

IN THE SUPREME COURT OF THE STATE OF NEVADA

STARR SURPLUS LINES  
INSURANCE CO.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT of the State of Nevada, in  
and for the County of  
Clark, and THE HONORABLE  
MARK DENTON, District Judge,

Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,  
Real Party in  
Interest.

Electronically Filed  
Sep 29 2022 03:19 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Supreme Court Case No. 84986

District Court Case No. A-20-  
816628-B

**BRIEF OF *AMICUS CURIAE*  
NEVADA STATE MEDICAL ASSOCIATION  
IN SUPPORT OF NEITHER PARTY BUT IN  
SUPPORT OF DENYING THE PETITION**

Adam Hosmer-Henner, Esq. (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
McDonald Carano LLP  
100 West Liberty Street, Tenth Floor  
Reno, Nevada 89501  
Telephone: (775) 788-2000  
ahosmerhenner@mcdonaldcarano.com  
clatino@mcdonaldcarano.com  
jsusskind@mcdonaldcarano.com

*Attorneys for Amicus Curiae Nevada State Medical Association*

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## **NRAP 26.1 DISCLOSURE STATEMENT**

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

The Nevada State Medical Association (“NSMA”) is a not-for-profit 501(c)(6) corporation, has no parent corporation, and no publicly held corporation owns stock in NSMA.

The law firm who has appeared for NSMA in this appeal or is expected to appear in this Court is McDonald Carano LLP.

McDONALD CARANO LLP

By: /s/ Adam Hosmer-Henner  
Adam Hosmer-Henner (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
100 W. Liberty Street, Tenth Floor  
Reno, Nevada 89501

*Attorneys for Amicus Curiae  
Nevada State Medical Association*

**IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE,  
AND ITS AUTHORITY TO FILE**

The Nevada State Medical Association (the “NSMA”) is a non-profit organization founded in 1875 in order to identify and address the needs of Nevada physicians and their patients and allow its members to share the latest medical knowledge and collaborate on best practices for their patients. The NSMA is the oldest and largest physician advocacy organization in the State of Nevada, and its members include practicing physicians and surgeons, medical researchers, educational faculty, and institutional administrators throughout the state. One of the primary purposes of the NSMA is to act on behalf of its members by representing their common interests before the Nevada courts.

The NSMA takes no position on the merits of the specific insurance dispute between the parties that has given rise to this petition. However, the NSMA believes it can provide this Court with a perspective distinct from either of the parties and grounded in science. Pursuant to NRAP 29(f), the NSMA does not support either party. The NSMA’s opposition to granting the Petition is not because it expresses a view on the substantive merits of the insurance issues (because it does not), but

rather because the Petition and the APCIA amicus brief supporting it, are grounded upon “scientific” contentions concerning COVID-19 that are contrary to scientific understanding and scientific studies that are best described as junk science or COVID denial.

This case concerns one of the most significant threats to the public health in the past one hundred years. The NSMA has an interest in this case because misinformation about the seriousness of COVID-19 and its causative virus, SARS-CoV-2, can undermine physician-patient trust and the public health of Nevadans. The briefs of Petitioner Starr Surplus Lines Insurance Co. (“Petitioner”) and *amicus curiae* American Property Casualty Insurance Association (“APCIA”) contain precisely the kind of scientifically inaccurate statements—minimizing the seriousness of COVID-19 and inaccurately claiming SARS-CoV-2 can be removed from a property by routine surface cleaning—that can cause patients to ignore the medical advice of our members and fail to protect themselves against this deadly virus.

Accordingly, the NSMA submits this brief to provide a scientific perspective on this important issue to assist this Court in determining

the issues before it in this case. The NSMA has concurrently filed a Motion for Leave to File Amicus Curiae Brief, which if granted, will provide NSMA with the authority to file this brief.

