IN THE SUPREME COURT OF THE STATE OF NEVADA

JAPONICA GLOVER-ARMONT, APPELLANT, v. JOHN CARGILE; CITY OF NORTH LAS VEGAS, A MUNICIPAL CORPORATION EXISTING UNDER THE LAWS OF THE STATE OF NEVADA IN THE COUNTY OF CLARK, RESPONDENTS.	CASE NO. 70988 District Court Case No. A-13-683211-C

AMICUS BRIEF

In support of Responding Brief filed by
John Cargile and the City of North Las Vegas, and
In Support of Affirmance

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

IMLA is committed to protecting its members' discretion under state and federal law to make policy-based decisions without the threat and cost of prolonged litigation, which would significantly—if not prohibitively—impede functionality and ingenuity. The decision below correctly applied Nevada's discretionary immunity statute. However, Appellant's arguments would have this Court adopt an unduly narrow interpretation of the discretionary immunity statute in Nevada while ignoring the purpose of discretionary immunity. If Appellant's positon is adopted, a whole host of important daily decisions made by police officers and other first responders will fall outside of the protections wisely afforded under the discretionary immunity

doctrine. In turn, municipalities like the City of North Las Vegas will be exposed to ceaseless litigation diverting resources (time and money) away from the central aims of governing; municipal employees will be hesitant to exercise discretion because of the potential civil exposure; and municipalities will be deprived of exceptional employees who decide the burden of government work is not worth the risk of becoming embroiled in civil litigation. IMLA thus has a strong interest in ensuring that local governments and their officials are protected from suit for decisions made in their official capacity based on the legitimate enforcement concerns that animate local municipalities.

IMLA was unable to obtain written consent from all the parties to file this amicus brief. Thus, IMLA files concurrently herewith a motion for leave addressed to this Court pursuant to NRAP 29.

III.

ARGUMENT

A. This Court Should Affirm The District Court's Grant of Summary Judgment to Sergeant Cargile and the City of North Las Vegas Because The District Court Properly Afforded Discretionary Immunity to Respondents.

"Shots fired."

Appellants' Opening Brief fails to mention the two most important words from the record below. These two words defined the urgency of Sergeant Cargile's behavior and directed his attempts to respond to a situation where danger to the public was already underway. These two words also serve to encapsulate the multiple policies he had to consider each second as he neared the scene of the incident. To ensure that Sergeant Cargile could focus on responding to the "shots fired" call and implement the training and experience invested in his position as a police officer, Nevada (like many other states) provides discretionary immunity to its emergency responders. This immunity rests on the recognition that a public police officer may bring about harm to an innocent bystander or to personal property while performing some of his or her duties. That accidents happen like this one is (in part) the reason why Nevada requires its drivers to carry automobile insurance, and why mortgage companies require homeowners to carry homeowner's insurance.

Although not absolute, discretionary immunity is broad. Here, it immunizes Sergeant Cargile (and the City of North Las Vegas) from any liability resulting from

his attempt to respond to the "shots fired" call so long as his decisions as he responded were policy-based and so long as he was not acting in bad faith (*i.e.*, intending harm). *See* NRS 41.032.[1] *See also Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007). As the record reflects, while responding to the emergency, Sergeant Cargile approached an intersection and proceeded through it even though he had a red light. He did so not because he was drag racing, or because he knew Appellant's car would be entering the intersection on a green light and he wanted to collide with it. Rather, he did it because in those few seconds, Sergeant Cargile determined he needed to respond to the call as quickly as possible, seeking to intervene in a dangerous and potentially deadly situation.

When we are awakened at night by an armed intruder, or when a spouse shoots another spouse in the dead of night, or when a fanatic has reached his or her limit and cannot stop pressing the trigger, we will find no comfort in the police driving to our

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[1] Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:

> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032.

homes concerned about maintaining the posted speed limit, stopping at every intersection, focused on adhering to regulations and statutes. Discretionary immunity recognizes this as necessary to civilized society and this Court should not carve out exceptions that will slow down the response time, require enforcement agencies to reconsider its responses to emergency calls, and embroil these agencies in years of litigation that drains the public's fisc. Therefore, IMLA respectfully urges the Court to affirm the lower court's decision to grant summary judgment on the basis of discretionary immunity.

