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IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks,

Petitioner,

vs.

The **FIRST JUDICIAL DISTRICT COURT** of the State of Nevada in and for the County of Carson City and the **NEVADA COMMISSION ON ETHICS**,

Respondents. /

Case No. 51850

VERIFIED PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR WRIT OF PROHIBITION (NRS 34.185 – FIRST AMENDMENT PETITION)

Councilman Michael A. Carrigan, the elected representative of the Fourth Ward of the City of Sparks, by and through the undersigned counsel of record, hereby petitions this Court for its Order issuing a writ of mandamus, or in the alternative a writ of prohibition against the First Judicial District Court of Nevada and the Nevada Commission on Ethics. This Petition is brought pursuant to Nevada Revised Statute (NRS) 34.185 as a First Amendment Petition, and is made upon the following Statement of Points and Authorities.[1]

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[1] All statutes relevant to this matter and cited herein are accurately reproduced in "Exhibit A" attached hereto for the Court's convenience. Petitioner notes that the Nevada Ethics in Government Law has been amended since the conclusion of the proceeding before the Nevada Commission on Ethics, and now resides in NRS Chapter 281A instead of NRS Chapter 281. The body of this pleading employs the former statutory citations because those are the citations contained in every supporting document to this claim. The new citations are present and highlighted in Exhibit A.

08-15116

STATEMENT OF POINTS AND AUTHORITIES

I.

Introduction

A. Jurisdiction

The Nevada Supreme Court maintains original jurisdiction to grant extraordinary relief through mandamus or prohibition. Nev. Const. Art. 6, Sec. 4; NRS 34.160; NRS 34.320. The circumstances of this Petition amount to an unconstitutional prior restraint of Councilman Carrigan's First Amendment rights – therefore, this action is brought pursuant to NRS 34.185, which secures prompt judgment on this application.

B. Factual History

On February 16, 2005, Red Hawk Land Company submitted an application to the City of Sparks Planning Department proposing the transfer of a tourist commercial zoning designation and a gaming entitlement from the Wingfield Springs development in Sparks, Nevada to another Red Hawk development - Tierra Del Sol - along the Pyramid Highway in Sparks. This project is known colloquially as the "Lazy 8." The transfer application was based upon a 1994 development agreement that allowed for the future transfer of development credits if the credits remained unused. The Lazy 8 is a source of public consternation, with a small group of residents of unincorporated Washoe County and the Sparks Nugget being the most vocal opponents of the project. At an August 23, 2006 public meeting, the Sparks City Council voted three to two to deny Red Hawk's application for tentative approval of the proposed Tierra Del Sol planned development handbook, which included the transfer of the gaming entitlement. At this meeting, Red Hawk Land Company was represented by a number of people, including Carlos Vasquez, who is a paid consultant to Red Hawk.

Subsequently, Red Hawk filed a lawsuit (Second Judicial District Court Case # CV06-02078) against the City on August 25, 2006, alleging that the denial of the application was a breach of the 1994 development agreement and that the breach caused damages in excess of $100 million. Through negotiations with Red Hawk, and after contemplating its options and assessing the legal obstacles in defending the Red Hawk Complaint, the City elected to settle the lawsuit. The Stipulation, Judgment and Order entered by the Second Judicial District Court of Nevada on September 1, 2006 obligated the City to tentatively approve Red Hawk's application.

Two weeks later, several nearly identical ethics complaints were filed against Sparks City Councilman Michael Carrigan with the Nevada Commission on Ethics (hereinafter "Commission" or "Commission on Ethics"). The complaints alleged that Councilman Carrigan used his position as a Sparks City Councilman to secure unwarranted benefits for himself from Carlos Vasquez and that Mr. Vasquez had an "undue influence" over Councilman Carrigan.

Mr. Vasquez has been friends with Councilman Carrigan since 1991, and served as the volunteer campaign manager for Councilman Carrigan during his initial election to the Sparks City Council in 1999, and each of his subsequent re-elections.

Councilman Carrigan disclosed this relationship prior to the public hearing on the Red Hawk application, and unequivocally stated that he was not in a position to reap any type of benefit from the project, and that he could faithfully and impartially discharge his duties as an elected official in this case. Nevertheless, the Commission commenced an investigation into the actions of Councilman Carrigan, and ultimately charged Councilman Carrigan with (1) using his position in government to secure an unwarranted benefit for Mr. Vasquez; (2) failing to make an adequate disclosure of his relationship with Mr. Vasquez; and (3) failing to abstain from voting on the Red Hawk application on August 23, 2006.

On September 20, 2006, the Sparks City Council voted to ratify the September 1, 2006 settlement as a perfunctory, prophylactic measure taken to eliminate even the slightest concern that the City's decision to settle the Red Hawk action occurred outside the boundaries of Nevada's Open Meeting Law. *See*, NRS 241.037.[1]

On October 6, 2006 the City of Sparks was sued again regarding the Lazy 8 – This time by the Sparks Nugget and a group of citizens. (Second Judicial District Court # CV06-02410). In that case, City's decision to settle the lawsuit was alleged to be faulty because of an alleged violation of

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[1] There has never been an official finding or formal opinion issued by the Nevada Attorney General that the City Council violated Nevada's Open Meeting Law. Therefore, the City maintains that the September 1, 2006 "Stipulation, Judgment and Order" did not require any subsequent approval or ratification by the City Council in a meeting conducted pursuant to Nevada's Open Meeting Law, and that the September 20, 2006 meeting was held only to demonstrate the City Council's commitment to the Open Meeting Law.

Nevada's planning and zoning laws. The Second Judicial District Court dismissed this lawsuit on jurisdictional grounds, never reaching the merits of the case. The subsequent appeal presently resides with this Court. (Supreme Court Case #'s 49504, 49682, 150251).

On August 27, 2007, Red Hawk sought final approval of the Tierra Del Sol planned development handbook from the Sparks City Council. This time, applying a different standard of review as required by NRS 278A.540, the City Council voted three to two to grant final approval of the application.