### **SUMMARY OF ARGUMENT**

The briefs of Petitioner and the APCIA rest on scientifically inaccurate statements minimizing the severity of COVID-19 and falsely proclaiming SARS-CoV-2 can be easily removed by “routine cleaning” or dissipation. Charitably, these statements are best described as junk science or COVID-19 denial. They ignore the scientific evidence presented to the district court in this case and instead rely principally on court opinions decided at the motion to dismiss stage without the benefit of expert discovery and a scientific record. As the NSMA demonstrates in this brief, such opinions are inconsistent with the scientific understanding of COVID-19, how it is transmitted, and the inability of routine surface cleaning to completely remove SARS-CoV-2 from a property.

Petitioner attempts to minimize SARS-CoV-2 by calling it “imperceptible activity at the microscopic level.” (Petition for Writ of



Mandamus or, in the Alternative, Prohibition (“Pet.”) at 14.) But such “imperceptible activity” has had profound effects: COVID-19 has claimed the lives of over one million Americans<sup>1</sup> and over 11,400 Nevadans.<sup>2</sup> Studies have shown that SARS-CoV-2 is transmitted not only by contaminated surfaces but especially through indoor air. Studies have also shown that SARS-CoV-2 cannot be effectively removed from surfaces by routine cleaning or even extraordinary disinfection, and such cleaning methods also do not remove the virus from the air. Further, cleaning, disinfection, and dissipation are ineffective at removing SARS-CoV-2 from business premises that remain open during the pandemic because the virus is continuously reintroduced into the premises.

While the APCIA argues that the presence of SARS-CoV-2 does not render property “uninhabitable,” these studies show that was false, particularly during the initial period of the pandemic before the

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<sup>1</sup> *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CDC (updated September 7, 2022), [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days).

<sup>2</sup> *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. TIMES (updated June 20, 2022), <https://www.nytimes.com/interactive/2021/us/nevada-covid-cases.html>.

development of effective vaccines and treatments for COVID-19. During that initial period, COVID-19 presented a serious risk of prolonged illness and death to high-risk individuals, and the only way to avoid it was to shut down public property. Moreover, studies have shown that essential workers staffing businesses that remained open were infected with, and died from, COVID-19 at rates much greater than the general public. In short, just because the government allowed an essential business to remain open did not mean it was habitable.

### **ARGUMENT**

#### **I. SCIENTIFIC STUDIES SHOW THAT SARS-COV-2 CANNOT BE REMOVED BY ROUTINE SURFACE CLEANING**

In arguing that the presence of SARS-CoV-2 inside a property cannot cause “physical loss of or damage” to that property (an insurance coverage question as to which the NSMA takes no position), Petitioner and the APCIA rely on statements about SARS-CoV-2 and COVID-19 that are not supported by science.

They argue that Coronavirus can be removed “through routine cleaning” using “ordinary cleaning materials.” Pet. at 15, 18 (internal quotation marks and citation omitted); *accord* Brief of *Amicus Curiae*

APCIA (“APCIA Br.”) at 7-8 (“it can be cleaned from surfaces through general disinfection measures” and “simple cleaning” (internal quotation marks and citations omitted). Not so.

Surface cleaning does not prevent COVID-19 transmission. In fact, Centers for Disease Control (“CDC”) has stated there is little evidence to suggest that routine use of disinfectants can prevent the transmission of Coronavirus from fomites (surfaces containing SARS-CoV-2) in community settings, such as the Grand Bazaar Shops in Las Vegas.<sup>3</sup> In particular, the CDC concluded that, according to a quantitative microbial risk assessment study, “surface disinfection once- or twice-per-day had little impact on reducing estimated risks” of Coronavirus transmission.<sup>4</sup>

Moreover, SARS-CoV-2 cannot be removed by *routine* surface cleaning. A number of studies have established that Coronavirus is “much more resilient to cleaning than other respiratory viruses so

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<sup>3</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html>.

