No. 79134

IN THE SUPREME COURT OF THE STATE OF NEVADA

SILVERWING DEVELOPMENT, A NEVADA CORPORATION; J. CARTER WITT III, AN INDIVIDUAL,
Appellants,

vs.

NEVADA STATE CONTRACTORS BOARD,
Respondent.

On Appeal from Judicial Review of Administrative Order, Second Judicial District Court, In and for Washoe County, Nevada; The Honorable Elliot Settler, District Court Judge

MOTION TO FILE AMICUS BRIEF SUPPORTING RESPONDENT AND AFFIRMANCE

of Amici Curiae Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, by and through its Trustees, Christopher Christophersen and Tom Pfundstein

EVAN L. JAMES, ESQ.
Nevada Bar No. 7760
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Attorneys for Amici Curiae

POINTS AND AUTHORITIES

Amicus Curiae Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee ("LMCC") is a federal Taft-Hartley trust fund existing under the authority of 29 U.S.C. §§ 175a(a) and 186(c)(6) and pursuant to a collective bargaining agreement ("CBA") between the International Union of Painters and Allied Trades District Council No. 16, Local Union No. 159 ("Union") and various contractors and construction trade organizations. Pursuant to NRAP 29(a), the LMCC has obtained the written consent of all parties for leave to file the attached Amicus Brief. *See* emails granting consent from Michael S. Kimmel, Esq. and Noah Allison, Esq., attached hereto as Exhibit 1. In an abundance of caution, the LMCC is also requesting that this Court grant leave to the LMCC to file the attached Amicus Brief attached hereto as Exhibit 2.

DATED this 28th day of January, 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James, Esq.*
Evan L. James, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 28th day of January 2020, I submitted the foregoing **MOTION TO FILE AMICUS BRIEF SUPPORTING RESPONDENT AND AFFIRMANCE (Docket 79134)** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

NOAH ALLISON, ESQ.
PHILIP MANNELLY, ESQ.
MICHAEL S. KIMMEL, ESQ.
ROBERT L. EISENBERG, ESQ.

And by mailing First Class Mail, postage prepaid to:

Aaron Ford, Attorney General
Office of the Attorney General
100 N. Carson St.
Carson City, Nevada 89701

By: */s/ Evan L. James, Esq.*
Evan L. James, Esq.

EXHIBIT 1

Re: Nevada Supreme Court Case No. 79134

Laura Wolff
Tue 12/31/2019 3:46 PM
To: Noah Allison <noah@allisonnevada.com>

Thank you.

Laura J. Wolff, Esq.

Christensen James & Martin
7440 W. Sahara Ave.
Las Vegas, NV 89117
702-255-1718
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From: Noah Allison <noah@allisonnevada.com>
Sent: Tuesday, December 31, 2019 11:45 AM
To: Laura Wolff <ljw@cjmlv.com>
Cc: Noah Allison <noah@allisonnevada.com>
Subject: RE: Nevada Supreme Court Case No. 79134

Yes, the Contractors Board consents.

Noah G. Allison

The Allison Law Firm Chtd.
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noah@allisonnevada.com

From: Laura Wolff <ljw@cjmlv.com>
Sent: Tuesday, December 31, 2019 10:33 AM

To: Noah Allison <noah@allisonnevada.com>
Subject: Nevada Supreme Court Case No. 79134

Dear Noah,

As you know, our law firm represents the Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee ("LMCC"). The LMCC intends to file an Amicus Brief in the appeal filed by Silverwing Development with the Nevada Supreme Court Case No. 79134 on November 22, 2019. As I understand, we must either file a Motion or have consent of all parties to file the Amicus Brief. The Appellants have already consented. Will you please let me know if your client will consent?

Thanks so much.

Laura J. Wolff, Esq.

Christensen James & Martin
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Re: Nevada Supreme Court Case No. 79134

Laura Wolff
Tue 12/31/2019 10:20 AM
To: Michael S. Kimmel <mkimmel@nevadalaw.com>

Thank you.

