IN THE SUPREME COURT OF THE STATE OF NEVADA

SILVERWING DEVELOPMENT, A NEVADA CORPORATION; AND J. CARTER WITT, III, AN INDIVIDUAL, Appellants, vs. NEVADA STATE CONTRACTORS BOARD, Respondent.	Supreme Court Case No. 79134 District Court Case No. CV18-00128

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BRIEF OF AMICUS CURIAE CONSTRUCTION TRADE ASSOCIATIONS IN SUPPORT OF RESPONDENT

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NRAP 26.1 DISCLOSURE

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 justices of this Court may evaluate possible disqualifications or recusal.

Amici curiae have no parent corporations and no publicly held company holds 10% or more of any of the amici curiae's stock. Amici curiae were represented by attorneys at McDonald Carano LLP as amici curiae in the district court judicial review proceeding.

Dated: January 28, 2020.

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The Construction Trade Associations comprises nine construction industry trade associations throughout the State of Nevada.[1] Collectively, the Construction Trade Associations have approximately 1,200 active member-companies, which employ tens of thousands of Nevadans. The members are directly involved in all aspects of the construction industry throughout the State and include representatives from various trades and sizes, including general contractors, subcontractors, suppliers, engineers, architects, and insurance agencies. These members are engaged in building homes, apartments, commercial buildings, infrastructure, and public works. These members include construction companies that have both limited and unlimited license

[1] The Construction Trade Associations comprises the following Nevada-based construction associations: Nevada Chapter Associated General Contractors ("AGC"), Nevada Association of Mechanical Contractors ("NAM"), Southern Nevada Chapter of National Electronic Contractors' Association ("NECA"), Southern Nevada Home Builders Association ("SNHBA"), Nevada Contractor's Association ("NCA"), Mechanical Contractor's Association of Las Vegas ("MCA"), Nevada Subcontractor's Association ("NSA"), Sheet Metal and Air Conditioning Contractors' National Association of Southern Nevada ("SMACNA"), and Associated Builders and Contractors of Nevada, Inc. ("ABC").

limits. The members also include companies that are not directly engaged in construction, including casinos, law firms, accountants, banks, and investment professionals.

The Construction Trade Associations' members are either regulated or affected by Chapter 624 of the Nevada Revised Statutes and the license limit provisions found in NRS 624.220(2) (the "Statute"). The Construction Trade Associations' collective missions are to enhance and maintain the quality of the construction industry in the State of Nevada, and to further the purpose of Chapter 624 of the NRS, which is to promote public confidence and trust in the competence and integrity of contractors and to protect the health, safety, and welfare of the public.

As noted in the Nevada State Contractors Board's (the "Board") Answering Brief, in the 1960s, groups of contractors started asking the Board for stricter enforcement of the license limits imposed on contractors. Ans. Br. 33. The Minutes of a Board Meeting on January 27, 1961 reflect that three contractors appeared on behalf of a substantial group of contractors in the Reno area to request further enforcement of license limits. *Id.* at 33-34; 5 A.App. 1071-72. Two of those contractors were Al Scolari (RHP Mechanical Systems, NSCB License Number 3714)

and L.J. Savage (Savage & Son Plumbing, NSCB License Number 10). *Id.* Both of those construction companies are members of AGC and the Construction Trade Associations. Those firms, and the contractors they appeared on behalf of in 1961, were instrumental in establishing contractor license limit procedures that would promote the quality of the construction industry and protect the public. Those companies, and the other members of the Construction Trade Associations, remain committed to promoting and protecting these interests today through their participation in this appeal and other, numerous efforts.

On behalf of their members, the Construction Trade Associations have a significant interest in the Court's determination of the constitutionality of the Statute.[2]

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[2] The Construction Trade Associations believe it is worth noting that on August 18, 2016, Silverwing, through its counsel Heather Ijames, Esq. at Laxalt & Nomura, wrote a letter to the Board, which set forth many of the same positions BANN, NBA, and Chambers are advocating in this proceeding, through their counsel Holly Parker, Esq. at Laxalt & Nomura. 1 A.App. 66-70. Specifically, that August 18 letter stated: "NRS 624.220 is further inapplicable due to the fact that each of Silverwing's buildings and phases have different permits, making each a distinct construction site. There are also different final maps, making for different sites, insuring [sic] compliance with NRS 624.220." *Id.* at 68. This is essentially the same interpretation of the statute at issue that is advocated by BANN, NBA, and Chambers in their brief. The August 18 letter also goes into detail of why Silverwing believes its contractual

AUTHORITY TO FILE

The Construction Trade Associations have authority to file this brief pursuant to NRAP 29(a), the stipulation of the parties on file with the Court, and the Court's Order dated January 9, 2020.