<sup>4</sup> *Id.* (citing A. K. Pitol & T. R. Julian, *Community transmission of SARS-CoV-2 by fomites: Risks and risk reduction strategies*, ENV'T SCI. & TECH. LETTERS 8, 263-69 (2021)).

tested.”<sup>5</sup> Even *extraordinary* cleaning measures do not remove Coronavirus from surfaces. In a 2021 study by the largest hospital network in New York State, the virus proved capable of *surviving* disinfection procedures used by trained hospital personnel in Coronavirus patient treatment areas.<sup>6</sup> If trained hospital workers using hospital-grade disinfectants cannot remove all SARS-CoV-2, neither can “routine” cleaning. Petitioner’s and the APCIA’s claims to the contrary have no basis in science and should not guide this Court’s decision.

## **II. PETITIONER’S SURFACE CLEANING ARGUMENT IGNORES THE PRESENCE OF SARS-COV-2 IN AMBIENT AIR AND THE CONTINUOUS REINTRODUCTION OF SARS-COV-2 INTO BUSINESS PREMISES OPEN TO THE PUBLIC**

Petitioner’s arguments focus on the transmission of COVID-19 from virus on surfaces, also known as fomite transmission. But this mischaracterizes how SARS-CoV-2 spreads.

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<sup>5</sup> Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. MED. VIROLOGY 11, 2498-510 (June 12, 2020), <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170>.

<sup>6</sup> Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 5, 2479 (Mar. 3, 2021), <https://www.mdpi.com/1660-4601/18/5/2479>.

Airborne transmission is the primary transmission vector for SARS-CoV-2. The CDC has concluded that:

- “[t]he principal mode by which people are infected with SARS-CoV-2 . . . is through exposure to respiratory droplets carrying infectious virus”; and
- “[w]hen a person with suspected or confirmed COVID-19 has been indoors, virus can remain suspended in the air for minutes to hours.”<sup>7</sup>

The World Health Organization (“WHO”)<sup>8</sup> agrees, as does the scientific community. Numerous studies have made clear that the danger of COVID-19 transmission comes primarily from the presence of SARS-CoV-2 in the indoor air of buildings and other enclosed premises. Indeed, an investigation of over 7,000 COVID-19 cases found that ***all*** outbreaks involving three or more people occurred indoors.<sup>9</sup>

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<sup>7</sup> *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CDC (updated Apr. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html>.

<sup>8</sup> Ramon Padilla & Javier Zarracina, *WHO agrees with more than 200 medical experts that COVID-19 may spread via the air*, USA TODAY NEWS (last updated Sept. 21, 2020), <https://www.usatoday.com/in-depth/news/2020/04/03/coronavirus-protection-how-masks-might-stop-spread-through-coughs/5086553002/>.

<sup>9</sup> Hua Qian et al., *Indoor transmission of SARS-CoV-2*, 31 INDOOR AIR 3, 639-45 (May 2021), <https://pubmed.ncbi.nlm.nih.gov/33131151/>.

Airborne Coronavirus viral RNA has also been detected inside hospitals at distances over 50 meters from COVID-19 patients' rooms.<sup>10</sup> Another study examined a restaurant's air conditioning system and found that it spread SARS-CoV-2 to people sitting at separate tables downstream of the restaurant's airflow.<sup>11</sup> Yet another study detected SARS-CoV-2 inside HVAC systems transmitted over 180 feet from its source.<sup>12</sup>

Moreover, on May 7, 2021, the CDC issued a warning of the risks of indoor airborne transmission of Coronavirus from aerosols at distances greater than six feet from the source, stating that "[t]ransmission of

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<sup>10</sup> Yuan Liu et al., *Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals*, 582 NATURE 7813, 557-60 (June 2020), <https://pubmed.ncbi.nlm.nih.gov/32340022/>.

