Case No. 82951

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Appellant,

v.

STATE OF NEVADA EX. REL. DIVISION OF INSURANCE OF THE DEPARTMENT OF BUSINESS AND INDUSTRY; BARBARA D. RICHARDSON, in her official capacity as Commissioner of Insurance,

Respondents.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. A-21-829339-B

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL (IN PART)

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The Chamber's membership includes a broad range of businesses that use consumer credit reports and credit scoring systems to measure risk associated with various commercial transactions. The Chamber supports the efforts of the National Association of Mutual Insurance Companies ("NAMIC") to invalidate and/or permanently enjoin the enforcement of Regulation R087-20 (the "Regulation"). In December 2020, under the guise of preventing "unfair discrimination," the Division of Insurance of the Department of Business and Industry (the "Division") adopted the Regulation, which prohibits all credit-based premium increases or negative

[1] All parties consented to the Chamber's participation as *amicus curiae*. *See* NRAP 29(a), (d)(3); *see also* Stipulation dated Oct. 27, 2021 (on file). No party's counsel authored this brief either in whole or in part, and no party or party's counsel, or person or entity other than the Chamber, its members, and its counsel contributed money for the preparation and submission of this brief.

underwriting decisions from March 1, 2020 through a presently-unknown date two years after the expiration of the Governor's Declaration of Emergency due to the Covid-19 pandemic. The Regulation further requires that insurers reunderwrite and rerate affected policyholder policies and provide retroactive refunds to consumers for any credit-based premium increases during the approximately nine months that preceded the Regulation's adoption.

The Chamber recognizes the effects the Covid-19 pandemic has inflicted on Nevada citizens and has supported lawful, temporary relief measures such as the Coronavirus Aid, Relief and Economic Security (CARES) Act. But any relief efforts must be lawful, as well as ensure the stability and predictability necessary for businesses to thrive.

Here, the Division has exceeded its statutory authority by acting through regulatory fiat to implement major changes to the insurance market. The Regulation conflicts with the governing statutory scheme, which permits insurers to use credit-scoring and includes a statutory exception that allows consumers to seek relief if they have experienced extraordinary life events such as economic recessions, job loss or, as applicable here, a government-declared pandemic. The Regulation replaces this case-by-case inquiry with a one-size-fits-all approach that applies regardless of whether a consumer's insurance credit score was impacted by the pandemic. Because the Division exceeded its statutory authority by adopting the

Regulation and created irreconcilable conflicts with NRS Chapter 686A, the Chamber supports NAMIC's request that the Court invalidate and/or permanently enjoin enforcement of the Regulation.

SUMMARY OF ARGUMENT

The Nevada Legislature expressly granted property and casualty insurers the right to use credit-based insurance scoring, subject to specific requirements designed to ensure the use of this information is fair and not discriminatory. Insurance companies use credit-based insurance scoring as one factor to assess the risk of a consumer who applies for new coverage or is seeking a policy renewal. *See* NRS 686A.660. Much like lenders use credit scores to determine a potential borrower's ability to remain current on a credit obligation, insurance companies use insurance-based credit scores to predict insured losses. *Id.* The better one's insurance credit score, the higher likelihood he or she will receive better premiums and rates.

Recognizing that extraordinary life events can potentially impact a person's insurance credit score, the Legislature enacted NRS 686A.685, which permits applicants or policyholders to request reasonable exceptions from insurers if their credit information has been impacted by unforeseen circumstances like (i) "a catastrophic event, as declared by the Federal or State Government;" (ii) "a serious illness or injury, or a serious illness or injury to an immediate family member;" or (iii) the "[t]emporary loss of employment for a period of 3 months or more, if it

results from involuntary termination." The Legislature enacted NRS 686A.685 in response to the "high unemployment rate[,] home foreclosures, and the economic difficulties" during the Great Recession. (App. 397-98.) Nevada, in other words, already has a permanent relief measure for individuals facing a "catastrophic event" (like the Covid-19 pandemic) in the same statutory scheme granting insurers the right to use consumer credit information when assessing potential risks and setting appropriate insurance policy premiums.

