ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

Docket No. 51920

District Court Case No. 07-OC-012451B

FILED

SEP 24 2008

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APPELLANT'S

REPLY BRIEF

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COMES NOW, Appellant Michael A. Carrigan, by and through the undersigned counsel of record, and files his Reply to the Respondent's Answering Brief.

Respectfully submitted this 24th day of September 2008.

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I.

ARGUMENT

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). However, the scope of First Amendment protection available to a public officer may be diminished in cases where the public official has a disqualifying conflict of interest. *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 (1st Cir. 2002). In Nevada, a public officer is required to abstain from voting on an issue if the "independence of judgement of a reasonable person in the public officer's situation would be materially affected" by the public officer's commitment in a private capacity to the interest of others. NRS 281A.420(2). The term "commitment in a private capacity to the interest of others" is defined by NRS 281A.420(8). NRS 281A.420(8)(d) and NRS 281A.420(8)(e) are unconstitutionally vague. Accordingly, in cases where the application of NRS 281A.420(2) depends on the invocation of NRS 281A.420(8)(d) and NRS 281A.420(8)(e), NRS 281A.420(2) is similarly unconstitutionally vague. Because the statutory vagueness in this case relates to whether a public officer must abstain from voting, it necessarily ensnares innocent relationships and prevents the free exercise of protected speech. Therefore, the vagueness that permeates NRS 281A.420(8)(d), NRS 281A.420(8)(e) and NRS 281A.420(2) chills political speech and operates as an unconstitutional prior restraint.

A. NRS 281A.420(8)(d) AND NRS 281A.420(8)(e) ARE UNCONSTITUTIONALLY VAGUE

Vague laws offend due process in two respects. First, they fail to provide the persons targeted by the statutes with a reasonable opportunity to know what conduct is prohibited so that they may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Second, by failing to provide explicit standards for those who apply them, vague laws impermissibly delegate basic policy matters to administrative boards and judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Id.* at 108-109. A vague law is especially troublesome when, as in the instant case, "the uncertainty induced by the

statute threatens to inhibit the exercise of constitutionally protected rights." *Okpalobi v. Foster*, 190 F.3d 337, 358 (5th Cir. 1999) (quoting *Colautti v. Franklin*, 439 U.S. 379, 391, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (citations omitted)); *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). In those instances, the court's standard of review is more stringent; a vague law that chills First Amendment rights is void on its face "even when [the law] could have had some legitimate application. *Id.*; See also *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 Nevada Commission on Ethics found that Councilman Carrigan and Carlos Vasquez share a relationship that is "substantially similar" (NRS 281A.420(8)(e)) to a "substantial and continuing business relationship" (NRS 281A.420(8)(d)) or a family relationship within the third degree of consanguinity or affinity (NRS 281A.420(8)(b)). Respondent's Answering Brief (RAB) p.8, lns. 20-22. The phrase "substantially similar" contained in NRS 281A.420(8)(e) establishes a standard that is so broad and subjective that it is impossible to discern whether a particular relationship falls within the grasp of the statute.

By way of example, the word "consanguinity" means: kinship; blood relationship; the connection or relation of persons descended from the same stock of common ancestor. *Black's Law Dictionary* (6th ed., 1990). Consanguinity is distinguished from "affinity," which is the connection existing in consequence of a marriage, between the married persons and the kindred of the other. Although no Nevada case could be located that discusses relationships by affinity, decisions from other jurisdictions make clear that affinity is a legal relationship which results from marriage. See, e.g., *Smith v. Associated Natural Gas Co.*, 7 S.W.3d 530, 535 (Mo. 1999); *Brooks v. Commonwealth*, 41 Va.App. 454, 460, 585 S.E.2d 852 (2003); *Commonwealth v. Rahim*, 441 Mass. 273, 275, 805 N.E.2d 13, 16 (2004); *State v. Ramsey*, 171 Ariz. 409, 411, 831 P.2d 408, 410 (1992); *State v. Hargrove*, 108 N.M. 233, 237, 771 P.2d 166, 170 (1989). NRS 281A.420(8)(b) contemplates the family trees of Nevada's public officers. The standards for evaluating a relationship under NRS 281A.420(8)(b) are biological (consanguinity) and legal (affinity) and give absolutely no consideration to whether or not two people share a friendship. The statute is unconcerned with the

emotional depth of the relationships it governs, and applies only in cases where a relationship falls into either of two concrete categories.

