

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

Docket No. 51920

District Court No. 07-OC-012451B

vs.

**THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,**

Respondent. /

FILED

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APPELLANT'S

OPENING BRIEF

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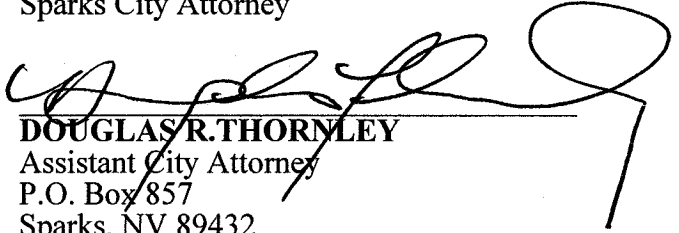
11
12 **THE COMMISSION ON ETHICS OF THE**
STATE OF NEVADA,

13 _____ Respondent. /

14
15 COMES NOW, Appellant Michael A. Carrigan, by and through the undersigned counsel of
16 record, and files his Opening Brief.

17 Respectfully submitted this 23rd day of July 2008.

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I.

STATEMENT OF THE ISSUES

There are four primary issues for the Court to consider in this appeal:

1. Whether the District Court erred in concluding that Nevada Revised Statute (NRS) 281A.420(8) (formerly NRS 281.501(8)) is not unconstitutionally vague;
2. Whether the District Court erred in concluding that NRS 281A.420(2) (formerly NRS 281.501(2)) is not unconstitutionally vague;
3. Whether the District Court erred in concluding that the vagueness that permeates NRS 281A.420(8) and NRS 281A.420(2) does not chill protected political speech in violation of the First Amendment to the United States Constitution;
4. Whether the Order of the District Court, coupled with the Opinion of the Nevada Commission on Ethics in this case, amounts to a prior restraint of protected political speech.

II.

STANDARD OF REVIEW

Constitutional challenges present questions of law that are subject to this Court's de novo review. *Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 711 (Nev. 2007); *City of Las Vegas v. Dist. Ct.*, 146 P.3d 240, 245 (Nev. 2006).

III.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal stems from the Nevada Commission on Ethics' improper application of certain unconstitutionally vague provisions of Nevada's Ethics in Government Law. In particular, on August 29, 2007, the Commission found that Sparks City Councilman Michael A. Carrigan should have abstained from voting on a certain matter before the City Council. Joint Appendix (JA) 0279-0291. The specific statutes invoked by the Commission do not adequately delineate the boundaries of lawful behavior and therefore public officers across Nevada are required to guess as to the applicability of the Ethics in Government Law.

///

1 **B. Course of Proceedings**

2 The Nevada Commission on Ethics convened on August 29, 2007 to review the actions of
3 Councilman Carrigan related to his August 23, 2006 vote to tentatively approve a planned
4 development handbook. *Id.* Applying the unconstitutionally vague statutes that are the subject of this
5 appeal, the Commission determined that Carrigan should have abstained from voting on the matter,
6 and found him guilty of a non-willful violation of NRS 281A.420(2). *Id.*

7 Councilman Carrigan subsequently sought Judicial Review of the Commission's decision. The
8 First Judicial District entertained the petition, noting that it was a "close call," but in an order dated
9 May 28, 2008, affirmed the Commissions' decision. JA 0369, Ins. 3-4; JA 0378-0414. Because the
10 effect of the District Court's order coupled with the Commission's decision in this case amounts to
11 a prior restraint on protected speech, Carrigan filed a First Amendment Petition for Writ of
12 Mandamus with this Court on June 13, 2008. (Supreme Court Case # 51850) On June 19, 2008, this
13 Court denied the petition, finding that an appeal from the District Court's order afforded Councilman
14 Carrigan an adequate legal remedy, precluding writ relief.

15 Councilman Carrigan then filed a timely notice of appeal from the District Court's order, and
16 the matter now resides before this Court. JA 0417-0418.

17 **C. Statement of Facts**

18 On February 16, 2005, Red Hawk Land Company submitted an application to the City of
19 Sparks Planning Department proposing the transfer of a tourist commercial zoning designation and
20 a gaming entitlement from the Wingfield Springs development in Sparks, Nevada to another Red
21 Hawk development - Tierra Del Sol - along the Pyramid Highway in Sparks.¹ This project is known
22 colloquially as the "Lazy 8." The transfer application was based upon a 1994 development agreement
23 that allowed for the future transfer of development credits if the credits remained unused. The Lazy
24 8 is a source of public consternation, with a small group of residents of unincorporated Washoe

26 ¹ Certain facts presented here are not contained in the record presently before the court, but are
27 indispensable for an accurate historical overview. Although these facts have little to no
28 bearing on the issues on appeal here, they are nonetheless important for the purpose of
 framing the factual recitations. Please see Supreme Court Case #'s 49504, 49682, and 20521
 for more information regarding the underlying land use dispute.

1 County and the Sparks Nugget being the most vocal opponents of the project. At an August 23, 2006
2 public meeting, the Sparks City Council voted three to two to deny Red Hawk's application for
3 tentative approval of the proposed Tierra Del Sol planned development handbook, which included
4 the transfer of the gaming entitlement. At this meeting, Red Hawk Land Company was represented
5 by a number of people, including Carlos Vasquez, who is a paid consultant to Red Hawk.

6 Subsequently, Red Hawk filed a lawsuit (Second Judicial District Court Case # CV06-02078)
7 against the City on August 25, 2006, alleging that the denial of the application was a breach of the
8 1994 development agreement and that the breach caused damages in excess of \$100 million. Through
9 negotiations with Red Hawk, and after contemplating its options and assessing the legal obstacles in
10 defending the Red Hawk Complaint, the City elected to settle the lawsuit. The Stipulation, Judgment
11 and Order entered by the Second Judicial District Court of Nevada on September 1, 2006 obligated
12 the City to tentatively approve Red Hawk's application.

