IN THE SUPREME COURT OF THE STATE OF NEVADA

MASS LAND ACQUISITION, LLC, a Nevada limited liability company,

Petitioner,

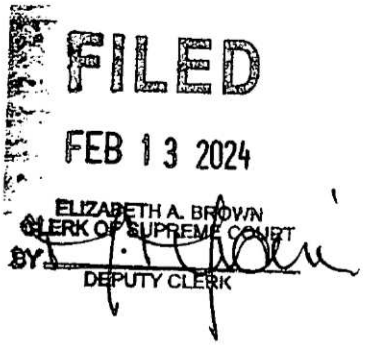
vs.

FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR STOREY COUNTY, AND THE HONORABLE JAMES E. WILSON, JR., DISTRICT JUDGE,

Respondents, and

SIERRA PACIFIC POWER COMPANY, a Nevada corporation, d/b/a NV ENERGY

Real Party in Interest.



Supreme Court Case No.: 85693

District Court Case No.: 22 RP 00001 1E

AMICI CURIAE SOUTHERN NEVADA WATER AUTHORITY AND LAS VEGAS VALLEY WATER DISTRICT'S BRIEF IN SUPPORT OF REAL PARTY IN INTEREST NV ENERGY'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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24-05302

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I. IDENTITY, INTEREST, AND FILING AUTHORITY OF AMICI CURIAE

Amici Curiae, Southern Nevada Water Authority ("**SNWA**") and Las Vegas Valley Water District ("**LVVWD**") (collectively, "**Amici**") are not-for-profit political subdivisions of the State of Nevada. SNWA acquires and maintains water rights for wholesale water delivery to its purveyor members in the Las Vegas Valley. LVVWD is a member of SNWA and is the retail water purveyor for the City of Las Vegas and vast areas of unincorporated Clark County.

Amici and Real Party in Interest, Sierra Pacific Power Company ("**NVE**") are similarly situated, as both provide utility services to Nevadans. Petitioner Mass Land Acquisitions, LLC's ("**Petitioner**") contentions in this matter could directly and substantially impact Amici's ability to continue developing critical utility infrastructure and delivering water to the public. If the Court determines that statutorily defined public uses can be nullified by a jury's determination to the contrary, Amici will be significantly impacted as follows:

1. Amici may not be allowed to proceed with a "public use" project that squarely falls within public uses identified in NRS 37.010; and
2. Amici (and their ratepayers) will be subjected to increased litigation, costs, substantial delays, and other risks when exercising eminent domain. Legally authorized condemning entities would have to expend

resources for two trials. Amici could be prohibited from carrying out vital public projects intended to advance the public's health, safety, and welfare by a landowner seeking to invalidate an obvious and statutorily defined "public use." Two trials would also strain judicial resources and the individual resources of landowners.

In sum, ruling as Petitioner urges the Court to do would significantly frustrate Amici's ability to efficiently operate for the public's health, safety, and welfare.

Amici, as political subdivisions, are free to file amicus briefs without leave of the Court or permission of the parties. NRAP 29(a). Due to the late timing, however, Amici seek leave of the Court to file this Amicus Brief. Accordingly, this Brief is a Motion for Leave to File Amicus Brief. *See* NRAP 29(c).

II. LEGAL ARGUMENT

A. Statutory "Public Use" Determinations Are Questions Of Law To Be Determined By The District Court.

"The construction of a statute is a question of law" determined by the district court. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000), as amended (Dec. 29, 2000) (citing *Maxwell v. SIIS*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993)). "Constitutional interpretation utilizes the same rules and procedures as statutory interpretation," and a "constitutional provision will be

harmonized with other statutes." *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008). When a statute and the Constitution address the same subject, the Court will harmonize the terms if they "are capable of coexistence." *Perry v. Terrible Herbst*, 132 Nev. 767 383 P.3d 257 (2016).

Under NRS Chapter 37, the District Court determines whether the underlying public use of a public utility project falls within the statutorily defined public uses found in NRS 37.010. *See* NRS 37.100(3). These include Amici's legislatively stated public uses regarding eminent domain projects, such as "reservoirs, water rights, canals . . . ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city or town" or for "aqueducts and pipes for supplying and storing water[.]" NRS 37.010(1)(c), (e), (i).

Nevada's Constitution also addresses eminent domain, and states that a property owner can demand that a jury determine "whether the taking is actually for a public use." Nev. Const. art. 1, § 22(2). Petitioner argues that the district court's determination of "public use" as a matter of law pursuant to NRS 37.100 (instead of a "district court jury") cannot be squared with the constitutional language in Article 1, Section 22(2). Petitioner, however, ignores the core issue: there are no questions of fact for the jury when the "public use" is legislatively mandated. Regardless, if factual issues exist, questions of fact become questions of law "when the evidence

will support no other inference." *Horvath v. Burt*, 98 Nev. 186, 187, 643 P.2d 1229, 1230 (1982) (citing *Wagon Wheel v. Mavrogan*, 78 Nev. 126, 369 P.2d 688 (1962)).