The Nevada Commission on Ethics convened on August 29, 2007 and held a hearing regarding the ethics complaints filed against Councilman Carrigan. The Commission found that the Councilman (1) did not use his position in government to secure or grant unwarranted privileges, preferences, exceptions or advantages for Carlos Vasquez; and (2) that Councilman Carrigan adequately disclosed his relationship with Mr. Vasquez. See Exhibit B *(In re: Carrigan,* Commission on Ethics Opinion (CEO) 06-61, 06-62, 06-63, 06-64). However, the Commission applied an unconstitutionally vague statute and inconsistently determined that Councilman Carrigan should have abstained from voting on the Red Hawk application at the August 23, 2006 meeting of the Sparks City Council due to his connection to Mr. Vasquez, despite concluding that a majority of Councilman Carrigan's constituency favored the proposed Red Hawk application. *Id.*

Thereafter, on September 21, 2007, the Sparks Nugget and the same group of citizens filed another lawsuit against the City of Sparks (Second Judicial District Case # CV07-02180). This lawsuit requests that the Second Judicial District Court invalidate the August 27, 2007 vote of the Sparks City Council based on the August 29, 2007 findings of the Nevada Commission on Ethics. A motion to dismiss this action is presently pending in Department Six of the Second Judicial District Court.

The Commission on Ethics published a formal opinion regarding its findings at the August 29, 2007 hearing on October 8, 2007. Exhibit B. Councilman Carrigan filed a Petition for Judicial Review in Carson City on October 9, 2007 (First Judicial District Court Case # 07-OC-012451B).

On December 14, 2007, the Sparks Nugget and the same group of citizens filed a Motion to Intervene in the original lawsuit filed against the City of Sparks by Red Hawk (Second Judicial

District Court Case # CV06-02078, *supra*) based on the August 29, 2007 decision of the Commission. The motion argues that the September 20, 2006 vote of the Sparks City Council ratifying the September 1, 2006 settlement is invalid because Petitioner Carrigan should not have voted on the issue. The motion was granted, and the Interveners filed a counter-claim against Red Hawk and a cross-claim against the City of Sparks. Motions to dismiss these claims are currently pending in Department Six of the Second Judicial District Court.

Finally, on May 12, 2008 a hearing regarding Councilman Carrigan's Petition for Judicial Review (First Judicial District Court Case No. 07-OC-012451B, *supra*) was held in Department Two of the First Judicial District Court. In an Order dated May 28, 2008, the District Court upheld the decision of the Nevada Commission on Ethics. Exhibit C (Order of First Judicial District Court).

II.

Relief Requested

A. Mandamus

A writ of mandamus may be issued by the Supreme Court to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by an inferior tribunal, corporation, board or person. NRS 34.160. Here, the actions of the Nevada Commission on Ethics and the First Judicial District Court have the effect of unlawfully preventing Councilman Carrigan from voting on certain issues before the Sparks City Council without prior approval from the Nevada Commission on Ethics and have a substantial chilling effect on Councilman Carrigan's ability to exercise his rights of political association.

A writ of mandamus will issue in cases where a plain, speedy and adequate remedy is unavailable in the ordinary course of law. NRS 34.170. However, the mere fact that an appeal is available from final judgment does not preclude the issuance of an extraordinary writ, particularly when the circumstances reveal urgency or strong necessity. *Jeep Corp. v. District Court*, 98 Nev. 440, 652 P.2d 1183 (1982). Although an appeal often constitutes a plain, speedy, and adequate legal remedy, *Pan v. District Court*, 120 Nev. 222, 225, 88 P.3d 840, 841 (2004), in this case an appeal is not adequate or speedy, and writ relief is appropriate.

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In general terms, this Petition concerns conflicts between the private and political relationships of Councilman Carrigan and the interests of the general public whom he serves. NRS 281.501(2) prohibits public officers, like Councilman Carrigan, from voting on matters that involve the relationships enumerated in NRS 281.501(8). Subsections (d) and (e) of NRS 281.501(8) are unconstitutionally vague, both facially and as applied to Councilman Carrigan, therefore, NRS 281.501(2), which relies on the definition proffered by NRS 281.501(8), is similarly unconstitutionally vague as applied to Councilman Carrigan.

The First Amendment guarantees Councilman Carrigan the right, by virtue of his position as a City Councilman, to vote on issues before the Sparks City Council when he is not otherwise required to abstain under NRS 281.501(2). In finding that Councilman Carrigan violated NRS 281.501(2), the Commission on Ethics invoked the unconstitutionally vague subsections (d) and (e) of NRS 281.501(8), rendering the decision of the Commission both erroneous and constitutionally infirm. Exhibit B. In upholding the Commission's decision, the First Judicial District Court did nothing to delineate the boundaries of the Ethics in Government Law - instead the District Court admonished Councilman Carrigan for not seeking an advisory opinion from the Commission on Ethics. See Exhibit C, p. 18, lns. 1-7 ; Exhibit D, p. 38, lns. 1-12 (Transcript of hearing before First Judicial District Court) (The District Court explained that a primary factor in finding that NRS 281.501(8) is not unconstitutionally vague was the fact that Carrigan could have sought an advisory opinion from the Ethics Commission.) Advisory opinions from the Commission on Ethics are binding upon the future conduct of the requesting party. NRS 281.551(1)(a).

Councilman Carrigan is being forced to choose between risking fines, removal from office, and potential criminal prosecution by performing his duties as an elected representative of the citizens of Sparks without any certainty regarding the boundaries of the law or abstaining from the performance of his duties as a City Council Member, and the free exercise of his first amendment right to vote on matters before the Sparks City Council, until such time as an advisory opinion can be secured from the Commission on Ethics. This Hobson's choice is far reaching and applies to every public officer in the State of Nevada. Subsections (d) and (e) of NRS 281.501(8) are unconstitutionally vague, deceptive, and uncertain. Because of this constitutional infirmity,

Councilman Carrigan, and public officers throughout the State, are unable to determine when, or if, they are required to abstain from voting or otherwise participating on certain issues before their respective governmental bodies. By essentially forcing public officers to seek a binding advisory opinion regarding the boundaries of a vague statute before speaking or acting – for fear of disciplinary action and sanctions – the Nevada Commission on Ethics and the First Judicial District Court have established a system of prior restraint that cannot be allowed to stand.

"It is the inadequacy, and not the mere absence, of all other legal remedies, and the danger of failure of justice without it, that must usually determine the propriety of this writ." *State v. Murphy*, 19 Nev. 89, 6 P. 840, 843 (1885) (citing *La Grange v. State Treasurer*, 24 Mich. 468 (1872)). The Nevada Supreme Court has routinely exercised discretion to entertain a petition for writ relief where, as here, an important issue of law requires clarification and sound judicial economy and administration favor the granting of the petition. *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); *Borger v. District Court*, 120 Nev. 1021, 1025-1026, 102 P.3d 600, 603 (2004); *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998); *State of Nevada v. District Court*, 116 Nev. 127, 135, 994 P.2d 692, 696-697 (2000) (entertaining writ petition that reviewed decision of a district court acting in its appellate capacity based on exigent circumstances presented by the petition and because the petition concerned an unsettled issue of statewide importance) .

