

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY
DEPARTMENT OF AVIATION,
a political subdivision of the State
of Nevada,

Appellant,
vs.

SOUTHERN NEVADA LABOR
MANAGEMENT
COOPERATION COMMITTEE,
by and through its Trustees Terry
Mayfield and Chris
Christophersen (Petitioner
Below); and OFFICE OF THE
LABOR COMMISSIONER
(Respondent Below),

Respondent.

CASE NO.: 83252

District Court Case No.
A-18-781866-J

Electronically Filed
Nov 19 2021 02:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

FISHER & PHILLIPS LLP
MARK J. RICCARDI, ESQ.
Nevada Bar No. 3141
ALLISON L. KHEEL, ESQ.
Nevada Bar No. 12986
300 S. Fourth Street
Suite 1500
Las Vegas, NV 89101
Telephone: (702) 252-3131
Attorney for Appellant,
Clark County Department of Aviation

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Appellant, Clark County Department of Aviation (“CCDOA”), is represented in this proceeding, and was represented in the case below, by the law firm of Fisher & Phillips, LLP. The CCDOA is a political subdivision of Clark County, State of Nevada.

Dated this 19th day of November 2021.

FISHER & PHILLIPS LLP

/s/ Allison L. Kheel, Esq.
Mark J. Ricciardi, Esq.
Nevada Bar No. 3141
Allison L. Kheel, Esq.
Nevada Bar No. 12986
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

On August 30, 2018, the Office of the Labor Commissioner (“OLC”) issued a final written agency decision, which ruled against Southern Nevada Labor Management Cooperation Committee (“LMCC”) and found no violation of prevailing wage laws based solely on its finding that the carpet replacement work for the CCDOA was not funded by “public money,” as that term is used in NRS Chapter 338. Joint Appendix (hereinafter “APP”) 248-249, Vol. 2. On September 27, 2018, LMCC filed a Petition for Judicial Review before the District Court. APP 001-009, Vol. 1.

On February 4, 2020, the District Court entered its Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial Review (the “February Order”). APP 389-399, Vol. 2. The CCDOA filed a Motion for Reconsideration or Clarification of the February Order on February 21, 2020. APP 400-414, Vol. 2. The CCDOA also filed a timely appeal of the February Order on March 9, 2020, which was assigned Case No. 80798 (“Prior Appeal”). APP 421-435, Vol. 2. The Prior Appeal was later dismissed by the Nevada Supreme Court on July 30, 2020, finding that the CCDOA’s Motion for Reconsideration was a tolling motion, and the Prior Appeal was premature. APP 473-474, Vo. 2.

1 The District Court subsequently issued an Order on the CCDOA's
2 Motion for Reconsideration dated June 25, 2021 (hereinafter the "June
3 Order"). APP 475-480, Vol. 2. The Order modifies and clarifies several
4 of the findings in the February Order and the documents must be read
5 together to determine the final decision of the District Court. ("June
6 Order" and "February Order" collectively referred to as the "Decision").
7
8 APP 389-399; APP 475-480, Vol. 2. The February Order clarifies that the
9 Decision is intended to be a "final order" and is only intended to remand
10 the matter back to the OLC for "ministerial" determinations of the amount
11 of wages due. APP 478:9-479:9, Vol. 2. The Decision on its face has
12 substantive finality. *See Bally's Grand Hotel & Casino v. Reeves*, 112 Nev.
13 1487, 1489 (1996) (finding a final appealable order resolving all claims
14 between all parties where "The district court's order merely sent the case
15 back for a calculation of the amount due Reeves pursuant to the conclusion
16 that she was entitled to benefits. . . . The district court's order reversing the
17 appeals officer's decision that Reeves was entitled to benefits cannot be
18 altered by any decision on remand calculating benefits"). While this
19 Appeal argues that the District Court exceeded the scope of its authority by
20 deciding the maintenance issue and placing limitations on the scope of the
21 OLC's review, if the Decision is enforced as written, the CCDOA is
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1 prohibited from introducing (and the OLC is prohibited from receiving)
2 evidence showing this carpet installation work is exempt maintenance
3 work. Thus, the Decision is a substantively final order on the issue that
4 prevailing wages are due and owing and is a final order denying a stay of
5 enforcement (which is a request for injunctive relief). Thus, the Decision
6 is a final order for purposes of appeal under NRAP 3A(b)(1) and (3). To
7 hold otherwise would allow the erroneous actions of the District Court to
8 escape judicial review. On July 16, 2021, the CCDOA timely filed this
9 Appeal from the Decision in accordance with NRAP 4(a) and pursuant to
10 NRS § 233B.150. APP 481-502, Vol. 3.
11

12 Alternatively, if this Court were to find that that the Decision was
13 not a final order giving right to an immediate appeal, the CCDOA hereby
14 Petitions in the alternative for a Writ of Prohibition and/or a Writ of
15 Certiorari to ensure the errors of the Decision do not escape substantive
16 judicial review. The Petition in the alternative is supported by the
17 Affidavit of Counsel, Allison L. Kheel, Esq., attached hereto as **Exhibit A**.
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19

20 **ROUTING STATEMENT**

21 The Supreme Court should retain assignment of this case. This is an
22 Appeal of a Final Order Granting a Petition for Judicial Review of the final
23 agency determination issued by the OLC under the Administrative
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1 Procedure Act, NRS § 233B.150. This Court has primary jurisdiction over
2 matters which present questions of first impression as well as matters
3 which present questions of statewide importance. *See* NRAP 17(a)(13)
4 and (14). This case meets both requirements.

5
6 Here, the CCDOA argues that the District Court exceeded its
7 authority and jurisdiction by making factual findings beyond the
8 administrative record and OLC's sole "public money" determination.
9 Additionally, the District Court's Decision purports to retain jurisdiction
10 over this case despite simultaneously ordering the matter remanded to the
11 OLC. APP 398, Vol. 2. The Decision also purports to preclude the OLC
12 from ever making a determination that the carpet maintenance work is
13 "routine maintenance" work and exempt from prevailing wage
14 requirements. APP 478, Vol. 2. This case presents issues of first
15 impression regarding the District Court's authority to impose restrictions
16 upon an administrative agency's review upon remand, and the amount of
17 evidence which is sufficient to show work is maintenance work and
18 exempt from the prevailing wage.
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24 This case also presents matters of statewide importance as resolution
25 of the issues in this case will have enormous practical and financial
26 implications for county and municipal governments, their contracting and
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1 bidding practices, and their budgets. Requiring the CCDOA to pay
2 prevailing wage rates for normal, everyday maintenance work (the vast
3 majority of which is regularly performed by the CCDOA’s own “in-house”
4 employees) would ultimately hinder all state and local government efforts
5 to provide efficient operations to service the needs of the public.
6