Nevertheless, on December 29, 2020, the Division adopted the Regulation for the stated purpose of addressing "unfair discrimination" in the use of credit-scoring by insurers during the Covid-19 pandemic. Specifically, Section 2 of the Regulation flatly prohibits insurers from increasing a policyholder's premium or making an adverse underwriting decision as a result of any change in the policyholder's consumer credit report or insurance score occurring between March 1, 2020 and a presently-unknown date two years after Nevada's Governor terminates the Declaration of Emergency for Covid-19 issued on March 12, 2020. Section 2 further mandates that any change in a consumer credit report or insurance score shall be deemed to have been caused by the Covid-19 pandemic, thereby forcing insurers to forgo traditional methods of assessing risk and setting premiums, such as an individual's personal choices or financial management decisions, relevant claims history, and the company's expected losses and expenses for all lines of insurance.

Any violation of Section 2 by an insurer shall automatically be deemed "unfairly discriminatory."

Section 4 of the Regulation requires insurers to identify any policyholder whose premium was increased because of changes in the policyholder's consumer credit report or insurance score during the subject period, and revise or reunderwrite the premium using pre-pandemic information—which necessarily does not accurately account for a consumer's present risk. That's not all. Section 4 then obligates insurers to refund the policyholder *retroactively* for overpayments related to increases based on consumer credit report or insurance score changes dating back to March 1, 2020—approximately nine months before the Regulation was adopted.

In short, by adopting the Regulation and labelling the use of credit-based insurance risk scores during the pandemic as "unfairly discriminatory" regardless of any individual circumstances, the Division effectively nullified NRS Chapter 686A for an indefinite period that will exceed three and a half years at a minimum. The Division, moreover, took this drastic step to remedy a problem the Legislature expressly addressed a decade ago when it enacted the extraordinary life event exception codified in NRS 686A.685. The Division greatly exceeded its authority by promulgating a Regulation that conflicts with existing law, goes far beyond the powers delegated to the Division by the Legislature, and disrupts stable markets by imposing retroactive obligations on businesses.

The district court upheld Section 2 of the Regulation, but permanently enjoined the Division from implementing or enforcing the retroactive refund requirement contained in Section 4. The Chamber respectfully submits the entire Regulation should be invalidated or permanently enjoined.

ARGUMENT

I. THE REGULATION NULLIFIES THE PROVISIONS OF NRS CHAPTER 686A ALLOWING INSURERS TO USE CREDIT-BASED SCORING.

The Nevada Constitution has an express separation of powers provision. *See* Nev. Const. art. III, § 1. It states, in part, that "no persons charged with the exercise of powers properly belonging to [the Legislative, Executive or Judicial] departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." *Id.* In the context of administrative agencies, which are considered part of the executive branch, "[b]asic separation of powers principles dictate that an agency may not promulgate a rule or regulation that renders [the Legislature's] words a nullity." *E. Bay Sanctuary v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018) (citing *Mohasco Corp. v. Silver*, 447 U.S. 825 (1980)); *see also State v. Dodd*, 783 P.2d 106, 108 (Wash. Ct. App. 1989) ("It is a cardinal rule of administrative law that an agency by its rulemaking authority may not amend or nullify a statute under the guise of interpretation.") (citing *Green River Cmty. Coll. v. Higher Educ. Personnel Bd.*, 622 P.2d 826 (Wash.

1980)); *see also Tew v. City of Topeka Police and Fire Civil Serv. Comm'n*, 697 P.2d 1279, 1283 (Kan. 1985) ("Regulations adopted by an administrative agency must lie within its competence to make, and its regulations may not contravene or nullify controlling statutes.").

This Court, accordingly, will "not hesitate to declare a regulation invalid when the regulation [ ] conflicts with existing statutory provisions or exceeds the statutory authority of the agency." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) ("Any regulation that prohibits a casualty insurer from charging an accident against an insured even though the insured is legally liable for the accident under NRS 41.141 is clearly in conflict with both NRS 687B.385 and 41.141. Therefore, we conclude that the Division exceeded its authority under NRS 679B.130 by promulgating NAC 690B.230(2)."); *see also Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995) ("this court has held on many occasions that administrative regulations cannot contradict the statute they are designed to implement").

Here, under the pretense of interpreting NRS 686A.680(1)(a) and other general statutes prohibiting unfair discrimination in insurance practices, the Division has nullified the statutory scheme permitting insurers to use consumer credit information to determine insurance premiums and make underwriting decisions. *See* NRS 686A.600 – NRS 686A.730. Section 2 of the Regulation unequivocally states

that insurers shall not increase a policyholder's premium or make an adverse underwriting decision based on any change in the policyholder's consumer credit information during the subject time period. But the statutory scheme codified in NRS Chapter 686A provides that insurers are entitled to take those very actions provided they comply with the requirements contained therein. *See generally* NRS 686A.680; NRS 686A.700; NRS 686A.710. Thus, the Regulation is directly at odds with the statutes it claims to interpret.