13 Two weeks later, several nearly identical ethics complaints were filed against Sparks City
14 Councilman Michael Carrigan with the Nevada Commission on Ethics. JA 0009-0041. The
15 complaints alleged that Councilman Carrigan used his position as a Sparks City Councilman to secure
16 unwarranted benefits for himself from Carlos Vasquez and that Mr. Vasquez had an "undue
17 influence" over Councilman Carrigan. *Id.*

18 Mr. Vasquez has been friends with Councilman Carrigan since 1991, and served as the
19 volunteer campaign manager for Councilman Carrigan during his initial election to the Sparks City
20 Council in 1999, and each of his subsequent re-elections. JA 0280-0281.

21 Councilman Carrigan disclosed this relationship prior to the public hearing on the Red Hawk
22 application, and unequivocally stated that he was not in a position to reap any type of benefit from
23 the project, and that he could faithfully and impartially discharge his duties as an elected official in
24 this case. JA 0281. Nevertheless, the Commission commenced an investigation into the actions of
25 Councilman Carrigan, and ultimately charged Councilman Carrigan with (1) using his position in
26 government to secure an unwarranted benefit for Mr. Vasquez; (2) failing to make an adequate
27 disclosure of his relationship with Mr. Vasquez; and (3) failing to abstain from voting on the Red
28 Hawk application on August 23, 2006. JA 0055-0056

1 On September 20, 2006, the Sparks City Council voted to ratify the September 1, 2006
2 settlement as a perfunctory, prophylactic measure taken to eliminate even the slightest concern that
3 the City's decision to settle the Red Hawk action occurred outside the boundaries of Nevada's Open
4 Meeting Law. *See*, NRS 241.037.²

5 On October 6, 2006 the City of Sparks was sued again regarding the Lazy 8 – This time by
6 the Sparks Nugget and a group of citizens. (Second Judicial District Court # CV06-02410). In that
7 case, City's decision to settle the lawsuit was alleged to be faulty because of an alleged violation of
8 Nevada's planning and zoning laws. The Second Judicial District Court dismissed this lawsuit on
9 jurisdictional grounds, never reaching the merits of the case. The subsequent appeal presently resides
10 with this Court. (Supreme Court Case #'s 49504, 49682, 150251).

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

15 The Nevada Commission on Ethics convened on August 29, 2007 and held a hearing
16 regarding the ethics complaints filed against Councilman Carrigan. JA 0279-0291. The Commission
17 found that the Councilman (1) did not use his position in government to secure or grant unwarranted
18 privileges, preferences, exceptions or advantages for Carlos Vasquez; and (2) that Councilman
19 Carrigan adequately disclosed his relationship with Mr. Vasquez. *Id.* However, the Commission
20 applied an unconstitutionally vague statute and inconsistently determined that Councilman Carrigan
21 should have abstained from voting on the Red Hawk application at the August 23, 2006 meeting of
22 the Sparks City Council due to his connection to Mr. Vasquez, despite concluding that a majority of
23 Councilman Carrigan's constituency favored the proposed Red Hawk application. *Id.*

24
25 ² There has never been an official finding or formal opinion issued by the Nevada Attorney
26 General that the City Council violated Nevada's Open Meeting Law. Therefore, the City
27 maintains that the September 1, 2006 "Stipulation, Judgment and Order" did not require any
28 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.

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. JA 0279-0291. Councilman Carrigan filed a Petition for Judicial Review in Carson City on October 9, 2007. JA 0292-0295; JA 0296-0335. 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 Councilman 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 was held in Department Two of the First Judicial District Court. JA 0292-0295; JA 0296-0335. In an Order dated May 28, 2008, the District Court upheld the decision of the Nevada Commission on Ethics. JA 0378-0414.

IV.

ARGUMENT

A. NRS 281A.420(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

1 void-for-vagueness doctrine derives from the Due Process Clause of the Fourteenth Amendment to
2 the United States Constitution. *Silvar v. District Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006).
3 The Nevada Supreme Court has established a two-part test for determining whether a statute is
4 unconstitutionally vague: a statute is facially invalid if it (1) fails to provide notice sufficient to
5 enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) lacks
6 specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and
7 discriminatory enforcement. *Id.*; *City of Las Vegas v. District Court*, 118 Nev. 859, 862, 59 P.3d 477,
8 480 (2002).

9 The focus of the first prong of the vagueness test is to protect “those who may be subject to
10 potentially vague statutes,” *Silvar*, 122 Nev. at ___, 129 P.3d at 688 (2006), and to “guarantee that
11 every citizen shall receive fair notice of conduct that is forbidden.” *City of Las Vegas*, 118 Nev. at
12 864, 59 P.2d at 481 (2002). The notice required under the first prong “offers citizens the opportunity
13 to conform their...conduct to that law.” *Silvar*, 122 Nev. at ___, 129 P.3d at 685 (2006). While
14 absolute precision in drafting statutes is not necessary, the Legislature “must, at a minimum, delineate
15 the boundaries of unlawful conduct.” *City of Las Vegas*, 118 Nev. at 863, 59 P.3d at 480 (2002).
16 Additionally, where the Legislature does not define each term it uses in a statute, the statute will only
17 survive a constitutional challenge if there are well settled and ordinarily understood meanings for the
18 words employed when viewed in the context of the entire statutory provision. *Woofter v. O’Donnell*,
19 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975). In particular, questions of vagueness must be more
20 closely examined where, as in this case, First Amendment rights are implicated. *Ashton v. Kentucky*,
21 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966); *Reno v. American Civil Liberties Union*,
22 521 U.S. 844, 870-872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (noting that even if a statute is not
23 so vague as to violate due process, it may be impermissibly vague under the First Amendment if it
24 chills protected speech).

25 Previously, this Court invalidated the entire Ethics in Government Law based on
26 unconstitutionally vague financial disclosure provisions that required public officers to file a financial
27 statement detailing, among other things, economic interests “within the jurisdiction of the officer’s
28 public agency.” *Dunphy v. Sheehan*, 92 Nev. 259, 263, 549 P.2d 332, 335 (1976). In that case, the

1 Court found the phrase “within the jurisdiction of the officer’s public agency” unconstitutionally
2 vague for the purposes of financial disclosure laws. *Id.* at 264. By way of illustration, the Court wrote:

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

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

14 NRS 281A.420(8) enumerates various relationships that amount to a “commitment in a private
15 capacity to the interests of others” under the Nevada Ethics in Government Law.³ In this case, the
16 Nevada Commission on Ethics and the First Judicial District Court made use of two subsections of
17 NRS 281A.420(8) when they determined that Councilman Carrigan had a commitment in his private
18 capacity to the interests of Mr. Vasquez – subsection (d) and subsection (e). See JA 0279-0291; JA
19 0408, Ins. 4-13; JA 0410, Ins.13-18. Subsections (d) and (e) are unconstitutionally vague, deceptive
20 and uncertain.

