Docket No. 51920

IN THE

SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER OF THE CITY OF SPARKS,

Appellant,

v.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DOCKET NO. 07-OC-012451B

SUPPLEMENTAL BRIEF FOR APPELLANT MICHAEL A. CARRIGAN

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STATEMENT OF OUTSTANDING ISSUES

The outstanding issues in this appeal are:

1. Whether Nevada's disqualification provision, Nev. Rev. Stat. §§ 281A420(2), (8) (2007), is unconstitutionally vague under the First or Fourteenth Amendments; and

2. Whether the disqualification provision impermissibly infringes on First Amendment rights of association.[1]

INTRODUCTION

Following the United States Supreme Court's remand of this case, Appellant Michael A. Carrigan's constitutional challenge to his censure for voting on a controversial casino project supported by a campaign volunteer remains unresolved. The Supreme Court did not address his arguments that Nevada's disqualification provision is unconstitutionally vague and impermissibly burdens the First Amendment association rights of candidates and their campaign volunteers. Because Councilmember Carrigan preserved both challenges, this Court should address them now. And it should vacate the censure on either or both grounds.

For reasons this Court already has recognized, the disqualification provision is hopelessly vague. It enumerates several categories of disqualifying relationships, requiring a legislator to abstain if a vote implicates his own financial interests or those of a household member, a relative, an employer, or anyone else with whom the official has a

[1] The 2007 version of the statute is cited in this brief to maintain consistency with prior opinions and briefs. The statutory provisions at issue are now codified at Nev. Rev. Stat. §§ 281A420(3), (8)(a) (2009).

substantial and continuing business relationship. Nev. Rev. Stat. § 281A.420(2), (8) (2007). But it also supplements those broad categories with a catchall that disqualifies the official based on any relationship that is "substantially similar" to the ones enumerated. *Id*. § 281A.420(8)(e). This Court correctly held that "[t]here is no definition or limitation to subsection 8(e)'s definition of any relationship 'substantially similar' to the other relationships in subsection 8," and that the provision accordingly "fails to sufficiently describe what relationships are included." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 623 (Nev. 2010). On that basis alone, the provision is constitutionally deficient.

But even if the provision were clear, the censure severely burdens First Amendment rights. The Commission on Ethics' application of the provision in this case puts every candidate and key campaign volunteer to an untenable—and unconstitutional—choice: They both have a First Amendment right to associate to advance the candidate's election. But if they do, the volunteer must be prepared to check his right to petition the government at the campaign door. And the candidate must be prepared to miss critical votes on any issue that may turn out to be of interest to the volunteer. The censure should not stand.

STATEMENT OF THE CASE AND FACTS

The factual and procedural background of this case was set forth in the Court's prior opinion, *Carrigan*, 236 P.3d at 618-19, and the parties' original briefs before this Court, A.O.B. 1-5; R.A.B. 1-3.[2] The Commission on Ethics censured Mr. Carrigan, a

[2] This brief uses the following abbreviations: Nevada Supreme Court Joint Appendix ("J.A."); Councilmember Carrigan's opening brief in this Court ("A.O.B."); his opening

member of the Sparks City Council, for voting on the "Lazy 8"—a controversial casino project that was *the* issue in the 2006 local election, J.A. 88-90—because his volunteer campaign manager, Carlos Vasquez, had promoted the project and lobbied for it on behalf of the developer. *See Carrigan*, 236 P.3d at 618-19; J.A. 290.

Councilmember Carrigan had no financial interest in the project. *Carrigan*, 236 P.3d at 618 (quoting disclosure statement). But the development was to be in his ward, and he knew his constituents would not support the originally proposed stand-alone casino. J.A. 109-10, 137. So, long before Vasquez was hired by the developer, Councilmember Carrigan intervened in the negotiations to insist that the developer turn the project into a mixed-use venue that would benefit his constituents. J.A. 109-12, 137-38. As modified by his efforts, he believed that the project was right for his ward and he supported it on that basis. J.A. 111. But the developer had hired Vasquez in the meantime, and out of an abundance of caution, Councilmember Carrigan "consulted the Sparks City Attorney for guidance regarding any potential conflict of interest" based on their relationship. *Carrigan*, 236 P.3d at 618. The City Attorney "advised [him] to disclose" the relationship "on the record" "before voting on the Lazy 8 matter." *Id*. Councilmember Carrigan followed that advice. *Id*. Nevertheless, after the vote, John Ascquaga's Nugget ("the Nugget"), another local casino bent on defeating the new competitor, instigated an ethics proceeding against Councilmember Carrigan for not abstaining. A.O.B. 2-4; J.A. 73.

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brief in the district court ("P.O.B."); his reply brief in the district court ("P.R.B."); the Commission's answering brief in this Court ("R.A.B.").

Like all standard ethics statutes, Nevada's law enumerates several categories of disqualifying relationships: An official must abstain if a vote implicates his own financial interests or those of a household member, a relative, an employer, or anyone else with whom the official has a substantial and continuing business relationship. Nev. Rev. Stat. § 281A.420(2), (8) (2007). But Nevada stands apart in supplementing those broad categories with a catchall that disqualifies the official for any relationship that is "substantially similar" to the ones enumerated. *Id*. § 281A.420(8)(e).

The Commissioners struggled with how the disqualification provision applied to this case. *See* J.A. 249-59. They ultimately concluded that the "sum total of [Carrigan and Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated" in the statute—all of them—"including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" J.A. 286. And they found that Councilmember Carrigan "had improperly voted" because he "should have known that his relationship with Vasquez fell within the catchall definition." *Carrigan*, 236 P.3d at 619. The Commission based its decision on a concern about the corrupting influence of Councilmember Carrigan's political "loyalties." J.A. 290. No other state agency appears to have ever disqualified an elected official on that basis.

Councilmember Carrigan appealed the Commission's censure to the First Judicial District Court. He argued that Nevada's disqualification provision impermissibly restricts protected speech and association in violation of the First Amendment and is overbroad and vague in violation of the First and Fourteenth Amendments. Part of his challenge was

based on an asserted First Amendment right to expression through his vote. P.O.B. 10-15 (J.A. 313-18). But Councilmember Carrigan also contended that this was a case where "rights of association were ensnared in [a] statute[] which, by [its] broad sweep, might result in burdening innocent associations." P.O.B. 15 (J.A. 318) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); *see* P.R.B. 8 (Ad13) (the provision's vagueness allows the Commission to "eviscerate a constitutionally protected political relationship" between a candidate and a volunteer).[3]

The district court found that "the free speech and associational rights of public officers and employees are not absolute," and therefore that "states may enact reasonable regulations limiting the political activities of public officers and employees without violating the First Amendment." J.A. 390. It upheld the censure, rejecting all of Councilmember Carrigan's constitutional arguments. *See Carrigan*, 236 P.3d at 619; J.A. 390-93, 398, 405.