SUMMARY OF THE ARGUMENT

NRS 624.220(2) requires the Board to set a maximum contract amount a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client. Appellants Silverwing Development and J. Carter Witt, III (collectively "Silverwing") argue that the Statute is unconstitutionally vague on its face, is unconstitutionally vague as applied to Silverwing, and violates equal protection. The Statute is not unconstitutionally vague on its face because there are clear applications of the Statute where a person of ordinary intelligence can ascertain whether a contractor is violating the Statute. The Statute is not unconstitutionally vague as applied to Silverwing because there is evidence in the record that shows

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structure of using multiple "contract extensions" does not allow the Board to aggregate the separate contracts. *Id.* Again, this is essentially the position of the other amici curiae supporting Silverwing and Silverwing itself, in this appeal.

Silverwing knew each project may be considered "a single subdivision site or subdivision site" and the Board was within its discretion and the language of the Statute in citing Silverwing for violating the license limit laws. The Statute does not violate equal protection because imposing different license limits on different contractors based on the contractors' different levels of experience and financial status is rationally related to the legitimate government interests of protecting the public and construction industry. Therefore, this Court should uphold the constitutionality of the Statute.[3]

The Statute and monetary license limits for licensed contractors in the State of Nevada have been specifically and validly justified by the Nevada Legislature and by the experience of the construction industry. First, the Statute is intended to promote public confidence and trust in the competence and integrity of licensees. NRS 624.005. Second, the Statute is intended to protect the health, safety, and welfare of the public. NRS 624.005; NRS 624.220(2). There are also many real-world benefits of this Statute and the monetary license limits addressed therein.

[3] This brief is limited to the issue of the constitutionality of the Statute. The Construction Trade Associations do not address other issues raised in this appeal.

Namely, the Statute protects homeowners, allows smaller companies to obtain a contractor's license (and later request higher limits), and protects the construction industry, including, but not limited to, the companies in the industry who supply materials and equipment.

The Nevada Legislature created the license limits to guard the public from the adverse consequences of a contractor's financial insolvency, as well as a contractor's lack of experience. Therefore, pursuant to NRS 624.220(2), and for the protection of the public, the Board is tasked with ensuring that contractors are not engaged in projects on a single construction site or subdivision site for one client beyond the contractor's financial capability or experience. There is a rational basis for the Statute, which does not differentiate between truly similarly-situated contractors.

ARGUMENT

Silverwing argues that NRS 624.220(2) violates its substantive due process rights found in the Nevada and the United States Constitutions because the Statute is unconstitutionally vague and violates equal protection. The first step in analyzing a due process challenge is to identify the appropriate level of constitutional scrutiny the Court should

apply in evaluating the challenged statute. *Arata v. Faubion*, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007). The next step is to identify the specific tests that the Court uses to address claims of due process violations based on the type of challenge. The third step is then to apply those rules to the statute at issue.

A. Level of Scrutiny

Unless a statute discriminates against a suspect class or interferes with a fundamental right, a statute will survive a due process challenge so long as the statute withstands "minimum scrutiny." *Arata*, 123 Nev. at 159, 161 P.3d at 248. Under minimum scrutiny, a statute is constitutional so long as it is "rationally related to a legitimate government purpose." *Id.*

In reviewing a statute under this relational relationship test, the Court is not limited to considering only the justifications for the statute specifically asserted by the Legislature but may hypothesize the legislative purpose behind the statute. *Id.* at 160. Under this low level of scrutiny, "if *any state of facts* may reasonably *be conceived* to justify the legislation, a statute *will not* be set aside." *Id.* (citation, brackets, and

internal quotations omitted) (emphasis added). In reviewing the Statute at issue in this appeal, the rational relationship test is appropriate.