21
22 ³ **NRS 281A.420** Additional standards: Voting by public officers; disclosures required of public
23 officers and employees; effect of abstention from voting on quorum; Legislators authorized
24 to file written disclosure.

- 25 8. As used in this section, “commitment in a private capacity to the interests of others”
26 means a commitment to a person:
27 (a) Who is a member of his household;
28 (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.

1 NRS 281A.420(8)(d) classifies a “substantial and continuing business relationship” as a
2 “commitment in a private capacity to the interests of others.” The phrases “business relationship” and
3 “substantial and continuing” have never been defined by the Nevada Legislature. No state case law
4 or published opinion of the Commission on Ethics exists to clarify what these phrases mean - in the
5 context of the Ethics in Government Law or otherwise. Is a business relationship an attempt to turn
6 a profit, or is making money not a relevant factor? Does it include volunteer relationships? Are
7 political relationships encompassed by this subsection? If a public officer is a party to a business
8 relationship, what standards are used to determine if the relationship is substantial and continuing?
9 Is a relationship substantial because it represents a certain percentage of an individual’s income, or
10 is there some unidentified, previously determined amount of money? Is money even involved in the
11 analysis? Is a relationship continuing because it exists for some undefined fixed period of time, or
12 is there an unpublished standard that contemplates frequency of dealings? Without guidance from
13 Nevada’s Legislature, Nevada’s Courts, or the Nevada Commission on Ethics, there can be no well
14 settled or commonly understood meaning of “business relationship” or the conditions that make a
15 business relationship “substantial and continuing.” Consequently, public officers across Nevada are
16 to guess at the boundaries of the statute. Where terms contained in a statute are so poorly defined as
17 to leave persons “guessing” at what behavior is, or is not, lawful, the statute is void-for-vagueness.
18 *Childs v. State*, 107 Nev. 584, 585, 816 P.2d 1079, 1079-1080 (1991).

19 NRS 281A.420(8)(e) provides that any relationship that is “substantially similar” to any other
20 relationship enumerated in NRS 281A.420(8) also amounts to a “commitment in a private capacity
21 to the interests of others.” The phrase “substantially similar” establishes a standard that is so
22 subjective and so expansive, that it is impossible for a person of ordinary intelligence to discern which
23 relationships fall within the purview of the statute – nearly any relationship could be made to satisfy
24 the broad and unfettered grasp of NRS 281A.420(8)(e). The Legislature, the Nevada Courts, and the
25 Commission on Ethics have never established standards BY which a relationship is analyzed for
26 substantial similarity under NRS 281A.420(8)(e). Without a statutory or well settled and commonly
27 understood definition of the term “substantially similar,” public officers in the State of Nevada must
28 rely on their own best guesses and advice from similarly confused attorneys, while the Nevada

1 Commission on Ethics is left to its own unfettered predilections to determine whether a relationship
2 is substantially similar to one of the relationships enumerated in subsection (e).

3 Underscoring the unconstitutional implementation of NRS 281A.420(8), the Commission on
4 Ethics specifically found that the nature of Councilman Carrigan's relationship with Mr. Vasquez was
5 political and not for profit:

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

13 JA 0286.

14 The United States Supreme Court has made clear that the First and Fourteenth Amendments guarantee
15 "freedom to associate with others for the common advancement of political beliefs and ideas."
16 *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Kusper v. Pontikes*, 414 U.S.
17 51, 56-57, 94 S. Ct. 303, 38 L.Ed.2d 260 (1973). Carlos Vasquez testified that he volunteered for
18 Councilman Carrigan's campaigns because he believed Carrigan would be "a great candidate" and
19 a "great council person." JA 0158, lns. 16-18 (Transcript of hearing before the Nevada Commission
20 on Ethics). Additionally, Mr. Vasquez explained that he donated his time to Councilman Carrigan's
21 campaigns because he "believed in Mr. Carrigan as a political candidate" and that he "thought the
22 City needed some help at the time." JA 0159, lns. 2-5. Mr. Vasquez' participation in Councilman
23 Carrigan's campaigns amounts to political volunteerism that is protected by the United States
24 Constitution – not a "business relationship" that is "substantial and continuing," or a relationship that
25 is "substantially similar" to any other relationship included in NRS 281A.420(8).

26 Effectively, the vagueness that permeates NRS 281A.420(8) enables the Commission on
27 Ethics to unilaterally eviscerate a constitutionally protected relationship under color of Nevada law.
28 Foreclosing upon an elected officer's ability to vote on particular matters because a person or group

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

8 The unconstitutional vagueness of NRS 281A.420(8) demands any of three intolerable results:
9 (1) public officers in Nevada will continue to be forced to gamble with their positions as public
10 servants by voting on matters without understanding the parameters of the statute or risking the
11 discontent of their constituency by abstaining unnecessarily and thereby failing to perform the
12 function of their position; (2) political contributions that led to the election of a candidate will render
13 that candidate ineffective; (3) political contributions, volunteerism and citizen involvement will
14 dissipate across the State of Nevada.

15 Demonstrating the inherent vagueness that permeates NRS 281A.420(8), the Commissioners
16 presiding over the August 29, 2007 hearing were unable to agree among themselves on which
17 provision of the statute Councilman Carrigan's relationship fell under. Commissioner Jenkins
18 believed that Councilman Carrigan's relationship with Carlos Vasquez was substantially similar to
19 a substantial and continuing business relationship. JA 0249, Ins. 6-9. Commissioner Hsu did not think
20 that the relationship was like a substantial and continuing business relationship at all, *Id.*, Ins. 23-25,
21 instead, he found that the relationship was substantially similar to a familial relationship. JA 0250,
22 Ins. 1-2. In contrast, Commissioner Cashman found that a substantial and continuing business
23 relationship did exist between Councilman Carrigan and Mr. Vasquez. JA 0253, Ins. 10-12. Since
24 the administrative body charged with enforcing the Ethics in Government Law was unable to come
25 to a collective interpretation and application of NRS 281A.420(8)(d) and 281A.420(e), it is certainly
26 unreasonable to expect that an elected official, vested with ordinary intelligence, could comprehend
27 what conduct is prohibited.

