument sections as the brief that has been stricken. The stricken brief was filed on June 20, 2017, more than a month before ESEA's brief was due. Accordingly, ESEA was able to respond to Local 14's arguments, and in fact did so.

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Conclusion

Local 14 should be allowed to present its arguments to the Court, either in its answering brief or as an *amicus*. For all of the foregoing reasons, Local 14 respectfully requests that the Court reconsider its order dated September 13, 2017 striking Local 14's answering brief. In the alternative, Local 14 requests that it be permitted to file its brief as *amicus curiae.*

Respectfully Submitted,

/s/Kristin L. Martin
Kristin L. Martin

Attorneys for Respondent International Brotherhood of Teamsters, Local 14

Signed this 15th Day of September, 2017 in San Francisco, CA.

Case No. 70586

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the McCracken, Stemerman & Holsberry, LLP and that on the 15th day of September 2017 I served the foregoing RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14'S MOTION FOR RECONSIDERATION OF ORDER STRIKING BRIEF OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE AMICUS BRIEF via electronic service to the following:

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