B. Standards of Addressing Vagueness Challenges

As noted, the over-arching standard for reviewing a statute for a due process violation is the "rational relationship" test. However, courts have adopted specific rules and tests for reviewing a due process constitutionality challenge for vagueness. In *Flamingo*, the Court clarified the proper framework to be used in analyzing a facial vagueness challenge. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509–13, 217 P.3d 546, 551–54 (2009). In that case, the Court noted that there was a divergence of authority regarding the appropriate test that courts should apply in evaluating a facial vagueness challenge. *Id.* As a result, the Court spent significant time in its decision walking through the different tests and analyses used by the Nevada and United States Supreme Courts. *Id.* Ultimately, after that review, the Court identified the standard that would apply under Nevada law. *Id.*

The Court noted that there was a general consensus that a two-part test applied. *Id.* at 510. Under this two-part test, a statute is unconstitutionally vague if it: "(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.*

Next, the Court held that there are two approaches to a facial vagueness challenge, depending on the type of statute at issue. *Id.* at 510–13. If the facial vagueness challenge is to a civil statute, "the plaintiff must show that the statute is impermissibly vague *in all of its applications*." *Id.* at 512 (emphasis added). However, if the statute involves criminal penalties or constitutionally protected rights, the statute is unconstitutional if vagueness "permeates the text." *Id.* Other situations (none of which are applicable here) in which a statute is reviewed under the heightened standard of whether "vagueness permeates the text" are when fundamental liberty interests protected under substantive due process are at issue such as the right to marry, the right to custody of one's children, and the right to keep the family together. *See Arata*, 123 Nev. at 159. Civil statutes are held to a less-strict vagueness standard than criminal laws, "because the consequences of imprecision are qualitatively less severe." *Carrigan v. Comm'n on*

Ethics of State, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013) (citation and internal quotations omitted).

In conducting a review of the constitutionality of a statute, all statutes "are presumed to be valid." *Shapiro v. West*, 133 Nev. 33, 37, 389 P.3d 262, 267 (2017) (citation and internal quotations omitted). Moreover, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Id.* (emphasis added). Further, the burden is on the challenger to make a clear showing of the statute's unconstitutionality. *Id.*

Here, the Statute is a civil statute and a heightened standard of review is not appropriate. *Flamingo*, 125 Nev. at 518 n.12, 217 P.3d at 557 n.12. In *Flamingo*, the Court recognized that a statute that imposes fines without the possibility of license revocation is not a criminal or quasi-criminal statute and is not subject to the heightened standard of review. *Id.* In the proceedings below, Judge Pro held, and the district court affirmed, that Silverwing violated NRS 624.3015(3) for knowingly entering into a contract with a contractor for work in excess of its monetary limit and beyond the scope of its license (i.e., the first and third

causes of action asserted by the Board against Silverwing). Op. Br. 8-9; 1 A.App. 7, 15-16; 4 A.App. 767-76; 6 A.App. 1236.

NRS 624.300(3) establishes the potential penalty for a violation of NRS 624.3015(3). That potential penalty is exclusively a fine up to $50,000, depending on various factors set forth in NRS 624.300(4) and NAC 624.7251. The only penalty imposed on Silverwing was a monetary fine. Op. Br. 9. Thus, the fact that the Board may potentially revoke a contractor's license under different circumstances and violations of different statutes, does not give Silverwing standing to challenge the Statute at issue in this appeal on those unrelated grounds and does not warrant a heightened standard of review in this appeal. *Flamingo*, 125 Nev. at 518 n.12, 217 P.3d at 557 n.12 (stating that "appellants cannot rely on the application to others in a facial challenge when it is constitutional as applied to them").

Therefore, as a civil statute that is not subject to the heightened standard of review, the Statute at issue is only facially unconstitutionally vague if Silverwing makes a clear showing "that the statute is impermissibly vague *in all of its applications*." *Id.* at 512 (emphasis added). Thus, "if the statute provides sufficient guidance as to *at least*

some conduct that is prohibited and standards for enforcement of that conduct, it will survive a facial challenge because it is not void in all its applications." *Id.* at 514.

