IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF MESQUITE

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

DOUGLAS SMAELLIE,

Real Party in Interest

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Case No.: 75743

Clark County District Court
Case No. A-17-759770-C

BRIEF OF AMICI CLARK COUNTY, DOUGLAS COUNTY, HUMBOLDT COUNTY, LYON COUNTY, CITY OF SPARKS, TRUCKEE MEADOWS WATER AUTHORITY, LINCOLN COUNTY SCHOOL DISTRICT, LANDER COUNTY SCHOOL DISTRICT, HUMBOLDT COUNTY SCHOOL DISTRICT, CARSON CITY SCHOOL DISTRICT and EUREKA COUNTY SCHOOL DISTRICT IN SUPPORT OF PETITIONER

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I. AMICI'S STATEMENT OF INTEREST

Amici Clark County, Douglas County, Humboldt County, Lyon County, City of Sparks, Truckee Meadows Water Authority, Lincoln County School District, Lander County School District, Humboldt County School District, Carson City School District and Eureka County School District and are local government employers as defined by NRS 288.060. Amici are political subdivisions of the State of Nevada and are authorized to file this brief without the prior consent of the parties or leave of the Court pursuant to NRAP 29(a).

The decision of the district court below directly implicates potential liabilities of amici because, if affirmed, it will expose amici to a six-year limitations period for claims based on a breach of a collective bargaining agreement and breach of a duty of fair representation. The decision of the district court also implicates public policy concerns surrounding the administration of the grievance and arbitration proceedings that are negotiated into amici's respective collective bargaining agreements.

II. SUMMARY OF ARGUMENT

There are different federal approaches to hybrid suits, but all roads lead to the same result – a six-month limitations period. Each approach looks to the relevant collective bargaining laws as the source to define the limitations period when allegations of a breach of the duty of fair representation are at issue. By its very nature a hybrid suit cannot be brought without alleging a breach of the duty of fair

representation. The limitations period under Nevada collective bargaining laws that governs claims for a breach of the duty of fair representation is six months.

Aside from the rather straightforward reasoning that mandates a six-month limitations period, other public policy concerns are at play. These concerns weigh heavily against the extensive six-year limitations period adopted by the district court.

III. LEGAL ARGUMENT

A. The Nature of a Hybrid Suit Precludes a Six-Year Limitations Period

Amici's concerns stem from the very nature of a hybrid suit. In order to contextualize these concerns, and appreciate the negative impacts of the district court's ruling, it is imperative that the Court proceed with a thorough understanding of the varying federal approaches to hybrid suits.

As a general proposition, this Court will often look to federal law for guidance when applying Nevada's labor statutes. *E.g. UMC Physicians' Bargaining Unit of Nev. Serv. Emples. Union, SEIU Local 1107 v. Nev. Serv. Emples. Union/SEIU Local 1107*, 124 Nev. 84, 91, 178 P.3d 709, 714 (2008).

But on the topic of hybrid suits federal law is not a monolith. There are actually two principal federal approaches to hybrid suits: one approach that applies to private-sector collective bargaining and one that applies to public-sector collective bargaining. The decisions from this Court historically have mirrored the federal public-sector approach. However, recent unpublished orders have sowed confusion

as to which of the two federal approaches might apply to Nevada law.

1. The Federal Private-Sector Approach

Under federal law, a hybrid suit arises out of the milieu of private-sector collective bargaining statutes. This Court's recent unpublished order in *Clark County v. Tansey*, Case No. 68951 (March 1, 2017) and its unpublished prior order in this case, V1 APP 025-027, point to the federal private-sector approach.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, authorizes a labor organization to file suit in federal court against a private employer to enforce a collective bargaining agreement. But this statutory right to file a Section 301 claim directly against an employer is not available for individual employees – unless the employee simultaneously claims a breach of the duty of fair representation against the labor union representing that employee. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-65 (1983).

A private-sector hybrid suit is thus composed of two claims that are inextricably intertwined: (1) the Section 301 claim against an employer for breach of a collective bargaining agreement; and (2) a claim against a labor union for breaching the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Both components of a private sector hybrid claim are derived from statute. The first component of a hybrid claim is of course the statutory right of action conferred by federal law – Section 301. The second component is also statutory, and

is derived from a recognized labor union's statutory standing as the employees' exclusive representative. *Miranda Fuel*, 140 N.L.R.B. 181, 185-186 (January 1, 1962).

