

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

FRANCISCO SILVA, AN  
INDIVIDUAL,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR THE  
COUNTY OF CLARK, AND THE  
HONORABLE MARIA A. GALL,  
DISTRICT JUDGE,

Respondents, and

ED CLAY, AN INDIVIDUAL; SCOTT  
NELSON, AN INDIVIDUAL;  
DEDDRICK PERRY, AN  
INDIVIDUAL; AND CPI  
MANAGEMENT GROUP, LLC,

Real Parties in Interest.

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**AMICI CURIAE NEVADA BUSINESS LAW PROFESSORS AND NEVADA  
BUSINESS LAW ATTORNEYS' MOTION FOR LEAVE TO FILE  
AMICUS BRIEF**

James M. Jimmerson, Bar No. 12599  
THE JIMMERSON LAW FIRM, P.C.  
1635 Village Center Circle, Suite 200  
Las Vegas, Nevada 89134  
(702) 388-7171 – telephone  
(702) 380-6413 – facsimile

*Attorneys for Amici Curiae  
Nevada Business Law Professors and  
Nevada Business Law Attorneys*

## **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 Justices of this Court may evaluate possible disqualification or recusal.

Amici Curiae, NEVADA BUSINESS LAW PROFESSORS (“NVBLP”) and NEVADA BUSINESS LAW ATTORNEYS (“NVBLA”) (collectively “Amici”) are unincorporated associations of professors and attorneys, respectively, who dedicate a substantial part of their professional time and practice to Nevada business and commercial law. Identification of the members of NVBLP and NVBLA is found in Exhibit A to the proposed Amicus Brief. Amici are represented in this matter by James M. Jimmerson, Esq.

DATED this 12th day of November, 2025.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Phone: (702) 388-7171

[jmj@jimmersonlawfirm.com](mailto:jmj@jimmersonlawfirm.com)

*Attorneys for Amici Curiae Nevada Business  
Law Professors and Nevada Business Law  
Attorneys*

**AMICI CURIAE NEVADA BUSINESS LAW PROFESSORS AND NEVADA  
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AMICUS BRIEF**

Pursuant to NRAP 29(c), Amici, through their counsel, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C., submit this Motion For Leave To File Amicus Brief (the “**Motion**”) in the matter concerning Petitioner Francisco Silva (“**Petitioner**”) Petition For Writ Of Mandamus (the “**Petition**”), which has been challenged by Real Parties in Interest, Ed Lay, Scott Nelson, Deddrick Perry, and CPI Management Group, LLC (“collectively, the “**Real Parties in Interest**”).

Amici respectfully submit this Motion as they seek to assist this Court in resolving the Petition which involves a matter upon which Amici address with regularity in their professional practices and careers. The Nevada Business Law Professors research, write, and teach on topics related to business law in general and Nevada business law in particular. They have an interest in the development of Nevada business law and in providing context and information to the Nevada Supreme Court to aid in its consideration of the issues presented in this appeal. Likewise, the Nevada Business Law Attorneys advise clients about Nevada business law and have an interest in the continued development of Nevada’s business laws. Nevada Business Law Attorneys have an interest in the continued excellence of Nevada law and in ensuring a stable and predictable legal environment for Nevada’s business entities.

Petitioner readily acknowledges that the matter before the Court is a critical question concerning Nevada business and commercial law. In fact, the Petition begins as follows:

This Petition raises a single, pivotal question of Nevada law: whether including express fiduciary duties in a limited-liability company's ("LLC") operating agreement also incorporates the business judgment rule (the "Rule") into the operating agreement sub silentio, especially where the Rule is found in the corporations but not the LLC statute...

Petition at 1. While Amici agree that the issue before the Court is a "pivotal question of Nevada law," that is end of Amici's agreement with Petitioner.

In their Answer to Petition for Writ of Mandamus (the "Answer"), the Real Parties in Interest correctly state, "[t]he Business Judgment Rule's application to limited liability companies is firmly grounded in longstanding, fundamental principles of business law existing in the common law and consistent with Nevada's position as a leader in the development of business law." Answer at 1.