28 ///

1 Under the second prong of the vagueness test, a statute is unconstitutional if it “lacks specific
2 standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory
3 enforcement.” *City of Las Vegas v. District Court*, 146 P.3d 240, 245 (2006). A particular fear of this
4 Court has been that absent adequate guidelines, a statute may permit standard-free application. *Silvar*,
5 122 Nev. at 293, 129 P.3d at 685 (2006) (quoting *Koleander v. Lawson*, 461 U.S. 352, 358, 103 S.Ct.
6 1855, 75 L.Ed.2d 903 (1983)).

7 In *Silvar*, this Court analyzed and struck down a Clark County loitering ordinance because law
8 enforcement officers had too much discretion in determining whether the ordinance had been violated.
9 *Id.* at 295-96. Like the ordinance in *Silvar*, NRS 281A.420(8) is susceptible to arbitrary and
10 discriminatory enforcement. Because subsections (d) and (e) lack statutory, well settled or ordinarily
11 understood definitions, the Nevada Commission on Ethics, and in this case the First Judicial District
12 Court, is forced to rely on broad, unfettered discretion when interpreting, applying, and enforcing
13 those provisions of the statute. NRS 281A.420(8) fails to provide the clear language necessary to
14 bridle that discretion, therefore the statute encourages, authorizes, or at least fails to prevent its own
15 arbitrary and discriminatory enforcement. Accordingly, NRS 281A.420(8)(d) and 281A.420(8)(e) fail
16 to satisfy the second prong of the vagueness test set forth by this Court.

17 **B. NRS 281A.420(2) is Unconstitutionally Vague**

18 NRS 281A.420(2) requires public officers in the State of Nevada to abstain from voting on
19 matters when the independence of judgment of a reasonable person would be materially affected in
20 any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his
21 commitment in a private capacity to the interests of others. The Commission and the First Judicial
22 District Court did not address the first two conditions, but specifically invoked the third, as defined
23 by NRS 281A.420(8). See JA 0279-2091; JA 0408, Ins. 4-13; JA 0410, Ins.13-18. A statute which
24 “forbids or requires the doing of an act in terms so vague that men of common intelligence must
25 necessarily guess at its meaning and differ as to its application, violates the first essential of due
26 process of law.” *Connally*, 269 U.S. at 391 (1926); *Dunphy*, 92 Nev. at 262, 549 P.2d at 334 (1976);
27 *Ballard*, 120 Nev. at 868, 102 P.3d at 548 (2004). Because the definition proffered by NRS
28 281A.420(8) is unconstitutionally vague, there is no reliable way for an ordinary public officer to

1 determine whether or not he is required to abstain from voting in certain situations without guessing.
2 Accordingly, in cases such as this, where the application of NRS 281A.420(2) relies on subsections
3 (d) or (e) of NRS 281A.420(8), NRS 281A.420(2) is unconstitutionally vague.

4 **C. The Vagueness of NRS 281A.420(8) and NRS 281A.420(2) Offends the First Amendment**

5 In Nevada, planning and zoning decisions have long been characterized as “legislative.”
6 *McKenzie v. Shelly*, 77 Nev. 237, 240-42, 362 P.2d 258, 269-70 (1961); *Nova Horizon, Inc. v. Reno*,
7 105 Nev. 92, 94, 769 P.2d 721, 722 (1989).

8 Here, the Red Hawk Land Company submitted an application to the City of Sparks Planning
9 Department on February 6, 2005. The application proposed the transfer of a tourist commercial zoning
10 designation and a gaming entitlement from the Wingfield Springs development in Sparks, Nevada,
11 to another Red Hawk development known as Tierra Del Sol along the Pyramid Highway in Sparks.
12 At an August 23, 2006 public meeting, the Sparks City Council voted three to two to deny Red
13 Hawk’s application. The vote cast by Councilman Carrigan is the subject of this appeal. Because the
14 August 23, 2006 vote related to a planning and zoning decision, it is appropriately classified as
15 “legislative.”

16 Although no Nevada Court has previously answered the question of whether legislative voting
17 is protected speech, all three federal courts that have directly considered the issue concluded that the
18 act of voting on public issues by a member of a public agency or board comes within the freedom of
19 speech guarantee of the First Amendment. *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989);
20 *Clarke v. United States*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski v. City of Madison*, 558 F.Supp. 664
21 (W.D.Wisc. 1983). A legislator’s vote is inherently expressive, *Clarke*, 886 F.2d at 411 (D.C.Cir.
22 1989), and legislative voting has been recognized by the United States Supreme Court as the
23 “individual and collective expression of opinion.” *Hutchison v. Proxmire*, 443 U.S. 111, 133, 99 S.Ct.
24 2675, 2697, 61 L.Ed.2d 411 (1978). Voting by public officials comes within the “heartland of First
25 Amendment doctrine,” and “...the status of public officials’ votes as constitutionally protected speech
26 is established beyond peradventure of doubt”. *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995). Simply
27 put, there can be no more definitive expression of an opinion protected by the First Amendment than
28 when an elected official votes on a controversial subject. *Mihos v. Swift*, 358 F.3d 91, 107, 109 (1st

1 Cir. 2004); *Miller*, 878 F.2d at 532 (1st Cir. 1989). That Councilman Carrigan's vote occurred in the
2 heat of a controversial land use decision only strengthens the protection afforded to Carrigan's
3 expression: urgent, important, and effective speech can be no less protected than impotent speech, lest
4 the right to speak be relegated to those instances when it is least needed. *See Terminiello v. Chicago*,
5 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949).