Councilmember Carrigan appealed to this Court, reasserting the same First and Fourteenth Amendment arguments, including those regarding associational rights and vagueness. *See* A.O.B. 9-11, 15-19, 23. This Court held that "voting by an elected public officer on public issues is protected speech under the First Amendment." *Carrigan*, 236 P.3d at 621. Applying strict scrutiny, the Court found that the disqualification provision could not stand because the catchall's "application to a wide range of differing

[3] Councilmember Carrigan's opening brief in the district court was included in the Joint Appendix; his reply brief was not. For the Court's convenience, the reply brief is reproduced in the Addendum attached to this brief. Parallel citations to the Addendum are denoted with "Ad."

commitments and relationships is not narrowly tailored." *Id*. at 623. Although the Court stated that it "need not address" Councilmember Carrigan's vagueness challenge, *id*. at 619 n.4, it effectively did so, holding that the "catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal," *id*. at 623.

The Commission appealed to the United States Supreme Court. The Supreme Court reversed this Court's decision, considering only "whether legislators have a personal, First Amendment right to vote on any given matter." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2346 (2011). It held that legislators have no such right. *Id*. at 2350. The Court concluded that it "ha[d] no occasion to consider" Councilmember Carrigan's vagueness and association arguments, which he had reasserted, because "[n]either was decided below …. [n]or was either … raised in Carrigan's brief in opposition to the petition for writ of certiorari." *Id*. at 2351. It remanded to this Court for "further proceedings not inconsistent" with its opinion. *Id*. at 2352.

Justice Kennedy filed a concurring opinion. Although he agreed that Councilmember Carrigan's association-based challenge was not a "proper part of the case" before the Supreme Court, *id*., he found that "the possibility that Carrigan was censured because he was thought beholden to a person who helped him win an election raises constitutional concerns of the first magnitude," *id*. at 2354. Justice Kennedy stated that apart from whether a legislator's vote is entitled to First Amendment protection by itself, "if the [disqualification provision] imposes unjustified burdens on speech or association protected by the First Amendment, or if it operates to chill or suppress the

exercise of those freedoms by reason of vague terms or overbroad coverage, it is invalid." *Id*. at 2353.

In light of the United States Supreme Court's remand, this Court granted Councilmember Carrigan's motion for additional briefing on July 29, 2011, reserving decision on the requested additional oral argument.

ARGUMENT

Councilmember Carrigan's outstanding constitutional challenges present questions of law subject to *de novo* review. *Sheriff v. Burdg*, 59 P.3d 484, 486 (Nev. 2002).

I. THE DISQUALIFICATION PROVISION IS UNCONSTITUTIONALLY VAGUE

When this Court last took up this case, it found that the "catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." *Carrigan*, 236 P.3d at 623. In support of that conclusion, the Court observed that "[t]here is no definition or limitation to subsection 8(e)'s definition of any relationship 'substantially similar' to the other relationships in subsection 8." *Id*. It concluded that the provision "fails to sufficiently describe what relationships are included," *id*., and found that the 2009 addition to the statute stating that abstention should be required only in "clear cases" did nothing to cure that deficiency, *id*. at 618 n.2. Although the Court discussed these constitutional infirmities under the heading of "overbreadth," it was (as the dissent noted) identifying a vagueness problem, *id*. at 637 n.7. That problem remains and renders the statute unconstitutional under the

Fourteenth Amendment, for lack of notice, and under the First Amendment, for creating an unacceptable danger of chilling associational activities.

The Court was correct that the catchall disqualification provision is so ill-defined that people of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see Silvar v. District Court*, 129 P.3d 682, 685 (Nev. 2006); *Nev. Comm'n on Ethics v. Ballard*, 102 P.3d 544, 548 (Nev. 2004). The provision's plain terms do not provide fair warning that it applies to a relationship like Councilmember Carrigan and Vasquez's.[4]

Vasquez is obviously not a "member of [Carrigan's] household," is not "related to [Carrigan] by blood, adoption or marriage within the third degree of consanguinity or affinity," and does not "employ[] [Carrigan] or a member of his household." Nev. Rev. Stat. § 281A.420(8) (2007). And the Commission has tacitly conceded that the two do not have (and surely do not plainly have) a "substantial and continuing business relationship"; it acknowledges that "Vasquez and his companies did not make a profit from [his] services" even when acting as middleman in some transactions. R.A.B. 3.

Instead, the Commission's position is that a campaign manager is "substantially similar" to one of these enumerated relationships—particularly, it only recently specified, to a "business relationship"—and Councilmember Carrigan was supposed to know that.

[4] The dissent mistakenly asserted that "Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that [his] relationship with Vasquez was disqualifying." *Carrigan*, 236 P.3d at 630. In fact, as the Commission acknowledged, R.A.B. 6 n.5, Councilmember Carrigan has argued emphatically that "Mr. Vazquez' participation in [his] campaigns" was "not a 'business relationship' that is 'substantial and continuing,' or a relationship that is 'substantially similar' to any other relationship included in NRS 281A.420(8)," A.O.B. 9.

Brief for Petitioner 51–52 n.13, *Carrigan*, 131 S. Ct. 2343, 2011 WL 661711; J.A. 286; *Carrigan*, 236 P.3d at 619. The record proves the opposite.

First, Councilmember Carrigan should not have been expected to override the City Attorney's well-founded conclusion that the disqualification provision captures only relationships where the subject "stood to reap either financial or personal gain or loss as a result of his official action." J.A. 282. The only commitments we know for a fact are disqualifying are relationships with household members, family members, employers, and business associates. A pecuniary benefit or detriment to anyone in those categories would also affect Councilmember Carrigan's financial interests, triggering concerns about self-dealing[5]. The City Attorney's conclusion that such a concern must be present for any relationship to be considered disqualifying was reasonable under the "interpretative canons of *noscitur a sociis* and *ejusdem generis*," pursuant to which the catchall provision's "'general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington Dept. of Soc. and Health Servs. v. Guardiaship Estate*, 537 U.S. 371, 384 (2003) (citations omitted). A layperson of "common intelligence" should not even be expected to have heard of interpretative canons, much less to second-guess learned counsel's application of them.

[5] Counsel for the Commission stated during oral argument before the United States Supreme Court that the purpose of requiring recusal "for members of the household, who are presumably part of the same economic unit, and for employers, in whom the officer has obviously a very close financial interest and they're tied together, and for business relationships" is "to get at the financial interests of the officer, not of the third party." Transcript of Oral Argument at 9, *Carrigan*, 131 S. Ct. 2343 (No. 10-568), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-568.pdf

Second, Councilmember Carrigan cannot be expected to know that his relationship with Vasquez is "substantially similar" to a "business relationship," when one Commissioner confesses, "I don't necessarily believe that there was a substantial and continuing business relationship," J.A. 249, and another says, "substantially similar to a substantial and continuing business relationship gives me pause," J.A. 229; *see* R.A.B. 8 (acknowledging differing views among the Commissioners). If the Commissioners' views were so disparate and tentative that they could not agree on which enumerated relationship the Vasquez relationship was most like—and so declined to specify, J.A. 286—then Councilmember Carrigan should not be expected to do any better. And the Commissioners were not the only ones who had difficulties with the taxonomy. In upholding the censure, the district court opined that "Carrigan and Vasquez had a substantial and continuing *political*, *professional* and *personal* relationship." J.A. 393 (emphasis added). Not one of those words is in the provision.

