IN THE SUPREME COURT OF THE STATE OF NEVADA

LENDER PROCESSING SERVICES INC.; FIDELITY NATIONAL INFORMATION SERVICE, INC.; LPS DEFAULT SOLUTIONS, INC.; AND DOCX, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Docket No. 61387

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CHAMBER OF RENO, SPARKS, AND NORTHERN NEVADA, AND AMERICAN TORT REFORM ASSOCIATION

Pursuant to Rules 21(b)(3) and 29(c) of the Nevada Rules of Appellate Procedure, the Chamber of Commerce of the United States of America, the Chamber of Reno, Sparks, and Northern Nevada, and American Tort Reform Association ("Movants") hereby move this Court for leave to file a brief as *amici*

curiae in the above-referenced matter. The proposed brief is submitted conditionally with this Motion.

Statement of Interest

Proposed *amici curiae* are organizations representing a wide range of employers that contribute to Nevada's economy. This case is of importance to *Amici* because arrangements that delegate authority to enforce state laws to private attorneys with a profit interest violate constitutional and ethical requirements, public policy, and express restrictions established by Nevada law. *Amici* are concerned that if the Attorney General is permitted to ignore or circumvent the statute at issue, NRS § 228.110(2), individuals, organizations and businesses will find themselves targeted by attorneys wielding state authority but unrestrained by the safeguards that accompany the exercise of that authority.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest businesses federation. The U.S. Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. Many U.S. Chamber members are located, and countless others do business, within Nevada and are directly affected by its litigation climate. The

U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber of Reno, Sparks, and Northern Nevada is the largest business organization in Northern Nevada with over 2,500 members representing businesses of every size and industry. The organization helps its members thrive through a number of services, including advocacy for sound public policies to promote growth and employment. Among these policies is ensuring the fairness of the legal and regulatory climate in Nevada.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts on important issues.

Reasons Why an Amicus Brief is Desirable

The proposed *amicus curiae* brief examines why contingent-fee agreements between state governments and private law firms raise serious legal ethics, constitutional, and public policy concerns – arguments not advanced by the Petitioners but which could help inform this Court's decision making. *Amici* will utilize their broad perspective to inform this Court about how such arrangements,

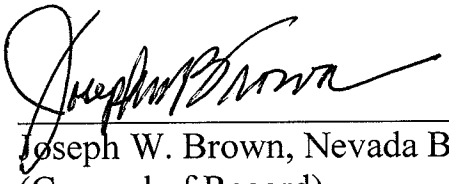
when used in other states, have damaged the public's faith in government. Finally, the proposed brief will argue that Nevada's approach, which requires that government attorneys represent the state in all litigation absent a conflict of interest or specific legislative approval, NRS § 228.110(2), is the most effective policy for avoiding the problems that have arisen elsewhere.

Request to File Out-of-Time

Amici curiae file this motion and the accompanying brief at the earliest opportunity upon learning of the Court's consideration of the Petition. Typically, Rule 29(f) requires an *amicus curiae* to file its brief, accompanied by a motion for leave to file, no later than seven days after the brief of the party being supported is filed. This case, however, case comes before the Court on a Petition for Writ of Mandamus or, in the alternative, a Writ of Prohibition, filed on July 31, 2012. On August 9, 2012, the Court issued an Order directing the State of Nevada to file and serve an answer within thirty days (by September 10, 2012). The rules do not set a specific time frame for filing an *amicus* brief in this situation. No party will be prejudiced as a result of the Court granting leave to file the proposed brief. The State will have two weeks to incorporate any response to the proposed brief in its answer. Movants have no objection to the Court providing the State with additional time to file a response to the proposed brief.

For these reasons, the proposed *amici curiae* request that the Court grant its Motion.

Respectfully submitted this 24th day of August, 2012,



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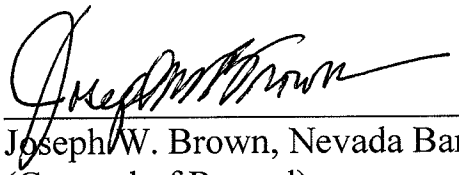
Of Counsel for the
Chamber of Commerce of the
United States of America

ATTORNEY CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2

I have reviewed the foregoing Motion for Leave to File Amicus Curiae Brief. To the best of my knowledge, the Motion is not frivolous or interposed for any improper purpose and complies with all applicable Nevada Rules of Appellate Procedure.