Laura J. Wolff, Esq.

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From: Michael S. Kimmel <mkimmel@nevadalaw.com>
Sent: Tuesday, December 31, 2019 8:56 AM
To: Laura Wolff <ljw@cjmlv.com>
Cc: rle@lge.net <rle@lge.net>
Subject: Re: Nevada Supreme Court Case No. 79134

We consent.

Please Reply to:

Michael S. Kimmel

HOY | CHRISSINGER
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On Dec 31, 2019, at 7:50 AM, Laura Wolff <ljw@cjmlv.com> wrote:

Dear Michael and Robert,

As you know, our law firm represents the Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee ("LMCC"). The LMCC intends to file an Amicus Brief in the appeal filed by your clients with the Nevada Supreme Court Case No. 79134 on November 22, 2019. As I understand, we must either file a Motion or have consent of all parties to file the Amicus Brief. Will you please let me know if your clients will consent?

Thanks so much.

Laura J. Wolff, Esq.

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EXHIBIT 2

No. 79134

IN THE SUPREME COURT OF THE STATE OF NEVADA

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On Appeal from Judicial Review of Administrative Order, Second Judicial District Court, In and for Washoe County, Nevada; The Honorable Elliot Settler, District Court Judge

AMICUS BRIEF SUPPORTING RESPONDENT AND AFFIRMANCE of Amici Curiae Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee, by and through its Trustees, Christopher Christophersen and Tom Pfundstein

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NRAP 26.1 DISCLOSURE

In accordance with NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Amicus Curiae Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee is a federal Taft-Hartley trust fund existing under the authority of 29 U.S.C. §§ 175a(a) and 186(c)(6) and pursuant to a collective bargaining agreement ("CBA") between the International Union of Painters and Allied Trades District Council No. 16, Local Union No. 159 ("Union") and various contractors and construction trade organizations and is not affiliated with any corporation. The names of the current Trustees are Christopher Christophersen, Daniel Lincoln, Jason Lamberth, Thomas Pfundstein, Terry Mayfield, Bob Campbell and Harold Daly.
2. The only law firm that has appeared or is expected to appear for Amici Curiae in this case is Christensen James & Martin, 7440 W. Sahara Ave., Las Vegas, Nevada 89117. Other law firms whose attorneys have appeared for a party or amicus in this case (including proceedings in the

district court or before an administrative agency) or are expected to appear in this Court:

HOY CHRISSINGER KIMMEL VALLAS
LEMONS GRUNDY & EISENBERG
HUTCHISON & STEFFEN, PLLC
THE ALLISON LAW FIRM CHTD.
MCDONALD CARANO LLP
LAXALT & NOMURA, LTD.

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED this 28th day of January, 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James, Esq.*
Evan L. James, Esq.
Nevada Bar No. 7760
Laura J. Wolff, Esq.
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I. STATEMENT OF INTEREST

Pursuant to NRAP 29(a), this Amicus Brief ("Brief") is filed with the written consent of all parties. The LMCC has also filed a brief Motion concurrently with the Court requesting leave to file this Brief.

Amici Curiae are the Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee ("LMCC" or "Amici Curiae"). LMCC is a federal Taft-Hartley trust fund existing under the authority of 29 U.S.C. §§ 175a(a) and 186(c)(6) and pursuant to a collective bargaining agreement ("CBA") between the International Union of Painters and Allied Trades District Council No. 16 (formerly District Council No. 15), Local Union No. 159 ("Union") and various contractors and construction trade organizations. Per congressional purpose, the LMCC exists, in part, to "assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;" and to "study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;" Pub. L. 95-524, § 6(b) Oct. 27, 1978, 92 Stat. 2020. To this end, the LMCC exists to address the matters of concern at issue before this Court as resolution of those matters will affect the construction industry. Indeed the LMCC as a labor organization is a party with unique

knowledge and experience regarding the effects of regulation on the construction industry.