In short, the best Councilmember Carrigan could be expected to do was to "guess at [the provision's] contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). That is especially true here because the phrase "substantially similar," like the terms "general" and "elaboration" at issue in *Gentile*, is a "classic term[] of degree." *Id*. at 1048–49. In the "context" here, the term has "no settled usage or tradition of interpretation in law." *Id*. at 1049; *see Gallegos v. State*, 163 P.3d 456, 460 (Nev. 2007). "The [official] has no principle for determining when his [relationships] pass from the safe harbor" of the insubstantially similar to the "forbidden sea" of the substantially similar. *Gentile*, 501 U.S. at 1049. *Compare Roberts v. U.S. Jaycees*, 468 U.S. 609, 630

(1984) (use of "familiar standards" "ensure[d] that the reach of the statute is readily ascertainable"); *Woofter v. O'Donnell*, 542 P.2d 1396, 1400 (Nev. 1975). Justice Alito recognized as much, commenting during oral argument before the United States Supreme Court that the "substantially similar" language means that "the public officer not only has to think about … cousins; the person has to think about everybody who is like a … cousin to him or her. I have no idea … how you go about that." Transcript of Oral Argument at 10, *Carrigan*, 131 S. Ct. 2343 (No. 10-568).

The Commission contends that Councilmember Carrigan should have known what the provision means because of an isolated snippet of legislative history discussing a relationship with a "'person [who] ran your campaign time, after time.'" J.A. 285 (quoting *Hearing on S.B. 478 before Senate Comm. on Gov't Affairs*, 70th Leg. 42 (Nev. Mar. 30, 1999)); *see* J.A. 256–57. But in applying the void-for-vagueness doctrine, it cannot be "assum[ed] that all persons in fact know the relatively inaccessible legislative history of statutes." *Fleuti v. Rosenberg*, 302 F.2d 652, 655 n.5 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449. Instead, "it is uniformly held that in applying the doctrine, a statute … must be judged on its face." *Id*. (citing *United States v. Harriss*, 347 U.S. 612, 617 (1953); *United States v. Spector*, 343 U.S. 169, 171 (1952)); *see Schwegmann Bros. v. Calvert Distillers Corp*., 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country."). In recognition of that principle, this Court has found a statute unconstitutionally vague because "the Legislature failed to provide the public with *statutory* notice of what [a] term means," even though the

legislative history indicated an intent to mirror federal law. *Gallegos*, 163 P.3d at 459 (emphasis added).[6]

The Commission has also made much of the opportunity a legislator has to seek guidance from the Commission as to "the propriety of [his] … future conduct" under Nevada Revised Statute § 281A.440(1). R.A.B. 6-7. That is not much of an option in the heat of a legislative battle, especially inasmuch as that provision allows the Commission to sit on the request for 45 days. The Commission suggests that it does not typically take that long to issue an opinion. R.A.B. 7. But the Commission's informal practice is no guarantee. And in any event, the freedom to seek an agency's advice—no matter how long it takes the agency to respond to the request—does not address the First Amendment burden described below (at 15-21), which occurs long before a legislative vote, when a candidate and a prospective volunteer are deciding whether to associate together and may not even know how close their relationship will end up being. As insightful as the Commission may be about "future conduct," it cannot actually tell the future. It cannot opine on what sorts of votes are likely to arise, which ones are likely to excite the campaign volunteer to legislative action, and what clients will materialize to seek his services. Moreover, even if an aspirant to office or prospective volunteer could be sure about an upcoming vote, the Commission cannot help them, because it is not allowed to

[6] Moreover, witness statements like the one the Commission relies on occupy such a lowly status in the hierarchy of legislative materials that this Court should not even consider it relevant. *See* William N. Eskridge, Jr., et al., *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 1019 (4th ed. 2007) (observing that "the [Supreme] Court will not rely on" statements by public, nonlegislative officials who draft or promote statutes "as the most probative—and certainly not the only—evidence of statutory meaning").

issue opinions to anyone but a sitting "public official or employee." Nev. Rev. Stat. § 281A.440(1) (2009); *see Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1976) (observing that reliance on the FEC to cure ambiguity in the law "is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating [the law] do not have a right to obtain an advisory opinion from the Commission").

Finally, the Commission suggests that this sort of catchall provision is essential to the administration of ethics laws. R.A.B. 4. But the very suggestion is belied by the reality that no other state feels the need to adopt one.[7]

In sum, this case presents the classic situation where a vague law "trap[s] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). And "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961); *see In re Discipline of Schaefer*, 25 P.3d 191, 202 (Nev. 2001); *infra* at 15-21.

Because it was instigated by the Nugget, a rival political interest, this case also illustrates an additional—perhaps even graver—problem of vague statutes regulating the political process: The catchall disqualification provision here is "an invitation to selective

[7] The Commission has pointed to Seattle's ethics law, which requires disqualification where, in addition to expressly enumerated circumstances, "it could appear to a reasonable person" that the official's impartiality is impaired because of "a personal or business relationship not covered under [the provisions] above." Seattle Mun. Code § 4.16.070(1) (2011). That provision is, like Nevada's, hopelessly vague. But unlike Nevada's, there is no indication that Seattle's provision has been interpreted to require disqualification based on a political relationship like the one at issue here.

enforcement." *Carrigan*, 131 S. Ct. at 2353 (Kennedy, J., concurring). It "impermissibly delegates basic policy matters" to those charged with interpreting and enforcing the law, "with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09; *see Silvar*, 129 P.3d at 686. The First Amendment's vagueness doctrine, in particular, is designed "in part" to combat "a kind of standardless discretionary authority" that "[v]ague laws delegate to administering officials." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 457 n.117 (1996). "The fundamental purpose of this rule barring standardless discretion thus resides in its capacity to assist in the campaign against impermissible motive." *Id*. at 457. It is necessary because "even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted." *Carrigan*, 131 S. Ct. at 2353 (Kennedy, J., concurring).

II. THE DISQUALIFICATION PROVISION UNCONSTITUTIONALLY INFRINGES ON ASSOCIATIONAL RIGHTS

To resolve Councilmember Carrigan's outstanding association-based challenge to Nevada's disqualification provision, this Court must first determine what level of scrutiny applies. The level of constitutional scrutiny depends on how much First Amendment activity the provision burdens. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 n.12 (1999); *Heller v. Give Nevada A Raise, Inc.*, 96 P.3d 732, 735 (Nev. 2004). Because requiring disqualification based on a political relationship like the one at issue here places severe burdens on associational rights, the provision is subject to

scrutiny and is unconstitutional unless it "'furthers a compelling interest and is narrowly tailored to achieve that interest,'" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted). But Nevada's disqualification provision cannot withstand even intermediate scrutiny. Stamping out political loyalty is not a legitimate governmental interest, much less an important or compelling one. Even if it were, the provision is substantially overbroad and underinclusive, and burdens more association than necessary to achieve the stated objectives.