As detailed in the proposed Amicus Brief, attached hereto as Exhibit 1, variations of the common law business judgment rule have existed within American jurisprudence for centuries. Courts apply the business judgment rule because they recognize that courts are ill-suited to second-guess ordinary business decisions. Although different formulations of common law business judgment rules exist, courts have overwhelmingly extended business judgment rule protections to limited liability companies with fiduciary duties. Unsurprisingly, existing decisions show

that both Nevada state courts and federal courts applying Nevada law now both extend business judgment rule protections to limited liability companies.

The business judgment rule exists to allow persons operating business entities to make ordinary business decisions without fearing that their decisions will be second-guessed in hindsight with overly harsh consequences. Business leaders must take risks and often must make decisions quickly. Subjecting business leaders to liability for suboptimal performance would generate needless and vexatious litigation while causing existing managers to become timid for fear that they will be sued. The business judgment rule also interacts with existing demand futility standards. A finding that no common law business judgment rule insulates Nevada limited liability companies from ordinary mismanagement claims would weaken demand futility protections by making it significantly easier to establish a substantial likelihood of liability. Worse, such liability might make many business ventures uninsurable. Courts will struggle to draw lines between due care and breach in the business context because no clear precedent exists for how to evaluate such decisions.

Stripping common law business judgment rule protections from existing limited liability companies with fiduciary duties would fundamentally reallocate power within these entities by giving minority members litigation rights for which they did not bargain for when entering into an operating agreement. This shift in

power would likely generate needless litigation or force the managing members to pay minority members to amend the operating agreement to restore ordinary baseline protections for limited liability companies with fiduciary duties.

Although the Nevada Legislature has not yet explicitly provided for a statutory business judgment rule for limited liability companies with fiduciary duties, applying a common law business judgment rule in the limited liability company context maintains consistency with Nevada's clear policy to minimize governance costs and avoid value-destroying litigation for business entities.

Amici seek leave to submit the accompanying Amicus Brief to ensure the Court is adequately advised of the significant impacts of its decision in this matter. The gravity of the Court's decision and the chain reaction of impacts to future business and commercial law jurisprudence compels Amici to seek leave of the Court to file accompanying Amicus Brief. *See* NRAP 29(f).

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For these reasons, and the reasons identified in the Amicus Brief, Amici respectfully request the Court to grant the Motion and accept the Amicus Brief.

DATED this 12th day of November, 2025.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Phone: (702) 388-7171

[jmj@jimmersonlawfirm.com](mailto:jmj@jimmersonlawfirm.com)

*Attorneys for Amici Curiae Nevada Business  
Law Professors and Nevada Business Law  
Attorneys*

**CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this Motion 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 Motion has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point font, Times New Roman style.

2. I further certify that this Motion complies with the page-volume limitations of NRAP 32(a)(7) and NRAP 27(d)(2) because it does not exceed 10 pages.

DATED this 12th day of November, 2025.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Phone: (702) 388-7171

[jmj@jimmersonlawfirm.com](mailto:jmj@jimmersonlawfirm.com)

*Attorneys for Amici Curiae Nevada Business  
Law Professors and Nevada Business Law  
Attorneys*

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that as *AMICI CURIAE NEVADA BUSINESS LAW PROFESSORS AND NEVADA BUSINESS LAW ATTORNEYS' MOTION FOR LEAVE TO FILE AMICUS BRIEF* was filed electronically with the Nevada Supreme Court on November 12, 2025. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

JEFFERY A. BENDAVID, ESQ.  
JACQUELINE VOKOUN, ESQ.  
BENDAVID LAW  
7301 Peak Drive, Suite 150  
Las Vegas, Nevada 89128

V.R. BOHMAN, ESQ.  
KELLY H., DOVE, ESQ.  
XYZLO LEE, ESQ.  
SNELL & WILMER L.L.P.  
1700 South Pavilion Center Dr.  
Suite 700  
Las Vegas, Nevada 89135

PETER R. CHRISTIANSEN, ESQ.  
WHITNEY BARRETT, ESQ.  
CHRISTIANSEN TRIAL LAWYERS  
710 S 7th Street  
Las Vegas, Nevada 89101

/s/ James M. Jimmerson  
An Employee of JIMMERSON LAW FIRM, P.C.