6 The Constitution demands a high level of clarity from a law if it threatens to inhibit the
7 exercise of a constitutionally protected right, such as the right of free speech or religion. *Colautti v.*
8 *Franklin*, 439 U.S. 379, 391, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979); *Smith v. Goguen*, 415 U.S. 566,
9 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109,
10 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604,
11 87 S.Ct. 675, 683-684, 17 L.Ed.2d 629 (1967). An unconstitutionally vague law tends to chill the
12 exercise of First Amendment rights by causing citizens to "steer far wider of the unlawful zone ... than
13 if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S.
14 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

15 Councilman Carrigan is not asserting that he has a protected right to vote when he has a
16 disqualifying conflict of interest. Carrigan's argument is that NRS 281A.420(8) is unconstitutionally
17 vague, NRS 281A.420(2) is vague because it relies on NRS 281A.420(8), and that the vagueness of
18 these laws extends to, and impermissibly chills, otherwise protected core political speech in violation
19 of the First Amendment. As a practical matter, Carrigan's only option to ensure compliance with the
20 imprecise standards of NRS 281A.420(8) and NRS 281A.420(2) is to abstain from voting, even when
21 abstention is not necessarily warranted or required by law. Because the Commission on Ethics is free
22 to determine what constitutes a "business relationship" that is "substantial and continuing," or which
23 relationships are "substantially similar" to relationships enumerated in NRS 281A.420(8), without
24 providing any legitimate guidance or standards to public officials in the State of Nevada, the
25 challenged statutes allow the unnecessary abridgment of protected political speech, and are therefore
26 void.

27 State statutes that burden political speech, such as NRS 281A.420(8) and NRS 281A.420(2),
28 are subject to strict scrutiny, and the statutory restriction of speech is upheld only if it is narrowly

1 tailored to serve a compelling state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347,
2 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786,
3 98 S.Ct.1407, 1421 (1978). The broad purview of NRS 281A.420(8) includes any actual or implied
4 relationship that the Commission on Ethics arbitrarily determines to be "substantially similar" to any
5 of the other relationships specifically enumerated in the subsection. Because of the uncertainty that
6 accompanies these unconstitutionally vague standards, relationships that do not amount to a
7 "commitment in a private capacity to the interests of others" but for the unfettered discretion and
8 personal predilections of the Commission on Ethics, are necessarily encumbered, and the reach of
9 NRS 281A.420(2), through its reliance on NRS 281A.420(8), is not restricted to a narrow category
10 of unprotected speech. Accordingly, NRS 281A.420(8) and NRS 281A.420(2) are not narrowly
11 tailored, and the statutes do not employ the least restrictive means available to regulate conflicts of
12 interest. Therefore, NRS 281A.420(8) and NRS 281A.420(2) do not survive strict scrutiny and violate
13 the First Amendment.⁴

14 ⁴ The First Judicial District Court incorrectly applied the balancing test established in *Pickering*
15 *v. Board of Education*, 391 U.S. 563 (1968), to the situation in this case. JA 0391, lns. 14-17.
16 When a court applies the *Pickering* balancing test, it must arrive at a balance between the
17 interests of the employee, *as a citizen*, in commenting upon matters of public concern and the
18 interest of the government, as an employer, in promoting the efficiency of the public services
19 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.

20 To the extent this Court is inclined to consider the *Pickering* balancing test, the scales of
21 justice still tip decisively in favor of Councilman Carrigan. Public officers in Nevada have a
22 strong interest in voting their conscience on important issues without having to suffer
23 retaliatory recriminations from the Nevada Commission on Ethics. *See, e.g., Connick v.*
24 *Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("It is essential that public
25 employees be able to speak freely without fear of retaliatory dismissal."). The public also has
26 a substantial interest in members of public authorities being able to freely cast their votes in
27 accordance with their best judgment, without fear of political interference and intimidation.
28 *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 Carrigan's 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.

1 **E. Through its Reliance on NRS 281A.420(8), NRS 281A.420(2) is Overbroad.**

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

5 The overbreadth doctrine invalidates laws, such as NRS 281A.420(2), that infringe upon First
6 Amendment rights. Even minor intrusions on First Amendment rights will trigger the overbreadth
7 doctrine. *Silvar*, 122 Nev. 289, 129 P.3d at 688 (2006). The “First Amendment freedoms need
8 breathing space to survive, [so] government may regulate in the area only with narrow specificity.”
9 *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
10 effect on free expression and thus impacts the “breathing space” of First Amendment rights, an
11 overbroad law is unconstitutional. *Silvar*, 122 Nev. 289, 129 P.3d at 688 (2006).

12 Claims of overbreadth are also entertained in cases where the reviewing court is of the opinion
13 that rights of association were ensnared in statutes which, by their broad sweep, might result in
14 burdening innocent associations. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915,

15
16 Moreover, NRS 294A.100 controls the timeframe in which political donations can be made.
17 Failure to comply with the provisions of NRS 294A.100 is a category E felony. Any concerns
18 that the state may have regarding the campaign contributions made by Mr. Vasquez to
19 Councilman Carrigan’s campaigns are mitigated by the limitations placed on campaign
20 contributions by state law. By finding that Councilman Carrigan’s vote on the Lazy 8 project
21 accurately reflected the will of his constituents and that Carrigan sufficiently disclosed his
22 relationship with Mr. Vasquez, the Commission on Ethics essentially found that no actual
23 impropriety existed in this case. JA 0281, #15; JA 0289. Therefore, the notion that
24 Councilman Carrigan should have abstained from voting on the Lazy 8 matter because of the
25 political contributions from Mr. Vasquez - the government’s interest in this case for purposes
26 of *Pickering* balancing - is based entirely on a supposed appearance of impropriety. The
27 contributions in this case did not violate NRS 294A.100, and were properly reported under
28 NRS 294A.120. Accordingly, any concern that the government may have regarding the ethical
performance of governmental 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.

1 37 L.Ed.2d 830 (1973).

2 NRS 281A.420(2) requires public officers in the State of Nevada to abstain from voting on
3 matters when the independence of judgment of a reasonable person would be materially affected in
4 any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his
5 commitment in a private capacity to the interests of others as defined by NRS 281A.420(8). NRS
6 281A.420(8)(d) and 281A.420(8)(e) are unconstitutionally vague. Therefore, in cases such as this,
7 when NRS 281A.420(2) relies on subsection (d) or (e) of NRS 281A.420(8), it is also
8 unconstitutionally vague.