A. The Disqualification Provision Burdens Associational Rights

The United States Supreme Court has held that a legislative vote is not itself protected by the First Amendment. *Carrigan*, 131 S. Ct. at 2350. But Nevada's catchall disqualification provision imposes another distinct set of First Amendment burdens that are not implicated by any other disqualification provision in the country. Although the disqualification falls directly on the legislator, the statute also burdens the relationship between the legislator/candidate and her campaign volunteers.

1. The disqualification was based on a political relationship.

Justice Kennedy found that "[t]he possibility that Carrigan was censured because he was thought to be beholden to a person who helped him win an election raises constitutional concerns of the first magnitude." *Carrigan*, 131 S. Ct. 2353-54. The record is clear that the Commission censured Councilmember Carrigan for exactly that reason. The Commission's opinion mentioned Councilmember Carrigan's "close personal friend[ship]" with Vasquez. *See* J.A. 286, 290. But the dominant factor in its opinion was their political relationship—and particularly the view that Vasquez was "instrumental in

the success of all three of Councilman Carrigan's elections." J.A. 285. As one Commissioner put it, "I don't think mere friendship requires disclosure," but "here … [w]e have the close friendship and relationship of a campaign manager, of a political confidante and adviser as well." J.A. 257. According to another Commissioner, it was "a dependent relationship … that has a feeling of debt or I'm here because this person got me elected and has kept me elected." J.A. 253; *see* J.A. 255.

This was not a new theme for the Commission. In a decision known as the "Terminal D" opinion, the Commission censured a legislator for voting on a matter involving two political supporters. *Gates v. Nev. Comm'n on Ethics*, No. A393960, slip op. at 2 (Clark Cnty. Nev. Dist. Ct. Sept. 9, 1999) (Ad22).[8] The Commission found that "a political alliance" is disqualifying if "both [parties] are dedicated to common causes, one of which is the furtherance of the [legislator's] political aspirations." *In re Gates*, Nev. Comm'n on Ethics Op. Nos. 97-54 et al. (Aug. 26, 1998), *available at* http://ethics.nv.gov (unpaginated document). Disqualification is also mandatory whenever a close relationship is "forged in the context of common political and philosophical beliefs that both [parties] felt strongly enough about that they had become politically active on behalf of those causes." *Id.*

[8] A district court overturned the Terminal D decision on the ground that an earlier version of the disqualification provision (one without the enumerated relationships) was unconstitutionally vague. Ad30-32. But Terminal D remains very much alive, because the Commission has taken the position that the current catchall provision was a codification of that opinion. J.A. 251-52. The district court's decision is not available online or in any electronic database. For the Court's convenience, the case is reproduced in the Addendum attached to this brief and cited as "Ad."

2. The disqualification provision burdens a protected relationship.

Vasquez gave voice to the venerable tradition of political volunteerism when he testified before the Commission that he "donated" his time to Councilmember Carrigan because "[s]omebody comes along that I believe in … and I think they can do the right things, it's not necessarily that they are going to be on the right place with all my stuff." J.A. 182. The Commission considers political relationships like the one Vasquez describes to be corrupting. But it is a relationship that exemplifies "the principles of participation and representation at the heart of our democratic government." *Carrigan*, 131 S. Ct. 2353 (Kennedy, J., concurring). We have been unable to find any instance in our history in which a relationship forged in politics was ever viewed as disqualifying or otherwise sanctionable.[9] In targeting these sorts of "political alliances" and "loyalties," the Commission has taken aim at core First Amendment rights of political speech and association on both sides of the political relationship.

Burdening the campaign volunteer's rights. The Supreme Court long ago held that the First Amendment protects the right of activists like Vasquez "to associate actively through volunteering services" to political campaigns, *Buckley v. Valeo*, 424

[9] The Commission has argued that New Jersey's disqualification provision, which prohibits local officials from voting on matters in which they have "a direct or indirect financial or personal involvement," N.J. Stat. Ann. § 40A:9-22.5(d), "has been applied to disqualify an official because of close friendship and 'political allegiance,'" Reply Brief 16 n.8, *Carrigan*, 131 S.Ct. 2343, 2011 WL 1476234 (citing *Ward v. Zoning Bd. of Adjustment*, No. BER-L5354-08, 2009 WL 1498705 (N.J. Super. Ct. Law Div. May 15, 2009)). But the *Ward* court mentioned the "shared political allegiance" only in passing and focused on the closeness of the friendship, including the fact that the official and his friend vacationed together. It was not a case where the political allegiance was predominant and, unlike here, the friend was not credited with helping the official win an election.

U.S. at 28, and more specifically that "political campaigning and management" are "activities … protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 370–71 (1976); *see NAACP v. Button*, 371 U.S. 415, 428–45 (1963); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

Moreover, like many political activists, Vasquez's activism does not hibernate between elections. He promotes candidates he believes in because he wants legislators who will do what he believes to be right by implementing the policies he favors. J.A. 158-60, 182, 207. So beyond the numerous campaigns he works on, Vasquez exercises his right "to petition the Government for a redress of grievances." U.S. Const. amend. I. The First Amendment protects Vasquez's right to engage in these political activities as well. His mediating activities between the Lazy 8 and the Sparks City Council were quintessential examples of the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990). Vasquez's public relations activities, too, lay "at the heart of the First Amendment's protection." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).[10]

[10] Vasquez did not lose his First Amendment protection because he was a hired advocate. *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 645 n.28 (1st Cir. 1995) (Lynch, J., dissenting). As the Supreme Court has recognized, "[s]ome of our most valued forms of fully protected speech are uttered for profit." *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

Under the Commission's view, the price of exercising the associational right to volunteer for a campaign is to check one's right to petition government at the campaign door. Before volunteering on a campaign, a citizen with strong political convictions must make a calculation: "If I want this candidate to win because of his political convictions—*i.e.*, because of how I expect him to vote—am I prepared to forego the right to engage the entire legislature on a vote that is important to me?"

When the volunteer knows up front that a major vote is looming, the burden is direct and palpable. An executive director or senior official of any local organization will have to decide whether to help manage a candidate's campaign or lobby the legislative body on the important issue. The activist will be leery of joining the campaign, particularly if the legislature is closely divided on the issue—which is the only time the election effort really matters. The very act of volunteering on a candidate's campaign could yield a disqualification that defeats the volunteer's political agenda. Even more chilling are circumstances in which the consequences of volunteering are unpredictable. A political activist might have numerous political passions. She has no idea which of them may arise in some upcoming multiyear legislative term. The only way to preserve her right to engage in future political advocacy on such an issue—known or unknown—is to sit out the election.

Burdening the candidate's associational rights. Councilmember Carrigan, for his part, has a correlative right to associate with the volunteers who believe in him—a right that is "deeply embedded in the American political process." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981).

"[R]eliance on volunteers [is] absolutely essential and, in light of the enormous significance of citizen participation to the preservation and strength of the democratic ideal, absolutely desirable, indeed indispensable." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 627–28 (1976) (Brennan, J., concurring in part).