7
8 Moreover, the Nevada Supreme Court previously issued two Orders
9 to Show Cause in the Prior Appeal, Case No. 80798, designating the
10 Motion for Reconsideration filed in the District Court as a tolling motion,
11 which resulted in the clarifying June Order which further complicated this
12 matter. APP 473-480, Vo. 2. Additionally, after the District Court denied
13 the CCDOA’s Request for a Stay Pending Appeal, the Nevada Supreme
14 Court also heard and denied the CCDOA’s Request for a Stay based on an
15 illusory stipulation from the LMCC. Docket Entry 21-24557 (“LMCC
16 pointed out that ‘no one is arguing that workers should be given the unpaid
17 wages while the appeal is pending’” and the “LMCC indicated that it has
18 ‘stipulated that [Labor Commissioner’s] calculation will have no
19 preclusive effect pending the appeal.’”). On Appeal, the Court may be
20 called upon to review the Supreme Court’s Decision on the Request for a
21 Stay. As many of the issues on Appeal will be impacted by the currently
22 ongoing proceedings before the OLC, this case also presents a unique
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1 procedural posture and question of law pertaining to simultaneous
2 litigation of the same matter in separate forums. *See* Ex. A at ¶ 11. Thus,
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4 the Nevada Supreme Court should retain this case despite it being
5 presumptively assigned to the Court of Appeals under NRAP 17(b)(9), in
6 the interest of judicial efficiency and consistency.
7

8 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

9 1. Whether the OLC correctly held that the carpet installation
10 work under Bid No 17-604273 was not subject to prevailing wage because
11 the work is not funded by “public money”?

12 2. Whether the District Court can retain jurisdiction over future
13 proceedings beyond merely enforcing its Order, while simultaneously
14 remanding the matter, and ceding jurisdiction to the OLC?

15 3. Whether the District Court erred by making factual and legal
16 findings that went beyond the Labor Commissioner’s sole “public money”
17 determination and the scant, undeveloped administrative record that was
18 before the District Court?

19 4. Whether the District Court erred by improperly limiting the
20 Labor Commissioner’s authority to hold a hearing, receive and consider
21 evidence, and reach an original determination regarding the scope of the
22 work and whether the nature of the work was exempt maintenance work?

23 5. Whether the District Court erred by denying the CCDOA’s
24 Request for a Stay Pending Appeal?

25 **STATEMENT OF THE CASE**

26 This Appeal seeks review of the District Court’s Decision granting
27 the LMCC’s Petition for Judicial Review (“PJR”) of the OLC’s final
28 agency determination under the Administrative Procedure Act, NRS
Chapter 233B. APP 478-479, Vol. 2. The OLC’s determination that the

1 carpet maintenance and installation work was not subject to the prevailing
2 wage requirements of NRS Chapter 338 was based solely on the OLC's
3 determination that this work was not funded by "public money." APP 007-
4 008, Vol. 1. As the OLC viewed the public money issues as a
5 determinative threshold issue, the OLC never held an evidentiary hearing
6 to investigate other reasons why this work is exempt from the prevailing
7 wage. APP 234-249, Vol. 2. The District Court's Decision exceeded its
8 authority and jurisdiction by making findings beyond the administrative
9 record. The remainder of the procedural posture of this case is outlined in
10 the Statement of Facts below.

11 **STATEMENT OF FACTS**

12 **A. Original Administrative Proceedings Before The OLC**

13 On April 28, 2017, LMCC filed a complaint with the OLC averring
14 that the CCDOA bid certain carpet maintenance work (Bid No. 17-604273)
15 in violation of prevailing wage laws contained in NRS Chapter 338. APP
16 014-019, Vol. 1. The Labor Commissioner did not hold a full evidentiary
17 hearing on this matter but did request and receive evidence on the
18 CCDOA's budget, tax revenue allocation and funding sources of the
19 maintenance work performed by the CCDOA. APP 234-249; APP 393 at
20 ¶ 15, Vols. 1 and 2. No evidence was presented to or considered by the
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1 OLC as to the nature or scope of the work and whether that work was
2 properly classified as “maintenance work.” APP 009-249, Vol. 1.
3

4 On August 30, 2018, the OLC issued a final agency decision which
5 ruled against LMCC and found no violation of prevailing wage laws based
6 solely on its finding that the carpet replacement work for the CCDOA was
7 not funded by “public money,” as that term is used in NRS Chapter 338.
8 APP 007-008, Vol. 1.
9

10 The OLC’s Determination stated in relevant part:
11

12 The complaint alleged possible violations of Nevada
13 Revised Statutes (NRS) 338.010 to 338.090, inclusive, or
14 Nevada Administrative Code (NAC) 338.005 to 338.125,
15 inclusive. DOA asserted carpet maintenance work is financed
16 from two sources airline revenues and non-airline revenues.
17 None of the repairs and maintenance funds are financed in
18 any part through any taxes or public money. The DOA is not
19 subsidized by any tax revenues of the County and has been a
20 self-sustaining entity since 1966. DOA represented in writing
21 that the work in question is not paid for with public money.
22

23 The Office of the Labor Commissioner has completed
24 its review of the complaint. The compliance review
25 conducted did not reveal violations of Nevada labor laws with
26 regards to NRS Chapter 338 or NAC Chapter 338. This
27 complaint has been closed.
28

APP 007, Vol. 1. The OLC’s determination does not discuss a definition
of “maintenance” nor discuss any facts pertaining to the nature of the
work. APP 007, Vol. 1.

1 **B. The LMCC’s Petition For Judicial Review**

2 On September 27, 2018, LMCC filed a PJR before the District Court
3
4 seeking to reverse the OLC’s decision. APP 001-009, Vol. 1. The PJR
5 alleged:

6 [t]he DOA, in the Bid documents, separated the Project’s
7 material costs from the Project’s labor costs. This is a
8 violation under NRS § 338.080(3), which reads in part: “A
9 *unit of the project* must not be separated from the total
10 project, even if that unit is to be completed at a later time, in
order to lower the cost of the project below \$250,000.”

11 APP 002:13-17, Vol. 1 (emphasis added). The PJR also asserted that
12 “[t]he matter is clearly not maintenance” without any argument or evidence
13 to support this claim. APP 003:9, Vol. 1.

14 The District Court held a Hearing on August 27, 2019. APP 363-
15 388, Vol. 2. The District Court entered its Findings of Fact, Conclusions
16 of Law and Order Granting Petition for Judicial Review on February 4,
17 2020. APP 389-399, Vol. 2.