The Regulation conflicts with the statutory scheme for the additional reason that the Legislature already provided a statutory avenue for insureds to seek relief based on the impact of unforeseen events. NRS 686A.685 allows an applicant or policyholder to request an exception to a premium increase or adverse underwriting decision if that person's credit score has been affected by "a catastrophic event as declared by the Federal or State Government," "serious illness," or the "temporary loss of employment for a period of 3 months or more." These fact-based criteria are directly applicable and provide available relief to "those swept up by a cataclysm[ic] disruption to Nevada's economy," such as the Covid-19 pandemic. (App. 304.) Nevertheless, the Division bypassed the provisions of NRS 686A.685 and categorically prohibited premium increases or adverse underwriting decisions based on changes in the policyholder's consumer credit information during the subject time period—regardless of whether the credit information was actually impacted by the

Covid-19 pandemic or was the result of the person's independent financial management decisions. This is a textbook example of agency overreach.

Try as it might, the Division cannot justify the Regulation's legality simply based on the statutory non-discrimination provision. The statute prevents an insurer from using "an insurance score that is calculated using income, gender, sexual orientation, gender identity or expression, address, zip code, ethnic group, religion, marital status or nationality of the consumer as a factor, *or would otherwise lead to unfair or invidious discrimination*." NRS 686A.680(1)(a) (emphasis added). The Division adopts a sweeping interpretation of what constitutes "unfair discrimination" that goes far beyond the bases enumerated in NRS 686A.680(1)(a) and swallows the entire statutory scheme. The Division's myopic focus on this provision disregards the subsequent provisions of the same statute, which make clear that reliance on insurance scores does not inherently constitute unfair discrimination. These provisions expressly *permit* insurers to take adverse actions partially premised on consumer credit information, so long as they also consider other independent underwriting factors. *See, e.g.,* NRS 686A.680(1)(b)-(f).[2]

[2] As NAMIC correctly points out, other courts have rejected the argument that use of consumer credit information in the insurance industry is "unfairly discriminatory." *See* NAMIC OB at 29-30 (analyzing *Insurance Inst. of Michigan v. Comm'r, Fin. & Ins. Servs.*, 785 N.W.2d 67, 86 (Mich. 2010)) ("Because the Commissioner has no authority under the Insurance Code to ban a practice that the code permits, the [regulations] exceed the scope of the Commissioner's rulemaking authority under the Insurance Code.").

Section 2 of the Regulation renders NRS 686A.680(1)(b)-(f) nugatory by mandating that any premium increase or adverse underwriting action during the relevant period shall be deemed unfairly discriminatory, irrespective of whether the insurer considered other factors. The Division's interpretation thus violates the fundamental rule that "subsections of a statute will be read together to determine the meaning of the statute." *Cable v. State ex rel. its Employers Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006); *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory."). Again, the Division's adoption of the Regulation for the ostensible purpose of preventing "unfair discrimination" is particularly problematic as it purports to solve a problem the Legislature already addressed by permitting case-by-case exceptions for unforeseen events. NRS 686A.685. *See supra* at 8-9.

Allowing the Division to promulgate a regulation that eviscerates Nevada law as described above would set a dangerous precedent. The Legislature codified the right of insurers in Nevada to use consumer credit information as one factor to help calculate premiums and make related underwriting decisions subject to the requirements of NRS Chapter 686A. Indeed, research indicates that risk-based pricing for insurance products has a positive impact on historically underserved

consumers.[3] Insurers, in turn, have relied on state law to adopt business practices that create a predictable and stable insurance market. Permitting the Division—an agency of the executive branch with no legislative power—to unilaterally nullify or indefinitely suspend public policy as enacted by the Legislature, would create volatility in the insurance market and harm Nevada policyholders. Such *post hoc* rulemaking would effectively grant the Division and other state agencies the power to repeal or amend existing law, acting as a shadow branch of the government to undermine the Legislature's will by fiat.

II. THE DIVISION MAY NOT RELY ON AN UNCONSITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY TO DEFEND THE REGULATION.