The candidate's right to associate with volunteers encompasses the right to choose the best person to fill each volunteer role that needs to be filled to win a campaign. *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (the First Amendment "protects [activists'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). The disqualification provision deprives the candidate of the latitude to choose the best advocates and strategists to advance his campaign. Candidates who take their public obligations seriously will be reluctant to enlist a campaign manager whose interests and activities might eventually come before the legislature.

The candidate is even more disadvantaged than the volunteer. At least the volunteer has some sense of the range of issues that interest her. But the candidate has no way of ensuring that a volunteer's activities will not end up interfering with legislative duties. The candidate might consider subjecting prospective campaign volunteers to extensive political questionnaires or seeking a no-lobbying pledge. But those are good ways to lose volunteers and terrible ways to guard against the dangers of disqualification. In any event, none of these measures will protect the candidate from the possibility that an ardent opponent in the Nugget's position might try to win a crucial legislative battle by throwing enough money at a former campaign manager like Vasquez so as to disqualify their legislative opponents. In the end, the candidate will enlist only the

volunteers who are least politically active, which almost by definition translates into volunteers who are least politically effective.

Justice Kennedy recognized that the disqualification provision implicates the burdens described above, stating that "to promote and protect [shared] beliefs, close friends and associates, perhaps in concert with organized groups with whom [a] citizen also has close ties, [may] urge the citizen to run for office" and "offer strong support in an election campaign, support which itself can be expression in its classic form." *Carrigan*, 131 S. Ct. at 2352. He opined that "[t]here is … a serious concern that [Nevada's] statute imposes burdens on the communications and expressions just discussed" by prohibiting a legislator from "vot[ing] upon legislation central to the shared cause, or, for that matter, any other cause supported by those friends and affiliates." *Id*.; *see id*. at 2353 (discussing the "logical and inevitable burden on speech and association that preceded the vote").

B. The Burdens Imposed By The Disqualification Provision Are Severe, Triggering Strict Scrutiny

The "logical and inevitable burdens" on association imposed by the disqualification provision raise "constitutional concerns of the first magnitude," *Carrigan*, 131 S. Ct. at 2353-54 (Kennedy, J., concurring), and are subject to strict scrutiny. The Commission's ruling would surely be subject to strict scrutiny if it directly penalized Vasquez for volunteering on Councilmember Carrigan's campaigns or if it penalized the Councilmember for enlisting his aid in common cause. *See, e.g.*, *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (regulations that

"burden the associational rights of political parties and their members" are subject to strict scrutiny). So too, if the Ethics Commission penalized Vasquez for lobbying in support of the Lazy 8. *See, e.g., Citizens United*, 130 S. Ct. at 915 ("Congress has no power to ban lobbying itself.").

"[T]he Constitution's protection," however, "is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Rather, First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Accordingly, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990); *see Give Nevada A Raise*, 96 P.3d at 736.

By establishing a dynamic where a candidate is forced to choose between enlisting volunteers who are especially politically active and safeguarding his duty to vote on issues of public importance, and a volunteer is forced to choose between promoting the candidates he believes in and engaging the legislature on the issues important to him, the Commission has accomplished indirectly what it could not constitutionally achieve directly. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (regulation is impermissibly coercive where "[i]t requires appellee to forfeit one constitutionally protected right as the price for exercising another").

Davis v. FEC, 554 U.S. 724 (2008), is instructive. There, the Supreme Court considered the so-called "Millionaires' Amendment," which provided that when a

candidate spent significant personal funds on her campaign, the candidate's opponent could "qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated expenditures." *Id*. at 736. The law did not ban the self-funded candidate from spending her own money. But this Court described the law as "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id*. at 739; *see also id*. at 740. The Court observed that "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id*. at 739. To the contrary, this Court found that the Millionaires' Amendment "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and therefore could not stand "unless it [was] 'justified by a compelling state interest.'" *Id*. at 740 (internal citation omitted); *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011) (statute subject to strict scrutiny because it "plainly forces the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy").

Even if the fact that the disqualification provision indirectly burdens associational rights were a basis for lowering the level of scrutiny, there would be no reason for this Court to slide the scale all the way down to reasonableness review, rather than applying intermediate scrutiny. *See Healy*, 408 U.S. at 189 n.20 (to justify "incidental" restrictions on association rights, the state's interest must be "legitimate and substantial" and the

restrictions must be "'no greater than is essential to the furtherance of that interest'" (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

C. The Disqualification Provision Fails Under Either Strict Or Intermediate Scrutiny

In addition to being hopelessly vague, *see supra* at 7-14, the disqualification provision cannot survive constitutional scrutiny for two additional, independent reasons. First, it does not advance a governmental interest that is even legitimate, much less important or compelling. Second, it is substantially overbroad and underinclusive and burdens more association than necessary to achieve the stated objectives.

1. The state has no legitimate, much less compelling, interest in prohibiting a vote based on political loyalty.

Putting the vagueness problem aside, the provision would be unconstitutional even if it had enumerated "campaign manager or other key campaign volunteer" as a disqualifying relationship. Such a disqualification does not advance any legitimate government interest, much less an important or compelling one.

We agree that disqualification rules *generally* are necessary to "promot[e] the integrity and impartiality of public officers." *Carrigan*, 236 P.3d at 623. We agree, also, that "an impairment of impartial judgment can occur in even the most well-meaning men when their *personal economic interests* are affected by the business they transact on behalf of the Government." *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961) (emphasis added). These concerns implicate compelling state interests, as this Court has already recognized, *Carrigan*, 236 P.3d at 623, but they have nothing to do with this case. This case is not about Councilmember Carrigan's "personal economic

interests." It is about his political interests. It is about a perceived problem with a candidate's "feeling of debt" that "I'm here because this person got me elected and has kept me elected." J.A. 253.

The concern that a legislator may act out of economic interest (whether for himself, his father, his spouse, his employer, or his business partner) is fundamentally different from the concern that he will act out of political "loyalty." The former is called "self-dealing" or "corruption"; the latter is called "politics." No state should be permitted to treat "political loyalty of the purest sort" as a new-fangled sort of corruption. *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). "'It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.'" *Citizens United*, 130 S. Ct. at 910 (citation omitted). "There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Commission has not adduced a shred of evidence to show that there is something about the relationship between a campaign volunteer (even a campaign manager) and the candidate that makes it especially susceptible to abuse. It merely "'posit[s] the exisence of the disease sought to be cured,'" which, even under intermediate scrutiny, will not do. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation omitted). To sustain the Commission's purported interest is to expose a wide range of political debts to state regulation. If Vasquez's relationship with

Councilmember Carrigan is corrupting because he was "instrumental in the success of … Councilman Carrigan's elections," J.A. 285, then the same would go for any number of equally "instrumental" relationships: the NRA or NAACP activist who rallies the troops to register voters or get out the vote; the party boss or celebrity who delivers a high-profile endorsement; the captain of industry who organizes a dinner for the candidate to meet other well-heeled supporters. The list is endless, and deeply troubling. *See Citizens United*, 130 S. Ct. at 910; *Carrigan*, 131 S. Ct. at 2352-53 (Kennedy, J., concurring).