18 The February Order made several problematic findings, including:

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- 22 • “The Court rules and Orders that the money received by the
23 Airport is public money within the meaning of NRS 338 and
24 that the Project did not constitute maintenance within the
meaning of NRS 338 et seq.” APP 398:9-11, Vol. 2;
 - 25 • “The Court further Orders the matter remanded to the OLC
26 for the sole purposes of determining the amount, if any, of the
27 completed work that constitutes maintenance and to whom
28 and how much additional wages should be paid for work

subject to NRS 338 et seq.’s prevailing wage requirements.” APP 398:12-15, Vol. 2;

- “In making such a determination, the OLC must not separate the Project into smaller units as doing so is in violation of Nevada law.” APP 398:15-16, Vol. 2;
- “The Court further Orders that it retains jurisdiction over any subsequent proceedings that may be necessary for the collection of information, the enforcement of this Order or for further review, if any, as may be sought by the parties.” APP 398:21-23, Vol. 2.¹

C. The CCDOA’s Motion For Reconsideration And The Prior Appeal

Due to numerous legal and factual errors contained in the February Order, the CCDOA filed a Motion for Reconsideration or Clarification of the February Order on February 21, 2020. APP 400-414, Vol. 2. The

¹ The following additional factual findings pertain to the discussions of the issues identified above:

- “The DOA, in 2016, published an Invitation to Bid, Bid No. 17-604273, for the removal and replacement of 12,000 square feet (approximately the area of two football fields) of carpet and 5,000 linear feet (approximately the distance of one mile) of base cover (collectively referred to herein as ‘Project’).” APP 392:9-12, Vol. 2.
- “The DOA further asserted that the carpet and base cover replacement was performed in smaller sections and so as not to interfere with Airport operations.” APP 392:9-12, Vol. 2.
- “The DOA separated Project material costs from Project labor costs.” APP 394:15, Vol. 2.

1 CCDOA also filed a timely appeal of the February Order on March 9,
2 2020, which was assigned Case No. 80798. APP 421-435, Vol. 2. The
3
4 Prior Appeal was later dismissed by the Nevada Supreme Court on July 30,
5 2020, finding that the CCDOA's Motion for Reconsideration was a tolling
6 motion and the Prior Appeal was premature. APP 473-474, Vol. 2.
7

8 The District Court held a hearing on the Motion for Reconsideration
9 on March 31, 2020, and stated the following relevant excerpts on the
10 record:
11

- 12 • “. . . potential ways in which it could be read to be
13 inconsistent, and some indication of findings that maybe need
14 to be clarified, that were the Court's findings, and not the
15 Labor Commissioner's findings as to whether this was
16 maintenance.” APP 444:22-445:1, Vol. 2.
- 17 • “The outcome is the outcome. The Court is finding that it
18 wasn't maintenance. The Court is finding that it should be
19 remanded to the Labor Commissioner to proceed as directed.
20 And the only issue was, you know, should this Court have
21 retained any of its own jurisdiction following that remand, and
22 where exactly was the finding with regard to the maintenance,
23 and that ultimately it is a final order. And if we make all of
24 those clarifications in the order, the outcome is still the same.
25 The appeal is unchanged, but I believe it at least clarifies the
26 Court's intent with those pieces of the final order.” APP
27 447:11-24, Vol. 2.
- 28 • “I agree with everyone's assessment at this point with the
appeal we are confined with what we can do, and so I think
the best course of action, it really was the Court's intent, you
know, if the Court's review of the order as it came in, as it
was written, was deficient, and the Court did not hand-correct
or send back for correction certain things that were perhaps

incorrect or inconsistent with its order, that's the Court's obligation to have been more on top of things. And that's the Court's fault, that the Court can at least clarify a couple of things now." APP 456:9-20, Vol. 2.

- "I think that this is motion seeking clarification. On that limited basis, the Court is going to give the clarification that it was not the Court's intention to retain jurisdiction for any Labor Commissioner proceedings. And to the extent that the order was worded that way, that was not the Court's intent, and would issue the advisory understanding that it was the Court's intent for the jurisdiction only to be retained for purposes of enforcing the order, or other appropriate basis upon which it would have had further jurisdiction." APP 457:6-17, Vol. 2.

D. The District Court Issues The June Order Modifying The February Order

The District Court subsequently issued an Order on the Motion for Reconsideration dated June 25, 2021. APP 475-480, Vol. 2. Notably, the June Order states the following in pertinent part:

Retention of jurisdiction.

The Court clarifies that paragraph 7 on page 8 of the February Order was intended to allow the Court to enforce ***and interpret*** the February Order, *see Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205, 557 U.S. 137, 151 (2009), and not to interfere with the Labor Commissioner in the performance of her duties. The Labor Commissioner is free to perform her duties, but the Labor Commissioner and the other parties are not free to disobey this Court's Order.

Improper conclusion of law regarding maintenance.

The administrative record and argument presented to the Court by the DOA indicated that the Labor Commissioner treated the contract at issue as a maintenance contract ***paid for***

1 *with repair and maintenance funds.* The Court disagreed,
2 finding that the contract at issue is not a maintenance
3 contract, which findings are consistent with the
4 administrative record, which also addressed whethe[r] the
contract at issue was a maintenance contract.

5 Incorrectly made new factual findings.

6 The Court made no new factual findings. The Court's
7 findings were based upon the administrative record as
8 presented and argued to the Court.

9 Improper limitation on agency's decision making.

10 In remanding the matter to the Labor Commissioner,
11 the Court intends for the Labor Commissioner to use
12 applicable prevailing wage rates to determine the value of
13 wages due and ensure that the unpaid wages are properly
14 paid. The Court considers these tasks to be ministerial in
15 nature. . . . To be clear, if wages were earned for work
16 performed on the project pursuant to the flooring contract and
its scope of work, those wages are to be paid at the applicable
prevailing wage rate because they were earned pursuant to a
public works construction contract.

17 APP 478:9-479:9, Vol. 2 (emphasis added). The June Order modifies and
18 clarifies several of the findings in the February Order and the documents
19 must be read together to determine the final decision of the District Court.

20 APP 389-399; 475-480, Vol. 2.

21
22 **E. The Current Appeal, The Denial Of The CCDOA's**
23 **Request To Stay This Case Pending Appeal And The**
24 **Current Administrative Proceedings Before The OLC**

25 Due to the language of the June Order creating additional legal
26 issues and failing to resolve the previous legal errors identified in the

27 ///

1 Motion for Reconsideration, the CCDOA timely filed the instant appeal²
2 on July 16, 2021. APP 481-502, Vol. 3. Together with filing the Appeal,
3 the CCDOA filed a request for a stay pending appeal in the District Court
4 on an order shortening time. APP 503-542, Vol. 3. The District Court
5 denied the requested stay and held:
6

7
8 The Court finds that no prejudice will come to any party by
9 having wage records produced, potential wage claims
10 calculated, and potential wage claimants identified. Such
11 activities will not defeat the object of DOA's appeal because
12 the Labor Commissioner's activities will not affect the appeal
13 to the Supreme Court. Further, the Labor Commissioner is
14 subject to the Supreme Court's decision and it appears will be
15 able to adjust the wage calculations in accordance with the
16 Supreme Court's ruling in the event that she needs to do so.
17 As for whether or not DOA is likely to succeed on the
18 appeal's merits, that is a matter for the Supreme Court as this
19 Court has already issued its judgment.

