NOT

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SUPREME COURT OF NEVADA

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DANA GENTRY, an individual; and ROBERT CLARKE, an individual, Plaintiffs, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, *et al*. Defendants.	No. 80520 Consolidated with No. 81166 **RESPONSE TO DEFENDANT'S ASSERTED "NEW" PRECEDENT RAISED FOR THE FIRST TIME DURING ORAL ARGUMENT**

Appellant Robert Clarke hereby provides a response, as requested by the Court, to the SEIU Defendants' assertions of changed circumstances or precedent raised for the first time during oral argument on June 1, 2021. Defendant SEIU, during oral argument, updated the court about recent decisions in: (1) Garcia/Mancini cases (993 F.3d 757, and 2021 WL 1255615); (2) the Eight Judicial District Court's recent decision in favor of Local 1107 in the remand proceeding in Garcia (Case A-17-755270); and (3) a change in precedent affecting the Michigan Supreme Court's decision in *Henry v. Laborers*, 495 Mich. 260 (2014).

I. The Trusteeship Cases.

Appellant does not dispute that the federal court has issued decisions in the federal case challenging the trusteeship, ruling the trusteeship permissible under federal law. However, the trusteeship case is entirely irrelevant to these proceedings. Whether the trusteeship was valid or not has no bearing on the issue of whether Appellant's breach of contract claims were preempted.

Furthermore, the plaintiffs in the trusteeship cases intend to raise the novel issue of Labor-Management Relations Act ("LMRA") preemption ruled on by the Ninth Circuit in a writ of certerori to the United States Supreme Court later this year. The remaining pendant state law claim from the federal cases that was remanded to state court because it was not preempted by Section 301 of the LMRA, was subsequently ruled by the Eighth Judicial District Court as preempted by Section 301 of the LMRA in *Garcia v. SEIU*, Case A-17-755270. The plaintiff in *Garcia* intends to appeal the ruling of the Eighth Judicial District Court given the conflicting rulings of federal and state courts on the issue, and the lower court misapplied Nevada's LMRA Section 301 complete preemption precedent. In any event, those cases have no bearing on the claims and legal issues in this case and do not warrant any consideration in this appeal. Neither case involved wrongful termination of a union employee, nor were there any claims of preemption under the Labor-Management Reporting and Disclosure Act ("LMRDA").

II. The Recent Michigan Supreme Court Decision In *Foster.*

Finally, Defendants raised a change in precedent in the state of Michigan, one of the states alleged to have adopted the *Screen Extras Guild* preemption analysis, citing *Henry v. Laborers*, 495 Mich. 260 (2014). Clearly, this 2014 case is not the changed circumstance that Defendant was citing, as it was held almost a decade ago. The case Defendant was actually referring to was the Michigan Supreme Court's 2020 holding in *Foster v. Foster*, which cites to *Henry*, and is significant to their arguments in this case. 505 Mich. 151, 186 n.6, 949 N.W.2d 102, 120 (2020). In *Foster*, one of the concurring justices took care to address the substantive/jurisdictional preemption doctrine that Defendants seek to be applied here, and discusses the decision of a lower Michigan appellate court "in *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 N.W.2d 94 (2010)," which Defendants cited in their brief as applying the *Screen Extras Guild* substantive/jurisdictional LMRDA preemption analysis. *See* Joint Answering Brief, at 34, 43.

The concurring justice in *Foster* noted that the *Packowski* court, citing to an earlier Michigan Supreme Court preemption case *Ryan v Brunswick Corp*, 454 Mich 20, 40; 557 N.W.2d 541 (1997), "affirmed the circuit court's order granting summary disposition for defendant under

MCR 2.116(C)(4) on the ground that it lacked subject-matter jurisdiction over the claim. In that case, the Court of Appeals determined that the trial court correctly held that it lacked subject-matter jurisdiction over plaintiff's wrongful-discharge claim since it was preempted by the Labor-Management Reporting and Disclosure Act." *Id.* The concurring justice in *Foster* went on to explain, however, that "the Court of Appeals did not ground its holding *on a designation by Congress* of an alternate federal forum for resolution of these types of disputes." *Id.* (emphasis added). The concurring justice in *Foster* went on to highlight that the *Packowski* decision "was not entirely clear on which basis the circuit court granted summary disposition…since on reconsideration, the trial court clarified that 'summary disposition of plaintiff's claim had been granted *under the substantive-preemption doctrine, not the jurisdictional-preemption doctrine*.'" *Id.* (emphasis added). The concurring justice in *Foster* then concluded that the *Packowski* Court's analysis was predicated on the substantive/jurisdictional preemption analysis applied in *Ryan*, which was bad law:

> [A]lthough the Court of Appeals noted that *Ryan* had been 'overruled in part on other grounds,'…the majority did not discuss whether the broad assertion from *Ryan* remained good law *once its operative preemption holding was abrogated by the United States Supreme Court*. Like in *Ryan*, the ambiguity in the Court's holding in *Packowski* is perhaps best thought of as a labeling error since the Court did not need to focus on the issue of whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment.