9 The act of voting on public issues by a member of a public agency or board comes within the
10 freedom of speech guarantee of the First Amendment. *Miller*, 878 F.2d 523 (1st Cir. 1989); *Clarke*,
11 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski*, 558 F.Supp. 664 (W.D.Wisc. 1983). When a public officer
12 in Nevada is not required to abstain from voting under NRS 281A.420(2), he has a constitutionally
13 protected interest in voting on matters before his board or agency. Because the definitions proffered
14 by NRS 281A.420(8)(d) and 281A.420(8)(e) are unconstitutionally vague, there is no reliable way
15 for an ordinary public officer to determine whether or not he is required to abstain from voting in
16 certain situations without guessing. Therefore, NRS 281A.420(2) ensnares rights that are protected
17 by the Constitution, either through the chilling effect the vagueness has on the free exercise of a
18 public officer's First Amendment rights, or through the arbitrary and discriminatory enforcement of
19 the statute by the Nevada Commission on Ethics.

20 In Nevada, public officers are not required to abstain from voting on matters that concern or
21 involve a donor of campaign *In Re: Boggs-McDonald*, CEO 01-12; *In Re: Wood*, CEO 95-51. Case
22 law from other states concludes that a conflict of interest does not necessarily exist where a board
23 member has received a campaign contribution. These decisions are harmonious with the previous
24 findings of the Nevada Commission on Ethics. In a Washington case, the court concluded an
25 administrative decision maker's participation after receiving campaign contributions from an
26 interested party does not necessarily violate the appearance of fairness doctrine. In *Snohomish County*
27 *Improvement Alliance v. Snohomish County*, 808 P.2d 781 (Wa. 1991), the court held when two
28 council members participated in a quasi-judicial proceeding after contemporaneously receiving

1 campaign contributions from interested parties, they did not violate the appearance of fairness
2 doctrine. In deciding this, the court stated: "Moreover, such participation by said Council members
3 was not a conflict of interest . . . The mere receipt of campaign contributions by a councilmember
4 does not constitute a 'direct or indirect substantial financial or familial interest..." *Id.* at 786. The
5 court implied there may have been another result had there been a failure to report the campaign
6 contributions. *Id.* In *Woodland Hills v. City Council*, 609 P.2d 1029 (Cal.1980), the California
7 Supreme Court held that absent bribery or some significant conflict of interest, a campaign
8 contribution is not sufficient to require recusal of a council member prior to a vote on projects of
9 developers who gave the contributions. *Id.* at 1032. Although the trial court found the party before
10 the council member had made substantial contributions of money to the campaign (exceeding \$9,000),
11 it found the challenger was not denied a fair hearing. *Id.* The court concluded it was not improper for
12 a member of the council to vote on the projects nor were they required to disqualify themselves in
13 such circumstances because expression of political support by campaign contribution does not prevent
14 a fair hearing before an impartial city council when the contributions were lawfully made and
15 received, and disclosed pursuant to laws governing campaign contributions. *Id.* at 1032. The court
16 discussed the importance of the political contribution in that it is an exercise of fundamental freedom
17 protected by the First Amendment of the United States Constitution. Because of this importance the
18 court stated, "to disqualify a city council member from acting on a development proposal because the
19 developer had made a campaign contribution to that member would threaten constitutionally protected
20 political speech and associational freedoms." *Id.* at 1033.

21 Here, no *quid pro quo* relationship has been alleged. The campaign contributions made to
22 Councilman Carrigan by Mr. Vasquez were made for valid and constitutionally protected purposes.
23 JA 0203, Ins. 17-24. Mr. Vasquez donated his time to Councilman Carrigan's campaigns long before
24 the Lazy 8 project appeared on the horizon. See Exhibit B. Mr. Vasquez' contributions to Councilman
25 Carrigan's campaigns were never conditioned on, or otherwise tied to, a particular vote or issue. *Id.*,
26 Ins.17-24. The Commission on Ethics found that "a majority of Councilman Carrigan's constituency
27 favored the Lazy 8." JA 0281, #15.

28 ///

1 The notion that campaign contributions disqualify the recipient from participating in
2 governmental decisions has been expressly and emphatically rejected by courts across the United
3 States. *See, O'Brien v. State Bar of Nevada*, 114 Nev. 71, 952 P.2d 952 (Nev. 1998); *Cherradi v.*
4 *Andrews*, 669 So.2d 326, (Fla.App 4th Dist. 1996); *J-IV Investments v. David Lynn Mach, Inc.*, 784
5 S.W.2d 106 (Tex.App. Dallas 1990). Foreclosing upon an elected official's ability to act on particular
6 matters because a person or group associated with the matter had made a campaign contribution to
7 that official threatens constitutionally protected political speech and association freedoms.
8 "Governmental restraint on political activity must be strictly scrutinized and justified only by
9 compelling state interest." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 637-638, 46 L.Ed.2d 659, 691
10 (1976). While disqualifying contribution recipients from voting would not prohibit contributions *per*
11 *se*, it would unconstitutionally chill contributors' First Amendment rights. *See, Woodland Hills*
12 *Residents Assn., Inc. v. City Council*, 26 Cal.3d 938, 609 P.2d 1029 (1980); *Let's Help Florida v.*
13 *McCrary*, 621 F.2d 195 (5th Cir. 1980), judgment aff'd, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed. 2d
14 284 (1982). Representative government would be thwarted by depriving certain classes of voters of
15 the constitutional right to participate in the electoral process. Based on the prior opinions of the
16 Nevada Commission on Ethics and decisions of courts around the United States, the campaign
17 contributions made to Councilman Carrigan by Mr. Vasquez did not create an impermissible conflict
18 of interest requiring Councilman Carrigan to abstain from voting on August 23, 2006. Mr. Vasquez'
19 right to volunteer, and Councilman Carrigan's right to accept Mr. Vasquez' in-kind donations, are
20 protected by the United States Constitution.