1. Appellant's Arguments Lose Sight Of The Purpose Of Discretionary Immunity.

Appellants would have this Court cast aside discretionary immunity in Nevada as an antiquated concept grounded in the precept that 'the King can do no wrong.' The evolving jurisprudence regarding discretionary immunity, however, shows that it is not a relic from the past that enables police officers to act without civil consequence and liability. Instead, discretionary immunity remains a vital protection that has withstood the test of time nationally and here in Nevada.

a. Appellants stray from the purpose of the discretionary immunity doctrine, codified in the Federal Tort Claims Act At 28 U.S.C. § 1346 *et seq.* ("FTCA") and 28 U.S.C. § 2680(a), which provides immunity so long as the act was discretionary.

Congress enacted the FTCA with an eye to balancing the competing interests of the government and the interests of individuals who were harmed by a governmental

act or omission. While that balance may seem unfair at times, it is a necessary and vital balance nonetheless. As the United State Supreme Court has noted, discretionary immunity reflects "Congress' purpose in enacting the [discretionary function exception]: to prevent 'judicial intervention in . . . the political, social, and economic judgments' of governmental . . . agencies." *Berkowitz v United States*, 486 U.S. 531, 539 (1988) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 820 (1984)). *See also United States v. Muniz*, 374 U.S. 150, 163 (1963) (where court noted that Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations.").[2]

Varig is instructive. In *Varig*, the Supreme Court was required to discern whether the FAA and its employees could be liable in tort for its procedures regarding spot-checks of airplanes and the actual spot-checks performed (or not performed). *Varig*, 467 U.S. at 800-02. At issue was the loss of property and tremendous loss of life when a commercial jet caught on fire during a flight. *Id.* at 800. The district court

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[2] The provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

recognized that the discretionary function exception applied even if a tort for breaching a "duty for inspection and certification activities" was not recognized in that jurisdiction (California). *Id.* at 801. The Ninth Circuit reversed, holding *inter alia* that "inspection of aircraft for compliance with air safety regulations" was not a "function entailing the sort of policy-making discretion contemplated by the discretionary function exception." *Id.* at 802. Furthermore, the Ninth Circuit held that the actions violated "Civil Air Regulation 4b.381(d)" and 49 U.S.C. § 1421, which "require[d] that the F.A.A. conduct a comprehensive inspection for compliance with all safety regulations before a certificate of airworthiness will issue." *Varig*, 467 U.S. at 801, citing *Varig v. United States*, 692 F.2d 1205, 1207-1209 (9th Cir. 1982). The Supreme Court reversed, and noted:

> In administering the 'spot-check' program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

Id. at 820. The Court further noted the agency's statutory duty was "to promote air transportation safety, not to insure it." *Id.* at 821. *Varig* thus illustrates core concepts about discretionary immunity, namely, that the magnitude of damages does not matter, nor the 'correctness' of the discretion employed, nor even violation of a regulation or statute. Rather, what matters is whether FAA employees exercised discretion in how

they conducted the spot-checks. To hold otherwise encourages the litigation at issue here as well as invites "Judicial intervention in such decisionmaking through private tort suits [which] would require the courts to 'second-guess' the political, social, and economic judgments" of a public entity exercising its enforcement function. *Id.* at 820.

Neither *Berkowitz* nor *United States v. Gaubert*, 499 U.S. 315 (1991) limit a broad construction of the discretionary function exception. *Berkowitz* draws heavily on the reasoning in *Varig*, again emphasizing that it is the discretionary nature of the action(s) at issue:

> The discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if the Bureau's policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful.