While these two components of a private-sector hybrid claim are inextricably intertwined, "[t]he employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 462 U.S. at 165.

Even though a hybrid claim gives a plaintiff the option of electing whether to proceed against an employer or a labor union, hybrid claims do not generally impose joint and several liability against whomever the plaintiff has elected to name as a defendant in a lawsuit. Under the damages rules attendant to hybrid claims, damages are ordinarily apportioned between the employer and the labor union that fails to represent the employee. *Bowen v. USPS*, 459 U.S. 212 (1983).

Under this apportionment rule, the employer is ordinarily liable for back pay damages from the date of termination up to the date that the employee would have been restored by a hypothetical arbitration. Labor unions are then liable for back pay damages accruing thereafter. *See S.F. Web Pressmen & Platemakers' Union v. N.L.R.B.*, 794 F.2d 420, 424 (9th Cir. 1986). The reasons for apportioning damages in this manner are explained in *Bowen*. But this apportionment can create a significant imbalance between the respective liabilities of employers and unions.

As explained in the four-justice dissent in *Bowen***:**

> Because the hypothetical arbitration date will usually be less than one year after the discharge, it is readily apparent that, under the Court's rule, in many cases the union will be subject to large liability, far greater than that of the employer, the extent of which will not be in any way related to the union's comparative culpability. Nor will the union have any readily apparent way to limit its constantly increasing liability.

Bowen v. USPS, 459 U.S. 212, 238 (1983).

This imbalance in respective back pay liability is militated somewhat by a six-month limitations period in which an individual employee must file a hybrid claim. *DelCostello* 462 U.S. at 169 (adopting the limitations period from the NLRA for hybrid claims); 29 U.S.C. § 160(b).

2. The Federal Public-Sector Approach

This Court's unpublished order in *Tansey* represents a dramatic departure from prior published authority from this Court; authority that establishes a system under state law that is aligned with the federal public-sector approach.

Under the federal public-sector approach, a hybrid suit is a *non sequitur*. As the public-sector bargaining statutes (the Civil Service Reform Act, ("CRSA")) have no counterpart that corresponds to Section 301 of the Labor Management Relations Act there is no private right of action against a public-sector employer for breach of a collective bargaining agreement. The absence of any statutory section to correspond to Section 301 means that a hybrid claim, under the federal public-sector

approach, simply does not exist.[1] *See Pham v. American Federation of Government Employees, Local 916*, 799 F.2d 634, 639 (10th Cir. 1986) (reasoning that the lack of a Section 301 counterpart in the CSRA was effectively a retention of sovereign immunity by the government against claims for breach of a collective bargaining agreement); *Warren v. American Federation of Government Employees, Local 1759*, 764 F.2d 1395, 1399 (11th Cir. 1985); *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 536 (1989) ("Section 301 has no equivalent under Title VII [of the CSRA]; there is no provision in that Title for suing an agency in federal court."); *see also Tucker v. Def. Mapping Agency Hydrographic/Topographic Ctr.*, 607 F. Supp. 1232, 1240 n.6 (D.R.I. 1985) (pointing to the omission of a Section 301 counterpart from the CSRA, and concluding that *Vaca* was "inapplicable; there is no room in the CSRA stable for the *Vaca* steed… *Vaca* is simply a horse of another color.").

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[1] Like the Civil Service Reform Act, the EMRA (NRS Chapter 288) also lacks any section that corresponds to Section 301. In opinions such as *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008), this Court has rigorously applied a structured analytic before deciding whether or not to recognize a private right of action derived from a statutory scheme, including a consideration of the absence of any express private right of action. This analytic has never been applied by this Court in the context of a hybrid suit. However this issue was not raised before the district court below.

The CSRA does permit an individual employee to assert the second component of a hybrid claim – for breach of the duty of fair representation – but does not permit such a claim to be litigated before a district court. Instead such a claim is channeled through the administrative process under the jurisdiction of the Federal Labor Relations Authority. *E.g. Steadman v. Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (D.C. Cir. 1990).