Therefore, the LMCC is in a unique position given its federal mandate relating to the construction marketplace and its involvement with labor related issues. The LMCC's concern in this matter is that the constitutionality of NRS 624.220(2) be upheld. The LMCC takes no position on whether Silverwing has violated any statute or law.

II. SUMMARY OF ARGUMENT

The District Court's finding that NRS 624.220(2) is constitutional on its face and as applied to Silverwing should be upheld. Facial challenges to a civil statute must establish invalidity in all circumstances and a heightened facial standard is not appropriate in this case. The phrase "Subdivision site" is not ambiguous in the context of NRS 624 et seq. nor is the phrase "Subdivision site" vague even in isolation. Further, the Severability Doctrine saves NRS 624.220(2) from any perceived unconstitutional vagueness. The statute applies equally to all contractors and the licensing limits are rationally related to a legislative purpose.

III. ARGUMENT

A. Silverwing Must Prove that NRS 624.220(2) Is Invalid in All Circumstances.

Facial challenges to the constitutionality of a statute must establish invalidity **in all circumstances**. *U.S. v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095 (1987)

(emphasis added). Statutes are presumed valid, so a court "will only interfere when the Constitution is clearly violated." *Schwartz v. Lopez,* 382 P.3d 886, 895 (Nev. 2016); *quoting List v. Whisler,* 99 Nev. 133, 137 660 P.2d 104, 106 (Nev. 1983). The challenger must prove no circumstance exist where the statute is valid. *Schwartz* at 895 *citing Deja Vu Showgirls of Las Vegas, LLC v. New Dep't of Taxation,* 334 P.3d, 398 (Nev. 2014). Ambiguity must exist in the language's plain meaning. S*chwartz* at 895. Ambiguity exists only if the language is subject to more than one reasonable interpretation. *City of Sparks v. Sparks Mun. Court,* 129 Nev. 348, 359, 302 P.3d 1118, 1126 (2013). If ambiguous, a court considers legislative history, public policy, and the reason for the statute. *Id.*

In a facial challenge, a statute must be impermissibly vague in all applications to be facially invalid. *Flamingo Paradise Gaming, LLC v. Chanos,* 217 P.3d 546, 553 (Nev. 2009). Under this standard, a statute is sufficiently clear if, in any application, the statute, "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Id.; quoting Silvar v. Dist. Ct.*, 122 Nev. 289, 293 129 P.3d 682, 683 (2006). A statute giving guidance for even one foreseeable situation survives a facial challenge because it is not void in all applications. *Id. at* 554; *See also Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 497, 102 S.Ct. 1186 (1982).

As the Nevada State Contractor's Board ("NSCB") has aptly pointed out, this is the first facial challenge to this statute to reach the Nevada Supreme Court since its inception 50 plus years ago. NSCB Responding Brief, pp. 1, 30-31. Thus, NRS 624.220 (2) has been in operation and applied in many instances and circumstances by virtue of the fact that it is still in existence. In its Opening Brief, Silverwing has failed to show that NRS 624.220(2) is void in all applications, only that it is

allegedly vague in this application. *See* Summary of Argument, pp. 10-11 ie ("NRS 624.220 (2) is unconstitutionally vague on its face because it cannot be applied without using additional criteria", "the statute is also unconstitutionally vague because there was no way of Silverwing to know", "The vagueness of NRS 624.220 (2) was compounded by the NSCB's attempt to usurp the legislative process"). All of these alleged inconsistencies occurred in this case and in this application of the statute. The true constitutional concern is whether NRS 624.220 (2) can give guidance for even one foreseeable situation. And though Silverwing argues that there is no evidence that NRS 624.220(2) has been used in this same manner against any contractor and spends many pages arguing about the vagueness of the language, Silverwing does not show that the statute fails in all applications. *See* Opening Brief generally.