21 Even if this Court were to employ the more rigorous conflict standards that apply to judges,
22 the campaign contributions from Mr. Vasquez to Councilman Carrigan do not amount to a
23 disqualifying conflict of interest. In the context of judges, the Nevada Supreme Court has held that
24 a campaign contribution to a presiding judge by a party or an attorney does not ordinarily constitute
25 grounds for disqualification. *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640,
26 644, 5 P.3d 1059 (2000) (quoting *In re Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988)). The Court
27 remarked that such a rule would "severely and intolerably" obstruct the conduct of judicial business
28 in a state like Nevada where judicial officers must run for election and consequently seek campaign

1 contributions. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275; *see also O'Brien v. State Bar of Nevada*,
2 114 Nev. 71, 76 n. 4, 952 P.2d 952, 955 n. 4 (1998) (judge serving on state bar board of governors
3 was not disqualified from voting on appointment to commission on judicial selection despite having
4 received over \$100,000.00 in campaign contributions from prospective appointee and her partner).
5 In *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 5 P.3d 1059 (2000), the
6 Las Vegas Redevelopment Agency filed petition for writ of mandamus or prohibition, challenging
7 a trial judge's decision to disqualify himself in an eminent domain action, involving agency and
8 landowners whose property was condemned for the development of a certain street. The Supreme
9 Court held that contributions made to judge's successful campaign to retain his seat by casinos that
10 stood to benefit from outcome of eminent domain action did not constitute proper grounds for judge's
11 disqualification. *Id.* at 645. The Court then ordered the district judge to preside over the case because
12 the campaign contributions were not an appropriate justification for his recusal, and therefore the
13 judge was obligated to perform the function of the position he was elected to fill. *Id.*

14 Councilman Carrigan is obligated to represent the will of the citizens who reside in the Fourth
15 Ward of the City of Sparks. The vagueness that permeates NRS 281A.420(8) and 281A.420(2)
16 unconstitutionally silences both Councilman Carrigan and the citizens he represents.

17 **F. Prior Restraint**

18 Governmental regulations or actions that prohibit or limit the future dissemination of
19 constitutionally-protected speech constitute prior restraints. *Fantasy Book Shop, Inc. v. City of Boston*,
20 652 F.2d 1115 (1st Cir. 1981). The term is generally used to describe administrative and judicial orders
21 forbidding certain communications when issued before such communications are to occur. *DVD Copy*
22 *Control Ass'n., Inc. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (2003); *Hobart v. Ferebee*, 692 N.W.2d 509
23 (S.D. 2004). A prior restraint imposes in advance a limit upon the right to speak, *State v. Haley*, 687
24 P.2d 305 (Alaska 1984), or otherwise prevents the expression of a message. *Hamilton Amusement*
25 *Center v. Verniero*, 156 N.J. 254, 716 A.2d 1137 (1998). The United States Supreme Court has
26 condemned any system of prior restraint of first amendment rights. *Near v. Minnesota*, 283 U.S. 697,
27 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The protection of political speech is a primary function of the
28 guarantee of freedom of speech. *Del Papa v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996); *Kirksey v.*

1 *City of Jackson*, 663 F.2d 659 (5th Cir. 1981) (*decision clarified on denial of reh'g*, 669 F.2d 316 (5th
2 Cir. 1982)); *CBS, Inc. v. F.C.C.*, 629 F.2d 1 (D.C. Cir. 1980) (*judgment aff'd*, 453 U.S. 367 (1981)).
3 There is no more definitive expression of a political opinion protected by the First Amendment than
4 when an elected official votes on a controversial subject. *Mihos*, 358 F.3d at 107, 109 (1st Cir. 2004);
5 *Miller*, 878 F.2d at 532 (1st Cir. 1989).

6 Moving forward from the conclusions of the Nevada Commission on Ethics and the First
7 Judicial District Court, Councilman Carrigan and every other public officer in the State of Nevada
8 is still faced with the same disconcerting decision – to vote on matters before his respective
9 governmental body without understanding the boundaries of an unconstitutionally vague statute, or
10 abstain from voting and fail to represent the citizens that make up his constituency.

11 The First Judicial District Court determined that the challenged provisions of the Ethics in
12 Government Law are not unconstitutionally vague because public officers are free to seek advisory
13 opinions from the Commission on Ethics before they vote on a matter. In its Order, the District Court
14 explained that Councilman Carrigan should have sought an advisory opinion from the Commission
15 on Ethics if he were unsure of the boundaries of lawful behavior. JA 0395, Ins. 1-7 ; JA 0373, Ins. 21-
16 24. Warnings from a court with respect to the exercise of speech have a bearing on whether there is
17 a prior restraint. *Multimedia Holdings Corp. v. Circuit Court*, 544 U.S. 1301, 1306, 125 S.Ct. 1624,
18 161 L.Ed.2d 590 (2005). The District Court's conclusion presupposes that every possible factual
19 scenario is either already covered by existing advisory opinions, or that an on-point advisory opinion
20 will be issued in time for a concerned public officer to act (or not act) based on that guidance.⁵ Nearly
21 every opinion published in the last decade by the Nevada Commission on Ethics contains the
22 following disclaimer:

23 *Note: The foregoing opinion applies only to the specific facts and circumstances*
24 *described herein. Facts and circumstances that differ from those in this opinion may*
25 *result in an opinion contrary to this opinion. No inferences regarding the provisions*

26 ⁵ Moreover, even if the supposition were accurate, it does not alter the fact that subsections (d)
27 and (e) of NRS 281A.420(8) are insufficiently specific to put public officers in the State of
28 Nevada on notice as to which relationships rise to the level of a “commitment in a private
capacity to the interests of others.”

1 of the Nevada Revised Statutes quoted and discussed in this opinion may be drawn to
2 apply generally to any other facts and circumstances. See, e.g., JA 0291.