The Division invokes a smattering of general statutes authorizing it to "adopt reasonable regulations" and to "ensure that policies are not unjust, unfair, inequitable, [or] unfairly discriminatory." (App. 303-05.) (citing NRS 679B.130(1) and NRS 679B.150(1)(b)). This, too, results in a separation of powers problem as "[t]he power conferred upon the Legislature to make laws cannot be delegated to any other body or authority." *Banegas v. State Indus. Ins. Sys*., 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) (citing Nev. Const. art. III, § 1).

[3] *See* https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/04/CCMC_RBP_v11-2.pdf (last visited Oct. 28, 2021).

While the legislature "may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power," *see id.*, "[a] statute that gives unlimited regulatory power to a commission, board, or agency without prescribed restraints offends the constitution." *3613 Ltd. v. Dep't of Liquor Licenses & Control*, 978 P.2d 1282, 1287 (Ariz. App. 1999); *accord McNeill v. State*, 132 Nev. 551, 557, 375 P.3d 1022, 1026 (2016) ("[s]uch authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power."). "Sufficient legislative standards are required in order to assure that the agency will neither act capriciously nor arbitrarily." *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985).

The Division contends the Regulation is constitutional because the Legislature "may delegate [to administrative agencies] the power to determine the facts or state of things upon which the law makes its own operations depend." *Id*. From that premise, the Division claims it "determined facts demonstrating 'unfairly discriminatory' rates due to the pandemic and regulated according to suitable standards from the Legislature such as the longstanding definition in NRS 686B.050(4)." (App. 305.) The Legislature, however, "vests [the Division] with mere fact finding authority and not the authority to legislate." *Luqman*, 101 Nev. at 153, 697 P.2d 107, 110. The Division, thus, "is only authorized to determine facts

which will make the statute effective." *Id.*; *see also Banegas*, 117 Nev. at 227, 19 P.3d at 248 ("To read NRS 616C.505(8)(1) to broaden the class of dependents to include any individual who is factually dependent upon the deceased employee, in the absence of legislative guidelines to aid SIIS in administering payments to such unspecified dependents, would constitute an invalid delegation of legislative power which would compromise the constitutionality of the statute.").

Here, the Division's adoption of the Regulation goes well beyond "fact-finding." Rather than give effect to the statutes specifically allowing insurers to use consumer credit information under defined standards, the Division issued a blanket prohibition on the very thing NRS Chapter 686A has permitted for nearly two decades. The Division's reliance on NRS 679B.150(1)(b) and other general statutes prohibiting discrimination as justification for the Regulation do not provide a safe harbor as they lack sufficient standards by which to determine the facts. None of the statutes cited by the Division as authorization for the Regulation contain any guidelines or benchmarks that would allow the Division to override legislative intent and suspend the legal effect of those sections of NRS Chapter 686A that allow insurers to engage in credit-based scoring.[4]

[4] Reliance on these general statutes, some of which are from different NRS Chapters than NRS 686A, also disregards the general/specific canon of statutory construction. "Under the general/specific canon, the more specific statute will take precedence [ ] and is construed as an exception to the more general statute [ ], so that, when read together, the two provisions are not in conflict, but can exist in harmony." *Williams*

The dangers posed by allowing the Division and other state agencies to legislate under the auspices of vague authorizing statutes with no identifiable guidelines are self-evident. The Legislature previously addressed the use of consumer credit information by insurers during an economic crisis and purposefully chose a targeted, case-by-case, and fact-driven approach to give consumers relief in the form of NRS 686A.685. The Legislature had two opportunities to revisit this approach amid the Covid-19 pandemic during its special session in summer 2020 and its regular session in spring 2021. It saw no need for modification. Now, however, the Division has substituted its judgment for that of the Legislature through regulatory fiat. NRS 679B.150(1)(b) and the other general statutes cited by the Division cannot be used as a source of authority to manipulate the law in this fashion.

III. THE DISTRICT COURT CORRECTLY ENJOINED SECTION 4 OF THE REGULATION.

The district court preliminarily and permanently enjoined Section 4's retroactive refund mandate. (App. 282-83; 740; 742.) While it is unclear whether the Division is challenging that ruling on appeal, this portion of the lower court's order should be affirmed as "[r]etroactivity is not favored in the law." *Cnty. of Clark*

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v. State Dep't of Corrections, 133 Nev. 594, 600, 402 P.3d 1260, 1265 (2017) (internal citations and quotations omitted). Here, the specific provisions of NRS 686A.680(1)(b)-(f) instruct that "adverse actions" based on consumer credit information are not inherently discriminatory or unlawful so long as insurers also consider other underwriting factors independent of credit information.

v. LB Props., Inc., 129 Nev. 909, 912, 315 P.3d 294, 296 (2013). Where a state agency has been delegated the proper authority to adopt legislative regulations, the "regulations generally operate prospectively unless an intent to apply them retroactively is clearly manifested." *Id.* "Where the new regulation is an explicit break from prior practice . . . it may not be retroactively applied." *Id.* (citing *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1152 (9th Cir. 2003)).