This Court elected to exercise its constitutional prerogative to entertain a writ petition in *Ashokan v. State Department of Insurance*, "despite the availability of an adequate legal remedy." *Ashokan*, 109 Nev. 662, 667, 856 P.2d 244,247 (1993) (emphasis added). In that case, the Court had not yet had the opportunity to interpret the statute in question. *Id.* Finding that the facts presented by the petition afforded the Court a "unique opportunity to define the precise parameters" of the statute, the Nevada Supreme Court opted to hear Ashokan's petition. *Id.* Additionally, by entertaining the writ petition, the Court in *Ashokan* protected other parties subject to the questioned statute by explaining the boundaries of the law in an expedited fashion so that appropriate measures could be taken to guard against future violations. *Id.*

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Here, the boundaries of the statutes in question have never been explored or interpreted by this Court. Public officers across Nevada are unable to discern which relationships amount to a conflict of interest requiring abstention under NRS 281.501(2), where political relationships intersect with these unwritten standards, and whether the Ethics in Government Law serves as a de facto limit on campaign contributions. This Petition raises important legal issues that are likely to be the subject of extensive litigation in Nevada's District Court system, especially following the upcoming election. Because inconsistent rulings at that level are a likely result, and because avoidance of multiple actions involving identical claims will conserve judicial resources at the Supreme Court and in the District Courts, this Court should exercise its discretion to resolve this Petition on its merits.

B. Alternatively, Prohibition

The writ of prohibition is the counterpart of the writ of mandamus. NRS 34.320. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. *Id.*

The Opinion of the Nevada Commission on Ethics (Exhibit B) and the Order entered by the First Judicial District Court (Exhibit C) in this case invoke an unconstitutionally vague statute and impose a legal impediment on Councilman Carrigan's ability to exercise his right to vote on matters before the Sparks City Council and his right to political association. The net effect of the decisions of these tribunals is a system of prior restraint. Accordingly, a writ of prohibition is appropriate to prevent further enforcement of the Opinion published by the Nevada Commission on Ethics, the Order entered by the First Judicial District Court and the unconstitutionally vague provisions of NRS 281.501(8).

III.

ARGUMENT

A. NRS 281.501(8) is Unconstitutionally Vague

A statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application..." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322

(1926); *Nevada Comm'n on Ethics v. Ballard*, 120 Nev. 862, 868, 102 P.3d 544, 548 (2004). The void-for-vagueness doctrine derives from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Silvar v. District Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). The Nevada Supreme Court has established a two-part test for determining whether a statute is unconstitutionally vague: a statute is facially invalid if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. *Id.*; *City of Las Vegas v. District Court*, 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). In particular, questions of vagueness must be more closely examined where, as in this case, First Amendment rights are implicated. *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (noting that even if a statute is not so vague as to violate due process, it may be impermissibly vague under the First Amendment if it chills protected speech).

The focus of the first prong of the vagueness test is to protect "those who may be subject to potentially vague statutes," *Silvar*, 122 Nev. at ___, 129 P.3d at 688 (2006), and to "guarantee that every citizen shall receive fair notice of conduct that is forbidden." *City of Las Vegas*, 118 Nev. at 864, 59 P.2d at 481 (2002). The notice required under the first prong "offers citizens the opportunity to conform their... conduct to that law." Silvar, 122 Nev. at ___, 129 P.3d at 685 (2006). While absolute precision in drafting statutes is not necessary, the Legislature "must, at a minimum, delineate the boundaries of unlawful conduct." *City of Las Vegas*, 118 Nev. at 863, 59 P.3d at 480 (2002). Additionally, where the Legislature does not define each term it uses in a statute, the statute will only survive a constitutional challenge if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision. *Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

Previously, the Nevada Supreme Court invalidated the entire Ethics in Government Law based on constitutionally infirm financial disclosure provisions that required public officers to file a financial statement detailing, among other things, economic interests "within the jurisdiction of the officer's public agency." *Dunphy v. Sheehan*, 92 Nev. 259, 263, 549 P.2d 332, 335 (1976). In that

case, the Court found the phrase "within the jurisdiction of the officer's public agency" unconstitutionally vague for the purposes of financial disclosure laws. *Id.* at 264. By way of illustration, the Court wrote:

> *[L]et us suppose that a city councilman, or his spouse, or his child, owns extensive economic interests within the county of his residence, but not within the boundaries of the city which he serves. Must he disclose such interests? They are not within the jurisdiction of his public agency. He must determine for himself whether to expose such interests to public scrutiny, and does not know if a failure to disclose may subject him to a criminal penalty. Examples of this initial 'jurisdictional' determination may be multiplied a hundredfold, and points to a basic vagueness in the law. The public office holder should not have to guess regarding his duty to disclose.* Id. at 265.

In *Dunphy*, public officers were forced to make a determination regarding the disclosure of economic interests on their own, at the risk of being penalized if their decision was later found to be erroneous. *Id.* That is precisely the situation in this case.

NRS 281.501(8) enumerates various relationships that amount to a "commitment in a private capacity to the interests of others" under the Nevada Ethics in Government Law.[2] In this case, the Nevada Commission on Ethics and the First Judicial District Court made use of two subsections of NRS 281.501(8) when they determined that Councilman Carrigan had a commitment in his private capacity to the interests of Mr. Vasquez – subsection (d) and subsection (e). See Exhibit B; Exhibit C, p. 31, lns. 4-13; p.33, lns.13-18. Subsections (d) and (e) are unconstitutionally vague, deceptive

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[2] NRS 281.501 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
   (a) Who is a member of his household;
   (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
   (c) Who employs him or a member of his household;
   (d) With whom he has a substantial and continuing business relationship; or
   (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

and uncertain.

NRS 281.501(8)(d) classifies a "substantial and continuing business relationship" as a "commitment in a private capacity to the interests of others." The phrases "business relationship" and "substantial and continuing" have never been defined by the Nevada Legislature. No state case law or published opinion of the Commission on Ethics exists to clarify what these phrases mean - in the context of the Ethics in Government Law or otherwise. Is a business relationship an attempt to turn a profit, or is making money not a relevant factor? Does it include volunteer relationships? Are political relationships encompassed by this subsection? If a public officer is a party to a business relationship, what standards are used to determine if the relationship is substantial and continuing? Is a relationship substantial because it represents a certain percentage of an individual's income, or is there some unidentified, previously determined amount of money? Is money even involved in the analysis? Is a relationship continuing because it existed for some undefined fixed period of time, or is there an unpublished standard that contemplates frequency of dealings? Without guidance from Nevada's Legislature, Nevada's Courts, or the Nevada Commission on Ethics, there can be no well settled or commonly understood meaning of "business relationship" or the conditions that make a business relationship "substantial and continuing." Consequently, public officers across Nevada are to guess at the boundaries of the statute. Where terms contained in a statute are so poorly defined as to leave persons "guessing" at what behavior is, or is not, lawful, the statute is void-for-vagueness. *Childs v. State*, 107 Nev. 584, 585, 816 P.2d 1079, 1079-1080 (1991).