This mirrors the same approach adopted by this Court through its published and *en banc* decision in *Rosequist v. Int'l Ass'n of Firefighters, Local 1908*, 118 Nev. 444, 49 P.3d 651 (2002). *Rosequist* considered an attempt by an individual employee to bring the same sort of private-sector hybrid suit that is at issue here. The underlying allegations in *Rosequist* asserted both a breach of the collective bargaining agreement against the employer and a breach of the duty of fair representation against the recognized labor union. *Rosequist*, 118 Nev. at 447, 49 P.3d at 653 (describing the allegations raised before the district court). On appeal, this Court unambiguously held "that Rosequist's complaint involves allegations of unfair representation against Local 1908 which arise under the Act [EMRA] and, therefore, are within the exclusive jurisdiction of the EMRB." *Id.*, 118 Nev. at 451, 49 P.3d at 655.

Rosequist also directly addressed the Supreme Court's decision in *Vaca v. Sipes*, which had in turn created the concept of a hybrid suit. In doing so, this Court

rejected the reasoning underlying *Vaca* as inapplicable to Nevada law and refused to recognize the same exception to administrative jurisdiction that had been created by *Vaca*. *Rosequist* at 449-451, 49 P.3d at 654-655.

The impact of *Rosequist* is that the rights of Nevada's local government employees are very similar to the rights of their federal public-sector counterparts, in that allegations for a breach of the duty of fair representation are not cognizable in court but must be pursued, if at all, before an administrative agency with exclusive jurisdiction over the claim. Claims for breach of an agreement are enforced not through the courts but through an arbitration process or directly with an administrative agency. 5 U.S.C. § 7121; *Abbott v. United States*, 144 F.3d 1, 4-6 (1st Cir. 1998); NRS 288.140(2); NRS 288.150(2)(o); NAC 288.030(3); *see also Boykin v. City of North Las Vegas*, Item No. 674E, EMRB Case No. A1-045921, 2010 NVEMRB Lexis 54 (Nov. 12, 2010)[2] (an individual employee may bring an EMRB complaint for unilateral change to a collective bargaining agreement).

The limitations period to bring a duty of fair representation claim under the federal public-sector approach is also six months. 5 U.S.C. § 7118(4).

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[2]http://emrb.nv.gov/uploadedFiles/emrbnvgov/content/Decisions/674E%20045921.pdf

3. A Six-Month Limitations Period Applies When A Breach of the Duty of Fair Representation is at Issue

While one federal approach recognizes a Section 301 hybrid cause of action, and the other does not, both approaches are consistent in looking to the respective collective bargaining laws as the statutory source that defines the limitations period when allegations of a breach of the duty of fair representation are at issue.

Here, there is also body of collective bargaining law to which the Court should look - the EMRA. NRS 288.110(4) imposes a six-month limitations period for claims arising under the EMRA. As a hybrid claim must necessarily allege a breach of the duty of fair representation, and as a breach of the duty of fair representation is undeniably a claim arising under the EMRA per *Rosequist*,[3] the controlling limitations period is set by the EMRA at six months.

In applying a six-year limitations period, the district court failed to appreciate that a hybrid claim is not a garden-variety claim for breach of contract. As this Court's own order provides, a hybrid claim hinges upon allegations of a breach of

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[3] This Court also recognized that the duty of fair representation arises under the EMRA in *Cone v. Nevada Service Employees Union/SEIU Local 1107*, 116 Nev. 473, 479, 998 P.2d 1178, 1182 (2000). *Cone* identified NRS 288.140(1) and NRS 288.270(2) specifically as the sections giving rise to the duty of fair representation. NRS 288.110(2) grants the EMRB exclusive jurisdiction over claims arising under the EMRA.

the duty of fair representation and cannot be asserted, in any scenario, independent of a duty of fair representation claim. V1 APP 025-027. Further, the Court should not be misled by the fact that the employer is the only named defendant in this particular case. This is immaterial as it could just have easily been that the union was the only named defendant, given a plaintiff's ability to elect whom to sue.

By its terms Section 301 of the Labor Management Relations Act does not apply to local government employees. But this is not a valid argument against a six-month limitations period. Rather this only suggests that dismissal is called for due to a lack of subject matter jurisdiction; for if Section 301 does not apply then there is no statutory warrant for any hybrid claim at all. *E.g. Pham*, *supra*. A plaintiff cannot state a claim founded upon a Section 301 hybrid claim as created by *Vaca*, V1 APP 001-004, but then selectively eschew that same foundation when confronted with a statute of limitations challenge. This Court should not be so inconsistent.