The Commission's finding that a friendship between Councilman Carrigan and Mr. Vasquez is "substantially similar" to a familial relationship within the third degree of consanguinity or affinity is wholly unsupportable and underscores the dangers of arbitrary enforcement of an unconstitutionally vague statute. In this case, the Commission used the vagueness that permeates NRS 281A.420(8)(e) to miscategorize a friendship between two individuals as a relationship that contemplates lineage rather than comradery. Because the Commission on Ethics is not constrained by previously established standards when interpreting and applying NRS 281A.420(8)(e), it is free to illogically conclude that a friendship is almost the same as biological and legal familial relationships without explaining which characteristics are akin to being related by blood or marriage.

This was precisely the concern of the Nevada Legislature in 1999 when the Ethics in Government Law was amended. During that session, the Governor's Office proposed that the statute now codified as NRS 281A.420(8)(d) be changed to read: "substantial and continuing business **or personal** relationship." JA0435 (emphasis added). Discussing the proposal and explaining the problem with policing personal relationships, Senator O'Donnell stated:

> "That is just friendship. And I think this is, like Senator Raggio said, this is way over the line... until you can define it down and tell me what I can and cannot do." JA0466.

Later in the hearing, Senator O' Donnell continued, questioning Lucille Lusk, a lobbyist representing Nevada Concerned Citizens, regarding his earlier remarks:

> "When the law is so broad and the discretion is so much, that we, ourselves, do not know when we are violating the ethics law, we no longer have a conscience. It is the other person who is our conscience, and at the will or whim of the ethics commission, they will tell us when we were right and when we were wrong, predicated on whether we met 5 times a week or whether we met 1 time a week for lunch, or you know, what the continuing relationship was. And I just wanted your response on that to see if you had any thoughts." JA0485.

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Ms. Lusk responded:

> "Yes, I think that is one of the gravest dangers of this whole ethics commission process that there are no clear ways to understand when you are in compliance with what may be a decision of the commission in the next case. In several cases [today], it was said that will have to [be] decided on a case ruling. Most of us do have a pretty good idea of what is right. However, my observation is that some of the rulings of the ethics commission have not been consistent with what the general populous thought was right. Particularly with regard to this political speech nonsense. And I do believe it is nonsense, I do not believe it belongs there. I believe the people are capable of making that decision whether they like what you had to say or not say; whether you are truthful or not truthful. That is up to me to decide as a voter, not up to some body to interfere in that and infringe on that political speech. But, while you still have your own conscience, of course, and you must act according to it, the punishment you receive will be based on someone else's conscience." JA0486.

When the Ethics in Government Law was amended in 1999, "personal relationships" were intentionally excluded from what is now NRS 281A.420(8)(d).

The Commission argues that the volunteer political relationship shared by Councilman Carrigan and Mr. Vasquez is also "substantially similar" to a substantial and continuing business relationship. RAB, p. 8, lns. 20-21. However, no definition of "business relationship" has ever appeared in any Opinion published by the Commission and a review of the legislative history related to the Ethics in Government Law provides no further guidance. In fact, in the Opinion published by the Commission in this case, no discussion of the characteristics of a "business relationship" is offered, except to say that the "Commission rejects [Councilman Carrigan's] interpretation of the term," thereby allowing the vague statue to remain a trap for the unweary. JA0286. Moreover, the Nevada Legislature and the Commission on Ethics have never provided the public officers of this State with any explanation of what factors turn an ordinary business relationship into one that is "substantial and continuing" and therefore a disqualifying conflict of interest under NRS 281A.420(8)(d). 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). Particularly difficult in this case is that a portion of the Commissioners relied upon NRS 281A.420(8)(e), which is unconstitutionally vague, to invoke NRS 281A.420(8)(d), **which is also unconstitutionally vague**. In essence, to understand that his relationship with Mr. Vasquez amounted to a disqualifying conflict of interest, Councilman Carrigan

would have had to research and interpret **two** unconstitutionally vague provisions of the Ethics in Government Law.