20 APP 598:10-22, Vol. 3.

21 In the interim period, the OLC set the case for a prehearing
22 conference on July 26, 2021. APP 537, Vol. 3. The CCDOA then filed an
23 emergency motion to stay and sought review and reconsideration of the
24 Stay with the Supreme Court. APP 503-547, Vol. 3. The Supreme Court

25 ² In the event that the Supreme Court determines that the District Court's
26 Decision is not a final judgment ripe for appeal, Appellant requests in the
27 alternative that the Supreme Court treat this as a Petition for a Writ of
28 Prohibition and/or a Writ of Certiorari to prohibit the District Court from
exercising jurisdiction beyond the statutory authority and prohibiting the
District Court from improperly limiting the scope of the Hearing and
matter before the OLC.

1 issued a temporary stay to permit the LMCC an opportunity to file a reply
2 to the motion. Docket Entry 21-21486.
3

4 On August 23, 2021, this Court denied the CCDOA's request for a
5 stay pending appeal, reasoning:

6 In particular, we note that, in the stay motion, appellant's
7 arguments focus on postponing the Labor Commissioner's
8 determination of how much is owed to whom, at least until
9 the appeal is decided and the scope of the agency proceedings
10 is clarified. Indeed, in its opposition to appellant's stay
11 motion below, LMCC pointed out that "***no one is arguing***
12 ***that workers should be given the unpaid wages while the***
13 ***appeal is pending.***" Further, in its opposition to the stay
14 motion in this court, LMCC indicated that it has "stipulated
that [Labor Commissioner's] ***calculation will have no***
preclusive effect pending the appeal." In light of this, it does
not appear that the object of the appeal will be defeated . . .

15 Docket Entry 21-24557 (emphasis added).

16 Once the temporary stay was lifted, the OLC rescheduled the
17 prehearing conference, which was held on September 28, 2021. The OLC
18 also sent a request for documents to the CCDOA, which the CCDOA
19 responded to on September 27, 2021. On October 15, 2021, the CCDOA
20 further clarified why each of the 132 documents produced were responsive
21 to the OLC's request for records. *See* Ex. 1 to Ex. A. In correspondence
22 dated October 28, 2021, the OLC indicated its intention to schedule a
23 hearing in December 2021 on the issue of whether the work performed on
24 Bid No. 17-604273 was "normal maintenance." Ex. 2 to Ex. A.
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SUMMARY OF ARGUMENT

The Decision of the District Court contains several legal errors and internally contradictory findings which render the Decision unenforceable, and which deprive Appellant of its right to due process. The OLC's decision that prevailing wage did not apply to the carpet maintenance work was based solely on its determination that the work was not funded with "public money." APP 007-008, Vol. 1. However, the District Court went beyond simply reversing and remanding the matter back to the OLC. The District Court made the additional finding that the "project did not constitute maintenance" without any evidence in the Record actually describing the work. APP 397:10-11, Vol. 2.

Additionally, the District Court's Decision retained jurisdiction over future proceedings while simultaneously remanding the case back to the OLC, which is contrary to Nevada law. APP 398:12-14, 21-23, Vol. 2. The District Court exceeded its authority by limiting the Labor Commissioner's authority and the scope of the OLC's review on remand to "ministerial" determinations of "the value of wages due." APP 478:26-479:2, Vol. 2.

The District Court incorrectly found that the OLC fully considered the issue of whether the work was maintenance. APP 478:16-23, Vol. 2. Even assuming *arguendo* that there had been a complete evidentiary record

(which there was not), the District Court still exceeded its statutory authority on a PJR by making additional findings beyond the sole “public money” findings set forth in the final agency determination of the OLC. *See Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (Nev. 1979). Agency determinations regarding factual issues or mixed issues of law and fact are entitled to great deference. *DMV v. Jones-West Ford, Inc.*, 114 Nev. 766, 772-773, 962 P.2d 624, 628-629 (1998). However, even assuming *arguendo* that the OLC had made such a determination (which it did not), such a determination would have required the OLC to make **factual findings** about the nature of the work as “maintenance,” to which the District Court should have accorded deference. *Id.*

For these reasons, the CCDOA requests that the District Court’s Decision be reversed and set aside, and the District Court ordered to remand the issue back to the OLC to hold a full and complete (unlimited) evidentiary hearing and make an initial determination regarding whether the project was “maintenance” and, thus, exempt from prevailing wage.

ARGUMENT

A. Standard Of Review

On appeal, “[t]he standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court.” *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686,

1 262 P.3d 715, 718 (2011); *see also City of Reno v. Bldg. & Constr. Trades*
2 *Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 723 (2011) (“We do
3 not give any deference to the district court decision when reviewing an
4 order regarding a petition for judicial review.”); *Elizondo v. Hood Mach.,*
5 *Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).
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8 The substantive controlling standards for conducting a judicial
9 review under the APA are set forth in NRS § 233B.135(3). NRS §
10 233B.135(3) provides three alternative outcomes for a PJR: the court
11 may: (1) remand or (2) affirm the final decision or (3) “set it aside in
12 whole or in part if substantial rights of the petitioner have been
13 prejudiced because the final decision of the agency is: . . . (b) In excess
14 of the statutory authority of the agency; . . . (d) Affected by other error of
15 law; (e) Clearly erroneous in view of the reliable, probative and
16 substantial evidence on the whole record; or (f) Arbitrary or capricious or
17 characterized by abuse of discretion.” NRS § 233B.135(3). The LMCC
18 bore the burden of proof in its PJR to show that the OLC’s decision was
19 tainted by one of the errors listed in NRS § 233B.135(3) but failed to
20 demonstrate any such errors. Thus, the District Court erred in granting
21 the PJR.
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1 Review of agency determinations should be confined to the record
2 as developed at the agency level. NRS § 233B.135(2). The standard of
3 deference accorded to an administrative decision depends on whether the
4 issues raised by the decision are questions of law or of fact. *State Bus. &*
5 *Indus. v. Granite Constr.*, 118 Nev. 83, 86, 40 P.3d 423, 426 (2002); NRS
6 § 233B.135. Under these standards, the Court must presume the agency's
7 decision to be reasonable and lawful and may not substitute its judgment
8 for that of the agency on factual questions. NRS § 233B.135(3).
9

10 The Court should not re-weigh the evidence, and instead is limited
11 to reviewing the decision under the substantial evidence standard. *Nassiri*
12 *v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489
13 (2014); *Construction Indus. Workers' Comp. Grp. ex rel. Mojave Elec. v.*
14 *Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 598-99 (2003). Substantial
15 evidence is the quantity of evidence which a reasonable person could
16 accept as adequate to support a conclusion. *State Employment Security*
17 *Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498-499,
18 n.1 (1986).
19

20 A court may conduct an independent (*de novo*) review of pure
21 questions of law. *DMV*, 114 Nev. at 772-773. However, an agency's
22 legal conclusions that are based upon the facts are not pure questions of
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1 law, and therefore are entitled to deference. *Id.* Moreover, a court may not
2 foreclose the exercise of an agency’s independent judgment on matters
3 that are particularly within the agency’s competence. *Nevada Tax*
4 *Comm’n v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957).