<sup>11</sup> Jianyun Lu et al., *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 7 (July 2020), [https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article); see also Keun-Sang Kwon et al., *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 J. KOREAN MED. SCI. 46, e415 (Nov. 30, 2020), <https://jkms.org/DOIx.php?id=10.3346/jkms.2020.35.e415>.

<sup>12</sup> Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in COVID-19 wards*, SCI. REPS. 10, 19589 (Nov. 11, 2020), <https://www.nature.com/articles/s41598-020-76442-2>.

SARS-CoV-2 from inhalation of virus in the air farther than six feet from an infectious source can occur” and:

With increasing distance from the source, the role of inhalation likewise increases. Although infections through inhalation at distances greater than six feet from an infectious source are less likely than at closer distances, the phenomenon has been repeatedly documented under certain preventable circumstances. These transmission events have involved the presence of an infectious person exhaling virus indoors for an extended time (more than 15 minutes and in some cases hours) leading to virus concentrations in the air space sufficient to transmit infections to people more than 6 feet away, and in some cases to people who have passed through that space soon after the infectious person left. Per published reports, factors that increase the risk of SARS-CoV-2 infection under these circumstances include:

- **Enclosed spaces with inadequate ventilation or air handling** within which the concentration of exhaled respiratory fluids, especially very fine droplets and aerosol particles, can build-up in the air space.
- **Increased exhalation** of respiratory fluids if the infectious person is engaged in physical exertion or raises their voice (e.g., exercising, shouting, singing).
- **Prolonged exposure** to these conditions, typically more than 15 minutes.<sup>13</sup>

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<sup>13</sup> *Scientific Brief: SARS-CoV-2 Transmission*, CDC (updated May 7, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html](https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html).

The insurance industry cannot dispute the fact that no amount of surface cleaning removes SARS-CoV-2 from the air—its number one transmission vector. Indeed, neither Petitioner nor the APCIA makes such an argument. As such, their arguments about surface cleaning are not only incorrect but also irrelevant to the larger issue.

To the extent that Petitioner and the APCIA acknowledge airborne transmission, they minimize the risks that it poses. Petitioner argues that the “virus lives in the air or on surfaces only temporarily and dissipates on its own without any intervention,” citing caselaw but *not one* scientific study. (Pet. at 15.) The APCIA likewise relies on caselaw to argue that SARS-CoV-2 is “evanescent.” APCIA Br. 8. But the cases they cite were decided at the motion to dismiss stage, without the benefit of expert testimony and a scientific record. *E.g., Nguyen v. Travelers Cas. Ins. Co. of Am.*, 541 F. Supp. 3d 1200, 1213 (W.D. Wash. 2021) (explaining that “[m]ost of the cases currently before the Court have not conducted discovery” and “the Court will evaluate all of the Motions according to the FRCP 12(b) and 12(c) standard and consider only the evidence appropriate to those types of motions”); *Circus Circus LV, LP v.*



*AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1272 (D. Nev. 2021) (deciding motion to dismiss), *aff'd*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1279 (Mass. 2022) (deciding motions to dismiss and for judgment on the pleadings).<sup>14</sup> Had the courts been informed by science, they would have reached a different result.

Thus, the scientific evidence shows that SARS-CoV-2 is persistent. Moreover, no amount of cleaning, disinfection, or even the dissipation of SARS-CoV-2 with the passage of time, will protect an indoor space from reintroduction of the virus if the space is open to persons infected with COVID-19. Any one infected person who enters an indoor space is capable of spreading aerosolized SARS-CoV-2 droplets that can be

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<sup>14</sup> The other cases cited by Petitioner regarding surface cleaning and dissipation were likewise decided at the pleading stage without the benefit of a scientific record. *See Tralom, Inc. v. Beazley USA Servs., Inc.*, No. 2:20-CV-08344-JFW-RAOx, 2020 WL 8620224, at \*1 (C.D. Cal. Dec. 29, 2020) (deciding motion to dismiss); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at \*1 (2d Cir. Jan. 28, 2022) (appeal of motion to dismiss decision); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 329 (7th Cir. 2021) (same); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398, 400 (6th Cir. 2021) (same); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1143 (8th Cir. 2021) (same).

inhaled by others. While disinfecting and dissipation may mitigate the situation temporarily, the virus will not be eliminated and such efforts are ineffective in the face of the continuous reintroduction of SARS-CoV-2 by infectious persons. Such continuous reintroduction into a business open to the public prevents a business owner from permanently removing the virus from the premises so that the building could be made safe for its intended use.