Further, a statute is not unconstitutionally vague "because there are some marginal cases where it is difficult to ascertain whether the facts violate the statute." *Cornella v. Justice Ct.*, 132 Nev. 587, 592, 377 P.3d 97, 101 (2016) (citations and internal quotations omitted). "Mathematical precision is not [required] in drafting statutory language." *Id.* Additionally, "[e]nough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving the statute's words their well-settled and ordinarily understood meaning, and by looking to the common law definitions of the related term or offense." *Shapiro*, 133 Nev. at 38 (citation and internal quotations omitted). Therefore, in sum, because the challenged Statute in this case is a civil statute and is not subject to a heightened standard of review, the following rules apply:

- The Statute is *presumed to be valid*. *Shapiro*, 133 Nev. at 37.
- The Statute is valid if it is *rationally related* to a legitimate public purpose. *Arata*, 123 Nev. at 159.

- The Statute is only unconstitutionally vague if it is vague in *all its applications*. *Flamingo*, 125 Nev. at 512.
- If *any state of facts* may reasonably be conceived to justify the legislation, the Statute cannot be set aside. *Arata*, 123 Nev. at 159.
- *Every reasonable construction* must be applied in favor of constitutionality. *Shapiro*, 133 Nev. at 37-38.
- The Statute is not unconstitutionally vague just because there might be "marginal cases" where it is difficult to ascertain whether certain facts violate the Statute. *Cornella*, 132 Nev. 592.
- Appellants have the burden of proof to show that the Statute is clearly unconstitutional. *Shapiro*, 133 Nev. at 37.

C. Applying the Relevant Standards and Tests to NRS 624.220

1. The Statute is not unconstitutionally vague.

NRS 624.220(2) is a civil statute without any criminal penalties or infringement on constitutionally protected rights. The fact that a contractor that violates the Statute for knowingly entering a contract with a contractor for work in excess of its limit or beyond the scope of its license may be penalized with monetary fines, does not rise to the level of a statute infringing on a constitutionally protected right or imposing

criminal penalties. NRS 624.3015(3); NRS 624.300(3)(a), (4); NAC 624.7251; *Flamingo*, 125 Nev. at 518 n.12, 217 P.3d at 557 n.12. Therefore, the less-strict standard for civil statutes applies. As such, Silverwing must make a clear showing that the Statute is impermissibly vague in *all of its applications*. *Flamingo*, 125 Nev. at 512. In order to make such a showing, Silverwing must demonstrate that there is *no state of facts* under which the Statute would provide a person of ordinary intelligence fair notice of what is prohibited. *Id.* at 518–20. Simply stated, Silverwing cannot make that showing. That is because there are very clear applications of the Statute in which no one could reasonably question whether a particular act would (or would not) violate the Statute—either under the "single construction site" or "subdivision site" provision.

Two examples of routine situations in which the "single construction site" provision in NRS 624.200(2) applies demonstrate that the Statute is not vague in all of its applications: (1) construction of an individual single-family residence that is not part of a larger subdivision development; and (2) construction of a single commercial building on a single parcel of property. In these circumstances, the Statute is not vague

in any possible way. For instance, if the cost to build the building at issue is $500,000, then the general contractor on the project must have a license limit of at least $500,000. By the same token, if the value of the plumbing work on the project is $100,000, the plumber on the project must have a license limit of at least $100,000. Thus, a general contractor with a $250,000 license limit who bids to construct or constructs that building is clearly and unquestionably in violation of the license limit Statute and NRS 624.3015(3). By the same token, a plumber with a $50,000 license limit who performs all the plumbing work on that building is also clearly and unquestionably in violation of the Statute and NRS 624.3015(3). These are the standard types of situations in which the license limit laws apply every day in the State of Nevada. They are straightforward situations without question of whether or how the license limits apply. As such, it cannot be plausibly argued that the "single construction site" provision in NRS 624.200(2) is impermissibly vague in all applications.

Further, Judge Pro provided a reasonable meaning of the phrase "subdivision site" when finding that the Board was within its discretion in concluding each of the four projects at issue were constructed on four

"subdivision sites." 6 A.App. 1256. Namely, that "subdivision site" means the physical location of a subdivision. *Id.* That is a reasonable interpretation of the phrase, which comports with black letter law and persuasive case authority. Ans. Br. 24-25.[4]