Nevada's Legislature enacted specific public uses justifying condemnation of private property through eminent domain. *See* NRS 37.010. If a public utility project falls under a statutorily defined public use (e.g. NRS 37.010(1)(c), (e), and (i)), identifying water pipelines), then there is no question of fact. In that instance, to harmonize the relevant constitutional provision with NRS 37.010, a jury can be said to have the question before it in the first instance, but a district court must make the determination as a matter of law, just as it would on any other claim appropriate for summary judgment. Accordingly, a jury can determine a "public use" only if (1) an eminent domain acquisition is not a statutorily identified public use, or (2) the condemnor is acquiring the property with the intent to subsequently transfer the property to another private party in contradiction of the Nevada Constitution and NRS 37.010(2). *See* Nev. Const. Art. 1, Sect. 22(1)-(2).

This interpretation is consistent with the fundamental roles judges and juries play in the legal systems of the United States and the State of Nevada. Petitioner's argument is not. NVE's (and Amici's) interpretation also adheres to canons of interpretation by harmonizing the provisions and showing the statutes and

Constitution are plainly "capable of coexistence." *See Perry*, 132 Nev. at 772, 383 P.3d at 261. Petitioner's interpretation, once again, does not.

1. A Court's Public Use Determination Should Give Great Deference To The Legislature's Codified Public Uses.

Nevada courts have a long history of finding that appropriating private property, under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community, is a taking for a public use. *Dayton Gold and Silver Mining Company v. W. M. Seawell*, 11 Nev. 394 (1876), 1876 WL 4573, *4. Indeed, Nevada courts have consistently held that the judiciary has a narrow role in evaluating a legislatively identified "public use" in eminent domain cases. *Urban Renewal Agency v. Iacometti*, 79 Nev. 113, 120 (1963).

The U.S. Supreme Court echoed these principles in *Hawaii Housing Authority v. Midkiff*. 467 U.S. 229, 104 S. Ct. 2321, 2329, 81 L. Ed. 2d 186 (1984). There, the Court opined that "the role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . is '**an extremely narrow' one**." *Id.* at 240 (internal citations omitted) (emphasis added). The Court also identified the inherent dangers when courts (and by extension, juries) substitute their judgment for that of the legislature's duly enacted statutes:

> **Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the**

> **basis of their view on that question at the moment of decision**[.] In short, [the] Court has made clear that **it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation**.

Id. at 240-41 (emphasis added) (internal citations omitted). The *Midkiff* Court went a step further and ruled, "But where the **exercise of the eminent domain power is rationally related to a conceivable public purpose**, the Court has never held a compensated taking to be [prohibited] by the Public Use Clause."[1] *Id.* (emphasis added) (internal citations omitted).

The U.S. Supreme Court subsequently restated the rule of deferring to legislatively defined public uses. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). *Kelo* remains instructive jurisprudence that controls judicial determinations of "public use." *Id.* The *Kelo* Court explained:

> The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." **Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.**
>
> . . .
>
> **For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad**

[1] Also known as the Takings Clause of the Fifth Amendment.

> **latitude in determining what public needs justify the use of the takings power.**

Id. at 480 (internal citations omitted) (emphasis added).[2]

The Nevada Supreme Court has followed the same path as the U.S. Supreme Court, ruling that Nevada's statutorily prescribed public uses frame the Court's public use determinations:

> **What is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. But if a public use be declared by the legislature, the courts will hold the use public**, unless it manifestly appears by the provisions of the act, that they have no tendency to advance and promote such public use.

Hess v. Pegg, 7 Nev. 23, 28 (1871), 1871 WL 3371, *4 (emphasis added).

The Court's ruling in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, remains instructive authority despite Petitioner's arguments related to Article 1, Section 22 of the Nevada Constitution and the "**PISTOL**" ballot initiative. *See* 119 Nev. 429, 76 P.3d 1 (2003). Once a district court determines a project's statutory public use, through a hearing on immediate occupancy of private property pending the outcome of the eminent domain proceedings, the jury determines the

[2] Indeed, Nevada and other states amended their constitutions and statutes to clarify what is and is not a legislatively defined "public use" in reaction to the specific "public use" determination in *Kelo* but because of the Court's determination that judges must respect the legislative definitions of "public use." *See id.*

amount of just compensation owed to the landowner. *See* NRS 37.100. The required deference to the Nevada Legislature's codification of public uses remains a necessary foundation of a district court's determination, as "[t]he sole remaining issue for a jury to determine is just compensation." *Pappas*, 119 Nev. at 434, 442, 76 P.3d at 5, 11 (2003). Thus, when a legislature "**determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.**" *Id.* (emphasis added) (internal citations omitted).