NRS 281.501(8)(e) provides that any relationship that is "substantially similar" to any other relationship enumerated in NRS 281.501(8) also amounts to a "commitment in a private capacity to the interests of others." The phrase "substantially similar" establishes a standard that is so subjective and so expansive, that it is impossible for a person of ordinary intelligence to discern which relationships fall within the purview of the statute – nearly any relationship could be made to satisfy the broad and unfettered grasp of NRS 281.501(8)(e). The Legislature, the Nevada Courts, and the Commission on Ethics have never established standards under which a relationship is analyzed for substantial similarity under NRS 281.501(8)(e). Without a statutory or well settled and commonly understood definition of the term "substantially similar," public officers in the State of Nevada must

rely on their own best guesses and advice from similarly confused attorneys, while the Nevada Commission on Ethics is left to its own unfettered predilections to determine whether a relationship is substantially similar to on of the relationships enumerated in subsection (e).

Underscoring the unconstitutional implementation of NRS 281.501(8), the Commission on Ethics specifically found that the nature of Petitioner Carrigan's relationship with Mr. Vasquez was political and not for profit:

> *Councilman Carrigan and Mr. Vasquez both testified that Mr. Vasquez worked in a volunteer capacity on all three of Councilman Carrigan's campaigns for Sparks City Council and that Mr. Vasquez never profited from any of Councilman Carrigan's campaigns. Mr. Vasquez testified that everything he and his companies did for Councilman Carrigan was at cost and that any related funds were a "pass-through," that is, Mr. Vasquez' companies would do work on the campaigns, or farm out the work, and then be reimbursed for costs from Councilman Carrigan's campaign fund.*
>
> Exhibit B

The United States Supreme Court has made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S. Ct. 303, 38 L.Ed.2d 260 (1973). Carlos Vasquez testified that he volunteered for Councilman Carrigan's campaigns because he believed Carrigan would be "a great candidate" and a "great council person." Exhibit E, p. 102, lns. 16-18 (Transcript of hearing before the Nevada Commission on Ethics). Additionally, Mr. Vasquez explained that he donated his time to Councilman Carrigan's campaigns because he "believed in Mr. Carrigan as a political candidate" and that he "thought the City needed some help at the time." *Id.*, p. 103, lns. 2-5. Mr. Vasquez' participation in Petitioner Carrigan's campaigns amounts to political volunteerism that is protected by the United States Constitution – not a "business relationship" that is "substantial and continuing," or a relationship that is "substantially similar" to any other relationship included in NRS 281.501(8).

Effectively, the vagueness that permeates NRS 281.501(8) enables the Commission on Ethics to unilaterally eviscerate a constitutionally protected relationship under color of Nevada law.

Foreclosing upon an elected officer's ability to vote on particular matters because a person or group associated with the matter made a campaign contribution to that officer threatens protected speech and associational freedoms. There would be no reason to contribute or volunteer for a political campaign if the contribution obligated the recipient to abstain from acting on the issues that spawned the contribution in the first place. Conversely, if a political contribution automatically disqualifies the recipient after his election from thereafter voting on matters in which the contributor has an interest, an enterprising group or individual could disqualify all known adverse candidates for municipal office by simply making nominal contributions or volunteering for the campaign of each such candidate.

Without guidance from this Court, the unconstitutional vagueness of NRS 281.501(8) demands any of three intolerable results: (1) public officers in Nevada will continue to be forced to gamble with their positions as public servants when voting on matters without understanding the parameters of the statute or risking the discontent of their constituency by abstaining unnecessarily and not performing the function of their position; (2) political contributions that led to the election of a candidate will render that candidate ineffective; (3) political contributions, volunteerism and citizen involvement will dissipate across the State of Nevada.

Demonstrating the inherent vagueness that permeates NRS 281.501(8), the Commissioners presiding over the August 29, 2007 hearing were unable to agree among themselves on which provision of the statute Councilman Carrigan's relationship fell under. Commissioner Jenkins believed that Petitioner Carrigan's relationship with Carlos Vasquez was substantially similar to a substantial and continuing business relationship. Exhibit E, p. 193, lns. 6-9. Commissioner Hsu did not think that the relationship was like a substantial and continuing business relationship at all, *Id.*, p. 193, lns. 23-25, instead, he found that the relationship was substantially similar to a familial relationship. *Id.*, p. 194, lns. 1-2. In contrast, Commissioner Cashman found that a substantial and continuing business relationship did exist between Petitioner Carrigan and Mr. Vasquez. *Id.*, p. 197, lns. 10-12. Since the administrative body charged with enforcing the Ethics in Government Law was unable to come to a collective interpretation and application of NRS 281.501(8)(d) and 281.501(e), it is certainly unreasonable to expect that an elected official - untrained in the law but vested with ordinary intelligence - could comprehend what conduct is prohibited.

Under the second prong of the vagueness test, a statute is unconstitutional if it "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *City of Las Vegas v. District Court*, 146 P.3d 240, 245 (2006). A particular fear of this Court has been that absent adequate guidelines, a statute may permit standard-free application. *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (2006) (quoting *Koleander v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

In *Silvar*, this Court analyzed and struck down a Clark County loitering ordinance because law enforcement officers had too much discretion in determining whether the ordinance had been violated. *Id.* at 295-96, 686-687. Like the ordinance in *Silvar*, NRS281.501(8) is susceptible to arbitrary and discriminatory enforcement. Because subsections (d) and (e) lack statutory, well settled or ordinarily understood definitions, the Nevada Commission on Ethics, and in this case the First Judicial District Court, is forced to rely on broad, unfettered discretion when interpreting, applying, and enforcing those provisions of the statute. NRS 281.501(8) fails to provide the clear language necessary to bridle that discretion, therefore the statute encourages, authorizes, or at least fails to prevent its own arbitrary and discriminatory enforcement. Accordingly, NRS 281.501(8)(d) and 281.501(8)(e) fail to satisfy the second prong of the vagueness test set forth by both this Court and the Supreme Court of the United States.