**EXHIBIT 1**

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**BRIEF OF AMICI CURIAE NEVADA BUSINESS LAW PROFESSORS  
AND NEVADA BUSINESS LAW ATTORNEYS**

James M. Jimmerson, Bar No. 12599  
THE JIMMERSON LAW FIRM, P.C.  
1635 Village Center Circle, Suite 200  
Las Vegas, Nevada 89134  
(702) 388-7171 – telephone  
(702) 380-6413 – facsimile

*Attorneys for Amici Curiae  
Nevada Business Law Professors and  
Nevada Business Law Attorneys*

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## **INTEREST OF *AMICI CURIAE***

*Amici Curiae* include two groups of individuals in their personal capacity, Nevada Business Law Professors and Nevada Business Law Attorneys. The identities of the Nevada Business Law Professors and Nevada Business Law Attorneys are set forth in Exhibit A to this brief.

The Nevada Business Law Professors research, write, and teach on topics related to business law in general and Nevada business law in particular. They have an interest in the development of Nevada business law and in providing context and information to the Nevada Supreme Court to aid in its consideration of the issues presented in this appeal.

The Nevada Business Law Attorneys advise clients about Nevada business law and have an interest in the continued development of Nevada's business laws. Nevada Business Law Attorneys have an interest in the continued excellence of Nevada law and in ensuring a stable and predictable legal environment for Nevada's business entities.

## **SUMMARY OF ARGUMENT**

Variations of the common law business judgment rule have existed within American jurisprudence for centuries. Courts apply the business judgment rule because they recognize that courts are ill-suited to second-guess ordinary business decisions. Although different formulations of common law business judgment rules

exist, courts have overwhelmingly extended business judgment rule protections to limited liability companies with fiduciary duties. Unsurprisingly, existing decisions show that both Nevada state courts and federal courts applying Nevada law now both extend business judgment rule protections to limited liability companies.

Fundamentally, the business judgment rule exists to allow persons operating business entities to make ordinary business decisions without fearing that their decisions will be second-guessed in hindsight. Business leaders must take risks and often must make decisions quickly. Subjecting business leaders to liability for suboptimal performance would generate needless and vexatious litigation while causing existing managers to become timid for fear that they will be sued. The business judgment rule also interacts with existing demand futility standards. A finding that no common law business judgment rule insulates Nevada limited liability companies from ordinary mismanagement claims would weaken demand futility protections by making it significantly easier to establish a substantial likelihood of liability. Worse, such liability might make many business ventures uninsurable. Courts will struggle to draw lines between due care and breach in the business context because no clear precedent exists for how to evaluate such decisions.

Stripping common law business judgment rule protections from existing limited liability companies with fiduciary duties would fundamentally reallocate

power within these entities by giving minority members litigation rights for which they did not bargain for when entering into an operating agreement. This shift in power would likely generate needless litigation or force the managing members to pay minority members to amend the operating agreement to restore ordinary baseline protections for limited liability companies with fiduciary duties.

Although the Nevada Legislature has not yet explicitly provided for a statutory business judgment rule for limited liability companies with fiduciary duties, applying a common law business judgment rule in the limited liability company context maintains consistency with Nevada’s clear policy to minimize governance costs and avoid value-destroying litigation for business entities.

## **ARGUMENT**

### **I. AMERICAN COMMON LAW HAS LONG INCLUDED THE BUSINESS JUDGMENT RULE.**

The common law business judgment rule has been a feature of American business law for centuries. *See* Gerard V. Mantese & Emily S. Fields, *The Business Judgment Rule*, MICH. B.J., JANUARY 2020, at 30 (2020) (“The business judgment rule has been part of English and American common law for more than 200 years”); R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 Bus. Law. 1337, 1341 (1993) (“The deference accorded directors’ business judgments is far older than the labelling of the business judgment rule as a presumption. One noted authority traces it back to 1829”).