B. A Heightened Facial Analysis is Not Appropriate because the issue is civil rather than criminal in nature.

Lower proceedings applied civil rather than criminal standards. The Court found and the ALJ upheld that Silverwing had violated NRS 624 and imposed a $33,000 fine. Silverwing's Opening Brief, pp. 8-9 (4 A. App. 775-76; 6 A. App. 1281-87). In *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 507, 217 P.3d 546, 550 (2009), this Court held, "A statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute, while a statute that only involves civil penalties is only facially vague if it is void in all its applications." Silverwing argues that a heightened facial analysis is appropriate because violations of NRS 624.220(2) can result in the deprivation of a contractor's license. However, Silverwing admits that a violation of this statute "does not itself give rise to criminal charges." Silverwing's Opening Brief, p. 14. Further, the District Court held that "NRS 624.220(2) is not unconstitutionally

vague on its face because it is a civil statute." 6 A.App. 1237. Therefore, a heightened facial analysis is not appropriate in this case.

Further, "[p]arties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.' " *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (*quoting Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989). The purpose for this rule "is to prevent appellants from raising new issues on appeal concerning which the prevailing party had no opportunity to respond and the district court had no chance to intelligently consider during proceedings below." *Landmark Hotel v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988); *See also Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court."). Although Silverwing discussed the rules regarding the difference in the heightened standard between criminal and civil statutes in the District Court, they never argued that the criminal standard should apply. 5 A.App. 968-972. Therefore, Silverwing's argument regarding applying the heightened standard should be deemed waived and should not be considered by this Court.

C. The Phrase "*Subdivision site*" is Not Ambiguous in the Context of NRS 624 et seq.

Silverwing confuses definitional possibilities with statutory ambiguity. For example, the NSCB surmised that "subdivision site … could mean the place where a subdivision exists, or, … it could mean a discrete place within a subdivision." 3 A.App. 722. [1] However, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 115 S.Ct. 552, 555, 513 U.S. 115, 118 (1994). The context in which "on a single construction site or subdivision site"

[1] The NSCB later backs off this statement.

exists is not ambiguous. The proffered definition of "subdivision site" to include a "single construction site" (or using the NSCB's terminology "discrete place within a subdivision") requires that the words "single construction site" be consumed by the words "subdivision site." Stated another way, the idea that "subdivision site" may mean something smaller than an entire subdivision cannot stand because the statute already accounts for a discrete place within the subdivision through the words "*single* construction site." Once a plot of ground within a planned (or actively developed) subdivision is legally identified as a separate parcel of property, it by necessity becomes a "single construction site" capable of receiving its own work of improvement. The Court should not accept the semantic conflation of terms by isolating each term into a definitional possibility where the terms are meant to be read together rather than separately; this issue is further discussed below.

D. Silverwing Impermissibly Isolated Statutory Words For Interpretation.

Silverwing extracts words from the statute and then impermissibly seeks to interpret the isolated words. "[W]ords within a statute must not be read in isolation…." *Rural Telephone Company v. Public Utilities Commission*, 398 P.3d 909, 911 (Nev. 2017) quoting *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). "FINALLY, WE CONSIDEr (sic) multiple legislative provisions as a whole, CONSTRUING A STAtute (sic) so that no part is rendered meaningless." *Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dept.*, 124 Nev. 138, 147, 179 P.3d 542, 548, (2008). Silverwing's argued ambiguity arises not from NRS 624.220(2) but from the analytical framework used for statutory interpretation. As a comparative example, the *Silvar* court articulated the first prong of the vagueness analysis rule as "fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is

prohibited." *Silvar* 122 Nev. 289, 293. Extracting the words "ordinary intelligence" from the rule and then interpreting only those words begs the question of "what is ordinary intelligence," the answer to which will vary from person to person. The Court would be wise not to get caught in Silverwing's definitional possibilities because "single site" and "subdivision site" are clear when considered in context.