Id. (emphasis added).

The Michigan Supreme Court's "preemption holding in *Ryan*," which was relied on by the courts in *Packowski* and *Henry* when finding that the LMRDA preempted Michigan wrongful termination law pursuant to the substantive/jurisdictional preemption analysis urged here, "was abrogated by *Sprietsma v Mercury Marine*, 537 U.S. 51; 123 S. Ct. 518; 154 L. Ed. 2d 466 (2002), which held that the FBSA *does not expressly or implicitly preempt state common-law claims*." *Id.* at 185-188. The *Foster* decision and its preemption analysis is remarkably significant, and contrary to Defendant's assertions during oral argument that it has no effect on the issues in this case, the decision has a substantial effect on Defendant's argument that this Court should adopt the

substantive/jurisdictional preemption analysis of the California Supreme Court in *Screen Extras Guild*.

The *Foster* decision is significant for numerous reasons. First, it is the most recent case to address the substantive/jurisdictional preemption analysis Defendants seek to be applied in this case, and notes that the correct analysis is whether Congress expressly or implicitly intended to preempt state law with the federal act being analyzed. *Id.* at 181-183. Second, it is a Michigan Supreme Court case expressly addressing the Michigan Court of Appeals case cited by Defendants in their joint brief, *Packowski*, which applied the substantive/jurisdictional preemption analysis applied in *Ryan* and *Screen Extras Guild* to the LMRDA, concluding that the LMRDA preempted Michigan wrongful termination law. *Id.* (J. Viviano concurring) at n6 *citing Packowski*, 289 Mich. App. at 141. Third, and more importantly, the concurring justice in *Foster* cited to the *Packowski* decision disapprovingly, noting that the decision was unclear on the issue of which doctrine, substantive or jurisdictional preemption it had applied, and noting that it relied on the Michigan Supreme Court's decision in *Ryan*, which was no longer good law. Fourth, and most importantly, the *Foster* decision discusses *Ryan*, which was the first Michigan Supreme Court case to apply the substantive/jurisdictional preemption analysis Defendants seek to be applied here, where Michigan Supreme Court incorrectly found state "common-law products-liability claims were preempted under the Federal Boat Safety Act (FBSA)." *Id.*

The *Foster* decision provides a clear example and evidence that the substantive/jurisdictional preemption analysis Defendants seek to be applied to Appellant's Nevada wrongful termination claims results in incorrect conclusions of federal preemption. *Id.* In *Ryan*, the Michigan Supreme Court analyzed and found federal preemption with the FSBA pursuant to the same substantive/jurisdictional analysis urged by Defendants in this case, and the United States Supreme Court later found that the FBSA did not preempt any state law because "the FBSA does not expressly or implicitly preempt state common-law claims." *Id.* The *Foster* decision highlights that the substantive/jurisdictional preemption analysis applied in *Screen Extras Guild*, *Packowski*, and *Henry* resulted in an incorrect conclusion of federal preemption with the FBSA,

because the express/implied preemption analysis this Court has faithfully applied in all preemption cases prior to this one resulted in the opposite conclusion with regards to FBSA preemption.

If this Court needed a clear example or definitive evidence that the preemption doctrine Defendants seek to be applied in this case pursuant to *Screen Extras Guild* results in incorrect findings of preemption, the 2020 decision of the Michigan Supreme Court in *Foster* provides that example and evidence, while also noting that one of the decisions relied on by Defendants is predicated on bad law abrogated by the United Statas Supreme Court. The *Foster* decision makes abundantly clear that the substantive/jurisdictional preemption doctrine applied in *Henry*, *Packowski*, and *Screen Extras Guild* is contrary to United States Supreme Court precedent, which consistently holds that there are only two types of federal preemption: (1) express preemption; and (2) implied preemption. This Court has faithfully applied those two preemption doctrines to every case raising an issue of federal preemption in Nevada, and to date, unlike the Michigan Supreme Court, the Nevada Supreme Court has never been overturned on an issue of federal preemption. This Court should continue to correctly apply this law and conclude that the LMRDA does not preempt Nevada wrongful termination law.

DATED this 3rd day of June, 2021.

/s/ Michael J. Mcavaoyamaya
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of June 2021, the undersigned served the foregoing **RESPONSE TO PRECEDENT RAISED FOR THE FIRST TIME DURING ORAL ARGUMENT** on all counsel in the E-Service Master List for the above-referenced matter in the Nevada Supreme Court eFiling System in accordance with the Nevada Electronic Filing and Conversion Rules.

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Dated this 3rd day of June, 2021.

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