### **III. EVIDENCE OF INFECTIONS AMONG ESSENTIAL WORKERS SHOWS THAT SARS-COV-2 RENDERED PROPERTY UNINHABITABLE OR LESS FUNCTIONAL IN 2020**

Citing yet another COVID-19 case decided on a demurrer (motion to dismiss) without any scientific evidence or record, which was rejected by a subsequent panel of the very same court, the APCIA argues that the presence of the SARS-CoV-2 “does not render a property useless or uninhabitable.” (APCIA Br. At 23 (citing *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65 (Ct. App. 2022), *rejected by Marina Pac. Hotel & Suites, LLC v. Fireman’s Fund Ins. Co.*, 296 Cal. Rptr3d 777, 789-90 (Ct. App. 2022))).

While that may be the case *today* due to the medical advancements of COVID-19 vaccines, monoclonal antibodies, anti-viral medications and other FDA-approved treatments for COVID-19, that was not true in 2020 during the early period of the pandemic. The Court should not evaluate the conditions that existed earlier in the pandemic through the lens of today's medical innovations.

In particular, while Governor Sisolak's orders did allow certain "essential" businesses to remain open during the early days of the pandemic in 2020, that did not mean those businesses were habitable. It meant only that the government determined there were economic or political reasons that outweighed the risk of COVID-19 that allowed those businesses to be open. In fact, the data shows that employees of "essential businesses"<sup>15</sup> that were allowed to re-open or operate at reduced capacities experienced higher rates of infection as compared to the general public, thus demonstrating the presence of SARS-CoV-2 in

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<sup>15</sup> The CDC defines essential workers as those conducting "operations and services in industries that are essential to ensure the continuity of critical functions in the United States." *See Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CDC (updated Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html>.

their workplaces and that such workplaces were unfit and unsafe for normal use.<sup>16</sup> For example:

- One study found that 20% of essential grocery store workers tested positive for COVID-19, a much higher rate of infection than others in their surrounding communities.<sup>17</sup> Further, grocery store workers with interactions with the public tested positive for COVID-19 at a rate five times greater than the general population.<sup>18</sup>
- Essential workers accounted for 87% of excess deaths in California<sup>19</sup> and over 60% in New York City.<sup>20</sup>
- Nursing home residents accounted for at least 35% of all COVID-19 deaths in the United States as of March 2021 despite comprising less than 1% of the nation's population.<sup>21</sup>

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<sup>16</sup> Joanna Gaitens et al., *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 4, 1446 (Feb. 4, 2021), <https://www.mdpi.com/1660-4601/18/4/1446>.

<sup>17</sup> *Id.*

<sup>18</sup> Fan-Yun Lan et al., *Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA*, 78 OCCUPATIONAL ENV'T MED. 237-43 (Oct. 30, 2020), <https://oem.bmj.com/content/oemed/78/4/237.full.pdf>.

<sup>19</sup> Yea-Hung Chen et al., *Excess mortality associated with the COVID-19 pandemic among Californians 18-65 years of age, by occupational sector and occupation: March through November 2020*, 16 PLOS ONE 6, e0252454 (June 4, 2021), <https://pubmed.ncbi.nlm.nih.gov/34086762>.

<sup>20</sup> *The plight of essential workers during the COVID-19 pandemic*, 395 LANCET 1587 (May 23, 2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2931200-9>.