Respectfully submitted this 24th day of August, 2012,



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I hereby certify that on the 24th day of August, 2012, a copy of the foregoing Motion for Leave to File Brief as *Amici Curiae* was sent via U.S. Mail, first class, postage prepaid, to the following:

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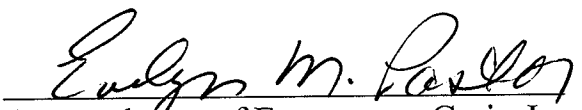

An employee of Fennemore Craig Jones Vargas

EXHIBIT

Nevada Supreme Court Docket No. 61387

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and

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PROPOSED *AMICI CURIAE* BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CHAMBER OF RENO, SPARKS, AND NORTHERN NEVADA, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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NRAP 26.1 DISCLOSURE

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, *Amici Curiae,* the Chamber of Commerce of the United States of America, the Chamber of Reno, Sparks, and Northern Nevada, and American Tort Reform Association, state that they have no parent corporations and that no publicly held company owns 10% or more of the organizations' stock.

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:

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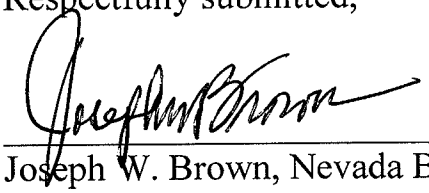

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INTEREST OF *AMICI CURIAE*

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ISSUE PRESENTED

Whether an agreement between the State of Nevada and a private law firm, deputizing outside lawyers to enforce Nevada law on a contingent-fee basis, is invalid because it violates the unambiguous language of NRS § 228.110(2) and otherwise is contrary to law and sound public policy.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt Petitioners' statement regarding the procedural posture of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Delegation of enforcement of state law to private lawyers with a profit interest in the litigation is contrary to legal and government ethics, constitutional law, and sound public policy. As the United States Supreme Court has recognized, government attorneys are "the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). By contrast, attorneys who work on a contingent-fee basis are motivated by financial incentives to maximize recovery. In state litigation, the two functions – impartial governance and profit motive – are irreconcilably conflicted.

Nevada's legislators had the foresight to ensure that enforcement of state law remains the providence of public officials. Longstanding Nevada law unambiguously prohibits the State from hiring outside counsel absent a conflict of interest that precludes the state from using its own lawyers or specific authorization from the legislature. NRS § 228.110(2). This statute is purposefully clear to avoid circumstances that may give rise to the serious concerns that are implicated when state power is delegated to private individuals with profit motivations.

Notwithstanding the unambiguous language of NRS § 228.110(2), the Attorney General claims implied authority to deputize a private law firm,

compensated based on the amount of recovery collected, to investigate and prosecute actions seeking damages, civil penalties, restitution and disgorgement of profits. This arrangement is in clear violation of the law and has substantial implications for those who do business in Nevada.[1] *Amici* urge the Court to grant the writ of prohibition and find the agreement void *ab initio.*

ARGUMENT

I. NEVADA LAW WISELY PROHIBITS SUCH ARRANGEMENTS

Longstanding Nevada law clearly establishes that the Attorney General and "duly appointed deputies" of the Attorney General represent the state "on all matters" arising in the Executive Department of the State Government. NRS § 228.110(1). The statute goes on to provide:

> No officer, commissioner or appointee of the Executive Department of the Government of the State of Nevada shall employ any attorney at law or counselor at law to represent the State of Nevada within the State, or to be compensated by state funds, directly or indirectly, as an attorney acting within the State for the State of Nevada or any agency

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[1] The Attorney General, through the law firm involved in this case, has brought enforcement actions against several companies pursuant to contingent-fee arrangements, but, thus far, have avoided court rulings on similar challenges. For example, after the Attorney General and this firm sued Pulte Homes and Lennar, both companies sought to void such agreements in federal court. They withdrew the suits before the court could rule on the merits when both cases settled. *See Pulte Homes, Inc. v. Goddard and Cortez-Mastro*, 1:10-cv-00377 (D.D.C.), filed Mar. 8, 2010, voluntarily dismissed Sept. 14, 2010; *Lennar Corp. v. Cortez-Mastro*, 1:10-cv-00378 (D.D.C.), filed Mar. 8, 2010, voluntarily dismissed Sept. 6, 2011.