Berkovitz, 486 U.S. at 546-47 (where Court reversed court of appeals' dismissal, saying that because the allegations in the complaint sufficiently stated that the acts at issue (quality control and release of polio vaccine lots) were not discretionary in nature, dismissal was improper when construing the allegations in the operative complaint as true). Significantly, violations of regulations and statutes were also at issue, but the Court did not reverse based on the purported existence of such violations; the Court focused only on the discretionary nature of the action(s). *Id.* at

540-42.

Gaubert similarly held that the discretionary function exception can apply at both the planning and operational level, but that the inquiry returns again and again to whether the action taken was discretionary. In *Gaubert*, the Supreme Court held Fifth Circuit had erred in finding the discretionary function exception did not apply to actions undertaken by the Federal Home Loan Bank Board or the Federal Home Loan Bank in Dallas in overseeing federal savings and loan association. *Gaubert*, 499 U.S. at 334. The Court reasoned:

> It may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations, but the regulatory acts alleged here are not of that genre. Rather, it is plain to us that each of the challenged actions involved the exercise of choice and judgment.

Id. at 331.

Like the analysis the Court employed in analyzing the acts before them in *Varig*, *Berkovitz*, and *Gaubert*, the analysis of Sergeant Cargile's acts must focus on their discretionary nature and the social, economic, and political policies that police who respond to "shots fired" and other emergency calls that certainly require discretion in balancing and implementing.

b. <u>Nothing in Nevada law alters the purpose of discretionary immunity.</u>

As Appellant and Appellees set forth in their briefs, discretionary immunity in Nevada is governed by NRS 41.032 and *Martinez v. Maruszczak*, 123 Nev. 433, 168

P.3d 720 (2007). *Martinez* embraced the focus on the discretionary nature of the action(s) at issue by adopting the "*Berkovitz-Gaubert*" test, which provides that:

> Under this two-part test, state-employed physicians enjoy immunity from medical malpractice liability only when (1) their allegedly negligent acts involve elements of judgment or choice, and (2) the judgment or choice made is of the kind that the discretionary-function exception was designed to shield, that is, a judgment or choice involving social, economic, or political policy considerations.

Martinez, 123 Nev. 433, 436, 168 P.3d 720, 722 (numeration added). This Court further stated:

> Thus, if the injury-producing conduct is an integral part of governmental policy-making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the legislative or executive branch's power or responsibility would be usurped, immunity will likely attach under the second criterion.

Id. at 446, 168 P.3d at 729. In *Martinez*, at issue were the professional judgment decisions of Dr. Martinez when he provided care to a patient in a public hospital. This Court did not find that discretionary immunity attached, however, because it could not discern that Dr. Martinez' individual acts of discretion were premised on policy considerations. *Id.* at 447, 168 P.3d at 729. As *Martinez* itself demonstrates, discretion is key in the analysis.

Even when considering the tort of an insurer's bad faith when allegedly denying benefits, the Court focused on discretion. As this Court reasoned in *Falline v. GNLV Corp.*, 838 P.2d 888, 891-92 (Nev. 1991), a case in which the plaintiff actually alleged bad faith as well as negligence-based claims, public employees do not have the

discretion to act in bad faith ("*i.e.*, without a reasonable basis or with knowledge or reckless disregard of the lack of a reasonable basis [in performing the act]"), and thus discretionary immunity cannot attach because one cannot abuse a discretion one does not have. Cases applying *Falline* to police officer conduct similarly hold the ambit of a police office's discretionary conduct does not include judgments and decisions made in bad faith:

> Thus, where an officer arrests a citizen in an abusive manner not as the result of the exercise of poor judgment as to the force required to make an arrest, but instead because of hostility toward a suspect or a particular class of suspects (such as members of racial minority groups) or because of a willful or deliberate disregard for the rights of a particular citizen or citizens, the officer's actions are the result of bad faith and he is not immune from suit. *See id.* No officer has the 'rightful prerogative' to engage in a malicious battery of a handcuffed citizen who is neither actively resisting arrest nor seeking to flee. Such an action, motivated by hostility or willful disregard for the law, is without the officer's 'circumference of authority,' even if 'ostensibly within [his] ambit of authority.' *Id.*

