

No. 81224

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Dec 11 2020 03:18 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DIAMOND NAT. RES. PROT. AND CONSERVATION ASSN, et al.,

Appellants

v.

DIAMOND VALLEY RANCH, LLC, et al.,

Respondents.

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT,
EUREKA COUNTY

Case No. 1902-348, 1902-349, 1902-350

**REPLY IN SUPPORT OF PACIFIC LEGAL FOUNDATION'S MOTION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

STEVEN M. SILVA
Nevada Bar No. 12492
BLANCHARD, KRASNER & FRENCH
5470 Kietzke Lane
Suite 200
Reno, Nevada 89511
Telephone: (775) 384-0022
Facsimile: (775) 236-0901
Email: SSilva@bkflaw.com

DANIEL M. ORTNER*
California Bar No. 329866
PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: DOrtner@pacificlegal.org

**Pro Hac Vice pending*

The “classic role” of an amicus curiae is “to assist a court in a case of public interest by supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). PLF’s proposed amicus brief performs exactly that function: it supplements the parties’ arguments for the Court’s assistance by drawing this Court’s attention to contradictory lines of case law regarding deference to agency statutory interpretations, and it suggests a resolution. This is a case of strong public interest, not merely a dispute between private parties, and PLF’s important perspective will assist the Court in resolving it.

1) PLF Has a Sufficient Interest to Participate as Amicus

Unlike an intervenor, *see* NRCP 24(a), an amicus curiae need not have a concrete “interest in the outcome” or be “affected by the Court’s determination” of the specific case before the Court. DNRPCA Opp. at 2. Rather, it is enough that the amicus have an interest in the subject matter and legal doctrines at issue. *See Nat. Res. Def. Council v. Env’tl. Prot. Agency*, 896 F.3d 459, 463 (D.C. Cir. 2018) (concluding a would-be intervenor was properly an amicus curiae); Black’s Law Dictionary 93 (8th ed. 2004) (defining “amicus curiae” as one who “has a strong

interest in the *subject matter*”) (emphasis added); NRAP 29(d) (requiring an amicus to merely state its “interest in the case”).¹

That standard is satisfied. PLF has a long history of representing property owners defending their ability to make reasonable use of their property.² Just last year, PLF filed an amicus brief in this Court in *Mineral County v. Lyon County* because of its interest in the development of the public trust doctrine and water rights in Nevada.³ PLF is also an expert on the separation-of-powers issues raised in its amicus brief, *see* PLF Amicus Br. at 1 (collecting cases), and on the topic of deference at the state level.⁴ PLF’s subject-matter expertise and interest in the development of property law make it well suited to assist the Court here. This Court

¹ In arguing for a heightened “interest” standard, Petitioners rely on inapposite authority. *See Herring v. FDIC*, 82 F.3d 282, 284–85 (9th Cir. 1995) (dismissing for lack of standing despite plaintiffs’ attempt to recast themselves as amici); *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903) (an interest in a related case should elicit “great liberality” in permitting amicus participation, but is not a requirement).

² *See Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

³ *See* Amicus Brief of Pacific Legal Foundation, *Mineral County v. Lyon County*, No. 75917 (April 19, 2019) (defending ability of the State Engineer to allocate water rights against a claim that this violated the public trust doctrine).

⁴ For example, PLF attorney Daniel Ortner has prepared a 50-state survey on the topic of judicial deference. *See* Daniel Ortner, *The End of Deference: How States are Leading a (Sometimes Quiet) Revolution against Administrative Deference Doctrines* (March 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552321. He was recently invited to present a webinar on the topic hosted by the American Bar Association’s Administrative Law and Regulatory Practice Session, <https://www.yalejreg.com/nc/aba-adlaw-webinar-10-30-the-state-of-deference-in-the-states-the-end-of-deference/>.

routinely accepts briefs of amicus curiae from public interest groups and scholars. *See, e.g., Order, Mineral Co. v. Lyon Co.*, No. 75917 (December 27, 2018) (accepting brief of amicus curiae Law Professors).

2) PLF's Brief Will Assist the Court

Petitioners have requested deference to the decision of the State Engineer, which raises the threshold question of whether such deference is required or appropriate in Nevada. Addressing that question does not “inject extrinsic issues,” DNRPCA Opp. at 8, but draws the issue into sharper relief by situating it in the context of the separation-of-powers guarantees of the Nevada Constitution and the rejections of deference by several sister states. PLF Amicus Br. at 10–25. Providing this kind of broader perspective is precisely the proper role of an amicus brief.