The precise contours and application of the common law business judgment rule have evolved over time, with different courts applying different formulations. See Stephen M. Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, 57 VAND. L. REV. 83, 88-101 (2004) (discussing competing conceptions of the business judgment rule).

One common theme remains: courts generally balk at substituting their business judgment for the decisions made by business leaders unless there is some showing that the transaction at issue was tainted by fraud, self-dealing, or some other disloyal motive. Consider *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968). Shlensky sued Wrigley alleging that Wrigley mismanaged the Chicago Cubs by not installing lights at the ballfield so that baseball games could be played at night. *Id.* at 175-176. The plaintiff, a minority stockholder, complained that the Cubs were losing money and attributed it to Wrigley's decision not to install lights for evening baseball games. Wrigley argued that courts should "not step in and interfere with honest business judgment of the directors unless there is a showing of fraud, illegality or conflict of interest." *Id.* at 177. The court agreed with Wrigley. Although it speculated that Wrigley might have considered the long-term interest of the Cubs in ensuring that the neighborhood surrounding the ballpark did not deteriorate, it refused to be drawn in to second-guessing the business leader's decisions. The court explicitly declined to consider whether "the decision of the

directors was a correct one.” *Id.* at 181. It treated the issue “beyond our jurisdiction and ability” and declared that “the decision is one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision.” *Id.*

Other states have also applied the business judgment rule to abstain from second-guessing even unwise business decisions. For example, New York courts refused to consider a case alleging that American Express needlessly generated millions in tax losses by distributing shares instead of selling them. *Kamin v. Am. Exp. Co.*, 86 Misc. 2d 809, 813 (N.Y. Sup. Ct. 1976), *aff'd sub nom. Kamin v. Am. Express Co.*, 387 N.Y.S.2d 993 (1976). One famous Delaware Chancery decision explained the business judgment rule as meaning that “to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary acting in a good faith pursuit of corporate purposes, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect.” *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).

Against this backdrop and concerned with the risk that courts applying Nevada corporate law would adopt different formulations of the business judgment rule or otherwise dilute its strength, the Nevada Legislature codified a statutory business judgment rule for corporations in 1999. Indeed, *Hilton Hotels Corp. v. ITT*

*Corp.* practically invited the Legislature to codify the business judgment rule for corporations with this passage:

Delaware case law merely clarifies the basic duties established by the Nevada statutes. *Shoen* recognized this, and explicitly found that a good faith breach of duty was actionable under Nevada corporate law. Neither the Nevada Legislature in two successive sessions nor the Nevada Supreme Court has disagreed. ITT would have this Court establish that the only duty a board has under Nevada law is a duty of good faith. **This Court will not eliminate the principles articulated in *Unocal*, *Blasius* and *Revlon* and the common law duties of care and loyalty without any indication from the Nevada Legislature or the Nevada Supreme Court that that is the legislative intent.**<sup>1</sup>

Unsurprisingly, the Nevada Legislature accepted the invitation and clarified in the corporation statute during the next session.

Despite the business judgment rule’s long common law history and relatively recent codification for corporations, the Petition mischaracterizes the business judgment rule as “*a term of art referring to a trio of statutory presumptions: that “directors and officers, in deciding upon matters of business, are presumed to act [1] in good faith, [2] on an informed basis and [3] with a view to the interests of the corporation.”* (Petition at 12 (citing NRS 78.138(3) (emphasis added)). This characterization is simply not accurate—either about what the business judgment rule is or what standard the lower court applied. The business judgment rule originated within the common law, and the doctrine encompasses much more than

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<sup>1</sup> *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1347 (D. Nev. 1997) (emphasis added).

Nevada’s specific statutory business judgment rule for corporations. Although differences in its application exist, the business judgment rule is a critical bedrock principle for business entities.