B. NRS 281.501(2) is Unconstitutionally Vague

NRS 281.501(2) requires public officers in the State of Nevada to abstain from voting on matters when the independence of judgment of a reasonable person would be materially affected in any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his commitment in a private capacity to the interests of others. The Commission and the First Judicial District Court did not address the first two conditions, but specifically invoked the third, as defined by NRS 281.501(8). See Exhibit B; Exhibit C, p. 31, lns. 4-13; p.33, lns.13-18. A statute which "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Dunphy v. Sheehan*, 92 Nev. 259, 262, 549 P.2d 332, 334 (1976); *Nevada Comm'n on*

Ethics v. Ballard, 120 Nev. 862, 868, 102 P.3d 544, 548 (2004). Because the definition proffered by NRS 281.501(8) is unconstitutionally vague, there is no reliable way for an ordinary public officer to determine whether or not he is required to abstain from voting in certain situations without guessing. Accordingly, in cases such as this, where the application of NRS 281.501(2) relies on subsections (d) or (e) of NRS 281.501(8), NRS 281.501(2) is unconstitutionally vague.

C. The Vagueness of NRS 281.501(8) and NRS 281.501(2) Offends the First Amendment

Although no Nevada Court has previously answered the question of whether legislative voting is protected speech, all three federal courts that have directly considered the issue concluded that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment. *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989); *Clarke v. United States*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski v. City of Madison*, 558 F.Supp. 664 (W.D.Wisc. 1983). A legislator's vote is inherently expressive, *Clarke*, 886 F.2d at 411 (D.C.Cir. 1989), and legislative voting has been recognized by the United States Supreme Court as the "individual and collective expression of opinion." *Hutchison v. Proxmire*, 443 U.S. 111, 133, 99 S.Ct. 2675, 2697, 61 L.Ed.2d 411 (1978). Voting by public officials comes within the "heartland of First Amendment doctrine," and "...the status of public officials' votes as constitutionally protected speech is established beyond peradventure of doubt". *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995). Simply put, there can be no more definitive expression of an opinion protected by the First Amendment than when an elected official votes on a controversial subject. *Mihos v. Swift*, 358 F.3d 91, 107, 109 (1st Cir. 2004); *Miller*, 878 F.2d at 532 (1st Cir. 1989). That Petitioner Carrigan's vote occurred in the heat of a controversial land use decision only strengthens the protection afforded to Carrigan's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. *See Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949).

The Constitution demands a high level of clarity from a law if it threatens to inhibit the exercise of a constitutionally protected right, such as the right of free speech or religion. *Colautti v. Franklin,* 439 U.S. 379, 391, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979); *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109,

92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604, 87 S.Ct. 675, 683-684, 17 L.Ed.2d 629 (1967). An unconstitutionally vague law tends to chill the exercise of First Amendment rights by causing citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964)).

Petitioner Carrigan is not asserting that he has a protected right to vote when he has a disqualifying conflict of interest. Petitioner's argument is that NRS 281.501(8) is unconstitutionally vague, NRS 281.501(2) is vague because it relies on NRS 281.501(8), and that the vagueness of these laws extends to, and impermissibly chills, otherwise protected core political speech in violation of the First Amendment. As a practical matter, Petitioner Carrigan's only option to ensure compliance with the imprecise standards of NRS 281.501(8) and NRS 281.501(2) is to abstain from voting, even when abstention is not necessarily warranted or required by law. Because the Respondent Commission is free to determine what constitutes a "business relationship" that is "substantial and continuing," or which relationships are "substantially similar" to relationships enumerated in NRS 281.501(8), without providing any legitimate guidance or standards to public officials in the State of Nevada, the challenged statutes allow the unnecessary abridgment of protected political speech, and are therefore void.

D. Strict Scrutiny

State statutes that burden political speech, such as NRS 281.501(8) and NRS 281.501(2), are subject to strict scrutiny, and the statutory restriction of speech is upheld only if it is narrowly tailored to serve a compelling state interest. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct.1407, 1421 (1978). The broad purview of NRS 281.501(8) includes any actual or implied relationship that the Commission on Ethics arbitrarily determines to be "substantially similar" to any of the other relationships specifically enumerated in the subsection. Because of the uncertainty that accompanies these unconstitutionally vague standards, relationships that do not amount to a "commitment in a private capacity to the interests of others" but for the unfettered discretion and personal predilections of the Commission on Ethics, are necessarily encumbered, and the reach of

NRS 281.501(2), through its reliance on NRS 281.501(8), is not restricted to a narrow category of unprotected speech. Accordingly, NRS 281.501(8) and NRS 281.501(2) are not narrowly tailored, and the statutes do not employ the least restrictive means available to regulate conflicts of interest. Therefore, NRS 281.501(8) and NRS 281.501(2) do not survive strict scrutiny and violate the First Amendment.[3]

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[3] The First Judicial District Court incorrectly applied the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to the situation in this case. When a court applies the *Pickering* balancing test, it must arrive at a balance between the interests of the employee, *as a citizen*, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-1735 (1968) (emphasis added). Here, Councilman Carrigan is speaking as an elected representative of the citizens of Sparks, not as a private citizen.

To the extent this Court is inclined to consider the *Pickering* balancing test, the scales of justice still tip decisively in favor of Councilman Carrigan. Public officers in Nevada have a strong interest in voting their conscience on important issues without having to suffer retaliatory recriminations from the Nevada Commission on Ethics. *See, e.g., Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("It is essential that public employees be able to speak freely without fear of retaliatory dismissal."). The public also has a substantial interest in members of public authorities being able to freely cast their votes in accordance with their best judgment, without fear of political interference and intimidation. *See Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (noting "public interest in encouraging the vigorous exercise of official authority"). Together, Carrigan's interest and the public's interests weigh heavily on their side of the *Pickering* balance. Although the state has an interest in securing the ethical performance of governmental functions, that alone is not strong enough to overcome the interest of the citizenry of Sparks in representative government. NRS 294A.100 limits the amount of money, or value of services, any person can contribute to a campaign for public office in Nevada. Moreover, NRS 294A.100 controls the timeframe in which political donations can be made. Failure to comply with the provisions of NRS 294A.100 is a category E felony. Any concerns that the state may have regarding the campaign contributions made by Mr. Vasquez to Councilman Carrigan's campaigns are mitigated by the limitations placed on campaign contributions by state law. By finding that Councilman Carrigan's vote on the Lazy 8 project accurately reflected the will of his constituents and that Carrigan sufficiently disclosed his relationship with Mr. Vasquez, the Commission on Ethics essentially found that no actual impropriety existed in this case. Therefore, the notion that Councilman Carrigan should have abstained from voting on the Lazy 8 matter because of the political contributions from Mr. Vasquez - the government's interest in this case for purposes of *Pickering* balancing - is based entirely on a supposed appearance of impropriety. The contributions in this case did not violate NRS 294A.100, and were properly reported under NRS 294A.120. Accordingly, any concern that the government may have regarding the ethical performance of governmental