Davis v. City of Las Vegas, 478 F.3d 1048, 1060 (9th Cir. 2007) (where police officer had allegedly slammed the plaintiff's head into a wall repeatedly, which the Ninth Circuit concluded fell outside the officer's 'ambit of authority') (quoting *Falline*, 107 Nev. at 1009 n.3). In such cases, then, "judicial intervention into the decisionmaking through private tort suits" does not "require the courts to 'second-guess' the political, social, and economic judgments" of a public enforcement entity exercising its enforcement function," *Varig*, 467 U.S. at 820, because acting in bad faith when carrying out law enforcement functions is not a policy consideration. *Falline*, 838

P.2d at 891-92. Therefore, *Falline* does not impose a narrower universe of conduct and actions than in *Varig*, *Berkovitz*, and *Gaubert* because *Falline*, like those decisions, keeps "the focus of the inquiry . . . not on the agent's subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

As such, Nevada law wholly supports the lower court's determination that discretionary immunity attaches to Sergeant Cargile (and the City of North Las Vegas) because it is indisputable that his actions were discretionary, were driven by vital policy considerations, and that he did not act in bad faith in responding to this "shots fired" call.

2. <u>As the Responding Brief Shows This Court, Other Jurisdictions Have Concluded That Discretionary Immunity Attaches To Emergency Responders Because Those Jurisdictions Recognize That Responding To An Emergency Entails Policy Considerations.</u>

Appellees' Responding Brief contains a notable number of cases from other jurisdictions, and these cases demonstrate a broad recognition of the moment-by-moment decisions that individuals such as Sergeant Cargile must make when responding to an emergency. (Resp. Brf. at 11:5 – 16:19). Specifically, the Responding Brief includes cases involving: a police officer who entered an intersection against a red light while responding to an emergency call (*Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456 (Minn. 2014) (immunity attached)); a police officer pursuing a driver entered an intersection against a red light (*Colby v. Boyden*,

400 S.E.2d 184 (Va. 1991) (immunity attached)); a police officer who responded to a domestic disturbance call entered an intersection against a red light (*Terrell v. Larson*, 2008 WL 2168348 (Minn. 2008) (unpub.) (immunity attached)); deputy entered intersection against a red light while responding to assault in progress call (*Muse v. Schleiden*, 349 F.Supp. 2d 990 (E.D. Va. 2004) (immunity attached)); ambulance driver entered an intersection against a red light (*Rivas v. City of Houston*, 17 S.W.3d 23 (Tex.App. 2000) (immunity attached)); and, a police officer engaged in a high-speed pursuit of a suspect involved in a fatal accident (*Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992) (immunity attached)).

Although not involving a vehicle, *Tamez v. City of San Marcos*, 118 F.3d 1085 (5th Cir. 1997) supports Appellee's collection of cases and underscores the significance of the emergency nature of law enforcement decision-making:

> Misiaszek's actions here were not pursuant to specific orders, or spelled out in minute detail beforehand. His response required quick, but careful deliberation and the exercise of his judgment. In particular, the decision whether to enter Tamez's house required Misiaszek to balance the property rights and constitutional liberties of the homeowner against the interests of anyone who might be hurt inside, considerations of the safety of his fellow officers, and the exigencies of the moment. This decision clearly falls within the realm of discretionary decisions police officers commonly make.

Tamez, 118 F.3d 1085, 1087, 1092 (where Fifth Circuit affirmed the district court's grant of a judgment as a matter of law following a jury verdict resulting in a $275,000 damages award because immunity attached as to officer's actions after responding to a

"shots fired" call).

Jurisdiction after jurisdiction recognize the discretionary nature of a police officer's response to a emergency call, and have immunized those police officers from civil liability arising out of their respective responses. This Court should hold no differently. Summary judgment in favor of Appellees was proper because the District Court hewed to the well-established conclusion that courts should not second-guess a police officer's policy-based decisions when responding to an emergency call.

B. Narrowing The Scope of Discretionary Function Immunity Will Impede The Functionality Of Local Governments And Harm The Public Interest.