E. *"Subdivision site"* is Not Vague Even in Isolation.

The argument that "subdivision site" may mean the subdivision as a whole or a single site within the subdivision violates the statutory language itself. "Subdivision site" is used in the singular. If subdivision site meant a specific location within the subdivision as a whole, the language must be plural as "subdivision site**s**" because multiple sites exist within a subdivision.

F. The Court Should Look to NRS 624 For Meaning.

NRS 624 et seq. is designed to regulate contractors for the health and safety of the public (*see* NRS 624.005). The Court focused on the wrong statute when seeking a definition for subdivision site. The litigants' argument concerning NRS 278.320(1) appears misplaced.

NRS 624.029 offers better insights than the 5 lot definition of NRS 278.320(1). It is axiomatic that every construction contract and its associated value is for a "work of improvement" regardless of the site being single or capable of subdividing. It is the contractor's financial capabilities—rather than a project's situs—associated with the contractual work of improvement that was of obvious concern to the Legislature. NRS 624.029 defines "work of improvement" by incorporating the definition of NRS 108.22188. This shows that the meaning of "work of improvement" is incorporated into the contractor licensing, supervision and discipline regulatory scheme of NRS 624 et seq. NRS 108.22188 reads as follows:

> "Work of improvement" means the entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon, whether under multiple prime contracts or a single prime contract except as follows:
>
> 1. If a scheme of improvement consists of the construction of two or more separate buildings and each building is constructed upon a separate legal parcel of land and pursuant to a separate prime contract for only that building, then each building shall be deemed a separate work of improvement; and
>
> 2. If the improvement of the site is provided for in a prime contract that is separate from all prime contracts for the construction of one or more buildings on the property, and if the improvement of the site was contemplated by the contracts to be a separate work of improvement to be completed before the commencement of construction of the buildings, the improvement of the site shall be deemed a separate work of improvement from the construction of the buildings and the commencement of construction of the improvement of the site does not constitute the commencement of construction of the buildings. As used in this subsection, "improvement of the site" means the development or enhancement of the property, preparatory to the commencement of construction of a building, and includes:
>
> (a) The demolition or removal of improvements, trees or other vegetation;
>
> (b) The drilling of test holes;
>
> (c) Grading, grubbing, filling or excavating;
>
> (d) Constructing or installing sewers or other public utilities; or
>
> (e) Constructing a vault, cellar or room under sidewalks or making improvements to the sidewalks in front of or adjoining the property.

NRS 108.22188.

Therefore, the general rule for a contract's value, for which contract licensing limits apply, is the aggregate of all work, materials and equipment incorporated into the *entire* structure or scheme of improvement whether done in a single contract or multiple contracts.

An exception to the general rule exists where clearing, testing, or infrastructure improvements are done to a piece property intended to be subdivided into smaller separate parcels upon which individual buildings will be constructed under separate contracts. In such a scenario, contract values cannot be aggregated for licensing limits because the work of improvement and its subsequent value are deemed to have accrued to each individual parcel of property and not the "subdivision site" as a whole. To be clear, NRS 624.220(2) contemplates that general work such as clearing and infrastructure will be done to the entire "subdivision site" as a whole in preparation for sub-parcels that will each become their own "single construction site" at some point in the future.

The question for the Court is therefore whether Silverwing has proven that the exception applies. Otherwise, the general rule governs, under which all contracts on a single "work of improvement" must be aggregated in assessing whether a contractor has stayed within the bounds of its licensing limits. The first step in showing that any exception to the general rule applies (and the burden to do so is on Silverwing) is to prove that "the scheme of improvement consists of the construction of two or more separate buildings" each of which is "constructed upon a separate legal parcel of land." In the absence of such proof, the "work of improvement" must be analyzed as a single project, no matter how many contracts Silverwing may have entered into.