B. Policy Considerations Weigh Heavily Against a Six-Year Period

This Court has historically been sensitive to the public policy that attaches when new or expanded liabilities against Nevada's public entities are at issue. *E.g. Ruiz v. City of North Las Vegas*, 127 Nev. 254, 255 P.3d 216 (2011) (recognizing that assignments of employee grievances would "undermine the purposes behind collective bargaining laws and thereby violate public policy by potentially requiring the employer to deal directly with numerous individuals – as opposed to their

exclusive representative…"); *Richardson Constr., Inc. v. Clark County Sch. Dist.*, 123 Nev. 61, 66, 156 P.3d 21, 24 (2007) (recognizing that creating a new private right of action against a public entity "could encourage lengthy and expensive litigation.").

The Court should continue to be attentive to such public policy concerns. In this case these public policy concerns weigh heavily against allowing a six-year limitations period.

1. A Six-Year Limitation Period Would Tend to Undercut the Statutorily-Mandated Grievance and Arbitration Process

The EMRA requires local government employers and bargaining agents to negotiate a grievance and arbitration process into the very fabric of a collective bargaining agreement. NRS 288.150(2)(o).

There is a well-regarded reason that local government employers and bargaining agents go through the rigors of negotiating a grievance and arbitration procedure. That reason is because Nevada's public policy holds the arbitration process up as the paragon for public-sector labor dispute resolution. This Court has recognized this ideal on more than one occasion. *E.g Int'l Ass'n of Firefighters, Local #1285 v. Las Vegas*, 104 Nev. 615, 621, 764 P.2d 478, 482 (1988) (recognizing Nevada's strong public policy favoring arbitration); *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, 130 Nev. ___, 340 P.3d 589, 593 (Nev. 2014); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002)

(requiring the EMRB to presumptively defer to an arbitration proceeding even though a statutorily prohibited labor practice may be at issue).

One practical impact of a *Vaca*-style hybrid suit is that it tends to undermine the grievance and arbitration process established in a collective bargaining agreement. Ordinarily a labor union has wide discretion to consider the collective needs and interests of the bargaining unit and thus decide whether or not to proceed with a grievance. *See Vos v. City of Las Vegas*, Item No. 749, EMRB Case No. A1-046000, 2014 NVEMRB LEXIS 5 (March 24, 2014).[4]

But the looming threat of liability in a hybrid suit tends to intrude on this latitude by incentivizing labor unions to pursue even frivolous grievances in order to minimize potential legal exposure. *See Bowen*, 459 U.S. at 241 (White J., dissenting); *see also* Lea VanderVelde, *Making Good on Vaca's Promise: Apportioning Back Pay to Achieve Remedial Goals*, 32 UCLA L. Rev. 302, 382-387 (1984) (discussing the various ways that an increased threat of liability can erode the foundations of the grievance process). Given the significantly increased potential for liability if damages continue to accrue for up to six years, this concern is only heightened in light of the district court's decision below.

There is a second way in which a hybrid suit can undermine the arbitration

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[4]http://emrb.nv.gov/uploadedFiles/emrbnvgov/content/Decisions/749%20046000.pdf

process. A hybrid suit is capable of depriving even a fully-litigated arbitration decision of finality.

Under the federal private-sector approach, a hybrid suit can still be brought even after a grievance has been fully arbitrated, essentially forcing the re-litigation of the same case that would have already been heard and decided by an arbitrator. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 551 (1976). While this potential to eradicate the finality of an arbitration decision lurks over the federal private-sector hybrid approach, it is subject to the relatively short six-month limitations period as stated above.

It was this sort of need for some meaningful degree of finality that was a driving concern for the Supreme Court when it held that the six-month limitations period was applicable to private-sector hybrid suits. *DelCostello*, 462 U.S. at 169 (stating "the 'law of the shop,' could easily become unworkable if a[n] [arbitration] decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as three years later.")(internal quotations omitted). This disruption in the labor-management dispute resolution process is even more pronounced under a six-year limitations period.