> in the Executive Department thereof unless the Attorney General and the deputies of the Attorney General are disqualified to act in such matter or unless an act of the Legislature specifically authorizes the employment of other attorneys or counselors at law.

NRS § 228.110(2). The law is straightforward and unambiguous. Its terms explicitly apply to all Executive Department officials, of which the Attorney General is a member. *Id.* ("No officer...."). The text prohibits both "employing" outside counsel and "compensating [them] by state funds, directly or indirectly" – language that eliminates any question as to whether state officials may hire outside counsel if they are to be paid out of recovery received in the action rather than directly through state funds. *See id.* Finally, the statute expressly provides only two situations in which Executive Department officials may hire outside counsel – (1) where the Attorney General's attorneys are disqualified, such as where there is a conflict of interest; or (2) where the Legislature "specifically authorizes" the public official to hire outside counsel. *Id.*

Tellingly, the Attorney General does not – because she cannot – contend that either of the sole two statutory exceptions authorize her to hire outside counsel to represent the State. Instead, the Attorney General attempts to bypass the statutory structure and argues that she has inherent and common law authority that trumps the express statutory enactment of the Legislature. Any such common law authority, however, must be consistent with statutory law of Nevada. *See* NRS § 1.030 ("The common law of England, *so far as it is not repugnant to or in*

conflict with the . . . laws of this state, shall be the rule of decision in all the courts of this state." (emphasis added)).

For many years, Nevada officials have understood that NRS § 228.110(1) reflects "the theory of government which holds that central responsibility and authority should be lodged with the officers of government upon whom the people have imposed such duties and responsibilities, and who are directly responsible to the electorate." Attorney Gen. Op. No. 57-243, at 13 (Mar. 1, 1957), *available at* http://ag.state.nv.us/publications/ago/archive/1957_AGO.pdf. As the Attorney General Opinion concluded, "[t]he appointment or hiring of attorneys by various governmental departments without direct legislative authority only creates confusion and adds to the cost of government." *Id.* While in that instance the Attorney General was focused on the problems that would occur if individual state agencies or officials hired their own lawyers rather than relied on the counsel of lawyers within the Office of the Attorney General, as this brief will show, similar and potentially more serious problems arise when the state's sovereign powers are contracted-out by the State Attorney General's office to private attorneys.

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II. LAW ENFORCEMENT THROUGH ATTORNEYS WITH A PROFIT-INTEREST IN THE LITIGATION IS CONTRARY TO LAW AND SOUND PUBLIC POLICY

A. The Purpose of Contingent Fees Is to Provide Access to Justice to Those Who Cannot Afford to Sue; Government Use is Suspect

Contingent fees, when properly used, can serve a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). When contingent-fee agreements do not further access to the courts for individuals with limited means or when these fee arrangements create incentives that violate public policy, they should be viewed with skepticism and scrutiny. Indeed, despite the widespread use of contingent-fee agreements today, they remain subject to prohibitions and limitations. For example, contingent fees are not permitted in criminal defense because they threaten to corrupt justice by incentivizing lawyers to win at any cost, such as by suborning perjury. *See* Nev. R. of Prof. Cond. 1.5(d). In addition, contingent-fee agreements in divorce cases are facially invalid because they would discourage reconciliation. *See id.*

Rule 1.5's express prohibition on contingent fees in representing criminal defendants and in domestic relations cases is not exclusive. The rule recognizes that a "fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) *or other law.*" *Id.* 1.5(c) (emphasis added). "Other law" includes situations

where such agreements are void for public policy, *see, e.g., Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 334 (1853) (invalidating a contingent-fee contract based on securing the passage of state legislation as "tend[ing] to corrupt or contaminate, by improper influences, the integrity of our social or political institutions"), violate due process, or are prohibited by statute. Here, due process and public policy concerns are implicated when the government delegates enforcement power to a private firm that is inherently motivated to seek the greatest amount of damages and inflict the maximum monetary penalties since the firm will receive a share of that recovery, and NRS § 228.110(2) expressly prohibits the agreement.