As a matter of law, the NCSB's aggregation approach appears valid, even though this amicus brief has offered a different statutory explanation for the approach.[2] The salient point of the foregoing argument is that that NRS 624.220(2), when interpreted within the context of the NRS 624 statuary scheme,

[2] No position on Silverwing's statutory compliance is taken.

has a conceivable interpretation that allows both a contractor and the NSCB to proceed without speculation.

The incorporation of NRS 108.22188, and its specific contract language, resolves any possible ambiguity issue because the statute directs how a contract's work of improvement is applied to various worksites, specific parcels of property within the subdivision or upon the subdivision as a whole. There is no ambiguity within the context of NRS 624.220(2) when analyzed from the work of improvement standpoint that specifically addresses the issue raised by Silverwing.

G. The Severability Doctrine Saves NRS 624.220(2) From Any Unconstitutional Vagueness.

NRS 0.020 provides, in pertinent part, that:

1. If any provision of the Nevada Revised Statutes . . . is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision . . .
2. The inclusion of an express declaration of severability in the enactment of any provision of NRS . . . does not enhance the severability of the provision so treated or detract from the severability of any other provision of NRS.

NRS 0.020 clearly allows statutes to be severed and in fact establishes a preference for such. The severability doctrine requires this Court "to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions." *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (internal quotations omitted). As discussed in Sections C, D and E *supra*, NRS 624.220(2) is not impermissibly vague, but even if this Court finds that some of the language in the statute is, the statute can still be given effect.

Before language can be severed from a statute, this court must first decide whether the remainder of the statute can be given legal effect and whether it

accords with legislative intent. *Cnty. of Clark v. City of Las Vegas*, 92 Nev. 323, 336–37, 550 P.2d 779, 788–89 (1976). In the instant case, even if the language "subdivision site" were stricken from the statute, NRS 624.220(2) could still be given legal effect because the words "single construction site" remain. In this scenario, NRS 624.220(2) would still continue to provide license limits for contractors, which would accord with the purpose of the statute and the legislative intent to protect the public from contractors who are not financially responsible, as exemplified in *Homewood Investment Co. v. Moses*, 96 Nev. 326, 608 P.2d 503 (1980). In *Homewood*, this Court upheld that the purpose of the statute is to promote the health, safety and general welfare of the public and thus the NSCB had the power to require contractors to provide documentation of substantial financial responsibility and limit the field and scope of a contractor's operations by setting a monetary limit on the contractor's license, which was consistent with the legislative intent of NRS 624.220. *Homewood,* 96 Nev. at 329-330, 609 P. 2d 505-506.

Thus, even if the phrase "subdivision site" was severed, NRS 624.220(2) could still be given effect and license limits invoked.

H. NRS 624.220(2) Applies Equally To All Contractors.

Silverwing confuses opportunity with result. "[T]he settled rule that the Fourteenth Amendment guarantees equal laws, not equal results" is applicable to Appellant's equal protection argument. *Personnel Adm'r of Massachusetts v. Feeney*, 99 S.Ct. 2282, 2293, 442 U.S. 256, 273 (1979). All contractors are subject to NRS 624.220.

> 'The equality of the Constitution is the equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, is an equal law. (Citations.) So long as the statute does not permit one to exercise the privilege while

> refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground.' *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 284, 298 P. 481, 483.

Sutter Basin Corp. v. Brown, 253 P.2d 649, 655 (Cal., 1953). All contractors bear the same burden under NRS 624.220(2). Each contractor can choose when, where and with whom it chooses to contract so long as its licensing limits are honored.