The Legislative Counsel Bureau (the "LCB") has interpreted the plain language of the Statute and found, at least implicitly, that the Board's and Judge Pro's interpretation of the Statute is reasonable. 3 A.App. 666. In a letter to Assemblyman Jim Wheeler, the LCB explained: "If the language of NRS 624.220(2) were read and applied *literally* [*i.e.*, pursuant to its plain language], a contractor who undertook work on a 'single construction site or subdivision site for a single client' would remain subject to the same monetary limit on his or her license for any and all work done at that site, for that client, in perpetuity." *Id.* (emphasis added). The LCB continued: "We think that *the more reasonable* interpretation of the statute is that some temporal and geographic limitations on 'site' were implied by the Legislature so that,

[4] *See also* Brief of Amici Curiae of BANN, NBA, and Chambers 15 ("Black's Law Dictionary defines the term 'site' as 'a place or *location*; esp., a piece of property set aside for a specific use.'" (citing Black's Law Dictionary (11th ed. 2019)) (emphasis added).

for example the cost of work completed and paid for in 1995 would not continue to apply against the contractor's monetary limit in 2020." *Id.* (emphasis added). While this may be *a more reasonable* interpretation, or a potential improvement of the Statute that could be implemented by the Legislature, that does not make the Board's and Judge Pro's interpretation unreasonable. Thus, at most, the phrase "subdivision site" is ambiguous—it may be subject to one or more reasonable interpretations. But that does not make the phrase vague and does not make the Statute unconstitutional.

Therefore, because NRS 624.200(2) is a civil statute not subject to the heightened standard of review, under clearly established law, the Statute is constitutional. *Cf. Flamingo*, 125 Nev. at 518–20 (holding that a civil statute which prohibited smoking tobacco in certain restricted areas was not facially unconstitutionally vague because smoking was clearly prohibited in those restricted areas such as bars and restaurants where food is served and, therefore, "the statute is not vague in all of its applications . . . because there are very clear applications of the statute in which no one could reasonably question whether a particular act would violate the statute"). This is the case even if Silverwing can come up with

a "marginal case" wherein the Statute is somewhat less clear. *Cornella*, 132 Nev. at 592.

Additionally, under the second prong of the two-part test, the Statute is not so standardless that it authorizes or encourages seriously discriminatory enforcement. Under most circumstances, there is no room for interpretation by the Board of whether a contractor violated the Statute and NRS 624.3015(3). For instance, in the examples noted above, when a contractor or subcontractor performs work beyond the scope of its license limit on a single-family residence or single building on a single parcel of property, it is clear that the Statute and NRS 624.3015(3) have been violated. It is true that there may be some cases, on the margins, where the Board must interpret the Statute. However, that does not make the Statute unconstitutional, because there are at least minimal guidelines that govern the Board's enforcement of the Statute. *See Cornella*, 132 Nev. at 592; NRS 624.300; NRS 624.3015; NAC 624.7251.

In the limited circumstances in which it is not abundantly clear whether a contractor has violated the Statute (such as the examples above), a Board Investigator must evaluate various criteria, together with the Legislature's intent in creating the license limits, to determine

whether the project in question is on a single construction site or subdivision site. The criteria evaluated by the Board are the geography, time, contract(s), design, permitting, and complexity of the project. The investigator must do so in light of the language and purpose of the Statute.

In these limited circumstances, the Board Investigator evaluates all the information and criteria and decides whether it appears the project is on a single construction site or subdivision site for a single client. However, that is not the end of the process. The contractor has the right and ability to challenge the investigator's interpretation. Once the investigator has made his or her findings, the Board reviews the findings and determines whether a contractor has engaged in conduct that warrants discipline. A hearing is then scheduled where the contractor can present its evidence and make arguments. *See* NRS 624.345; NRS 624.351. If the Board determines that a contractor has engaged in an action warranting discipline (*i.e.*, performed work beyond the scope of its license limit), the Board may issue one or more specific, limited penalties. *See* NRS 624.300; NRS 624.3015. Moreover, the Board has established standards it uses in determining the amount of any potential

administrative fine, which include the gravity of the violation(s), the number of violation(s), whether the contractor exhibited bad faith by ignoring warnings, whether the violation(s) caused harm to other persons, whether the violation(s) were perpetuated against a senior citizen or person with a disability, and the history or previous violations by the contractor. *See* NRS 624.300(4); NAC 624.7251. If the contractor objects to the Board's findings, it has a right to appeal. *See* NRS 233B.130. This is the very definition of due process.