The state could not directly limit any of these activities, of course. And it seems just as plain that it may not burden these activities by prohibiting a legislator from voting on an issue that is important to any of these political allies and supporters. Otherwise, disqualification provisions would be an easy backdoor route toward reviving all sorts of burdens on speech and association that, however well-intentioned, the Supreme Court Court has consistently and emphatically struck. *See, e.g., Citizens United*, 130 S. Ct. at 914 (striking direct prohibition on corporate independent spending); *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (striking spending limit); *Eu*, 489 U.S. at 228–29 (striking ban on political party endorsements of candidates during nonpartisan primaries).

2. The disqualification provision is overbroad and underinclusive and burdens more speech than necessary to advance the asserted interest.

Even if the state had a compelling or important interest in guarding against the influence of political loyalty on a legislator's vote, the means Nevada has chosen fails scrutiny.

Overbreadth & underinclusiveness. As an initial matter, the catchall disqualification provision is both overbroad and underinclusive. First, the provision is underinclusive so long as the Commission has chosen to single out some brands of political "loyalties" for special burdens to the exclusion of others that raise the same concerns. As noted above (at 26), all sorts of political supporters—independent spenders, endorsers, get-out-the-vote drivers, and so on—can raise graver concerns of political "debt" than a volunteer campaign manager. Either all these relationships should be disqualifying or none of them should be. And the Commission has never indicated that they all are. This "underinclusiveness … raises serious doubts about whether [the state] is, in fact, serving … the significant interests [it] invokes in support of" constitutionality. *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Second, the Nevada Legislature has now formally taken the position that the statute is even broader than the Commission has suggested, so as to cover: any "close, significant and continuing relationships that … are strictly comparable, alike in substance or essentials, analogous or parallel to the expressly listed relationships." Brief for the Nevada Legislature as Amicus Curiae Supporting Petitioner 32, *Carrigan*, 131 S. Ct. 2343, 2011 WL 805233. That pronouncement not only compounds the vagueness problems already discussed, but sweeps in droves of constitutionally protected relationships with even less influence than a campaign manager.

Tailoring. Whatever its exact scope, the disqualification provision "'burden[s] substantially more [First Amendment activity] than is necessary to further'" the state's interests. *Turner Broad.*, 512 U.S. at 662 (citation omitted). Even if it is reasonable to be

leery of various political relationships—or close personal ones—it does not follow that the appropriate governmental response is to make the parties choose between not forming the relationship and disqualifying the legislator. The most obvious alternative is disclosure, which "is a less restrictive alternative to more comprehensive regulations of speech" and associational activity. *Citizens United*, 130 S. Ct. at 915. Any regime to address the influence of political loyalty on a legislator should revolve around forcing legislators to do exactly what Councilmember Carrigan did here (*Carrigan*, 236 P.3d at 618): Describe the relationship in question on the record. Armed with that knowledge, the public can decide whether a public official has overstepped the boundaries of political-loyalty correctness. In this case, had voters shared the Commission's passion for political purity, they would not have reelected him by a landslide. J.A. 89.

D. Councilmember Carrigan Preserved His Right-Of-Association Challenge

The Commission asserts that Councilmember Carrigan's association-based challenge was "not previously preserved for appeal in this Court." Resp. to Mot. for Addt'l Brief. and Arg. 1. That is incorrect. "[T]he general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts" requires only that "the lower court be fairly put on notice as to the *substance* of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (emphasis added). Councilmember Carrigan plainly put both the district court and this Court on notice as to the substance of his right-of-association challenge.

Before the district court, Councilmember Carrigan contended that this was a case where "rights of association were ensnared in [a] statute[] which, by [its] broad sweep, might result in burdening innocent associations." P.O.B. 15 (J.A. 318) (citing *Broadrick*, 413 U.S. at 612); *see* P.O.B. 17 (J.A. 320) (the Commission uses its "unfettered discretion" to "regulat[e] more political speech and association than is constitutionally permissible"). Relying on *Buckley v. Valeo*, 424 U.S. 1, among other cases, he argued that the censure "threatens constitutionally protected speech and association freedoms" because "Mr. Vasquez' right to volunteer, and Petitioner Carrigan's right to accept Mr. Vasquez' in-kind donations, are [constitutionally] protected." P.R.B. 11 (Ad16). And he argued that the provision's vagueness poses constitutional concerns not only because of a lack of notice, but also because it allows the Commission to "eviscerate a constitutionally protected political relationship." P.R.B. 8 (Ad13).

Councilmember Carrigan pressed the exact same association-based arguments before this Court, contending that the Commission "employed unconstitutionally vague and overbroad statutes to strip Councilman Carrigan of his First Amendment right … to receive campaign contributions [in the form of volunteer services] [and] Carlos Vasquez of his right to associate with political campaigns." A.O.B. 23; *see* A.O.B. 15 (making the same overbreadth argument, relying on *Broadrick*, 413 U.S. 601); A.O.B. 18 (arguing, based on *Buckley*, 424 U.S. 1, and other cases, that the censure "threatens constitutionally protected speech and association freedoms" because his relationship with Vasquez is protected); A.O.B. 9 ("the vagueness that permeates NRS 281A.420(8) enables the Commission on Ethics to unilaterally eviscerate a constitutionally protected

relationship"). The Commission acknowledged that Councilmember Carrigan had raised these association-based arguments. *See* R.A.B. 10.

The United States Supreme Court declined to consider Councilmember Carrigan's right-of-association argument only because it "was [not] decided below …. [n]or was [it] … raised in Carrigan's brief in opposition to the petition for writ of certiorari." 131 S. Ct. at 2351. Those rationales are relevant only to whether the challenge was properly before the Supreme Court. They do not govern whether it is properly before *this* Court. Because the United States Supreme Court is a court of limited and discretionary review, parties have to make judgment calls as to what issues are worth bringing to its attention, whether in petitions for certiorari or oppositions thereto. The decision not to burden the Court with an argument at the certiorari stage does not amount to a waiver of issues otherwise properly before a lower court. *Cf. Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) (Posner, J.) ("The urging of alternative grounds for affirmance is a privilege rather than a duty."). Previously, this Court did not need to address Councilmember Carrigan's association-based challenge because it agreed with his argument on the First Amendment significance of voting. The fact that this Court has not yet passed on Councilmember Carrigan's right-of-association challenge does not mean it should not pass on it now. Indeed, because Councilmember Carrigan has preserved the claim, this Court must resolve it.

CONCLUSION

For the foregoing reasons, Councilmember Carrigan respectfully requests that the Court set aside the Commission's censure of him.

Respectfully submitted,

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CARSON CITY

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

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

Case No. 07-OC-012451B

Dept. No. 2

PETITIONER'S REPLY BRIEF

COMES NOW, Petitioner Michael A. Carrigan, by and through the undersigned counsel of record, and files his Reply Brief in Petition for Judicial Review.

Respectfully submitted this 26th day of March 2008.