<sup>21</sup> Artis Curiskis et al., *Federal COVID Data 101: Working with CMS Nursing Home Data*, ATLANTIC (Mar. 4, 2021), <https://covidtracking.com/analysis-updates/federal-covid-data-101-working-with-cms-nursing-home-data>.

Similar findings have been reported among essential workers in other fields, including elevated rates of infection for first responders, correctional officers, and transportation and factory workers, among others.<sup>22</sup> These findings refute the APCIA’s assertion that SARS-CoV-2 does not affect the habitability, safety, or usability of property.

### CONCLUSION

Petitioner and the APCIA deny the severity of COVID-19 and erroneously claim that SARS-CoV-2 is “evanescent,” can be removed by routine surface cleaning, and does not render property uninhabitable. The scientific evidence refutes each of these claims. This Court should not adopt Petitioner’s and the APCIA’s claims in reaching its decision, as doing so would risk undermining confidence in medicine and in the physicians who comprise the NSMA’s members, and thus public health in Nevada.

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<sup>22</sup> *Id.*

## AFFIRMATION

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

Submitted on September 29, 2022.

McDONALD CARANO LLP

By: /s/ Adam Hosmer-Henner  
Adam Hosmer-Henner (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
100 W. Liberty Street, Tenth Floor  
Reno, Nevada 89501

*Attorneys for Amicus Curiae  
Nevada State Medical Association*

### **NRAP 32(A)(9) CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief of Amicus Curiae complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Brief of Amicus Curiae has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface. I further certify that this Brief complies with the type-volume limitation under NRAP 21(d) and NRAP 29(e) as it contains 3,083 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Submitted on September 29, 2022.

McDONALD CARANO LLP

By: /s/ Adam Hosmer-Henner  
Adam Hosmer-Henner (NSBN 12779)  
Chelsea Latino (NSBN 14227)  
Jane Susskind (NSBN 15099)  
100 W. Liberty Street, Tenth Floor  
Reno, Nevada 89501

*Attorneys for Amicus Curiae  
Nevada State Medical Association*



## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on September 29, 2022, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

Daniel F. Polsenberg, Esq.  
Joel D. Henriod, Esq.  
Abraham G. Smith, Esq.  
LEWIS ROCA ROTHGERBER CHRISTIE LLP  
3993 Howard Hughes Parkway  
Suite 600  
Las Vegas, NV 89169

Amy M. Samberg, Esq.  
Lee H. Gorlin, Esq.  
CLYDE & CO LLP  
7251 W. Lake Mead Blvd.  
Suite 430  
Las Vegas, NV 89128

*Attorneys for Petitioner Starr Surplus Lines Insurance Company*

Bradley Schrager, Esq.  
WOLF RIFKIN SHAPIRO  
SCHULMAN & RABKIN, LLP  
3773 Howard Hughes Pkwy  
Suite 590 South  
Las Vegas, NV 89169

Robert L. Eisenberg  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, 3<sup>rd</sup> Floor  
Reno, NV 89519

*Attorneys for Real Party in Interest JGB Retail Vegas Lessee, LLC*

VIA E-MAIL only:

The Honorable Judge Mark Denton  
Trial Court Judge  
EIGHTH JUDICIAL DISTRICT COURT DEPARTMENT NO. 13  
Regional Justice Center, Courtroom 16D  
200 Lewis Avenue  
Las Vegas, NV 89155  
Dept13lc@clarkcountycourts.us

Marc T. Ladd, Esq.  
COHEN ZIFFER FRENCHMAN  
& MCKENNA LLP  
1325 Avenue of the Americas  
New York, NY 10019  
mladd@cohenziffer.com

Wystan M. Ackerman  
ROBINSON+COLE  
280 Trumbull Street  
Hartford, CT 06103  
wackerman@rc.com

/s/ Caitlin Pagni  
An Employee of McDonald Carano LLP