Silverwing also ignores subsection 3 of NRS 624.220. "A licensed contractor may request that the Board increase the monetary limit on his or her license, either on a permanent basis or for a single construction project…." NRS 624.220(3).[3] The outcome of how contract values aggregate may be different (as identified by Silverwing's example on page 31 of its Opening Brief), but, as noted above, the Constitution does not guarantee equal outcomes. Moreover, Silverwing's example fails because the identified outcomes are premised upon choice in how the contractor does business, with whom the contractor does business and whether or not to seek a licensing limit increase. Because equal protection only requires a single conceivable basis on which a statute might survive rational basis scrutiny (s*ee Lupert v. Cal. St. Bar*, 761 F.2d 1328 (9th Cir. 1985)), Silverwing's equal protection challenge fails.

Moreover, legislative history provides a specific example of how a monetary licensing limit helps identify construction fraud. Thomas Hall, an attorney, testified before the legislature that his client had been swindled by a contractor who entered into two contracts for the construction of a barn because the total construction value exceeded the contractor's $250,000.00 license limit. Eventually Mr. Hall brought a complaint against the contractor before the NSCB where substantial construction fraud was discovered. But for the monitory licensing limitation, the

[3] Subsection 3 also defeats all ambiguity argument. The increase applies to the entire "project" and not just a site, so as a matter of law and as a matter of regulatory fact, Appellant's ambiguity argument fails because monetary license limit increases are available to all contractors.

contractor's fraud would have gone undiscovered, placing the public at continued risk of harm. *See Regulation of Contractors: Hearing on A.B. 634 Before the Nevada State Assembly Committee on Commerce and Labor* 70th Legis. Session, Hrg. March 29 (Nev. 1999) (Statement of Thomas Hall). Thus, monetary licensing limits are more than just confirmation of economic viability, they act as a regulatory tool for identifying and removing bad actors from the construction industry. With a conceivable public interest, licensing limits are rational and must be upheld as constitutional.

Silverwing is correct that monetary licensing limits may produce peculiar results from time to time. But all laws do the same to one degree or another. For example, a speed limit law seems irrational if viewed in the context of rushing a pregnant woman to the hospital for delivery. But such a view is specious when considering the societal utility of lowered speed limits for public protection. The fact that a law may have an odd result as to one particular party does not mean that constitutional equal protection is violated.

I. Licensing Limits Are Rationally Related to the Legislative Purpose of Public Health And Safety.

Contrary to Silverwing's assertion, license limitations are rationally related to a legislative purpose—that of public welfare. *See* E.g., Hall Statement, supra. Other courts have found licensing limits to be constitutional. In *Martinez v. Goddard,* 521 F.Supp.2d 1002, 1004 (D. Ariz. 2007), a factually similar case, the plaintiff argued that that a licensing limit was unconstitutional. The court applied a rational basis review and upheld the statute because the purpose of a license and licensing limit is to "protect the public from unscrupulous, unqualified, and financially irresponsible contractors." *Id.* at 1008-9. *See also Urbatec v. Yuma Cnty.*, 614 F.2d 1216, 1218 (9th Cir. 1980) ("[A]ll of these requirements, taken

together, are designed to protect members of the general public without regard to the impact upon individual contractors.")

A monetary licensing limit is only part of Nevada's public policy scheme affecting contractors that is designed to protect the public. NRS 608.150 makes a general contractor liable for the unpaid wages and benefits of a subcontractor's employees. NRS 108.236 ranks laborers first, materialmen second, subcontractors third, and all other lien claimants fourth when distributing lien foreclosure proceeds. NRS 624.273(7) grants a priority to labor claims upon a contractor's licensing bond. NRS 338.1385(5) requires public bodies to award contracts to the "lowest responsive and responsible bidder." It is clear that Nevada places burdens on contractors because these burdens benefit and protect the public. Bad actors who harm the public are either prevented from entering the industry or identified and removed by Nevada's regulatory scheme.

IV. CONCLUSION

Based upon the foregoing, the Amici Curiae respectfully request that this Court affirm the decision of the district court in its entirety.

DATED this 28th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

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DATED this 28th day of January, 2020.

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I hereby certify that on this date, the 28th day of January 2020, I submitted the foregoing **AMICUS BRIEF (Docket 79134)** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

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