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POINTS AND AUTHORITIES

I.

Argument

In general terms, Petitioner Carrigan's challenge to NRS 281.501(8) and NRS 281.501(2) concerns conflicts between the private relationships of Petitioner Carrigan and the interests of the general public whom he serves. The Ethics in Government Law was enacted as a guide for the conduct of public officers and employees, and the Respondent Commission on Ethics was established to render advisory opinions and otherwise enforce the Ethics Law. NRS 281.501(2) prohibits public officials, such as Petitioner Carrigan, from voting on matters that relate to the relationships enumerated in NRS 281.501(8). Under NRS 281.551, the Commission on Ethics is authorized to impose severe civil penalties, commence proceedings to remove a public official from office, refer public officials to their private employers for further discipline, and refer the public official to the Attorney General or the appropriate District Attorney for possible criminal prosecution. The central aspect of this challenge is the application of the phrases "substantial and continuing," "business relationship" and "substantially similar" contained in NRS 281.501(8). The relationships enumerated in NRS 281.501(8) as a "commitment in a private capacity to the interests of others" are specifically employed when interpreting NRS 281.501(2) (regarding abstention), NRS 281.501(4) (regarding disclosure), and NRS 281.481(2) (regarding unwarranted privileges or benefits).[1]

Because NRS 281.501(8) is unconstitutionally vague both on its face, and as applied to Petitioner Carrigan, statutes, such as NRS 281.501(2), that rely on the definition proffered by NRS 281.501(8) are similarly void for vagueness. In this case, the Respondent Commission's unconstitutional application of NRS 281.501(2) chills protected political speech and therefore violates the First Amendment. The decision of the Nevada Commission on Ethics regarding Petitioner Carrigan is littered with a myriad of constitutional infirmities and must be vacated. NRS

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[1] Although Petitioner Carrigan was found in violation only of NRS 281.501(2), the Commission on Ethics charged, and tried, Petitioner Carrigan for violating NRS 281.501(4), NRS 281.501(2) and NRS 281.481(2) – making the constitutionality of NRS 281.501(8) particularly important in this case.

233B.135(3)(a).

II.

NRS 281.501(8) and NRS 281.501(2) are Unconstitutionally Vague

Since the Ethics in Government Law carries serious sanctions for disobedience, *supra*, its terms must be sufficiently explicit to inform those who are subject to its penalties. *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). 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." *Id.*; *Matter of T.R.*, 119 Nev. 646, 652, 80 P.3d 1276, 1280 (2003); *Nevada Com'n on Ethics v. Ballard*, 120 Nev. 862, 868, 102 P.3d 544, 548 (2004).

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*, 92 Nev. 259, 549 P.2d 332 (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 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.

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On August 29, 2007, the Respondent Commission found that Petitioner Carrigan had a "commitment in a private capacity to the interests of others." ROA000008.[2] Based on this "commitment," the Commission concluded that Petitioner Carrigan should have abstained from voting on a matter before the Sparks City Council on August 23-24, 2006, and found him in violation of NRS 281.501(2). ROA000012. Because the Commission's finding was dependent on the definition of "commitment in a private capacity to the interests of others" contained in NRS 281.501(8), the relevant question in this matter is whether the terms of NRS 281.501(8) provide "notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited." *Matter of Halverson*, 123 Nev. 48, 169 P.3d 1161, 1176 (2007); *Silvar v. Dist. Ct.*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Petitioner Carrigan respectfully submits that they do not.

NRS 281.501(8) enumerates various relationships that equate to a "commitment in a private capacity to the interests of others" under the Ethics in Government Law.[3] In this case, the Respondent Commission made use of two subsections of NRS 281.501(8) – subsection (d) and subsection (e). Subsections (d) and (e) are unconstitutionally vague, deceptive and uncertain. What is a "business relationship" for the purposes of the Ethics in Government Law? Is it a for-profit relationship? Does it include constitutionally protected political relationships? What makes a business relationship "substantial and continuing"? Is it a percentage of income or a previously determined amount of money? Does money even have to be involved? Does the statute contemplate a fixed period of time

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[2] This decision was later memorialized in a written opinion that was published by the Respondent Commission on October 8, 2007. ROA000013.

[3] 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.

or a frequency of dealings? What parts of a relationship make it "substantially similar" to one of the relationships enumerated in NRS 281.501(8)? Because these terms have not been defined by statute, and do not have well settled and ordinarily understood meanings, they necessarily require public officials, and in this case Petitioner Carrigan, to guess at their applicability.

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 the relationship in question fell under. Commissioner Jenkins believed that Petitioner Carrigan's relationship with Carlos Vasquez was substantially similar to a substantial and continuing business relationship. ROA000064, p. 193, lns. 6-9. Commissioner Hsu did not think that the relationship was like a substantial and continuing business relationship, *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. ROA000065, 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 of NRS 281.501(8), it is unreasonable to believe that a person of ordinary intelligence could understand what conduct is prohibited.

Petitioner Carrigan is being forced to choose between risking prosecution, fines and potential removal from office by performing his duties as an elected representative of the citizens of Sparks without any certainty regarding the boundaries of the law, or ceasing the performance of his duties as a City Council Member. The Respondent Commission points to its opinion *In re Woodbury*, CEO 99-56, for guidance regarding abstention under NRS 281.501(2). ROA000012. Unfortunately, the *Woodbury* opinion does not provide any clarification of the terms contained in NRS 281.501(8) – it simply states that "'commitments in a private capacity to the interests of others' (as defined in NRS 281.501(8)) must be disclosed," and that a public officer must then make an appropriate decision regarding abstention based on the substance of that disclosure. *In re Woodbury*, CEO 99-56.

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Woodbury places the onus squarely on Petitioner Carrigan to make a "proper" determination regarding abstention. *Id.*; ROA000012.[4] By extension, Petitioner Carrigan was forced to interpret and apply NRS 281.501(8) before determining the proper course of action regarding disclosure and abstention. Because NRS 281.501(8) is unconstitutionally vague, Petitioner Carrigan was unable to determine what relationships are encompassed by the statutory definition of "commitment in a private capacity to the interests of others," and was therefore unable to make the "proper" determination regarding abstention under *Woodbury*. Accordingly this Court should declare NRS 281.501(8) and NRS 281.501(2) void for vagueness, alternatively, decision of the Nevada Commission on Ethics must be vacated.

III.

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

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). A law is unconstitutionally vague if it 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)).

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

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[4] Under *Woodbury*, an elected official is left with nothing more than a Hobson's choice. Because the Respondent Commission has failed to provide elected officials in the State of Nevada with any guidance regarding the unconstitutionally vague definition of "commitment in a private capacity to the interests of others" in NRS 281.501(8), there are simply no standards for an elected official to rely on when making the determination that *Woodbury* requires.

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 v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1999). 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). No form of speech is entitled to greater constitutional protection than Petitioner Carrigan's.

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 create an unnecessary abridgment of protected political speech, and are therefore void.