6 Specialized government agencies have the power to construe the
7 laws they enforce, and their constructions are entitled to deference. *Folio*
8 *v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983) (“we are obliged to
9 attach substantial weight to the agency’s interpretation”); *State v. State*
10 *Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (same); *Sierra*
11 *Pacific Power Co. v. Dept. of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147,
12 1148 (1980) (same); *Clark County School District. v. Local Gov’t*
13 *Employee Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117
14 (1974) (same). The Legislature and the Nevada Supreme Court have
15 designated the OLC as the expert in labor standards enforcement. *See City*
16 *of Reno*, 127 Nev. at 119, 251 P.3d at 721; *see also Baldonado v. Wynn*
17 *Las Vegas, LLC*, 124 Nev. 951, 956, 194 P.3d 96, 104 (2008). Courts
18 should allow for the agency to use its specialized knowledge, experience
19 and expertise when evaluating the evidence before it to determine what
20 constitutes “maintenance.” NRS § 233B.123(5). NRS Chapter 338 governs
21 prevailing wage and requires employers to pay their employees prevailing
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1 wage rates only when an employee is: (1) performing covered work on a
2 ***public works project*** within the meaning of NRS § 338.010(16); and (2)
3
4 the work is not otherwise subject to exemption, such as NRS §
5 338.011(1)’s exceptions for work directly related to “normal maintenance.”
6
7 The definition of the phrases “public works project” and “normal
8 maintenance” are not abstract questions of statutory construction, they are
9 fact-based determinations. *Bombardier Transp. v. Nevada Labor Comr.*,
10 433 P.3d 248, 253-256 (2019). Thus, the OLC must make the initial
11 determination on these definitions and those determinations should be
12 accorded deference. *Id.* Here, the OLC considered evidence on the source
13 of funds and correctly concluded it was not “public money.” APP 007,
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15 Vol. 1. The Decision was an abuse of discretion and should be set aside.
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17 **B. The District Court Committed A Manifest Error Of Law**
18 **And Exceeded Its Jurisdiction By Simultaneously**
19 **Remanding The Matter Back To The OLC And Retaining**
20 **Jurisdiction**

21 The Decision issued by the District Court contains several legal
22 errors and internally contradictory findings which render the Decision
23 unenforceable, and which deprive the CCDOA of its right to due process.
24 Paragraph 4 of the February Order purports to remand the matter back to
25 the OLC. APP 398:12-16, Vol. 2. However, in direct contrast to this
26 remand instruction, Paragraph 7 of the February Order states:
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1 The Court further Orders that it retains jurisdiction over any
2 subsequent proceedings that may be necessary for the
3 collection of information, the enforcement of this Order or for
4 further review, if any, as may be sought by the parties.

5 APP 398:21-23, Vol. 2. Paragraph 7 purports to retain jurisdiction over
6 future proceedings while simultaneously disposing of the case and ceding
7 jurisdiction to the OLC. APP 398-21-23, Vol. 2. This language also alters
8 the standard subpoena power of the OLC, as a party would potentially face
9 contempt of court proceedings and sanctions and the OLC would not have
10 to institute separate enforcement proceedings in the remanded proceedings.
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12 APP 398:21-23, Vol. 2.

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14 The Nevada Supreme Court in *Westside Charter* made it clear that
15 the district court cannot remand a matter to the agency and retain
16 jurisdiction at the same time. *See Westside Charter Service, Inc. v. Gray*
17 *Line Tours of S. Nev.*, 99 Nev. 456, 459-460, 664 P.2d 351, 353 (1983);
18 *see also SFPP, L.P. v. Second Jud. Dist. Court*, 123 Nev. 608, 612, 173
19 P.3d 715, 717 (Nev. 2007). Doing so deprives the OLC of the power to
20 hear the matter and any findings or enforcement measures taken by the
21 OLC would contradict the jurisdiction of the Court. *Id.*

22
23 While not binding precedent on the Court, similar language in an
24 order drafted by the LMCC in another case (*LMCC v. City of Boulder City*
25 *& MMI Tank, Inc.*) was struck down in an unpublished order of affirmance
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1 from the Nevada Supreme Court citing *SFPP* and finding the district
2 court’s attempt to “retain jurisdiction over the matter, in the event that the
3 parties seek relief from the labor commissioner and thereafter desire
4 judicial review” was improper. *See Southern Nevada Labor Management*
5 *Cooperation Committee, by and through its Trustees Terry Mayfield and*
6 *John Smirk, et al v. City of Boulder City & MMI Tank, Inc.*, Case No.
7 68060, Doc. 16-14802 at *5 fn.1 (May 11, 2016 Order of Affirmance)
8 (unpublished) (discussing the district court’s retention of jurisdiction,
9 stating “[t]his the court cannot do.”) (emphasis added).³

13 The district court can only retain jurisdiction until a final judgement
14 has been entered. *SFPP*, 123 Nev. at 612, 173 P.3d at 718 (upon filing of
15 the signed order “the district court lost jurisdiction . . . and lacked
16 jurisdiction to conduct any further proceedings with respect to the matters
17 resolved in the judgment . . .”). The district court only retains jurisdiction
18 to deal with matters ancillary to the final order (e.g., taxation of costs, etc.).
19 *Westside Charter*, 99 Nev. at 458-459, 664 P.2d at 352-353.

23 The Court clarified in its June Order that Paragraph 7 on page 8 of
24 the February Order was intended to allow the Court to “enforce *and*
25 *interpret*” the February Order. APP 478:11, Vol. 2. However, the

27 ³ A copy is included in the Appendix at APP 407-411, Vol. 2, for ease of
28 reference.

1 language of the June Order does not correct the improper retention of
2 jurisdiction in Paragraphs 7 and 8 in such a way as to eliminate the
3 ambiguity in the retention of jurisdiction. APP 478-479, Vol. 2. The
4 Court should reach the same conclusion that it reached in *Westside Charter*
5 and *LMCC v. City of Boulder* and reverse the District Court’s improper
6 retention of jurisdiction.
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9 **C. The District Court Erred By Making Factual And Legal**
10 **Findings That Went Beyond The Labor Commissioner’s**
11 **Sole “Public Money” Determination And The Scant,**
12 **Undeveloped Administrative Record That Was Before The**
13 **District Court**

14 The Decision is replete with improper, internally inconsistent, and
15 unsupported findings, that show that the District Court exceeded its
16 authority in deciding the PJR.