A six-year limitations period simply cannot deliver on the promise of finality that would otherwise obtain under the six-month limitation period of NRS

288.110(4); *see also* NRS 38.241(2). To put this in perspective, consider this Court's recent decision in in *Washoe County School District v. White*, 133 Nev. ___, 396 P.3d 834 (2017). In *White* this Court heard a challenge to an arbitration decision under the Uniform Arbitration Act and ultimately upheld an arbitrator's decision that had found just cause to terminate a local government employee. This Court's decision should ordinarily resolve the matter.

Yet under the district court's decision here, *White* could easily be reduced to a mere academic exercise. The same employee in *White* is still less than six years removed from the date of her termination. *Id*., 396 P.3d at 837.

If private-sector hybrid claims were recognized as viable against Nevada's public-sector employers and a six-year limitations period were to apply, then the discharged employee in *White* could conceivably sidestep this Court's decision entirely simply by filing a hybrid suit.

The employee could repeat her same allegations that she was terminated without just cause and then need only include some alleged deficiency in how the Washoe School Principal's Association handled her grievance claiming that such a deficiency amounts to a breach of the duty of fair representation. From there it is only the next step down the pathway of the private-sector approach to invoke *Hines* and evade the finality that the arbitration decision, and this Court's opinion, ought to provide to all parties. She would thus be able to effectively litigate her termination

de novo, years after the fact.[5]

The grievance and arbitration process that has been so carefully negotiated into a collective bargaining agreement should not be cast aside so quickly or easily.

2. A Six Year Limitations Period Also Undercuts the Administrative Process

In a similar vein, a six-year limitations period undermines the administrative process that is committed to the expertise of the EMRB. *See* NRS 288.110(2). Amici pay annual assessments in order to fund and have recourse to the expertise and experience of this state administrative agency. NRS 288.105.

In *Rosequist*, this Court held that "once the [EMRA] applies to a complaint, we conclude that the remedies provided under the Act and before the EMRB must be exhausted before the district court has subject matter jurisdiction." *Rosequist*, 118 Nev. at 451, 49 P.3d at 655. *Rosequist* was overruled in part by *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007), but *Thorpe* still retained a strong stance in favor of administrative exhaustion by recasting the failure to exhaust

[5] In such a scenario, the employee would of course still bear the burden of proof to prove her case. *Ryan v. Gen. Motors Corp.*, 929 F.2d 1105, 1109 (6th Cir. 1989) ("In a hybrid section 301/breach of fair representation action, the burden of proof lies with the plaintiff."). The point remains that the courthouse doors would at least be thrown open to accommodate a potential suit of this type if the district court's decision in this case is upheld.

administrative remedies as a justiciability issue. *Id.* at 571, 170 P.3d at 993.

A six-year limitation period is incompatible with the principle of administrative exhaustion because such a claim could still be brought years after the fact, and even years after the time to file a claim with the administrative agency had run. The district court's decision bypasses the administrative process entirely, ignores the expertise and experience of the EMRB that this Court recognized in *Rosequist*, and excuses an employee from even attempting that process.

IV. CONCLUSION

Regardless of whether the federal private-sector approach or the federal public-sector approach applies to Nevada's public-sector employers, the Court should find that the district court's application of a six-year limitations period is erroneous as a matter of law.

When a breach of the duty of fair representation is at issue, as it must be in any attempt to bring a hybrid suit, Nevada law provides an administrative process to adjudicate that claim and NRS 288.110(4) provides for a clear limitations period of six months. Any complaint that includes a breach of the duty of fair representation that exceeds this six month limitations period is untimely.

Allowing this claim to proceed undermines the dispute resolution process negotiated by the parties to a collective bargaining agreement and undermines the authority of the EMRB.

Amici urge the Court to grant the petition from the City of Mesquite.

DATED this 14th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing 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 it has been prepared in a proportionally-spaced typeface using Microsoft Word in size 14 font in Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 3,561 words.

DATED this 14th day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May, 2018, I submitted the foregoing BRIEF OF AMICI CLARK COUNTY, DOUGLAS COUNTY, HUMBODLT COUNTY, LYON COUNTY, CITY OF SPARKS, TRUCKEE MEADOWS WATER AUTHORITY, LINCOLN COUNTY SCHOOL DISTRICT, LANDER COUNTY SCHOOL DISTRICT, HUMBOLDT COUNTY SCHOOL DISTRICT, CARSON CITY SCHOOL DISTRICT and EUREKA COUNTY SCHOOL DISTRICT IN SUPPORT OF PETITIONER for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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