Further, the Statute and related regulations provide established guidelines that govern the Boards enforcement of the Statute. These guidelines provide adequate direction and restraint on the Board to avoid arbitrary or discriminatory enforcement. The Statute is not unconstitutional simply because it provides the Board with the ability to exercise some discretion. *See City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) ("[T]his court will not readily disturb an administrative interpretation of statutory language. This court has held that '[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference

should be given to the agency's interpretation when it is within the language of the statute.'") (citation omitted). In fact, the Board (like any administrative agency) is tasked with using its knowledge and unique experience handling similar matters together with established guidelines to make a determination regarding the case before it. *Id.*; *see also Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (stating that "great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute. While the agency's interpretation is not controlling, it is persuasive.") (citations and quotations omitted); NRS 233B.135(3)(f) (establishing that an administrative agency's final decision will be set aside if it is "[a]rbitrary or capricious or characterized by abuse of discretion," which recognizes that agencies are tasked with exercising their discretion). The Statute properly authorizes and limits such discretion of the Board.

Moreover, there is no evidence before the Court that the Board improperly exercised its discretion or engaged in any discriminatory action towards Silverwing in this case. There is no evidence that the Board disregarded its established criteria for determining whether

Silverwing violated the Statute, or disregarded its established standards for determining the amount of the fine assessed on Silverwing. There is no evidence that a different contractor in a similar situation to Silverwing has been treated differently (either by this investigator or another Board investigator). *See Pimentel v. State*, 133 Nev. 218, 223-24, 396 P.3d 759, 765 (2017) (finding that the challenger failed to establish the second prong of the two-part test because he failed to put forth any evidence, and there was none in the record, to indicate discriminatory action towards the challenger compared to other similarly-situated individuals).

Finally, Silverwing argues that the Board's "Tesla Letter" proves that the Statute is unconstitutionally vague. However, that argument is misplaced. It is true that the Board's December 14, 2015 Advisory Opinion regarding the Tesla Gigafactory recognized that the Statute can be somewhat *ambiguous* in certain limited circumstances. Tesla sought the Board's opinion on how the Board interprets the applicable statutory license limit provisions with respect to a large construction project with multiple phases that would be built out over a decade or more, but which was on a single parcel. The construction of the Tesla Gigafactory is clearly a unique project and is one of the "marginal cases" where it may be

difficult to ascertain whether the facts violate the Statute, which requires further analysis by the Board. *See Cornella*, 132 Nev. at 592.

In the Tesla Letter, the Board opined that the phrase "single construction site" is *ambiguous* under those limited circumstances because the phrase is subject to more than one reasonable meaning.[5] Notably, the Board further opined that the "subdivision site" provision at issue in this appeal was "clear and unambiguous." 3 A.App. 505.

Silverwing agrees that "[t]here is a difference between vagueness and ambiguity." Op. Br. 14. However, without explanation, Silverwing states that the Tesla Opinion "confirmed that at least one part of NRS 624.220(2) fails for *vagueness*" and that the Board made an "*admission* that the phrase 'single construction site' is *vague* and ambiguous." Op. Br. 16 (emphasis added). Silverwing runs with its misstatement or misunderstanding of the Board's Tesla Opinion to argue that because (in its own, unexplained opinion) the phrase "single construction site" is vague, the phrase "subdivision site" must also be vague. Op. Br. 15.

[5] Under the applicable standard, to be found to be unconstitutional, the statute must be *vague* in *all its applications*. *See Flamingo*, 125 Nev. at 518–20.

There is a difference between ambiguity and vagueness; vagueness means the word or phrase has no set meaning and ambiguity means the word or phrase has two or more potential meanings. Even if the phrase "single construction site" is ambiguous, and that makes the phrase "subdivision site" also ambiguous (by default according to Silverwing), that does not mean either or both phrases are *vague*. The fact that there is a phrase that is potentially ambiguous in certain specific limited situations in a marginal case does not render the Statute unconstitutionally vague. *Cornella*, 132 Nev. at 592.[6]

2. The Statute is not unconstitutional as applied.

The relevant inquiry in an as-applied challenge is "whether the challenged statute is unconstitutionally vague 'as applied to the