E. Overbreadth

A statute is unconstitutionally overbroad and void on its face if it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of" protected First Amendment rights. *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

The overbreadth doctrine invalidates laws, such as NRS 281.501(2), that infringe upon First Amendment rights. Even minor intrusions on First Amendment rights will trigger the overbreadth doctrine. *Silvar v. Eighth Judicial Dist. Ct. ex rel. County of Clark,* 122 Nev. 289, 129 P.3d 682, 688 (2006). The "First Amendment freedoms need breathing space to survive, [so] government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Because it has a chilling effect on free expression and thus impacts the "breathing space" of First Amendment rights, an overbroad law is unconstitutional. *Silvar*, 122 Nev. 289, 129 P.3d at 688 (2006).

Claims of overbreadth are also entertained in cases where the reviewing court is of the opinion that rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). That is precisely the case at hand.

NRS 281.501(2) requires public officers in the State of Nevada to abstain from voting on matters when the independence of judgment of a reasonable person would be materially affected in any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his commitment in a private capacity to the interests of others as defined by NRS 281.501(8). NRS 281.501(8)(d) and 281.501(e) are unconstitutionally vague. Therefore, when NRS 281.501(2) relies on subsection (d) or (e) of NRS 281.501(8), it is also unconstitutionally vague.

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functions is alleviated by the limitations imposed on campaign contributions by NRS Chapter 294A. If properly received and reported campaign contributions amount to a disqualifying conflict of interest under NRS Chapter 281, the Ethics in Government Law will serve as the de facto limitation on campaign contributions without specifically enumerating the point at which a contribution becomes a disqualifying conflict of interest. Therefore, if a *Pickering* balancing test is applied to this situation, the interests of Councilman Carrigan, Nevada's public officers, and the public at large overwhelmingly militate in favor of Councilman Carrigan's First Amendment right to vote on projects before the Sparks City Council.

The act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment. *Miller*, 878 F.2d 523 (1st Cir. 1989); *Clarke*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski*, 558 F.Supp. 664 (W.D.Wisc. 1983). When a public officer in Nevada is not required to abstain from voting under NRS 281.501(2), he has a constitutionally protected interest in voting on matters before his board or agency. Because the definitions proffered by NRS 281.501(8)(d) and 281.501(8)(e) are unconstitutionally vague, there is no reliable way for an ordinary public officer to determine whether or not he is required to abstain from voting in certain situations without guessing. Therefore, NRS 281.501(2) ensnares rights that are protected by the Constitution, either through the chilling effect the vagueness has on the free exercise of a public officer's First Amendment rights, or through the arbitrary and discriminatory enforcement of the statute by the Nevada Commission on Ethics.

In Nevada, public officers are not required to abstain from voting on matters that concern or involve a donor of campaign *In Re: Boggs-McDonald*, CEO 01-12; *In Re: Wood*, CEO 95-51. Case law from other states concludes that a conflict of interest does not necessarily exist where a board member has received a campaign contribution. These decisions are harmonious with the previous findings of the Nevada Commission on Ethics. In a Washington case, the court concluded an administrative decision maker's participation after receiving campaign contributions from an interested party does not necessarily violate the appearance of fairness doctrine. In *Snohomish County Improvement Alliance v. Snohomish County*, 808 P.2d 781 (Wa. 1991), the court held when two council members participated in a quasi-judicial proceeding after contemporaneously receiving campaign contributions from interested parties, they did not violate the appearance of fairness doctrine. In deciding this, the court stated: "Moreover, such participation by said Council members was not a conflict of interest . . . The mere receipt of campaign contributions by a councilmember does not constitute a 'direct or indirect substantial financial or familial interest..." *Id.* at 786. The court implied there may have been another result had there been a failure to report the campaign contributions. *Id.* In *Woodland Hills v. City Council*, 609 P.2d 1029 (Cal.1980), the California Supreme Court held that absent bribery or some significant conflict of interest, a campaign contribution is not sufficient to require recusal of a council member prior to a vote on projects of

developers who gave the contributions. *Id.* at 1032. Although the trial court found the party before the council member had made substantial contributions of money to the campaign (exceeding $9,000), it found the challenger was not denied a fair hearing. *Id.* The court concluded it was not improper for a member of the council to vote on the projects nor were they required to disqualify themselves in such circumstances because expression of political support by campaign contribution does not prevent a fair hearing before an impartial city council when the contributions were lawfully made and received, and disclosed pursuant to laws governing campaign contributions. *Id.* at 1032. The court discussed the importance of the political contribution in that it is an exercise of fundamental freedom protected by the First Amendment of the United States Constitution. Because of this importance the court stated, "to disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms." *Id*, at 1033.

Here, no *quid pro quo* relationship has been alleged. The campaign contributions made to Councilman Carrigan by Mr. Vasquez were made for valid and constitutionally protected purposes. Exhibit E, p. 147, lns. 17-24. Mr. Vasquez donated his time to Councilman Carrigan's campaigns long before the Lazy 8 project appeared on the horizon. See Exhibit B. Mr. Vasquez' contributions to Councilman Carrigan's campaigns were never conditioned on, or otherwise tied to, a particular vote or issue. Exhibit E, p. 147, lns.17-24. The Commission on Ethics found that "a majority of Councilman Carrigan's constituency favored the Lazy 8." Exhibit B, p. 3, #15.

The notion that campaign contributions disqualify the recipient from participating in governmental decisions has been expressly and emphatically rejected by courts across the United States. See, *O'Brien v. State Bar of Nevada*, 114 Nev. 71, 952 P.2d 952 (Nev. 1998); *Cherradi v. Andrews*, 669 So.2d 326, (Fla.App 4th Dist. 1996); *J-IV Investments v. David Lynn Mach, Inc.*, 784 S.W.2d 106 (Tex.App. Dallas 1990). Foreclosing upon an elected official's ability to act on particular matters because a person or group associated with the matter had made a campaign contribution to that official threatens constitutionally protected political speech and association freedoms. "Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct.. 637-638, 46 L.Ed.2d 659, 691

(1976). While disqualifying contribution recipients from voting would not prohibit contributions *per se*, it would unconstitutionally chill contributors' First Amendment rights. See, *Woodland Hills Residents Assn., Inc. City Council*, 26 Cal.3d 938, 609 P.2d 1029 (1980); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), judgment aff'd, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed. 2d 284 (1982). Representative government would be thwarted by depriving certain classes of voters of the constitutional right to participate in the electoral process. Based on the prior opinions of the Nevada Commission on Ethics and decisions of courts around the United States, the campaign contributions made to Petitioner Carrigan by Mr. Vasquez did not create an impermissible conflict of interest requiring Petitioner Carrigan to abstain from voting on August 23, 2006. Mr. Vasquez' right to volunteer, and Petitioner Carrigan's right to accept Mr. Vasquez' in-kind donations, are protected by the United States Constitution.