2. *Petitioner's Arguments Rely On Invalid Assumptions That Lead To Absurd Results.*

Petitioner's argument that a public use determination must be made by a jury in *all* scenarios, even when the public use at issue is statutorily defined, requires numerous erroneous assumptions. These include:

1. Courts must assume that the entities providing the public uses identified by NRS Chapter 704 and NRS Chapter 37 are not serving a legitimate public use when providing critical public infrastructure and services to Nevadans, or else a jury can effectively reject a duly enacted law;
2. Courts must assume that statutorily defined public uses in NRS 37.010 (like a water pipeline) are not actual public uses; and

3. Courts must assume Nevada's Constitution permits juries to nullify the legislatively defined public uses in NRS Chapter 37.010.

Nothing in the PISTOL Amendments expressly justifies such assumptions. In fact, these assumptions cannot be the law because of the absurd results that would follow and the substantial disruption to the people and communities that rely on properly functioning public utility services.

Accepting Petitioner's argument at face value, and the assumptions required to establish the argument, would have detrimental impacts on Amici and on all Nevadans who rely on these entities for water, gas, power, heat, and light. If public utilities cannot rely on NRS 37.010's public uses that authorize eminent domain power, then development of critical public utility infrastructure will be chilled, delayed at enormous possible expense, and/or cease, as public utilities will avoid the risks of a jury nullifying NRS Chapter 37 and its enumerated public uses.

For example, assume that:

1. Amici designs a water pipeline to extend service to customers that must cross multiple private properties whose owners will not voluntarily sell, thereby requiring condemnation; and
2. Amici relies upon NRS 37.010(1), including subsection (c), to establish that the pipeline is a public use.

If a landowner seeks a jury determination of the project's public use, and the jury is permitted to nullify a statutorily defined public use, then Amici would face significant legal, logistical, and financial damages and delays related to a project that is plainly authorized by an unambiguous statute. This, in turn, would also hurt Nevadans, businesses, and local municipalities who need the new public infrastructure to continue receiving safe and reliable water service. Amici could be forced to realign the public utility project (assuming realignment was possible) and condemn additional properties to bypass the landowner at issue. Other landowners could then rely upon that jury's determination to block Amici from further acquisitions for the public utility project.

Ironically, Amici could not take advantage of the same issue preclusion. Further, it is entirely possible that Amici could succeed in convincing juries 1-20 that a particular water pipeline project is a public use, only to be left owning 20 properties they do not need and cannot use because Jury 21 disagreed. The impacts from failing to harmonize Nevada's Constitution and Nevada's statutes cannot be overstated. All public projects would cost more, many projects would never be built, economies would be throttled, and ratepayers would pay more for less.

The jury determination could also result in after-the-fact challenges from landowners who already voluntarily transferred property to Amici for the project.

The scenario presents major risks and costs to Amici and those who rely on Amici for delivery a life-sustaining public resource: water. This is just one example of the absurd outcomes that will result from Petitioner's misinterpretation of Article 1, Section 22 of Nevada Constitution and NRS Chapter 37.

The public use determination is a question of law for district courts to determine when the proposed use is legislatively defined as a "public use" in NRS 37.100(3). Article 1, Section 22 of the Nevada Constitution does not permit juries to invalidate statutorily defined public uses that must be given significant deference as proclamations by the Nevada Legislature. In sum, the only logical interpretation is that juries *only* make a public use determination if the use is not identified in NRS 37.010(1) or if there is a patent private-party to private-party transfer in violation of the statutes *and* Nevada's Constitution. Otherwise, the jury is in immediate danger of nullifying public uses established by Nevada's Legislature.

B. Forcing Public Utilities To Conduct Two Jury Trials Will Put A Damaging Strain On Public Utilities, Courts, And Nevadans.

Petitioner insists it is entitled to two separate jury trials: one at the beginning of the eminent domain proceedings to determine whether NVE's project is a public use; and one at the end of the eminent domain proceedings to determine the just compensation owed for NVE's acquisition of the property. To reach this point, the Court must ignore the many legal and logistical shortcomings of the Petition, which

are described in detail above. Petitioner's "two-trial" argument, however, presents its own set of legal and logistical deficiencies that will cause substantial impacts to Nevadans, district courts, and entities like Amici and NVE.