B. Contingent-Fee Agreements Permitting Private Attorneys to Pursue State Enforcement Actions Violate Legal and Government Ethics

There are key distinctions between government attorneys and private lawyers. The government attorney's duty is not necessarily to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). For example, requiring a defendant to change allegedly harmful behavior or remediate pollution for which it is responsible may be more important to the public interest than obtaining a monetary award.

Nevada law includes a number of rules designed to ensure that government officers and employees are independent and impartial, to avoid action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to protect against conflicts of interest. Nevada government attorneys, like other public officials, take an oath to "support, protect and defend the constitution and government of the United States, and the constitution and government of the State of Nevada." Nev. Const. art. 15, § 2. A public office is a "public trust" held for the "sole benefit of the people." NRS § 281A.020(1)(a).

The Nevada Ethics in Government Law prohibits government officials from engaging in employment that would "tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties" or from participating in negotiations between the government and any business entity "in which the public officer or employee has a significant pecuniary interest." NRS § 281A.400(1), (3). Nor can public officers or employees accept compensation from private sources for performance of government responsibilities. NRS § 281A.400(4). State attorneys are paid in full through public funds to ensure that their loyalty is to the people of the State. The federal government, recognizing the inherent conflict of interest of having outside counsel with a financial motive represent its agencies, prohibits such arrangements. *See* Executive Order 13433,

"Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 16, 2007).

In sum, private lawyers are not bound by the special ethical code that governs state attorneys. The incentive to maximize recovery for their own profit under a contingent-fee arrangement is antithetical to Nevada law.

C. A Well-Documented History of Political Patronage and Exorbitant Fees at the Public's Expense Cautions Against Permitting Such Arrangements

Experience has shown that when public entities hire private law firms, they often do so without the open and competitive process used with other contracts to assure the government receives the best value. Even where governments have issued some type of request for proposals, the selection standards are often lax. As a result, governments routinely have awarded potentially lucrative contracts to friends and political supporters. *See, e.g.,* Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009. In turn, the ultimate result is a system whereby the government may not receive the most qualified counsel, taxpayers may not have received the best value, and private attorneys benefit at the expense of the public. *See generally* Testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research, Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Hearing Before the

Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 112th Cong., 2d Sess., Feb. 2, 2012, Serial No. 112-82, at 48.

Delegation of government authority to profit-motivated attorneys has predictably resulted in exorbitant fee awards at the public's expense. Such agreements have transferred millions of dollars to private lawyers with little relation to the number of hours actually spent working on the government's behalf. *See* Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003* 6 (2003) (estimating that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion over the next 25 years from the 1998 tobacco settlement). Fees resulting from contingent-fee agreements often amount to the equivalent of thousands of dollars per hour; fees as high as $100,000 per hour have been documented. *See* Sheila R. Cherry, *Litigation Lotto*, Insight on the News, Apr. 3, 2000, *available at* 2000 WLNR 4426003.

In addition, contingent-fee awards are often misrepresented as coming at no cost to the public, with no need for government resources – "litigation for free." These contracts are, of course, not free. The cost, *i.e.*, the lucrative fees paid to private lawyers as a result of the litigation, is money that would otherwise fund government services or offset the public's tax burden. When governments enter into a contingent-fee arrangements that can yield multi-million dollar payouts to private firms when they could use their own lawyers, the public loses. Invalidating

such agreements will not tie the hands of cash-strapped states in enforcing their laws. Indeed, these arrangements may ultimately cost the state more than if the state had handled the matter with its own lawyers. *See, e.g.*, Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8, *available at* 2001 WLNR 1140793 (comparing the additional benefits gained by Virginia citizens whose Attorney General pursued the multi-state tobacco litigation without hiring outside counsel with the money lost by its neighbor, Maryland, to contingent fees).

III. THE AGREEMENT VIOLATES DUE PROCESS

While both public policy and Nevada law, together or by themselves, prohibit the Attorney General's contingent-fee agreement with private counsel, the agreement is also void because it violates fundamental principles of due process.

In examining the constitutionality of contingent-fee agreements between state governments and private attorneys, the Rhode Island and California Supreme Courts adopted a test that would permit such arrangements so long as the government maintains complete control over the litigation. *Amici* urge this Court to avoid the temptation to embrace a control-based test because this approach does not provide an effective safeguard as a matter of practice. Even if the Court were to take such an approach, however, government control is facially lacking here.