## **II. THE DOMINANT UNDERSTANDING OF NEVADA LAW HAS BEEN THAT THE BUSINESS JUDGMENT RULE APPLIES IN THE LIMITED LIABILITY COMPANY CONTEXT.**

For some time, the dominant understanding of Nevada law has been that the business judgment rule insulated ordinary business decisions by Nevada limited liability companies from challenge. *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008) (“Federal and state courts have consistently applied the law of corporations to LLCs, including for the purposes of piercing the corporate veil, the “alter ego” doctrine, determining standing, the “business judgment rule,” and derivative actions”); *Schreck v. Babcock*, No. A-09-593059-B, 2013 Nev. Dist. LEXIS 412, \*7 (Nev. D. Ct. Aug. 19, 2013) (“Nevada’s business judgment rule is codified at NRS 78.138(7). *The application of this statute to limited liability companies is not unusual.*”) (emphasis added) (Denton, J.).

Although the underlying decision and *Schreck v. Babcock* stand as the only two Nevada Business Court decisions currently identified as applying a business judgment rule to a limited liability company dispute, there have likely been many more instances where Nevada Business Courts have applied some form the business

judgment rule in the limited liability company context.<sup>2</sup> Presumably, Judge Denton’s observation—that it is “not unusual” for a business judgment rule to be applied to Nevada limited liability companies—reflects that because many Nevada Business Court judges have applied the business judgment rule in this context. As Dean Edwards noted when covering the underlying decision here, “Nevada’s trial-level business courts are not as heavily observed as the Delaware Court of Chancery.”<sup>3</sup> Dean Edwards’ explanation understates the difference between jurisdictions as few persons other than the courts and parties involved ever review Nevada trial court decisions. It is likely that there are many more instances where Nevada Business Courts have applied a business judgment rule to limited liability companies.

Functionally, these existing decisions, when combined with the high volume of decisions from other states applying the business judgment rule for fiduciary duty claims in the limited liability company context, mean that the default expectation for persons forming Nevada limited liability companies should be that their ordinary

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<sup>2</sup> Nevada Business Court decisions are not currently readily searchable. Clark and Washoe County Courts operate with different filing systems and there does not appear to be any currently available mechanism to search a significant body of past Nevada Business Court decisions.

<sup>3</sup> Benjamin P. Edwards, “Nevada Business Court Recognizes Common Law Business Judgment Rule for LLCs”. <https://www.businesslawprofessors.com/2025/07/nevada-business-court-recognizes-common-law-business-judgment-rule-for-llcs/>, published July 16, 2025. Last accessed online on Nov. 8, 2025.

business decisions will be protected by a business judgment rule.<sup>4</sup> Parties that agreed to fiduciary duties in their operating agreements are most likely to have agreed to them with a background default assumption that breach of fiduciary duty claims would need to overcome the business judgment rule.

### **III. STRIPPING BUSINESS JUDGMENT RULE PROTECTION FROM LIMITED LIABILITY COMPANIES WITH FIDUCIARY DUTIES WILL GENERATE SUBSTANTIAL PROBLEMS.**

A significant number of Nevada limited liability companies likely have either default fiduciary duties or negotiated fiduciary duties imposed by an operating agreement. Although the current iteration of the statute now requires limited liability companies to explicitly impose fiduciary duties if the members so agree to impose fiduciary duties on managers, open questions remain about fiduciary duties for entities created prior to earlier statutory amendments. *See* NRS 86.286.

Even though the Nevada Supreme Court does not need to reach this issue to resolve this case, for limited liability companies created prior to Nevada’s 2009 statutory amendments, default fiduciary duties may already exist. In 2009, the Nevada Legislature added provisions directing that operating agreements “be interpreted and construed to give the maximum effect to the principle of freedom of contract and enforceability” and explicitly authorizing member or manager duties to

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<sup>4</sup> As the Answer to the Petition collects a substantial body of cases, there is no need to cite them again here. (Answer to Petition, pages 11-13).

“be expanded, restricted, or eliminated.” NRS 86.286. In 2019, the Legislature amended this provision was amended to specify that fiduciary duties must be explicitly added. In an unpublished decision in *Israyelyan v. Chavez*, No. 78415, 2020 WL 3603743, at \*4 (Nev. July 1, 2020) (unpublished disposition), the Nevada Supreme Court treated the 2019 amendments as a clarification. *Id.* at note 5. To the extent that the 2019 amendment clarified the substantive 2009 change, Nevada LLCs created prior to the 2009 amendment likely imposed default fiduciary duties.