17 In a PJR, the district court has the limited statutory power to do one
18 of the following three actions: (1) remand; (2) affirm the final agency
19 decision; or (3) “set it aside in whole or in part . . . because the final
20 decision of the agency is: . . . Clearly erroneous in view of the reliable,
21 probative and substantial evidence on the whole record. . .” NRS §
22 233B.135(3)(e). The Court must (just as the District Court should have
23 done below) review the OLC’s determination for an abuse of discretion or
24 prejudicial legal error. *State Tax Comm’n v. Am. Home Shield of Nev.,*
25 *Inc.*, 127 Nev. 382, 385, 254 P.3d 601, 603 (2011). “While a reviewing
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1 court may decide pure questions of law without affording the agency any
2 deference, the agency's conclusions of law, which will necessarily be
3 closely related to the agency's view of the facts, are entitled to deference,
4 and will not be disturbed if they are supported by substantial evidence."
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6 *DMV*, 114 Nev. at 772-774.

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8 Consistent with this standard, it is the duty of the administrative
9 agency to state its findings of fact and conclusions of law in the final
10 agency decision — to facilitate and limit the scope of the court's review in
11 a PJR. NRS § 233B.125.⁴

12
13 Thus, the District Court should not have made findings beyond the
14 scope of the OLC's findings of fact and conclusions of law stated in the
15 OLC's determination which provided in pertinent part:
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17 . . . DOA asserted carpet maintenance work is financed
18 from two sources airline revenues and non-airline revenues.
19 None of the repairs and maintenance funds are financed in
20 any part through any taxes or public money. The DOA is not
21 subsidized by any tax revenues of the County and has been a
22 self-sustaining entity since 1966. DOA represented in writing
23 that the work in question is not paid for with public money.

24 The Office of the Labor Commissioner has completed
25 its review of the complaint. The compliance review

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28 ⁴ “. . . Except as provided in subsection 5 of NRS 233B.121, a final
decision must include findings of fact and conclusions of law, separately
stated. Findings of fact and decisions must be based upon a preponderance
of the evidence. Findings of fact, if set forth in statutory language, must be
accompanied by a concise and explicit statement of the underlying facts
supporting the findings. . .” NRS § 233B.125.

1 conducted did not reveal violations of Nevada labor laws with
2 regards to NRS Chapter 338 or NAC Chapter 338. This
3 complaint has been closed.

4 APP 007, Vol. 1. The OLC's original finding that the project was not
5 funded by "public money" is supported by substantial factual evidence in
6 the record. APP 007, Vol. 1; *see also* APP 241-247, Vols. 1 and 2
7 (receiving evidence of non-tax-based financing sources and operational
8 budget). Therefore, the District Court erred by failing to defer to this fact-
9 based conclusion of law. APP 007, Vol. 1; APP 236-249, Vols. 1 and 2.
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11 Additionally, the District Court's February Order appeared to have
12 chosen to remand the matter to the OLC, recognizing that the OLC must
13 determine "the amount, if any, of the completed work that constitutes
14 maintenance and to whom and how much additional wages should be paid
15 for work subject to NRS 338 et seq.'s prevailing wage requirements."
16 APP 398:12-15, Vol. 2. However, in direct contrast to this remand
17 directive, the immediately preceding paragraph of the February Order
18 concluded that "the Project did not constitute maintenance within the
19 meaning of NRS 388 et seq." APP 398:9-11, Vol. 2. It is internally
20 inconsistent to find the administrative record sufficient to conclude that the
21 project is not maintenance while simultaneously ordering the OLC to
22 develop a record whether the work might be maintenance. APP 398:9-16,
23 Vol. 2.
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1 In the June Order deciding the CCDOA's Motion for
2 Reconsideration, the District Court erroneously found that the Labor
3 Commissioner **previously** found that "the contract at issue was a
4 maintenance contract" (APP 478:20, Vol. 2) — a finding the Labor
5 Commissioner NEVER made. The Decision improperly makes new
6 factual findings on the maintenance issue, concluding "the contract at issue
7 is not a maintenance contract" and "the Project did not constitute
8 maintenance," despite the agency *deliberately* not expressing any findings
9 on this issue in its determination. APP 48:17-19, Vol. 1; APP 398:10-11,
10 Vol. 2. *Revert*, 95 Nev. at 782. The LMCC even agreed with the CCDOA
11 that any such finding from the District Court would constitute reversible
12 error.⁵

18 ⁵ In its April 16, 2019 Reply Brief, the LMCC expressly argued the reverse,
19 asserting in relevant part:

20 Nowhere in the Decision does the [OLC] address this issue,
21 let alone conclude that the [CCDOA] was engaging in mere
22 maintenance . . . The [CCDOA] never sought judicial review
23 of the [OLC's] refusal to go beyond the public money
24 argument and evaluate the matter under the normal operations
25 and normal maintenance exceptions found in NRS 338.001,
26 and neither did the [LMCC]. As such, that issue is not before
27 the Court . . . [the LMCC] believes any rulings on the issue
28 will constitute error, as the [OLC] made no factual findings or
legal conclusions related to [the] issue, and the LMCC was
never allowed to conduct discovery related to, nor to
challenge any other representations made by the [CCDOA] to
the [OLC]. APP 335:5-24, Vol. 2.

1 The administrative record reveals that the District Court did not have
2 before it the necessary factual record to determine whether, all, some or
3 none of the carpet installation work should be considered “maintenance”
4 work under NRS 338 et seq. APP 009-249, Vols. 1 and 2. The factual
5 findings of the OLC were limited to the public money issue (looking at tax
6 records and funding sources), and the District Court did not have
7 jurisdiction to make a determination beyond these factual findings. APP
8 007-008, Vol. 1. Factual findings about the scope and nature of the work
9 which might or might not result in the work being classified as
10 maintenance simply cannot be implied from the Record. APP 009-249,
11 Vols. 1 and 2. The CCDOA was never afforded the opportunity for a
12 hearing or to introduce evidence on the maintenance issue. APP 009-249,
13 Vols. 1 and 2. A permissible remand order, finding insufficient evidence
14 in the Record to support the maintenance exception (and thereby
15 instructing the OLC to collect such evidence) is simply not the same as the
16 Decision in this case, affirmatively finding the project “did not constitute
17 maintenance.” APP 398; APP 478, Vol. 2.
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24 Even the LMCC originally claimed that it was denied the
25 opportunity to introduce rebuttal evidence on the maintenance issue. APP
26 335:21-24, Vol. 2. *Cf. Griffin v. Westergard*, 96 Nev. 627, 632 (1980).
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1 The CCDOA is now being denied the opportunity to introduce evidence on
2 this critical issue of maintenance, in denial of its right to due process.
3

4 In *Bombardier*, the Nevada Supreme Court held that the statute
5 intentionally does not contain a definition of public money or maintenance
6 work because such determinations are highly dependent on the unique and
7 specific facts of each case, and it is up to the administrative agency to be
8 the initial finder of facts. *Bombardier*, 433 P.3d at 255. Deference to the
9 OLC’s technical expertise⁶ in judging factual nuances is necessary to
10 determine what is or is not “maintenance”. *See e.g., Bombardier*, 433 P.3d
11 at 248, 255 (stating that repairing a broken window was considered
12 maintenance, but heavy corrective maintenance of the tram system was not
13 maintenance).
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17 The Decision seems to rely mainly upon supposition and conjecture
18 derived from only the square footage stated in the original bid document.
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21 ⁶ The following hypotheticals further illustrate the need for a fact specific
22 determination from the OLC to demarcate the line (and/or factors) to
23 determine if a task is or is not normal maintenance: Does regular
24 shampooing of carpet constitute maintenance? Does adding glue or a nail
25 to a lifting edge of carpet tile constitute maintenance? Does swapping out
26 one square of carpet tile that was torn constitute maintenance? Does
27 replacing multiple tiles adjacent to a torn square of carpet so there is not a
28 color variation between old and new squares constitute maintenance?
Does the number of tile squares replaced determine if the task is
maintenance? Does the fact that replacing carpet tiles requires no
specialized skill make the task maintenance?