Untroubled by this reality, the Commission on Ethics would have referred Councilman Carrigan to the Commission's self-proclaimed "seminal" Woodbury opinion, which discusses disclosure and abstention under Nevada's Ethics in Government Law at some length. RAB, p. 7, lns. 19-20. Unfortunately, *In re Woodbury*, CEO 99-56 (1999), has absolutely nothing to do with whether two people share a substantial and continuing business relationship or how to determine whether a relationship is substantially similar to any of the other relationships listed in NRS 281A.420(8)(a)-(d). The "guidance" offered by *Woodbury* requires public officers to make an independent determination of whether the independence of judgment of a reasonable person in the officers' situation would be materially affected by the circumstances surrounding the situation, while simultaneously placing the burden on the officers to "make a proper determination regarding abstention..." *In re Woodbury*, CEO 99-56 (1999). This is exactly the dilemma that Senator O'Donnell sought to avoid during the 1999 legislative hearings on SB 478. Public officers around the State of Nevada have a Hobson's Choice when they consider parts of the Ethics in Government Law. Either the elected officer must choose to risk prosecution, fines and potential removal from office by making an uninformed decision regarding the unpredictable applicability of an unconstitutionally vague law, or he must abstain from voting and fail to represent the people who elected him. There are simply no clearly articulated standards for an elected official to rely on when making the determination that *Woodbury* requires.

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). As conceded by the Commission in its Answering Brief, "reasonable men may differ in their interpretation of these terms." RAB, p. 8, lns. 22-23. In fact, the Commissioners that presided over this matter differed over which portion of Councilman Carrigan's relationship with Mr. Vasquez was

"substantially similar" to the relationships enumerated in NRS 281A.420(8)(a)-(d).[1] One Commissioner believed that the relationship in question was substantially similar to a substantial and continuing business relationship. JA0249, lns. 6-9. Another Commissioner explicitly disagreed with that conclusion (JA0249, lns. 23-25) but stated that he believed the relationship was substantially similar to a familial relationship. JA0250, lns. 1-2. A third Commissioner concluded that Councilman Carrigan and Mr. Vasquez actually had a substantial and continuing business relationship. JA0253, lns. 10-12. The conflicting views between the Commissioners simply reinforces the argument now before this Court - whether a person of ordinary intelligence is able to ascertain the boundaries of NRS 281A.420(8).

The Commission concluded that Councilman Carrigan committed a non-willful violation of NRS 281A.420(2). RAB, p. 2, lns. 10-11. In a footnote, the Commission states: "NRS 281A.170 defines 'willful' to mean that the public officer knew or reasonably should have known that his conduct violated the Ethics in Government Law." RAB, p.2, n.1. By the Commission's own admission, it would have been unreasonable to conclude that Councilman Carrigan had any reason to know that his relationship with Mr. Vasquez amounted to a disqualifying conflict of interest. Because the boundaries of legal behavior under NRS 281A.420(8)(d) and NRS 281A.420(8)(e) cannot be identified by people of reasonable intelligence, those particular subsections are unconstitutionally vague.

In this case, the Commission on Ethics applied NRS 281A.420(8) when it determined that Councilman Carrigan had a disqualifying conflict of interest and should have abstained from voting under NRS 281A.420(2). In cases such as this, where the application and enforcement of NRS 281A.420(2) is dependent upon findings made under the unconstitutionally vague NRS 281A.420(8)(d) and NRS 281A.420(8)(e), NRS 281A.420(2) is also unconstitutionally vague as applied.

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[1] The nature of the various Commissioners' disagreement indicates that the Commission's determination in this case is not a plurality of law, rather it is a plurality of fact. The Commissioners could not agree on which characteristics of Councilman Carrigan's relationship with Mr. Vasquez violated the Ethics in Government Law - maybe the Commission simply knows it when they see it.

The Commission on Ethics argues that "a statute will not typically be found vague where a person subject to the statute can seek an advisory opinion..." RAB, p. 6, lns.13-16. A careful review of the cases provided in support of this premise reveals that the availability of an advisory opinion plays absolutely no role in determining whether or not a statute is unconstitutionally vague. See *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 580, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Groener v. Or. Gov't. Ethics Comm'n*, 651 P.2d 736 (Or.Ct.App. 1982). In each of these cases, the reviewing court determined that the plain language of the statute was not unconstitutionally vague, and then simply noted that if a person subject to the law remained unsure of the statute's applicability that an advisory opinion was available. None of the three cases cited by the Commission alters the constitutional standard for vagueness set out in *Grayned v. City of Rockford*, 408 U.S. at 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The availability of an advisory opinion is neither a consideration in a reviewing court's vagueness analysis nor a cure to the constitutional infirmities of a vague statute.

NRS 281A.420(8)(d), NRS 281A.420(8)(e), and by extension NRS 281A.420(2), are standardless and do not provide a reasonable opportunity for public officers in the State of Nevada to understand when a relationship rises to the level of a disqualifying conflict of interest. Therefore, NRS 281A.420(8)(d) and NRS 281A.420(8)(e) should be invalidated by this Court, and the decisions of the Commission on Ethics and the First Judicial District Court must be vacated.