Even if this Court were to employ the more rigorous conflict standards that apply to judges, the campaign contributions from Mr. Vasquez to Councilman Carrigan do not amount to a disqualifying conflict of interest. In the context of judges, the Nevada Supreme Court has held that a campaign contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification. *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 644, 5 P.3d 1059 (2000) (quoting *In re Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988)). The Court remarked that such a rule would "severely and intolerably" obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign contributions. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275; *see also O'Brien v. State Bar of Nevada,* 114 Nev. 71, 76 n. 4, 952 P.2d 952, 955 n. 4 (1998) (judge serving on state bar board of governors was not disqualified from voting on appointment to commission on judicial selection despite having received over $100,000.00 in campaign contributions from prospective appointee and her partner). In *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 5 P.3d 1059 (2000), the Las Vegas Redevelopment Agency filed petition for writ of mandamus or prohibition, challenging a trial judge's decision to disqualify himself in an eminent domain action, involving agency and landowners whose property was condemned for the development of a certain street. The Supreme Court held that contributions made to judge's successful campaign to retain his seat by casinos that

stood to benefit from outcome of eminent domain action did not constitute proper grounds for judge's disqualification. *Id.* at 645. The Court then ordered the district judge to preside over the case because the campaign contributions were not an appropriate justification for his recusal, and therefore the judge was obligated to perform the function of the position he was elected to fill. *Id.*

Councilman Carrigan is obligated to perform the function of the position he was elected to fill. The vagueness that permeates NRS 281.501(8) and 281.501(2) unconstitutionally silences both Councilman Carrigan and the citizens he represents. A writ of mandamus must issue to compel the Nevada Commission on Ethics and the First Judicial District Court to restore the rights and privileges of a Sparks City Councilman to Carrigan.

F. Prior Restraint

Governmental regulations or actions that prohibit or limit the future dissemination of constitutionally-protected speech constitute prior restraints. *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981). The term is generally used to describe administrative and judicial orders forbidding certain communications when issued before such communications are to occur. *DVD Copy Control Ass'n., Inc. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (2003); *Hobart v. Ferebee*, 692 N.W.2d 509 (S.D. 2004). A prior restraint imposes in advance a limit upon the right to speak, *State v. Haley*, 687 P.2d 305 (Alaska 1984), or otherwise prevents the expression of a message. *Hamilton Amusement Center v. Verniero*, 156 N.J. 254, 716 a.2D 1137 (1998). The United States Supreme Court has condemned any system of prior restraint of first amendment rights. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The protection of political speech is a primary function of the guarantee of freedom of speech. *Del Papa v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996); *Kirksey v. City of Jackson*, 663 F.2d 659 (5th Cir. 1981) (*decision clarified on denial of reh'g*, 669 F.2d 316 (5th Cir. 1982)); *CBS, Inc. v. F.C.C.*, 629 F.2d 1 (D.C. Cir. 1980) (*judgment aff'd*, 453 U.S. 367 (1981)). There is no more definitive expression of a political opinion protected by the First Amendment than when an elected official votes on a controversial subject. *Mihos*, 358 F.3d at 107, 109 (1st Cir. 2004); *Miller*, 878 F.2d at 532 (1st Cir. 1989).

Moving forward from the conclusions of the Nevada Commission on Ethics and the First Judicial District Court, Councilman Carrigan and every other public officer in the State of Nevada

is still faced with the same disconcerting decision – to vote on matters before his respective governmental body without understanding the boundaries of an unconstitutionally vague statute, or abstain from voting and fail to represent the citizens that make up his constituency.

The First Judicial District Court determined that the challenged provisions of the Ethics in Government Law are not unconstitutionally vague because public officers are free to seek advisory opinions from the Commission on Ethics before they vote on a matter. In its Order, the District Court explained that Councilman Carrigan should have sought an advisory opinion from the Commission on Ethics if he were unsure of the boundaries of lawful behavior. See Exhibit C, p. 18, lns. 1-7 ; Exhibit D, p. 38, lns. 1-12. Warnings from a court with respect to the exercise of speech have a bearing on whether there is a prior restraint. *Multimedia Holdings Corp. v. Circuit Court*, 544 U.S. 1301, 1306, 125 S.Ct. 1624, 161 L.Ed.2d 590 (2005). The District Court's conclusion presupposes that every possible factual scenario is either already covered by existing advisory opinions, or that an on-point advisory opinion will be issued in time for a concerned public officer to act (or not act) based on that guidance.[4] Nearly every opinion published in the last decade by the Nevada Commission on Ethics contains the following disclaimer:

> *Note: The foregoing opinion applies only to the specific facts and circumstances described herein. Facts and circumstances that differ from those in this opinion may result in an opinion contrary to this opinion. No inferences regarding the provisions of the Nevada Revised Statutes quoted and discussed in this opinion may be drawn to apply generally to any other facts and circumstances.* See, e.g., Exhibit B.

Although the Commission on Ethics has never published an opinion clarifying the provisions of NRS 281.501(8), or an opinion similar to that fact pattern presented in the instant case, this disclaimer eviscerates any precedential value of an opinion or decision of the Nevada Commission on Ethics, even in cases where a relevant publication exists. The Commission lacks jurisdiction to

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[4] Moreover, even if the supposition were accurate, it does not alter the fact that subsections (d) and (e) of NRS 281.501(8) are insufficiently specific to put public officers in the State of Nevada on notice as to which relationships rise to the level of a "commitment in a private capacity to the interests of others."

render advisory opinions where the request for an opinion seeks general guidance, *In re: Rural County District Attorney*, CEO 99-48, and the Commission is only authorized to opine on specific questions regarding specific facts and circumstances, *In re: Public Officer*, CEO 02-22; *In re: Eklund - Brown*, CEO 02-23. Therefore, the realistic effect of the District Court's finding coupled with the disclaimer detailed above is that Councilman Carrigan has no choice but to either seek a prior, binding advisory opinion from the Commission each and every time he has a concern regarding NRS 281.501(8) or act without understanding the boundaries of the law and risk the myriad of penalties enumerated in NRS 281.551. Requiring public officers to seek an advisory opinion from a panel before speaking or acting – for fear of disciplinary action and sanctions – is the "ultimate in prior restraint." *Spargo v. New York State Comm'n on Judicial Conduct*, 2003 WL 2002762, N.D.N.Y. (2003) (not reported in F.Supp.2d – vacated on basis of Younger Abstention by *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003)).