1 The Decision characterizes the scope of the work as “a large volume of
2 repair work” and “carpeting that would cover approximately two football
3 fields.”⁷ APP 397:5-17, Vol. 2. Assuming *arguendo* that all 12,000 square
4 yards of carpet was installed in one contiguous area (which it was not),
5 12,000 square yards is still only enough carpet to cover a few gate areas.
6
7 In a complex where a single terminal covers over 1.9 million square feet,
8 characterizing this work as a “large volume of repair work” is purely
9 subjective and represents an arbitrary and capricious finding by the District
10 Court.⁸ The District Court cannot usurp the OLC’s role as the initial finder
11 of fact and doing so in this case constitutes reversible error.
12

14 Additionally, the Decision further concludes — without any factual
15 support — that “the intent of the bid and Project execution was clearly an
16 effort to manage costs.”⁹ APP 397:13-14, Vol. 2. Such unsupported and
17 inflammatory conclusions are prejudicial to the CCDOA as such findings
18 potentially could support the OLC imposing additional penalties against
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22 ⁷ The Court can take judicial notice of the fact that a standard football field
23 (high school, college and the NFL) including both end zones is 57,600
24 square feet and two football fields is 115,200 square feet.

25 ⁸ The Court can take judicial notice of the size and square footage of the
26 Airport complex as a matter of public record.

27 ⁹ The Decision’s conclusion about cost saving intent is inflammatory and
28 unfairly prejudicial to the CCDOA, in addition to being simply wrong. It
is far cheaper for CCDOA to use its already existing maintenance staff
(who are exempt from prevailing wage and present no additional cost to
the CCDOA) for completion of this work.

1 the CCDOA (and, which the Decision expressly permits the OLC to do).
2 APP 398:17-18, Vol. 2. As only the OLC has the ability to make a
3 determination regarding whether the carpet project constituted exempt
4 maintenance work in the first instance, the Court must reverse the Decision
5 of the District Court to avoid denying the CCDOA its right to due process,
6 and order the District Court to remand the matter to the OLC to make an
7 original determination on the issue of “maintenance.”
8

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10 **D. The Decision Manifests Several Errors Of Law And Was**
11 **In Excess Of The Scope Of The District Court’s**
12 **Jurisdiction By Purporting To Limit The OLC’s Scope Of**
13 **Review On Remand**

14 The Decision of the District Court improperly limits the scope of the
15 OLC’s review on remand by explicitly ordering the OLC that it may not
16 consider the issue of maintenance and “must not separate the Project into
17 smaller units as doing so is in violation of Nevada law.” APP 398:15-16,
18 Vol. 2. “The Court further Orders the matter remanded to the OLC for the
19 sole purposes of determining the amount, if any, of the completed work
20 that constitutes maintenance and to whom and how much additional wages
21 should be paid for work subject to NRS 338 et seq.’s prevailing wage
22 requirements.” APP 398:12-15, Vol. 2. The June Order clarifies that the
23 OLC’s review is limited to ministerial determinations of wages due. APP
24 478:25-479:2, Vol. 2.
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1 By imposing these limitations, the Decision is improperly limiting
2 the scope of the issues and determinations that the OLC may consider on
3 remand — without any legal basis to impose such limitations. *See Westside*
4 *Charter*, 99 Nev. at 459. The District Court is prohibited from limiting the
5 manner in which the administrative agency makes its determinations. *Id.*
6

7
8 The District Court is not an appellate court reviewing the decision of
9 a lower court. Under the APA, the OLC is a state agency and part of the
10 executive branch issuing a quasi-judicial determination. The OLC
11 (executive) and the District Court (judiciary) are separate branches of
12 government. For the District Court to purport the ability to limit the
13 agency's scope of review or to control the content and breath of
14 information presented to the OLC would infringe upon the powers of the
15 administrative agency. Thus, the portion of Paragraph 4 of the February
16 Order which reads: "in making such a determination, the OLC must not
17 separate the Project into smaller units as doing so is in violation of Nevada
18 law" is akin to issuing an advisory opinion stating the law before a
19 purported violation has ever occurred. APP 398:15-16, Vol. 2.
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24 In this case, the District Court should have remanded the case to the
25 OLC and should not have opined on hypothetical scenarios that require the
26 occurrence of several future events prior to becoming ripe for review
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1 including, by way of example: a new hearing before the OLC; the
2 development of a new administrative record; the issuance of a new final
3 agency decision; and a new petition for judicial review (with a different
4 case number and a potentially different judge). The CCDOA is not aware
5 of any rule or precedent that would permit a district court to remand a
6 matter to an administrative agency and have the same case be returned to
7 the same judge and court under the same case and docket number for
8 purposes of “enforcement and implementation.” *See* APP 479:11, Vol. 2.
9 The *Bailey* case cited in the June Order, concerned the retention of
10 jurisdiction to enforce injunctive orders issued in bankruptcy proceedings
11 arising from asbestos litigation. *See Travelers Insurance Company v.*
12 *Bailey*, 129 S. Ct. 2195, 2205, 557 US 137, 151 (2009); APP 478:11-12,
13 Vol. 2. None of the circumstances of the *Bailey* case exist in this case, thus
14 the two are readily distinguishable. *Id.* To avoid any resulting prejudice to
15 the CCDOA, the Court should set aside the Decision of the District Court
16 and order the District Court to remand the case to the OLC for an
17 unrestricted hearing and determination.
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24 **E. The District Court Erred By Denying The CCDOA’s**
25 **Request For A Stay Pending Appeal**