B. THE VAGUENESS THAT PERMEATES NRS 281A.420(8)(d) AND NRS 281A.420(8)(e) CHILLS THE FREE EXERCISE OF PROTECTED SPEECH AND OPERATES AS AN UNCONSTITUTIONAL PRIOR RESTRAINT

Voting by public officers comes within the "heartland of First Amendment doctrine," and "... the status of public officers' votes as constitutionally protected speech is established beyond peradventure of doubt." *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995). 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)). The unconstitutional vagueness of NRS 281A.420(8)(d) and NRS 281A.420(8)(e) grants standardless

discretionary power the Nevada Commission on Ethics, resulting in virtually unreviewable prior restraints on protected speech.

When a public officer in Nevada has a concern regarding the applicability of NRS 281A.420(8), and by extension whether he should abstain from voting under NRS 281A.420(2), he has three choices: (1) seek a prior, binding advisory opinion from the Commission on Ethics; (2) act without understanding the boundaries of the unconstitutionally vague law, risking the myriad of penalties associated with the Ethics in Government Law;[2] or (3) unnecessarily abstain, fearing punishment by the Commission on Ethics, and failing to represent the people who elected him. Because NRS 281A.420(8)(d) and NRS 281A.420(8)(e) are unconstitutionally vague, in cases where those statutory subsections are potentially implicated, public officers in Nevada have no real choice but to request an advisory opinion from the Commission.

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)). In cases where the uncertainty surrounding NRS 281A.420(8)(d) and NRS 281A.420(8)(e) causes public officers to abstain, even when they would not have been required to, the vagueness of the statutes impermissibly chills protected speech. Accordingly, NRS 281A.420(8)(d) and NRS 281A.420(8)(e) must be invalidated.

C. THE NEVADA LEGISLATURE ASSERTS AN IMPROPER STANDARD REGARDING DISQUALIFYING CONFLICTS OF INTEREST

In its briefing to this Court, the Nevada Legislature argues that "[i]n determining whether a decisionmaker has a disqualifying conflict of interest, courts use the same standards that apply to the disqualification of judges." Amicus Curiae Brief (ACB), p. 10, lns. 12-14 (citations omitted). The Legislature is incorrect - the "appearance or implied probability of bias" standard has no bearing on this case. As a "public officer" Councilman Carrigan is subject to the constitutionally infirm ethical

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[2] See NRS 281A.480.

standards set forth in NRS Chapter 281A, not the Judicial Cannons of Ethics.[3] NRS 281A.160. The Ethics in Government Law does not recognize or apply an "implied probability of bias" test. The maxim *expressio unius est excusio alterius* - the expression of one thing is the exclusion of another - has been repeatedly affirmed in the State of Nevada. *Dept. of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 548 n. 28, 119 P.3d 135, 139 (2005). In this case, the Legislature elected to attempt to define various relationships as a disqualifying conflict of interest in the Ethics in Government Law rather than implement the test they now assert. The Legislature cannot be allowed to publish one set of regulations and then argue another.

The Nevada Legislature's extensive arguments regarding a "disqualifying conflict of interest" based upon an "implied probability of bias" test are confusing and misleading. This matter does not involve the re-litigation of whether Councilman Carrigan violated Nevada's Ethics Laws based upon some irrelevant test suggested by the Legislature. Instead, this appeal is concerned with whether the statutes invoked by the Nevada Commission on Ethics in arriving at their determinations against Councilman Carrigan are constitutional. The Legislature's argument should be disregarded.

II.

CONCLUSION

NRS 281A.420(8)(d) and NRS 281A.420(8)(e) fail to satisfy the most fundamental requirements of due process and are unconstitutionally vague. In cases such as this, where the application of NRS 281A.420(2) depends on the invocation of NRS 281A.420(8)(d) or NRS 281A.420(8)(e), NRS 281A.420(2) is similarly unconstitutionally vague. Because public officers in the State of Nevada are unable to determine when they have a disqualifying conflict of interest, this constitutional infirmity chills the free exercise of protected political speech. Accordingly,

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[3] Judges are specifically exempted from the Ethics in Government Law. NRS 281A.160(2)(a).

NRS 281A.420(8)(d) and NRS 281A.420(8)(e) must be invalidated and the Opinion published by the Commission on Ethics and the Order entered by the First Judicial District Court must be vacated.

Respectfully submitted this 24th day of September 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Reply 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 24th day of September, 2008.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(d), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **APPELLANT'S REPLY BRIEF** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

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DATED this 24th day of September, 2008.

Cyndi Boggan

Cyndi A. Boggan