As a practical matter, seeking an advisory opinion every time a public officer is unsure regarding the interpretation or application of an unconstitutionally vague statute is not a viable solution or cure of the constitutional infirmities of the Ethics in Government Law. The Nevada Open Meeting Law mandates that written notice of all meetings must be given at least three working days before the meeting. NRS 241.020(2). The Sparks City Council is required to hold regular meetings at least twice a month, at times established by ordinance. Sparks City Charter, Art. 2, Sec. 2.030(1). The Sparks Municipal Code (SMC) designates the second and fourth Mondays of each month as the times for regular meetings of the City Council. SMC 1.10.020(A). Accordingly, under NRS 241.020(2), the agenda for a regular meeting of the Sparks City Council is published on the first and third Wednesdays of each month, three working days prior to the meeting. The agenda and its supporting material are also distributed to the Council Members three working days prior to a scheduled meeting – prior to the dissemination of this information, the Council Members are unaware of the issues on the agenda, and are therefore unable to identify any potential conflicts.

NRS 281.551 allows the Commission on Ethics to take up to forty-five days to render an advisory opinion after receiving a request from a public officer. In practice, the Commission has declined to provide advisory opinions to the Sparks City Council until the concerned Council Member

has received an opinion from the City Attorney's Office. Once the City Attorney's Office prepares a perfunctory opinion, a letter is drafted to the Commission explaining that the Council Member remains unsure of the interpretation of the Ethics in Government Law. These documents, along with the Commission's official opinion request form, are then faxed and mailed to the Executive Director of the Commission on Ethics. The Executive Director thereafter gathers information relating to the request for an advisory opinion and attempts to secure a quorum of the Commissioners to hold a hearing regarding the advisory opinion. Once a hearing is held, the resulting opinion is binding upon the public officer's future conduct. NRS 281.551(1)(a). As there are only three working days between the date the Sparks City Council Members are provided with the agenda and supporting materials and the date of the actual City Council meeting, the Commission's procedure cannot be completed. Consequently, a public officer who requests an advisory opinion from the Commission on Ethics has three options: (1) a public officer may abstain from voting on an issue until the Commission issues an advisory opinion, at which time, in all likelihood, it will be too late for the public officer to represent the will of his constituents by voting; (2) a public officer may choose to risk fines, removal from office, and criminal prosecution by performing his duties as an elected representative of the citizens of Sparks by voting without any certainty regarding the boundaries of the law; or (3) although impermissible in some situations where statutory deadlines are implicated, the public officer may request that the public body table an issue until the Commission renders an advisory opinion. Thus, Councilman Carrigan is being forced to choose between delaying political speech that he has a right to make as a Sparks City Councilman and as an American Citizen, and risking fines, removal from office and potential criminal prosecution.

By essentially forcing public officers to seek a binding advisory opinion regarding the boundaries of an unconstitutionally vague statute before speaking or acting – for fear of disciplinary action and sanctions – the Nevada Commission on Ethics and the First Judicial District Court have established a system of prior restraint that cannot be allowed to stand.

G. Conclusion

The Nevada Commission on Ethics and the First Judicial District Court have employed unconstitutionally vague and overbroad statutes to strip Councilman Carrigan of his First Amendment

right to vote on legislative matters, his right to receive campaign contributions, Carlos Vasquez of his right to associate with political campaigns, and the citizens of Sparks, Nevada, of their voice in representative government. Moreover, the actions of the Commission and the District Court implicate the constitutionally guaranteed rights of all Nevadans, from the man or woman in the street to the long-time voter to all of the State's elected officers. Operating in a world apart from either the United States or Nevada Constitution the Commission on Ethics and the First Judicial District Court have established an informal system of prior restraint on political speech, irreparably damaging the most fundamental rights enjoyed by Americans and upon which our nation is based. Councilman Carrigan was elected to represent the citizens of Sparks, and is entitled to all of the privileges, rights and obligations that accompany his position as a City Councilman. For these reasons, a writ of mandamus, or in the alternative a writ of prohibition, must issue.

Respectfully submitted this 13th day of June 2008.

CHESTER H. ADAMS
Sparks City Attorney

By: _____
DOUGLAS R. THORNLEY
Assistant City Attorney
P.O. Box 857
Sparks, NV 89432
(775) 353-2324
Attorneys for Petitioner

VERIFICATION

STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

MICHAEL A. CARRIGAN, being duly sworn, deposes and says that the items contained in the above Petition are correct, to the best of my knowledge and belief.

Michael A. Carrigan
Sparks City Councilman

SUBSCRIBED AND SWORN to before me this 13 day of June, 2008.

HELEN L. ELLIOTT
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-58421-2 - Expires September 24, 2011

NOTARY PUBLIC

CERTIFICATE OF PERSONAL SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am personally serving the foregoing document(s) entitled **VERIFIED PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR WRIT OF PROHIBITION (NRS 34.185 – FIRST AMENDMENT PETITION)**, on the person(s) set forth below:

Adriana Frallick
Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

The Honorable Catherine Cortez Masto
State of Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

The Honorable William A. Maddox
First Judicial District Court
Department Two
885 E. Musser Street, Ste. 3057
Carson City, NV 89701

DATED this 13th day of June, 2008.

Shawna L. Liles

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER, OF THE CITY OF SPARKS,
Petitioner,
vs.
THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND, THE NEVADA COMMISSION ON ETHICS,
Respondents.

Supreme Court No. 51850
District Court Case No.

RECEIPT FOR DOCUMENTS

TO: Sparks City Attorney and Chester H. Adams, City Attorney and Douglas R. Thornley, Asst. City Attorney
Attorney General Catherine Cortez Masto/Carson City
Nevada Commission on Ethics and Adriana G. Fralick
Alan Glover , Carson City Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

06/13/08	Filing Fee Waived: State/County/Municipality.
06/13/08	Filed Petition for Writ. Verified Petition for Writ of Mandamus, or in the Alternative, for Writ of Prohibition. (NRS 34.185 - First Amendment Petition)
06/13/08	Filed Appendix to Petition for Writ. Appendix of Exhibits.

DATE: June 13, 2008

Tracie Lindeman, Clerk of Court

By: _____
Deputy Clerk