26 Finally, the District Court’s Order denying the CCDOA’s request to
27 stay the proceedings before the OLC pending appeal has resulted in further
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1 prejudice to the CCDOA. APP 595-600, Vol. 3. The OLC has indicated
2 its intent to hold an administrative hearing in December of 2021. Ex. 2 to
3
4 Ex. A. Although the District Court relied upon the LMCC indications
5 “that it has ‘stipulated that [Labor Commissioner’s] calculation will have
6 no preclusive effect pending the appeal’” and LMCC’s claim that “no one
7 is arguing that workers should be given the unpaid wages while the appeal
8 is pending,” these assertions ring hollow when viewed in context. APP
9 598, Vol 3. Without a stay in place, the OLC is proceeding as if it is duty
10 bound to make findings on the amount of prevailing wage due. Ex. 2 to Ex.
11 A. Once the OLC issues a “new” final agency determination, the OLC will
12 expect prompt payment to the employees and the CCDOA will face serious
13 financial prejudice (from having to pay additional wages and potentially
14 pay penalties and fines). The LMCC is presently arguing that the OLC is
15 precluded from holding a hearing on the issue of maintenance by the
16 Decision, and the LMCC is likely to seek to enforce the Decision if the
17 OLC proceeds with a hearing. Ex. 4 to Ex. A. Without a stay of
18 enforcement, there is no guarantee that the OLC will not also attempt to
19 enforce its determination once a monetary amount of wages due has been
20 calculated.

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27 Additionally, the mere fact that the OLC is proceeding with a
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1 hearing, and the CCDOA is forced to spend resources preparing for that
2 hearing and presenting evidence is prejudicial to the CCDOA. Ex. A, ¶¶
3 10-12. If the Court were to reverse the Decision and order the District
4 Court to remand the matter to the OLC, the OLC will be forced to hold
5 another hearing, effectively forcing the parties to hold multiple hearings
6 and allowing the parties multiple “bites at the apple” to present their case
7 to the OLC. At the time of filing this brief, the CCDOA does not know
8 whether the OLC will consider all evidence presented by the CCDOA
9 regarding the proper classification of this work as “maintenance” or
10 whether the OLC will exclude such evidence as beyond the scope of its
11 authority based on the District Court’s Decision. Exs. 2–4 to Ex. A.¹⁰ The
12 OLC had previously indicated an intent to hold a hearing on the issue of
13 “maintenance” but the LMCC objected to the OLC holding a hearing,
14 stating “In addition, the email from the Commissioner incorrectly states
15 that a determination as to ‘maintenance’ is to be considered. If that means
16 work pursuant to Bid No.17-604273, it is contrary to the District Court’s
17 Order that directs the calculating of wage value and the identifying of wage
18 claimants.” Ex. A, ¶ 7. The LMCC’s most recent correspondence indicates
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26 ¹⁰ OLC has requested that the “Parties meet and confer on potential
27 hearing dates for December 2021, on the issue of whether the work
28 performed, Bid No. 17-604275 was “normal maintenance.” Ex. 2 to Ex. A.

1 its position that the CCDOA “is not entitled to relitigate that issue and the
2 Labor Commissioner is not empowered to revisit it either.” Ex. 4 to Ex. A.

3
4 Regardless of the OLC’s ultimate determination, one party in this
5 case is likely to be unhappy with the OLC’s actions and determinations
6 and will likely file a new PJR challenging the actions of the OLC. Thus,
7 continued proceedings before the OLC without any clarification on the
8 OLC’s authority is likely to lead to conflicting judicial decisions and
9 multiple additional appeals and challenges.
10

11
12 The Appeal also has far reaching impact on the assessment and
13 financing of maintenance work across state and local governments in
14 Nevada. Because the OLC has been instructed to interpret and enforce
15 “maintenance” in a specific way, state and local governments may
16 potentially change their budgeting and fiscal approach to maintenance
17 work to try to align with the incorrect standard set forth in the District
18 Court’s Decision. Even if the Decision is later overturned, the actions of
19 state and local governments taken in the interim cannot be undone. The
20 Court should find that the denial of a stay while the appeal is pending was
21 reversible error. In the alternative, this Court should consider this to be the
22 CCDOA’s renewed motion to stay the hearing, determination and
23 enforcement of proceedings before the OLC pending the Appeal.
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CONCLUSION

Based on the arguments set forth above, the Decision of the District Court exceeded the scope of the court's authority on a PJR by purporting to retain jurisdiction and by limiting the OLC's scope of review on remand. The conclusion that the work was "not maintenance" without any citation to the record, manifests an arbitrary and capricious disregard for the substantial evidence in the administrative record and an abuse of the District Court's discretion. The ongoing prejudice to the CCDOA from simultaneous participation in two separate forums is a denial of the CCDOA's right to due process. To avoid any resulting prejudice to the CCDOA, the Court should set aside the Decision of the District Court and order the District Court to remand the case to the OLC for an unrestricted hearing and determination on the scope of the carpet work and whether such work is subject to the prevailing wage requirements or exempt as maintenance work.

Dated this 19th day of November, 2021.

Respectfully submitted,
FISHER & PHILLIPS LLP

/s/ Allison L. Kheel, Esq.
Mark J. Ricciardi, Esq.
Allison L. Kheel, Esq.
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this
5 brief has been prepared in a proportionally spaced typeface using
6 Microsoft Word 2013 in 14-point Times New Roman font.
7
8

9 2. I further certify that this brief complies with the page or type
10 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
11 brief exempted by NRAP 32(a)(7)(C), it contains 8,914 words.
12

13 Finally, I hereby certify that I have read this appellate brief, and to
14 the best of my knowledge, information and belief, it is not frivolous or
15 interposed for any improper purpose. I further certify that this brief
16 complies with all applicable Nevada Rules of Appellate Procedure, in
17 particular NRAP 28(e)(1), which requires every assertion in the brief
18 regarding matters in the record to be supported by a reference to the page
19 and volume number, if any, of the transcript or appendix where the matter
20 relied on is to be found. I understand that I may be subject to sanctions in
21
22
23

24 ///

25 ///

26 ///

1 the event that the accompanying brief is not in conformity with the
2 requirements of the Nevada Rules of Appellate Procedure.
3

4 Dated this 19th day of November, 2021.

5 **FISHER & PHILLIPS LLP**

6
7 By: /s/ Allison L. Kheel, Esq.
8 Mark J. Ricciardi, Esq.
9 Allison L. Kheel, Esq.
10 300 South Fourth Street
11 Suite 1500
12 Las Vegas, NV 89101
13 Attorneys for Appellant
14
15
16
17
18
19
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21
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23
24
25
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27
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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Appellant's Opening Brief was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada addressed as follows:

Andrea Nichols, Esq.
Deputy Attorney General
100 N. Carson
Carson City, Nevada 89701
anichols@ag.nv.gov
Attorneys for Respondent
Office of the Labor
Commissioner

Evan L. James, Esq.
7440 W. Sahara Avenue
Las Vegas, Nevada 89117
elj@cjmlv.com
Attorneys for Petitioner
Southern Nevada Labor
Management Cooperation
Committee

Dated this 19th day of November, 2021.

/s/ Darhyl Kerr
An Employee of Fisher & Phillips LLP