Reversing the lower court's decision puts at risk thousands of discretionary municipal decisions that span an extremely broad scope of activities. Given the close relationship between local government responsibilities and the communities they govern, many of these municipal activities can give rise to tort claims. The narrow interpretation of discretionary immunity that Appellant argues threatens the policymaking capacity and functionality of these entities as well as the critical services they provide.

Municipal decision-making touches upon countless aspects of every citizen's life. To name just a few, municipalities and local governments regulate and supervise sanitation, water systems, street construction and maintenance, public libraries, fire departments, ambulances, health departments, public transportation, utilities, public

schools, law enforcement, and housing inspections. These services encompass everything from transporting books between libraries to maintaining local parks. Municipalities tackle large-scale decisions like whether to fund a low-income project as well as the detailed minutiae of how many part-time school crossing guards to employ. Indeed, municipal activities span a tremendous variety of public services, including structuring and administering a tax system, urban planning and zoning, issuing licenses, and providing emergency response to natural disasters.

The nature and scope of such municipal activities render municipal entities (and the individuals who carry out these activities) particularly vulnerable to tort claims. Local governments are in charge of many local safety measures that involve decisions that could easily give rise to a tort claim, such as an injury resulting from an insufficient earthquake response or the absence of a stop sign. Municipal decision-making is not always suited for thorough analysis and debate. Judgment calls may sometimes need to be made quickly, such as a response to an unanticipated crisis. Local government activities necessarily touch upon the lives of all community members, often through frequent and personal interactions, and could easily generate hundreds, if not thousands, of suits in tort. Local governments require functionality, flexibility, and ingenuity to provide effective services, whether it is maintaining roads or providing shelter to the homeless in inclement weather, or allowing trained police officers to respond to emergencies. Any expansion of tort liability and any narrowing

of discretionary immunity will significantly impede the functionality, flexibility, and ingenuity of local governments. Given the nature and scope of municipal responsibilities, these consequences are of great public concern.

The danger of reversing the decision below has several dimensions, and would have profound and far-reaching consequences on local municipalities. Reversal would invite gamesmanship to bypass the traditional protection for discretionary functions. Given the large-scale and often personal relationships between municipal governments and community members, it would then be relatively easy (and enticing) to base numerous suits on violations of a regulation or statute if discretionary immunity would not be available despite the discretionary nature of the actions giving rise to an alleged injury.

Such protracted litigation and extraordinary discovery costs will force local governments to divert significant resources and pull personnel from other duties to meet the associated demands. This, in turn, would encourage a restriction of services and discourage any ingenuity in what type of services to deliver and how. Additionally, fear of being subjected to such litigation would deter individuals from entering public service, or encourage them to leave due to fear of or frustration with this type of liability and litigation. Tying the hands of local government in this way would adversely affect entire communities that require quick or creative action to address unanticipated or novel local issues. In communities that want their best and

brightest to stay and that wish its local government would function flexibly and innovatively, any limits on discretionary action must be very narrowly tailored. Finally, while tort caps for public employees are common, a tort cap speaks only to the cost of the outcome, not the cost of the litigation a municipality must bear. In sum, Appellant invites this Court to go down a path that will have a markedly negative impact on state and local municipalities for a multitude of reasons.

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IV.

CONCLUSION

The emergency nature of police officers responding to "shots fired" calls heightens the need to ensure that police officers' responses are not slowed down so they may weigh the risks of protecting the public against the risk of incurring civil liability. Therefore, for the foregoing reasons, IMLA respectfully urges this Court to affirm the lower court's proper grant of summary judgment to Appellees on the basis of discretionary immunity.

Dated this 16th day of August, 2017.

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ATTORNEY'S CERTIFICATE PURSUANT TO RULE 28.2

1. 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 4,230 words.

3. Finally, I hereby certify that I have read this appellate (amicus) brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where

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

Dated this 16th day of August 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and pursuant to NRAP 25(b) and NEFR 9(d), on this 16th day of August, 2017, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic filing system. The participants listed below are registered users of the Court's electronic filing system.

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