[6] The other amici curiae (BANN, NBA, and Chambers) advocate a permit-by-permit application of license limits and posit that such an interpretation is reasonable and based on common sense. Those amici curiae, however, fail to recognize that if "subdivision site" is tied to a permit, the phrase "single construction site" would be rendered superfluous. *Public Employees' Benefits Program v. Las Vegas Metro. Police Dept.*, 124 Nev. 138, 147, 179 P.3d 542, 548 (no part of a statute should be rendered meaningless); *Animal Legal Defense Fund v. United States Dept. of Ag.*, 935 F.3d 858, 869-70 (9th Cir. 2019) (courts will avoid a reading of a statute that tenders some words redundant). BANN, NBA, and Chambers do not provide an example of when a "permit site" would be considered a "single construction site" rather than a "subdivision site" or vice versa.

particular facts at issue' such that the challenging party did not have sufficient notice that his or her conduct would be a violation of the statute." *Oracle USA, Inc. v. Rimini Street, Inc.*, 191 F.Supp.3d 1134, 1148 (D. Nev. 2016) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). "Thus, the question for the Court to determine in an as-applied challenge is whether defendant had notice that his or her particular conduct *could* be a violation of the statute." *Id.* (citation omitted) (emphasis added). The unique contractual structure utilized by Silverwing in contracting with its subcontractors on these four projects is of specific note and merits the Court's close attention. The specifics of this structure are set forth more fully in the Board's Answering Brief (Ans. Br. 9-12) and in the record (1 A.App. 71-249; 2 A.App. 250-425).

Silverwing testified and has taken the position throughout these proceedings that it believed each building within each of the four projects constituted a separate "site." Op. Br. 21. Yet, the contracts (or "contract extensions") with schedules of values established many months after execution of the contract, were not separated by each building. 1 A.App. 71-249; 2 A.App. 250-425. Rather, the schedules of values grouped together multiple buildings, which conveniently added up to just under

the respective subcontractors' license limits. *Id.*; 1 A.App. 90, 97, 104, 112; 3 A.App. 517-20.

In a September 18, 2017 letter to Assemblyman Jim Wheeler, the LCB explained that one reasonable way to interpret the Statute is to allow a license limit to reset once one phase of a project was completed, approved, and paid for. 3 A.App. 669. The LCB emphasized, however, that its opinion on license limits resetting upon a phase of a project being closed out was limited to "the phases being *discrete*, both as a matter of contract *and by examination on the ground*." *Id.* (emphasis in original). Importantly, the LCB explained: "[a]ny attempt to establish other, artificial 'phases' of construction will probably be unsuccessful," primarily because "any such effort can fairly be characterized as an attempt to evade the monetary limit through an arbitrary division of the work." *Id.*

The contractual structure implemented by Silverwing on these four projects could lead a reasonable person to determine that Silverwing was on notice that its conduct, and the conduct of its subcontractors, could be a violation of the Statute.

3. The Statute is severable.

The Statute is not constitutionally vague, whether analyzed under the "single construction site" or "subdivision site" provision. However, in the event the Court disagrees and finds the phrase "subdivision site" to be unconstitutionally vague, the Construction Trade Associations agree with the Board that the "subdivision site" provision is easily severable. Ans. Br. 16-19.

The Court must apply every reasonable construction in favor of constitutionality. *Shapiro*, 133 Nev. at 37-38. The Board opined in the Tesla Opinion that the phrase "single construction site" was ambiguous. 3 A.App. 506. That phrase is not being challenged in this appeal as Silverwing was cited and found to have violated the Statute for knowingly entering a contract with contractors in excess of their license limits on a subdivision site. Thus, even if the Court finds the phrase "subdivision site" to be unconstitutional, the Court should merely sever that provision from the Statute and save the remainder.

Silverwing argues that "if the phrase 'single construction site' is unconstitutionally vague on its face, then NRS 624.220(2) is unconstitutional." Op. Br. 29. Again, Silverwing appears to be conflating

ambiguity and vagueness and misstating the opinion of the Board in the Tesla Opinion. The Board opined that the phrase "single construction site" was ambiguous. That does not make that phrase vague. *See Scott v. First Judicial Dist. Court*, 131 Nev. 1015, 1025, 363 P.3d 1159, 1166 (2015) (Hardesty, C.J. and Pickering, J., concurring in part) (stating that if an ordinance is ambiguous, "that does not result in the ordinance becoming unconstitutionally vague") (citing *City of Las Vegas v. Eighth Judicial Dist. Court,* 118 Nev. 859, 866–67, 59 P.3d 477, 482–83 (2002) (implying that the difference between an ambiguous statute and an unconstitutionally vague statute is the level of ambiguity), *abrogated on different grounds by State v. Castaneda,* 126 Nev. 478, 482 n. 1, 245 P.3d 550, 553 n. 1 (2010)); *see also Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[W]hen a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 66 (2012) ("An interpretation that validates outweighs one that invalidates....").