A. Stripping Business Judgment Rule Protection Invites Vexatious Litigation.

For Nevada limited liability companies with fiduciary duties, departing from the vast bulk of decisions that have considered the issue to strip away business judgment rule protection would have significant consequences and unleash a torrent of vexatious litigation. The manager or managing member of any Nevada limited liability company with fiduciary duties could be second-guessed for any business decision that turned out poorly. Functionally, then any disgruntled limited liability company member within any Nevada limited liability company with either default or bargained-for fiduciary duties would suddenly discover that the member could sue over any ordinary business decision that turned out poorly. This new leverage reallocate power away from the parties’ bargained-for operating agreement, giving that power to minority members. Moreover, disgruntled members would be able to

force the manager or managing member to defend his or her decisions under a negligence standard.

Consider a failed restaurant. Passive members could sue managing members for any business decision—hiring the wrong chef, advertising too much or too little, changing the menu, or any other decision they make in the conduct of the limited liability company's affairs. A limited liability company's managing member could be sued for deciding to not to operate the restaurant on Monday nights to give staff a day off.

Nevada courts would struggle to adjudicate these cases both because of the potential volume of litigation and because other jurisdictions simply avoid entangling their courts with litigation that second-guesses ordinary business decisions. Little precedent exists to establish the standard of care for these business decisions. Consider a managing member who pays a quality employee fifteen percent more than the median wage for the role within the jurisdiction. Has the member breached his duty of care by overpaying? How should a court determine how much damages to award against a managing member for making a business decision below whatever currently undefined standard of care exists for such decisions? The business judgment rule keeps courts from being drawn into such disputes.

Moreover, confirming that the business judgment rule exists in this context maximizes the welfare of investors in limited liability companies. As detailed by Judge Frank H. Easterbrook and Daniel R. Fischel in their seminal work, *The Economic Structure of Corporate Law*, the business judgment rule maximizes investor wealth. Easterbrook and Fischel explain as follows:

The fiduciary principle suggests that courts should routinely conduct wide-ranging inquiries to determine the bargain that managers and investors would have reached if transactions costs were zero. This sounds like the inquiry in tort law: the court would ask whether the costs of making a decision (taking a precaution) are less than the gains to be had (harms to be avoided), discounted by the probability of the gain (harm) occurring. Hearing tort cases, judges routinely make such calculations and impose stiff penalties on all who flunk felicific calculus. Yet judges invoke the “business judgment rule,” a doctrine absolving managers of liability even though their conduct is negligent. Statements of the rule vary; its terms are far less important than the fact that there is a specially deferential approach.

Why both demand that managers maximize investors’ wealth and then refuse to carry through with the demand by hitting managers in their wallets (a particularly appropriate place)? **Behind the business judgment rule lies recognition that investors’ wealth would be lower if managers’ decisions were routinely subjected to strict judicial review.**<sup>5</sup>

In reaching this conclusion, Easterbrook and Fischel go into painstaking detail as to why investor wealth would be lower without the benefit of the business judgment rule. Easterbrook and Fischel explain:

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<sup>5</sup> Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (1991) page 93 (emphasis added).

Costs of decision *ex post* will be highest precisely when it was also most difficult to contract *ex ante*. So when claims are made on the basis of the fiduciary principle—as opposed to a specific contract—courts are likely to lack essential tools of decision. This means that *ex post* settling up in markets has a comparative advantage over courts at enforcing the fiduciary principle except in the case of startling gaffes and large, one-shot, self-interested transactions. It should be no surprise, then, to learn that the business judgment rule confines courts to exactly these rare cases.<sup>6</sup>

Nevada has long benefited from being a state that rewards investment and innovation. Knowing that “investors’ wealth would be lower if managers’ decisions were routinely subjected to strict judicial review” without the protection of the business judgment rule, this Court should once and for all confirm that the business judgment rule insulates ordinary business decisions by Nevada limited liability companies from legal challenges.

