IN THE SUPREME COURT OF THE STATE OF NEVADA

GREATER LAS VEGAS SHORT TERM RENTAL ASSOCIATION, a nonprofit Nevada corporation; and JACQUELINE FLORES, President and Director,

Appellants/Cross-Respondents,

v.

CLARK COUNTY; CLARK COUNTY BOARD OF COMMISSIONERS, a subdivision of the State of Nevada; and the STATE OF NEVADA,

Respondents/Cross-Appellants.

Docket No. 86264

REPLY AND MOTION TO STRIKE BY AMICI CURIAE GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER WITH RESPECT TO OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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INTRODUCTION

Pursuant to Nev. R. App. P. 27(a)(4), proposed Amici Goldwater Institute and Liberty Justice Center reply to the County's Opposition to their Motion for Leave to File. The County's Opposition contains improper and impertinent matters that should be stricken, and offers no reasonable ground for denying the motion.

ARGUMENT

I. The County's standing argument is impertinent and an improper attempt to evade the page limit, and should be stricken.

The County uses the entire second half of its Opposition to make its merits argument regarding Appellants' standing. But that issue is simply not addressed in the proposed amicus brief. Thus the County's excursus on standing appears to be an inappropriate attempt to preemptively evade the page limits on their briefing. Because pages five through nine of the Opposition are impertinent and immaterial to the Amici's motion, they should be stricken.

Amici submitted their brief to explain why the County's ordinance violates the privacy and property rights of Nevadans by forcing homeowners who rent their property to turn over their, and their guests', personal financial information to the government without a warrant or probable cause; install cameras to record comings-and-goings in their houses, and give the video to the County without a warrant or probable cause; and permit searches of their bedrooms, bathrooms, etc.,

without a warrant or probable cause. These and other merits-based arguments are the focus of the proposed amicus brief.

The County, however, spends most of its Opposition addressing the issue of Appellants' standing. Whatever merit there might be in those arguments, they are a completely improper basis to oppose this motion for leave to file. The proposed amicus brief does not address that issue, and it has nothing to do with whether the proposed brief will assist this Court in its consideration of those issues of privacy and property rights that the brief *does* address.

Arguments about standing have their place—this motion is not that place. Instead, they belong in the County's brief on the merits, or in a brief answering the proposed amicus brief. To allow them in this Opposition would risk evading the page limits established by Rule 32(a)(7). It is not uncommon for attorneys to try to "incorporate" arguments from other documents into their briefs as a "means of circumventing the page limitations on briefs set forth in the appellate rules," *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998), and courts universally condemn the practice. *See, e.g., id*.; *Rhealy Travel, Inc. v. Sullivan*, No. 73115, 1998 WL 158847, at *2 (Ohio App. Apr. 2, 1998); *Mazzio's Corp. v. Bright*, 46 P.3d 201, 205 ¶ 20 (Okla. Civ. App. 2002); *see also State v. Leiser*, 717 N.W.2d 852 ¶ 12 (Wis. App. 2006) (motion combined with brief exceeded page limit). The County appears to be attempting something similar:

concealing a merits argument in its Opposition as a means of adding to the pages in its forthcoming Answering Brief.

In fact, what the County does here is even more improper than what happened in *Gaines-Tabb* and similar cases, because the Rules do not give Appellants any opportunity to file a response to the County's purported Opposition. That prejudices Appellants.

This Court has inherent authority to regulate its own proceedings, *Volpert v. Papagna*, 85 Nev. 437, 439–40 (1969), which includes the power to strike immaterial and impertinent matters from any paper, or any matter that violates the Rules of Appellate Procedure. *Cf. Carrigan v. Cal. State Legislature*, 263 F.2d 560, 564 (9th Cir.1959). It should therefore strike pages five through nine of the Opposition to Amici's Motion for Leave to File.

II. The County's arguments against granting the motion are unpersuasive.

The County's sole pertinent basis for opposing the motion consists of a citation to Judge Posner's condemnation of amicus briefs that add nothing of value to a case, *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), and its assertion that Amici's arguments are "similar" to those of the Appellants.