As shown above, the "subdivision site" phrase is not unconstitutionally vague because there are very clear applications of the phrase. If the Court holds otherwise, that phrase can easily and validly be severed.

4. The Statute does not violate Equal Protection.

The Statute does not violate the Equal Protection Clause. The threshold question in an equal protection analysis is whether the statute treats similarly situated people disparately. *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). As with vagueness challenges, the level of scrutiny applied in an equal protection challenge varies according to the type of classification created. *Id.* Silverwing acknowledges that it is not in a suspect class and the rational relationship test is appropriate. Op. Br. 29. Thus, the statute "is constitutional if there is *a* rational basis related to *a* legitimate government interest for treating businesses differently." *Flamingo*, 125 Nev. at 520 (emphasis added).

The very legitimate governmental interests of protecting the public, and contractors, are advanced by the Statute and the current license limit scheme in Nevada. These interests are furthered by connecting a contractor's financial capability and experience to the size of projects a

contractor is allowed to undertake on a single construction site or subdivision site for a single client. All contractors and potential contractors in the State of Nevada that have similar experience and financial status are treated equally. Thus, there is a rational basis for the Statute and the Statute does not differentiate between contractors that are truly similarly situated.

In determining the license limit for a specific contractor, the Board evaluates a series of factors and financial metrics. Op. Br. 30. The license limits are set by the amount requested by a contractor. If a contractor requests a specific limit and has the financial strength and experience to support that amount (and meets the other requirements for licensure), then the Board will provide the contractor the requested amount. If a contractor requests a specific limit but does not have the financial strength and experience to support that amount, the Board will set the license limit at a lower amount commensurate with the contractor's current strength.

For example, if a contractor requests a $100,000 license limit, the Board will grant a $100,000 limit if the contractor's financial statements support that amount. If the contractor's financial statements do not

support that amount, the Board will grant the contractor a lower license limit that is supported by its financial statements. If a contractor requests a license limit of $100,000 and its financial statements support a higher amount, the Board will not unilaterally set the license limit at a higher amount–it will grant the requested license limit. Once a contractor proves it has the skill and financial capability to work on larger projects, a contractor can apply for an increase either for a single project or permanently.

The license limits are directly tied to the financial status of contractors. The Board treats all licensees with the same license limit the same, and there is no evidence to the contrary in the record. There is no evidence that the Board treated Silverwing differently than any other contractor with an unlimited license. There is no evidence that the Board treated any of Silverwing's subcontractors differently than other contractors with the same license limits. For example, ABC Builders had a license limit of $150,000. 2 A.App. 350. There is no evidence that the Board treated ABC Builders differently than another other contractor with a $150,000 license limit, or that it would have under the same circumstances and contracting structure.

The Statute and the corresponding license limits directly relate to a contractor's financial status, which furthers the government's legitimate interests in promoting the public's confidence in the construction industry and protecting the health, safety, and welfare of the public.

CONCLUSION

NRS 624.220(2) requires the Board to set a maximum contract amount a licensed contractor may undertake on one or more contracts on a single construction site or subdivision site for a single client. Although there may be marginal cases in which it could be difficult to determine whether a contractor violated the Statute, it is indisputable that the Statute is not vague in all its applications. Moreover, the fact that there may be some room for interpretation of the Statute in some limited circumstances does not render the Statute unconstitutional. NRS 624.220(2) is rationally related to the legitimate purpose of protecting the public. As a civil statute subject to the minimum scrutiny, it is valid, constitutional, and enforceable.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

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CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) and 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,430 words.

Pursuant to NRAP 28.2, 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 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.

Respectfully submitted on January 28, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on January 28, 2020, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE CONSTRUCTION TRADE ASSOCIATIONS IN SUPPORT OF RESPONDENT was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

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