

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

AMICUS CURIAE
CONSTRUCTION TRADE
ASSOCIATIONS'
MOTION TO PARTICIPATE IN
ORAL ARGUMENT

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Elizabeth A. Brown
Clerk of Supreme Court

Pursuant to NRAP 27 and 29, amicus curiae Construction Trade Associations,¹ by and through their undersigned counsel, hereby move the Court for an order granting the Construction Trade Associations' request to participate in oral argument. This Motion is based on the

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").

points and authorities below, the briefs on file with the Court, the Court's Order granting the parties' stipulation to file an amicus brief in support of Respondent dated January 9, 2020, the Court's Order Scheduling Oral Argument dated August 6, 2020, and such other matters as the Court may wish to consider.

Points and Authorities

I. Introduction

Through this appeal, Appellants Silverwing Development and J. Carter Witt, III (collectively "Appellants" or "Silverwing") request that the Court deem NRS 624.220(2) (the "Statute") unconstitutional. The Statute provides, in relevant part, that the Nevada State Contractor's Board ("Respondent" or "Board") "shall limit the field and scope of the operations of a licensed contractor by establishing a monetary limit on a contractor's license, and the limit must be the maximum contract a licensed contractor may undertake on one or more construction contracts on a single construction site or subdivision site for a single client." *Id.* The Construction Trade Associations have a significant interest in the Court's determination of the constitutionality of the Statute and the outcome of this appeal. This interest is distinct from, yet complementary

to, the interest of the Board and the effect of the Court's ruling would impact the Construction Trade Associations differently than the Board.

As noted in their amicus brief, many of 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 the Statute. Several of the members were instrumental in establishing the contractor license limit procedures in the State to promote the quality of the construction industry and protect the public. The Construction Trade Associations remain committed to furthering these interests—to protect the health, safety, and general welfare of the public and to promote public confidence and trust in the competence and integrity of licensees—through their participation in this appeal and other, numerous efforts.

Silverwing raised multiple arguments, including that the statute is unconstitutional on its face, is unconstitutional as applied, and that the Board improperly fined Silverwing in this instance. The Construction Trade Associations support the Board's position that the Statute is constitutional and have consistently maintained their position that the Statute is constitutional at the district court and on appeal. The Construction Trade Associations' respectfully submit that their

participation in oral argument will assist the Court by offering analysis of the legal and public policy reasons that support upholding the Statute.

II. Factual Background

Appellants were fined by the Board for violating the Statute and ancillary statutes and regulations. Appellants disputed the validity of the fines and an administrative hearing was held with the Board. The Administrative Law Judge, retired Honorable Judge Pro, ruled in favor of the Board and found the fines were justified; Judge Pro did not address the constitutionality of the Statute. Appellants appealed that decision to the district court. The Construction Trade Associations sought and were granted the ability to participate as amicus curiae at the district court level in both briefing and oral argument. The district court denied Appellants' petition for judicial review and found that the Statute is constitutional and that the fines were justified. Appellants appealed the district court order.

The Construction Trade Associations sought and were granted the ability to file an amicus brief in support of the Board's position. On January 28, 2020, the Construction Trade Associations filed their amicus brief. On March 5, 2020, Appellants filed their answering brief, which in

part addressed the arguments raised by the Construction Trade Associations. Ans. Br. 13-15. On August 6, 2020, the Court issued an Order Scheduling Oral Argument, which set oral argument for 30 minutes on September 15, 2020 at 10:30 a.m. in Carson City.

III. Argument

Participation in oral argument by an amicus curiae is within the Court's discretion. NRAP 29(h) ("An amicus may file a motion to participate in oral argument, but the court will grant such motions only for extraordinary reasons."). The Court has previously granted an amicus curiae's request to participate in oral argument when the amicus curiae proffered, and the Court agreed, that such participation would be helpful to the Court. *See DeGraw v. District Court*, 134 Nev. Adv. Op. 43 (2018). In *DeGraw*, the Court granted the amicus curiae five minutes of argument and also provided the other side five minutes to respond to the amicus argument. *Id.*; *see also Magliarditi v. Transfirst Group, Inc.*, Case No. 73889 (filed Sept. 5, 2017) (amicus granted ten minutes to argue with no separate time for a response by any other party); *State Board of Parole Commissioners v. District Court*, Case No. 76024 (filed June 7, 2018)

(amicus granted five minutes to argue and the other side was provided an additional five minutes to respond to the amicus).

Here, the Construction Trade Associations submit that their participation in oral argument will assist the determination of the constitutionality of the Statute and the Court's resolution of this appeal would benefit from their participation at oral argument. The Construction Trade Associations and Board agree that the Statute is not unconstitutionally vague, is not unconstitutional as applied to Appellants, is rationally related to a legitimate government interest of protecting the public and construction industry, and, to the extent the Court disagrees, can be severed to save the Statute. However, the Construction Trade Associations and Board have different perspectives and slightly different reasons for those conclusions.

For example, the Board's position is that Appellants knowingly violated the Statute, which forms the basis for the citations and resulting fines. The Construction Trade Associations' position is, regardless of whether Appellants knowingly violated the Statute, Appellants had notice that their conduct *could* violate the Statute; thus, the Statute is not unconstitutional as applied. *Oracle USA, Inc. v. Rimini Street, Inc.*,

191 F.Supp.3d 1134, 1148 (D. Nev. 2016) (citation omitted). As such, the Construction Trade Associations respectfully request that the Court grant the Motion and permit them five minutes of oral argument time to discuss the constitutionality issues and answer any questions the Court may have.

The Board has indicated that it has no objection to the Construction Trade Associations' participation in oral argument. The Construction Trade Associations do not anticipate an objection from Silverwing, which would suffer no prejudice from the Construction Trade Associations' participation in oral argument of this appeal. The Construction Trade Associations respectfully request five minutes of time and consent to a corresponding expansion of time for Silverwing, should Silverwing request that expansion, so that argument time allotted to the two sides would remain equal.

IV. Conclusion

Based on the foregoing, the Construction Trade Associations respectfully request that the Court grant their Motion and permit them five minutes of oral argument time at the upcoming oral argument.

Affirmation

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

Dated: August 24, 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 August 24, 2020, a true and correct copy of the foregoing AMICUS CURIAE CONSTRUCTION TRADE ASSOCIATIONS' MOTION TO PARTICIPATE IN ORAL ARGUMENT 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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Dated: August 24, 2020

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