The Division adopted the Regulation on December 29, 2020. It admittedly intended for the Regulation to apply retroactively as it requires insurers to (i) identify policyholders whose premiums were increased based on a change to their credit information after March 1, 2020, (ii) revise the premiums applicable to affected policies, and (iii) issue refunds for the overpayments attributable to said increases. As discussed above, the Division lacked the proper authority to enact the Regulation in the first place, given the Regulation's conflict with existing law and the absence of any guidelines in the general statutes the Division relies upon to justify its action. *See* Points I and II, *supra*.

But even if the Legislature had properly delegated authority to the Division to adopt legislative regulations like that at issue here—and it did not—the Regulation cannot be applied retroactively. The Legislature did not authorize retroactive regulations under the governing statutes. *See* NRS 679B.130. Moreover, the Regulation is not interpretive and instead "represents an explicit break from the

approach" embodied in NRS Chapter 686A. *LB Props., Inc.,* 129 Nev. at 913, 315 P.3d at 296. Whereas "adverse actions" based (in part) on an applicant's or policyholder's credit information were permissible under NRS 686A.680(1)(b)-(f) since 2003, they are now forbidden, by decree of the Division, if based on credit information post-dating March 1, 2020. Whereas premium increases based (in part) on changes to credit information—including credit information obtained between March 1, 2020 and December 28, 2020—were permissible and had already been collected, those increases were declared illegal *ex post facto* on December 29, 2020 and must now be refunded.

Retroactive application of such substantive obligations will assuredly disrupt insurance markets where predictability, certainty and continuity in the law are essential for insurers and policyholders alike. Insurance is a contractual means of managing risk whereby a policyholder transfers a specified risk (here, the risk of damage or loss to one's home, business, *et cetera*) to an insurer in exchange for a specified premium. Insurers set premiums based on their estimates of the likelihood and amount of future losses that may be covered by their policies. Determining the appropriate premiums for insurance policies requires determining the nature, probability, and magnitude of any assumed risk. *See generally*, 1 Couch on Ins. § 1.2 (3d. ed) (through June 2021 Update). Insurers must also accurately calculate and

set aside reserves that enable them to continue operations while being able to pay out policyholders' future claims.

Retroactively stripping one of the tools available to insurers to calculate accurate premiums is problematic enough. Requiring them to refund increased premiums for a nine-month period—based on a legitimate business practice that has been expressly authorized by statute for nearly two decades—is beyond the pale. Unlike NRS 686A.685, which can be applied on a case-by-case basis when a particular consumer needs relief, the Regulation applies across the board to all credit-related premium increases occurring since March 1, 2020. Considering that Nevada's written premium volume exceeded $17 billion as of year-end 2017,[5] the magnitude of potential harm comes quickly into view. And if insurers do not receive premiums adequate to cover the risk and expenses they have undertaken—and if they are required to refund significant portions of already-collected premiums—it will imperil the manner and means by which insurance companies determine adequate funds to pay valid claims, thereby jeopardizing both the insurers and their insureds. That, of course, is not good for anyone.

[5] *See* https://doi.nv.gov/uploadedFiles/doi.nv.gov/Content/News_and_Notices/2019%20Market%20Report_Final.pdf (last visited October 28, 2021).

CONCLUSION

For the reasons set forth herein, the Chamber supports NAMIC's request that the Court invalidate and/or permanently enjoin enforcement of the Regulation by reversing that portion of the district court's order that upheld the validity of Section 2 of the Regulation, and affirming that portion of the order permanently enjoining Section 4 thereof.

DATED this 1st day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this Amicus 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 4057 words.

I further certify that I have read this Amicus 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 Rules

of Appellate Procedure.

DATED this 1st day of November, 2021

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 1st day of November 2021, I caused true and correct copies of the foregoing ***Amicus Curiae*** **Brief of the Chamber of Commerce of the United States of America in Support of Appellant and Reversal (In Part)** to be served via the Court's e-filing/service system to the following:

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