3 Although the Commission on Ethics has never published an opinion clarifying the provisions
4 of NRS 281A.420(8), or an opinion similar to that fact pattern presented in the instant case, this
5 disclaimer eviscerates any precedential value of an opinion or decision of the Nevada Commission
6 on Ethics, even in cases where a relevant publication exists. The Commission lacks jurisdiction to
7 render advisory opinions where the request for an opinion seeks general guidance, *In re: Rural County*
8 *District Attorney*, CEO 99-48, and the Commission is only authorized to opine on specific questions
9 regarding specific facts and circumstances, *In re: Public Officer*, CEO 02-22; *In re: Eklund-Brown*,
10 CEO 02-23. Therefore, the realistic effect of the District Court's finding coupled with the disclaimer
11 detailed above is that Councilman Carrigan has no choice but to either seek a prior, binding advisory
12 opinion from the Commission each and every time he has a concern regarding NRS 281A.420(8) or
13 act without understanding the boundaries of the law and risk the myriad of penalties enumerated in
14 NRS 281A.440. Requiring public officers to seek an advisory opinion from a panel before speaking
15 or acting – for fear of disciplinary action and sanctions – is the “ultimate in prior restraint.” *Spargo*
16 *v. New York State Comm'n on Judicial Conduct*, 2003 WL 2002762, N.D.N.Y. (2003) (not reported
17 in F.Supp.2d – vacated on basis of Younger Abstention by *Spargo v. New York State Comm'n on*
18 *Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003)).

19 As a practical matter, seeking an advisory opinion every time a public officer is unsure
20 regarding the interpretation or application of an unconstitutionally vague statute is not a viable
21 solution or cure of the constitutional infirmities of the Ethics in Government Law. The Nevada Open
22 Meeting Law mandates that written notice of all meetings must be given at least three working days
23 before the meeting. NRS 241.020(2). The Sparks City Council is required to hold regular meetings
24 at least twice a month, at times established by ordinance. Sparks City Charter, Art. 2, Sec. 2.030(1).
25 The Sparks Municipal Code (SMC) designates the second and fourth Mondays of each month as the
26 times for regular meetings of the City Council. SMC 1.10.020(A). Accordingly, under NRS
27 241.020(2), the agenda for a regular meeting of the Sparks City Council is published on the first and
28 third Wednesdays of each month, three working days prior to the meeting. The agenda and its

1 supporting material are also distributed to the Council Members three working days prior to a
2 scheduled meeting – prior to the dissemination of this information, the Council Members are unaware
3 of the issues on the agenda, and are therefore unable to identify any potential conflicts.

4 NRS 281A.440 allows the Commission on Ethics to take up to forty-five days to render an
5 advisory opinion after receiving a request from a public officer. In practice, the Commission has
6 declined to provide advisory opinions to the Sparks City Council until the concerned Council Member
7 has received an opinion from the City Attorney's Office. Once the City Attorney's Office prepares
8 a perfunctory opinion, a letter is drafted to the Commission explaining that the Council Member
9 remains unsure of the interpretation of the Ethics in Government Law. These documents, along with
10 the Commission's official opinion request form, are then faxed and mailed to the Executive Director
11 of the Commission on Ethics. The Executive Director thereafter gathers information relating to the
12 request for an advisory opinion and attempts to secure a quorum of the Commissioners to hold a
13 hearing regarding the advisory opinion. Once a hearing is held, the resulting opinion is binding upon
14 the public officer's future conduct. NRS 281A.440(1)(a). As there are only three working days
15 between the date the Sparks City Council Members are provided with the agenda and supporting
16 materials and the date of the actual City Council meeting, the Commission's procedure cannot be
17 completed. Consequently, a public officer who requests an advisory opinion from the Commission
18 on Ethics has three options: (1) a public officer may abstain from voting on an issue until the
19 Commission issues an advisory opinion, at which time, in all likelihood, it will be too late for the
20 public officer to represent the will of his constituents by voting; (2) a public officer may choose to
21 risk fines, removal from office, and criminal prosecution by performing his duties as an elected
22 representative of the citizens of Sparks by voting without any certainty regarding the boundaries of
23 the law; or (3) although impermissible in some situations where statutory deadlines are implicated,
24 the public officer may request that the public body table an issue until the Commission renders an
25 advisory opinion. Thus, Councilman Carrigan is being forced to choose between delaying political
26 speech that he has a right to make as a Sparks City Councilman and as an American Citizen, and
27 risking fines, removal from office and potential criminal prosecution.

28 ///

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

5 V.

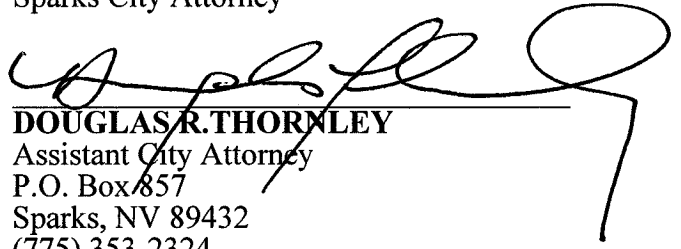
6 **CONCLUSION**

7 The Nevada Commission on Ethics and the First Judicial District Court have employed
8 unconstitutionally vague and overbroad statutes to strip Councilman Carrigan of his First Amendment
9 right to vote on legislative matters, his right to receive campaign contributions, Carlos Vasquez of his
10 right to associate with political campaigns, and the citizens of Sparks, Nevada, of their voice in
11 representative government. Moreover, the actions of the Commission and the District Court implicate
12 the constitutionally guaranteed rights of all Nevadans, from the man or woman in the street to the
13 long-time voter to all of the State's elected officers. Operating in a world apart from either the United
14 States or Nevada Constitution the Commission on Ethics and the First Judicial District Court have
15 established an informal system of prior restraint on political speech, irreparably damaging the most
16 fundamental rights enjoyed by Americans and upon which our nation is based. Councilman Carrigan
17 was elected to represent the citizens of Sparks, and is entitled to all of the privileges, rights and
18 obligations that accompany his position as a City Councilman. For these reasons, the Opinion
19 published by the Commission on Ethics and the Order entered by the First Judicial District Court must
20 be vacated.

21 Respectfully submitted this 23rd day of July 2008.

22 **CHESTER H. ADAMS**
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24 By:


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Respectfully submitted this 23rd day of July 2008.

By:

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1 **CERTIFICATE OF SERVICE**

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

7 **Adriana Fralick**
8 Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

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

12 **Brenda J. Erdoes**
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13 **Kevin C. Powers**
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401 S. Carson Street
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16 DATED this 23rd day of July 2008.

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19 Shawna L. Liles
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