In Rhode Island, the state's Attorney General hired two private law firms to pursue a public nuisance action against former manufacturers of lead paint on a

contingent-fee basis. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469 (R.I. 2008). In light of the special obligations of the Attorney General to the public, the Rhode Island Supreme Court found that contingent-fee agreements between the state and private lawyers must include "exacting limitations" that ensure that the Office of the Attorney General "retains ***absolute and total control over all critical decision-making***" and that the case-management authority of the Attorney General is "final, sole and unreviewable." *See id.* at 475-76 (emphasis in original). Under these conditions, the Rhode Island Supreme Court permitted the contingent-fee representation. *See id.*[2] In 2010, the California Supreme Court followed Rhode Island's lead and adopted a very similar approach. *See County of Santa Clara v. Atlantic Richfield*, 235 P.3d 21, 38-39 (Cal. 2010).[3]

If applied to the agreement in this case, the control test would require invalidating the contract because its terms expressly prevent the Attorney General from settling for injunctive relief, even if in the best interests of Nevada citizens,

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[2] The Rhode Island Supreme Court permitted the practice with trepidation. *Id.* at 476 n.50 ("Given the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time.").

[3] The Supreme Court of Louisiana has also invalidated a contingent-fee agreement on the basis that it violates the separation of powers because the Attorney General lacked authority to pay outside counsel fees from state funds without legislative approval. *See Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997).

unless a defendant agrees to pay the law firm's fees and costs. The Contingency Fee Professional Services Agreement dated Oct. 29, 2009 (attached as Exhibit A to Appendix Exhibit C, LPS 078-91) provides:

> In the event the Litigation is resolved by the settlement for injunctive relief only, or under terms involving the provision of goods, services or other "in kind" or non-monetary payment, . . . Contractor will receive costs and hourly fees at fair market value of their legal services expended on behalf of the State. **In such an event, the State agrees not to settle the case unless defendants agree to pay said amount.**

Section 3.5.4 (emphasis added). In and of itself, this last sentence cedes final control over settlement to the private firm, placing protection of the financial interests of private counsel before the public interest.

The safeguards imposed by the Supreme Courts of Rhode Island and California are an attempt to address this type of due process concern. As a practical matter, however, the control test is unworkable and unenforceable, as the trial court in the California case recognized. *See County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657, 2007 WL 1093706 (Cal. Super. Ct., Santa Monica County, Apr. 4, 2007) (Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys). While a court may have authority to review the language of the contingent-fee contract to ensure that it contains the judicially-mandated language, it cannot oversee the day-to-day management of the litigation to ensure that government lawyers, not financially-motivated private attorneys, are calling the shots. Who is leading the actual

litigation of the case would be shielded from the court's view, and that of the public, by the attorney-client privilege.

As such, the Court should recognize the impracticality and unworkability of the California and Rhode Island control test. Moreover, the agreement here raises heightened due process concerns because it deputizes a private law firm with state authority to "prosecute" the litigation, identify which companies to sue, and seek civil penalties – punitive measures akin to a criminal action. In such instances, due process requires a complete prohibition of the arrangement.[4]

Given the clarity of NRS § 228.110(2), however, the Court need not struggle with the extent of safeguards required by due process, as the statute expressly voids the Attorney General's contract in this case. In addition, the serious concerns discussed above provide adequate and independent grounds for voiding the agreement as a violation of due process and public policy.

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[4] In an earlier case, the California Supreme Court held that government use of contingent-fee arrangements is absolutely prohibited in quasi-criminal enforcement actions because a private attorney who has the "vast power of the government available to him" must "act with the impartiality required of those who govern." *See People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350 (Cal. 1985).

CONCLUSION

For these reasons, *Amici* respectfully urge the Court to grant the Writ of Prohibition and invalidate the legal services contract at issue.

Respectfully submitted this 24th day of August, 2012

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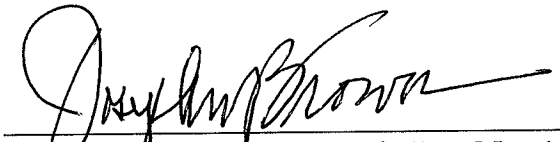
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Joseph W. Brown, certify that this 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 2007 in 14-point Times New Roman. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed fifteen pages, and contains 3,230 words.

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. 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.

DATED this 24th day of August, 2012.



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