Two trials means that the parties must engage in the litigation process twice. That means conducting discovery, pre-trial and trial work, and potential appellate work twice, including multiple phases of: (1) written discovery; (2) initial and rebuttal expert witness reports; (3) subpoena practice; (4) depositions; (5) dispositive motion practice; (6) trial preparation; and (7) jury selection and empanelment. This will also involve two full trials and potentially seeking appellate review of the juries' verdicts twice: once from the jury's verdict in the public use trial, and once from the jury's verdict in the just compensation trial.

The double trial process advocated by Mass Land would drastically increase the attorney fees and costs incurred by both condemning authorities and landowners. Moreover, conducting two trials for a single eminent domain matter would put a strain on the judicial resources of the presiding District Court and would strain the time of Nevadans to empanel two separate juries.

Condemning authorities could not occupy a property to commence construction of the public utility project until *after* the first trial concludes. Holding two trials for every eminent domain matter would thus materially delay the

construction of, and public access to, critical public infrastructure, and negatively impact the entities providing these utilities to Nevadans who rely on the service.

Delays from using a two-trial system to determine if a legislatively mandated "public use" is "actually for a public use" can derail entire public utility projects through years of litigation that must occur before a public utility is ever granted occupancy of a property to construct its project. Indefinite construction timelines with inflated and increased material and labor costs during the delay, and double litigation costs can transform a public utility project into a prohibitively expensive endeavor that must be terminated out of necessity.

The increased costs of conducting two trials will further impact Nevadans through increased utility rates charged by public utilities. Rate increases would result from the increased eminent domain acquisition costs that such entities will recover through rate increase. Nevadans will also be hurt through the increased use of public funds needed to operate district courts over the course of two jury trials.

Petitioner's demand for two jury trials, despite statutorily defined public uses, also conflicts with statutory litigation deadlines. Under NRS 37.120(1), the trial to assess the amount of just compensation owed to a landowner *must* occur within two years after the date of the first service of summons of the eminent domain complaint. Failure to do so may result in the date of valuation (i.e. "the date on which the value

of the property actually taken, and the damages, if any, to the remaining property, must be determined") resetting to the date of the trial's actual commencement. *See id.*; *see also* NRS 37.009(1). A landowner objecting to a legislatively mandated public use (i.e., for water, gas, or power) could receive the windfall of an increased property valuation based on the date of the second trial (and, therefore, increased just compensation) at the expense of entities like Amici and NVE, and of Nevadans who will pay more for utilities.

Due to the two-year rule of NRS 37.120(1), landowners would be incentivized to make public use challenges (regardless of their merit) to delay eminent domain proceedings. Public utilities would be forced to rush, instead of proceeding diligently and thoroughly, through the required two phases of discovery, pre-trial work, and separate jury trials, to avoid the trap of the just compensation trial deadline under NRS 37.120(1). Meritless challenges to public use determinations and rushed eminent domain proceeding do not benefit any of the parties, nor do they adequately vet the constitutional rights of both the landowner and condemning authority at issue. *Stagecoach Utilities, Inc., v. Stagecoach Gen. Imp. Dist.*, 102 Nev. 363, 364, 724 P.2d 205, 206 (1986) ("[j]ust compensation" must be "just" to both the condemnor and the condemnee).

Forcing two trials on public use and just compensation when the public use is

already statutorily defined would be contrary to Nevada's Constitution and NRS Chapter 37 based on fundamental canons of interpretation. Two trials would also be an unnecessary drain on private and public resources.

III. CONCLUSION

Based upon the foregoing, the Court should deny the Petition in its entirety.

DATED this 8th day of February 2024.

LAS VEGAS VALLEY WATER DISTRICT
SOUTHERN NEVADA WATER AUTHORITY

/s/ Steven C. Anderson

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CERTIFICATE OF COMPLIANCE

1. 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 this Brief 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 Answer complies with the page-volume limitations of NRAP 21(d) (Petition for Writs) because it does not exceed 15 pages or contains less than 3,500 words.

DATED this 8th day of February 2024.

LAS VEGAS VALLEY WATER DISTRICT
SOUTHERN NEVADA WATER AUTHORITY

/s/ Steven C. Anderson

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), the undersigned, an employee of LAS VEGAS VALLEY WATER DISTRICT, hereby certifies that on the 8th day of February, 2024, she served a true and correct copy of the foregoing, **AMICI CURIAE SOUTHERN NEVADA WATER AUTHORITY AND LAS VEGAS VALLEY WATER DISTRICT'S BRIEF IN SUPPORT OF REAL PARTY IN INTEREST NVE'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION,** by:

_____ Depositing for mailing, in a sealed envelope, U.S. postage prepaid, at Las Vegas, Nevada

_____ Personal Delivery

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addressed as follows:

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