B. The Business Judgment Rule Informs Demand Standards.

For derivative cases, such as this one, courts must first determine whether a member must make a demand on managers or may proceed to litigation by alleging demand futility. Although not controverted by the parties, the lower court recognized that because Nevada follows Delaware on demand futility, the standard for assessing whether a plaintiff has established demand futility comes from *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension*

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<sup>6</sup> *Id.* at 99. Easterbrook and Fischel also cite to substantial scholarship supporting their conclusion that “markets best courts in enforcing contracts between parties that have enduring relations.” *Id.* at 94, note 3.

*Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021).<sup>7</sup> This standard requires courts to consider, on a director-by-director basis:

(i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;

**(ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and**

(iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand. (emphasis added)<sup>8</sup>

Functionally, the demand futility test operates with an understanding that a business judgment rule exists. *See e.g. Cent. Laborers' Pension Fund v. Karp*, 2023-0864-LWW, 2025 WL 1213104, at \*8 (Del. Ch. Apr. 25, 2025) (considering demand futility in the context of the business judgment rule). If the Nevada Supreme Court finds that no business judgment rule exists for ordinary duty of care claims in the

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<sup>7</sup> Although *Zuckerberg* has not yet been formally adopted by the Nevada Supreme Court, this action provides an opportunity to clarify and simplify Nevada law on demand futility by following the Delaware Supreme Court's decision to abandon the prior alternative tests in favor of a single test. *See McMahon on Behalf of Uranium Energy Corp. v. Adnani*, 135 Nev. 685, 457 P.3d 968 (2019) (explaining that Nevada follows Delaware on demand futility standards). The Nevada Supreme Court might also use this opportunity to create consistency by making clear that the same test applies in the corporate and the limited liability company context—with the understanding that courts should read “director” as manager or managing member in the limited liability company context.

<sup>8</sup> *Id.*

limited liability company context, litigants may bypass demand simply by showing that there is a substantial likelihood that a limited liability company's manager made a business decision that, in hindsight, appears unwise. Nevada courts lack any guidance about how to evaluate demand without a business judgment rule insulating ordinary business decisions from challenge.

C. The Business Judgment Rule Makes Insurance Attainable.

Removing business judgment rule protection for limited liability companies with fiduciary duties would also likely generate significant insurance problems. To the extent that current Nevada limited liability companies carry insurance against such suits, the increase in liability would likely lead their insurance carriers to drop coverage. Although insurers might be willing to renew coverage for Nevada limited liability companies that either abandon fiduciary duties or explicitly adopt business judgment rule standards within their operating agreements—as the Petition apparently envisions—disgruntled holdout members may either refuse to agree to such amendments or demand compensation for surrendering their newly-discovered litigation rights while holding the limited liability company hostage.

D. The Business Judgment Rule Facilitates Business.

For Nevada limited liability companies with fiduciary duties that continue to operate without business judgment rule protection, the risk of litigation over ordinary business decisions will have significant governance impacts. Managers who know

that their members may readily sue them for any perceived breaches of their duty of care will have strong incentives continuously to document the rationale and reasonableness of all their decisions and to conform to whatever local norms may exist. By spending more time and effort to protect their own hides, limited liability company managers and members will necessarily spend less time focused on growing the business. The liability risks will generate managerial timidity. Any attempt to try new strategies will face a risk of litigation should the strategy fail to succeed. Many manager or managing-members may conclude that the better decision is to simply avoid taking risks. *See Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (“But directors will tend to deviate from this rational acceptance of corporate risk if in authorizing the corporation to undertake a risky investment, the directors must assume some degree of personal risk relating to ex post facto claims of derivative liability for any resulting corporate loss”).