Petitioners mistakenly argue that PLF's broader perspective is irrelevant because under NRS 533.450(10), the Court must extend a presumption of correctness to a “decision of the State Engineer.” DNRPCA Opp. at 5–6 (quoting NRS 533.450(10)). But that only highlights the ongoing confusion in Nevada regarding deference. Does an agency's *statutory interpretation* constitute a “decision” for purposes of the statute? In at least one case, this Court said no. *See Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (contrasting the deference due to a “decision” to grant an application with a determination on a question of law, where “the State Engineer's ruling is

persuasive but not controlling”). But in *United States v. State Engineer*, this Court went the other way and cited the statute in support of its conclusion that the State Engineer’s interpretation “shall be presumed correct, and the party challenging the decision has the burden of proving error.” 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Put simply, NRS 533.450(10) does not answer the deference question, but highlights the confusion in Nevada over the role and scope of deference.

Resolving that confusion is not an “irrelevant academic exercise” that “exceeds the scope of this appeal.” DNRPCA Opp. at 3, 7. Petitioners and Respondents invoke dueling and incompatible lines of precedent in favor of their preferred positions.⁵ PLF’s amicus brief highlights the need for this Court to resolve the tension and provides compelling reasons for rejecting deference under the Nevada Constitution.

Nor is there any merit to Petitioners’ suggestion that PLF is “clearly antagonistic to the State Engineer” and “seeks to assist the Respondents, not the Court.” Opposition at 8, 10. There is nothing unusual about supporting one side’s legal position; indeed, that is contemplated by Rule 29. Nev. R. App. P. 29(d)

⁵*Compare* Sadler Ranch Br. at 14 (“While courts generally defer to the State Engineer’s factual findings, questions of law are reviewed without deference to the State Engineer’s ruling.”) (internal quotation marks omitted), *with* DNRPCA Br. at 28-29 (“The State Engineer’s factual findings and *interpretation of the statutes* he is tasked with implementing are entitled to deference. However, questions of *statutory interpretation* receive de novo review.”) (emphases added and quotation marks omitted).

(“[T]he cover must identify the party or parties supported”); *see also Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Petitioners’ suggestion that PLF’s brief should be excluded as insufficiently “objective,” DNRPCA Opp. at 9, is baseless and should be rejected.⁶

CONCLUSION

PLF respectfully requests this Court permit it to file an amicus brief.

Dated: December 11, 2020.

Respectfully submitted,

/s/ Steven M. Silva

STEVEN M. SILVA

Nevada Bar No. 12492

BLANCHARD, KRASNER & FRENCH

5470 Kietzke Lane

Suite 200

Reno, Nevada 89511

Telephone: (775) 384-0022

Facsimile: (775) 236-0901

Email: SSilva@bkflaw.com

DANIEL M. ORTNER*

California Bar No. 329866

PACIFIC LEGAL FOUNDATION

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

Email: DOrtner@pacificallegal.org

**Pro Hac Vice Pending*

⁶ To the extent Petitioners claim that PLF’s brief demonstrates improper bias, such a claim is unsupported and is contrary to PLF’s long history of principled support for both property rights and the separation of powers.

CERTIFICATE OF SERVICE

I hereby certify that the REPLY IN SUPPORT OF PACIFIC LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS was filed electronically with the Nevada Supreme Court on the 11th day of December, 2020. Electronic Service of the Brief shall be made in accordance with the Master Service List, as follows:

Debbie Leonard, Esq.
Don Springmeyer, Esq.
James N. Bolotin, Esq.
Theodore Beutel Esq.

James N. Bolton, Esq.
Christopher W. Mixon, Esq.
John E. Marvel, Esq.
Karen A. Peterson, Esq.

I further certify that on the 11th day of December, 2020, I served, via USPS first-class mail, complete copies of the Document on the following attorneys of record who are not registered for electronic service:

Beth Mills, Trustee
Marshall Family Trust
HC 62 Box 62138
Eureka, Nevada 89316

DATED: December 11, 2020.

Respectfully submitted,



Barbara Spagna
An employee of Blanchard, Krasner &
French