As for the latter, this Court has never required that amici *not* have a "similar" view to that of any party. It typically receives briefs from amici who

have similar views to those of the party supported. *See, e.g.*, *Dow Chem. Co. v. Mahlum*, 115 Nev. 13, 14 (1999); *Guinn v. Legislature of State of Nev.*, 119 Nev. 460 (2003); *Republican Nat'l Comm. v. Eighth Jud. Dist. Ct.*, 521 P.3d 1212 (Nev. 2022). And Nev. R. App. P. 29(f) expressly contemplates amici "supporting" one side or the other of a dispute.

Then-Judge Alito expressly rejected the idea that amici can't support one side or another in *Neonatology Assocs. v. Comm'r Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002), when he remarked—in the process of refuting Judge Posner's view—that the idea of an entirely neutral amicus "flies in the face of current appellate practice." He said there's nothing wrong with groups that have "policy" interests in a case appearing as amici. The D.C. Circuit has agreed, *Boumediene v. Bush*, 476 F.3d 934, 935–36 (D.C. Cir. 2006) and the Sixth Circuit has also remarked that the idea of an "impartial" amicus may have been "[h]istorically" true, but has now been "departed" from. *United States v. Michigan*, 940 F.2d 143, 164–65 (6th Cir. 1991).

As for whether the proposed brief adds value, Judge Posner also said that "the criterion for deciding whether to permit the filing of an amicus brief should be … whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs. The criterion is more likely to be satisfied in a case … in which the amicus has a unique

perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003).[1] The proposed brief easily satisfies this test.

To cite just one example, Amici point out the substantial similarity between the unconstitutional record-keeping requirements in the challenged ordinance and the law that this Court declared unconstitutional in *Techtow v. City Council of N. Las Vegas*, 105 Nev. 330 (1989). That argument does not appear in Appellants' brief. Amicus also offers citations to cases from New Jersey, Arizona, Oregon, and elsewhere, thereby giving the Court a broader perspective than that offered by Appellants.

Finally, the County says that Amici have not appeared in Nevada state courts before. Opposition at 4. To that, Amici can only answer, there's a first time for everything.[2] It may be true that Nevada—like all 50 states—"has unique caselaw

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[1] Judge Posner was infamous for his loathing of amicus briefs—a position rejected by most other courts. *See, Bishop v. Smith*, 112 F. Supp.3d 1231, 1245 (N.D. Okla. 2015) (criticizing Judge Posner's view); *In re Heath*, 331 B.R. 424, 430 n.4 (B.A.P. 9th Cir. 2005) (same); *Neonatology Assocs*., 293 F.3d at 131 (same).

[2] Amici's counsel is, however, a long-time member of the Nevada bar who has litigated extensively in state and federal courts in Clark County, and has been counsel of record before this Court. Other Goldwater Institute legal staff have also litigated frequently in Nevada (its Vice President, for example, helped litigate *Guinn, supra*; *Castillo v. Ingram*, 90 F. Supp.3d 1153 (D. Nev. 2015); and *Underwood v. Mackay*, 614 F. App'x 871 (9th Cir. 2015)), and the Institute has often appeared before the Nevada Legislature, helping write and obtain passage of legislation such as Nevada's "Right to Try" laws, Nev. Rev. Stat. § 454.351, et seq.

and its own constitutionally protected property rights," Opposition at 5, but these are precisely the rights Amici seek to defend.

CONCLUSION

The offending portions of the County's opposition should be stricken, and Amici's motion *granted*.

Respectfully submitted this 21st day of September 2023 by:

/s/ *Scott Day Freeman*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this completed REPLY AND MOTION TO STRIKE BY AMICI CURIAE GOLDWATER INSTITUTE AND LIBERTY JUSTICE CENTER WITH RESPECT TO OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Dated: September 21, 2023

/s/ *Scott Day Freeman*
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