#### **IV. APPLYING A COMMON LAW BUSINESS JUDGMENT RULE TO NEVADA LIMITED LIABILITY COMPANIES WITH FIDUCIARY DUTIES MAINTAINS CONSISTENCY WITH NEVADA’S EXISTING POLICY PREFERENCES FOR BUSINESS ENTITIES.**

In amending Nevada’s corporation statute, the Nevada Legislature has provided significant protections for corporate directors and officers on the theory that, by keeping governance costs low and avoiding value-destroying litigation, in the business climate results in results in greater overall efficiency and wealth creation. *See* Stephen M. Bainbridge, *Dexit Drivers: Is Delaware’s Dominance*

*Threatened?*, 50 J. CORP. L. 823, 874 (2025) (explaining that there is a “widely shared perception that Nevada law is significantly more protective of directors and officers than is Delaware”).

The Petition advances no clear explanation for why the Nevada Legislature would depart from this policy and foment value-destroying litigation by abandoning the business judgment rule for Nevada limited liability companies. To the extent that the Nevada Legislature ever desires to make such a change, doing so explicitly and applying the policy change to limited liability companies created after the statute’s passage would allow parties to bargain for both duties and review standards without unsettling default expectations for existing Nevada limited liability companies. The Nevada Legislature has provided that the common law continues to exist unless supplanted. *See* NRS 1.030 (“The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State”). As the business judgment rule is creature of the common law, it should remain in application until the Nevada Legislature clearly directs otherwise.

## CONCLUSION

For the reasons set forth herein, *amici curie* urge the Nevada Supreme Court to leave the underlying decision undisturbed. We encourage the Nevada Supreme Court to recognize that the appropriate test for demand futility under Nevada law

now comes from *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021).

DATED this 12th day of November, 2025.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Phone: (702) 388-7171

[jmj@jimmersonlawfirm.com](mailto:jmj@jimmersonlawfirm.com)

*Attorneys for Amici Curiae Nevada Business  
Law Professors and Nevada Business Law  
Attorneys*

## CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this Amici Curiae Brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 29 and 32 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,053 words.

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I further certify that I have read this Amici Curiae 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. I understand that I may be subject to sanctions in the event that the accompanying reply does not conform with the requirements of the Nevada Rule of Appellate Procedure.

DATED this 12th day of November, 2025.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

1635 Village Center Circle, Suite 200

Las Vegas, Nevada 89134

Phone: (702) 388-7171

[jmj@jimmersonlawfirm.com](mailto:jmj@jimmersonlawfirm.com)

*Attorneys for Amici Curiae Nevada Business  
Law Professors and Nevada Business Law  
Attorneys*

## Exhibit A

### Nevada Business Law Professors<sup>9</sup>

Benjamin P. Edwards  
Associate Dean for Faculty Development and Research  
William S. Boyd School of Law  
University of Nevada, Las Vegas

Nancy B. Rapoport  
Garman Turner Gordon Professor of Law, William S. Boyd School of Law  
Affiliate Professor of Business Law and Ethics, Lee Business School  
William S. Boyd School of Law  
University of Nevada, Las Vegas

Lori D. Johnson  
Terry Pollman Professor of Law  
William S. Boyd School of Law  
University of Nevada, Las Vegas

### Nevada Business Law Attorneys

Michael Roitman, Nevada Bar No. 14756  
Roitman Legal

Jennifer L. Braster, Nevada Bar No. 9982  
Naylor & Braster Attorneys at Law

J. Robert Smith, Nevada Bar No. 10992  
Silver State Law

Samuel Castor, Nevada Bar No. 11532<sup>10</sup>  
Lex Tecnica

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<sup>9</sup> All Nevada Business Law Professors and Nevada Business Lawyers join this brief in their personal capacities and not on behalf of their employers. Names, titles, and affiliations have been provided for identification purposes.

<sup>10</sup> Mr. Castor is also an adjunct professor at the William S. Boyd School of Law.

Nicholas R. Shook, Nevada Bar No. 13400  
Neon Law

Omar Nagy, Nevada Bar No. 15293  
Hall & Evans, LLC

Glenn Gavin, Nevada Bar No. 16082  
Gavin & Brown, PLLC

Mark Billion, Nevada Bar No. 17048  
Billion Law

John Netto, Nevada Bar No. 17262  
Rareview Capital