Petitioner Carrigan is not asserting, as argued by the Respondent Commission and the Nevada Legislature, that he has a protected right to vote when he has a disqualifying conflict of interest. Respondent's Answering Brief (RAB), p.23, lns. 10-11; Amicus Curiae Brief (AB), p. 9, lns. 5-6. 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.

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.[5] Because this unconstitutionally vague standard necessarily encumbers relationships that do not amount to a "commitment in a private capacity to the interests of others" but for the challenged statutes, 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 as argued by the Respondent Commission and the Nevada Legislature. Accordingly, the reach of NRS 281.501(8) and NRS 281.501(2) is not narrowly tailored, and the statutes do not employ the least restrictive means available to the Respondent Commission in regulating conflicts of interest.

In fact, the vague "catch-all" provision in NRS 281.501(8) is an expansive mechanism that allows the Respondent Commission to regulate otherwise protected speech in an arbitrary and discriminatory fashion. Because the only practical way for public officials to ensure compliance with the imprecise standards of NRS 281.501(8) and NRS 281.501(2) is to abstain from voting, in some situations the vagueness that permeates these statutes amounts to an unconstitutional prior restraint. Therefore, NRS 281.501(8) and NRS 281.501(2) do not survive strict scrutiny, the challenged statutes violate the First Amendment, and must be invalidated by this Court. Alternatively, the Court must vacate the decision of the Respondent Commission.

IV.

Petitioner Carrigan has a Protected Political Relationship with Mr. Vasquez that is not a Business Relationship

Respondent Commission argues that "substantial evidence exists in the record to support the Commission's conclusion" that Petitioner Carrigan had a relationship with Mr. Vasquez that was either a "business relationship" that was "substantial and continuing," or a relationship that was "substantially similar" to a "business relationship" that was "substantial and continuing." RAB, p. 9, lns. 20-22.

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[5] The Nevada Legislature suggests that the Respondent Commission be allowed to apply an "implied probability of bias" test when determining whether Petitioner Carrigan had a disqualifying conflict of interest. AB, p. 11, lns. 12-22; p. 22, lns 21-23. Such a test is neither contemplated nor authorized under the Nevada Ethics in Government law.

In reality, the Commission 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. In re Carrigan*, CEO 06-61, 06-62, 06-63, 06-64; ROA000008.

Mr. Vasquez' participation in Petitioner Carrigan's campaigns simply amounts to political volunteerism, not a "business relationship" that is "substantial and continuing." The unconstitutionally vague standards employed by the Commission in this case eviscerate a constitutionally protected political relationship.

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 Petitioner Carrigan's campaigns because he believed Petitioner Carrigan would be "a great candidate" and a "great council person." ROA000041, p. 102, lns. 16-18. Additionally, Mr. Vasquez explained that he donated his time to Petitioner 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.

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In Nevada, public officers are not required to abstain from voting on matters that concern or involve a donor of campaign contributions when there is no evidence of a *quid pro quo* arrangement.[6] *In Re: Boggs-McDonald*, CEO 01-12. In *Boggs-McDonald*, a Las Vegas City Council Member traveled to Chicago in the fall of 1999 to attend a football game at the University of Notre Dame and network with fellow alumni with regard to her campaign. *Id.* The trip was at least in part paid for by Station Casinos, which was reported as an in-kind campaign contribution in a timely fashion by the Council Member pursuant to NRS 294A.007 and 294A.120. *Id.* Matters concerning Station Casinos subsequently came before the Las Vegas City Council in September of 2000. *Id.* The Council Member made no disclosure of the 1999 trip during the City Council's deliberations, and voted on the issue

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[6] 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 Respondent Commission. 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.

at the same meeting. *Id.* The Respondent Commission found no violation of NRS 281.501 or the public trust because there was no evidence that tied the in-kind campaign contribution that *Boggs-McDonald* received from Station Casinos to the subsequent vote taken by the Las Vegas City Council on matters concerning Station Casinos. *Id.* Similarly, in a separate opinion, the Commission found that when campaign contributions were properly reported, and there was "no direct evidence of an express *quid pro quo*" between the contributors and the public official, the public official did not violate Nevada's Ethics in Government Law if there was an "arguably colorable public policy concern" for the decision made by the public officer. *In Re: Wood*, CEO 95-51.

Here, no *quid pro quo* relationship has been alleged. The testimony taken by the Respondent Commission unequivocally demonstrates that the campaign contributions made to Petitioner Carrigan by Mr. Vasquez were made for valid and constitutionally protected purposes. ROA000052, p. 147, lns. 17-24. The Respondent Commission found that "a majority of Councilman Carrigan's constituency favored the Lazy 8." ROA000003. Accordingly, the decision of the Commission in the instant matter is inconsistent with its previous opinions. *See*, *In Re: Boggs-McDonald*, CEO 01-12; *In Re: Wood*, CEO 95-51.[7]

The evidence before the Respondent Commission demonstrates that Mr. Vasquez donated his time to Petitioner Carrigan's campaigns long before the Lazy 8 project appeared on the horizon. ROA000003. The testimony received by the Respondent Commission demonstrates that Mr. Vasquez' contributions to Petitioner Carrigan's campaigns were never conditioned on, or otherwise tied to, a particular vote or issue. ROA000052, p. 147, lns.17-24. Further, Petitioner Carrigan's decision to vote in favor of the Lazy 8 project was supported by his constituency, and affirmed by his overwhelming re-election in November 2006. ROA000003; ROA000504. The campaign

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[7] In the context of NRS 281.481(2), which relies on NRS 281.501(8) for a definition of "commitment in a private capacity to the interests of others," the Commission has previously found no violation where a "business relationship" developed from a friendship and not a public position. *In re Montandon*, CEO 01-11. In this case, Petitioner Carrigan and Mr. Vasquez have been friends since 1991. ROA000002. The political relationship they share did not begin until 1999, and stemmed from that friendship. ROA000003; ROA000021, p.21, lns. 6-11.

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.

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.

Therefore, the finding of the Respondent Commission that Petitioner Carrigan had a "business relationship" that was "substantial and continuing" or a relationship that was "substantially similar" to a relationship enumerated in NRS 281.501(8) is not supported by the evidence in the Record before this Court, and the Commission's decision in this matter must be vacated.

V.

Campaign Contributions do not Create an Implied Probability of Bias

The Nevada Legislature has advocated that this Court apply standards that ordinarily apply only to judges. AB, p. 11, lns. 12-17. 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.*

Petitioner Carrigan was elected to represent the citizens of Sparks. By requiring him to abstain from voting in the absence of appropriate justification, the Respondent Commission is stripping Petitioner 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. A campaign contribution, in the absence of evidence of a *quid pro quo* relationship, does not amount to a conflict of interest requiring abstention. Respondent is using unconstitutionally vague statutes to restrict Petitioner's constitutional rights under color of law. Accordingly, the findings of the Respondent Commission are not supported by the evidence in the Record before this Court, and the Commission's decision in this matter must be vacated.

VI.

Conclusion

Based on the foregoing, Petitioner Carrigan respectfully requests that this Honorable Court declare the challenged statutes invalid based on their various constitutional infirmities and vacate the decision of the Respondent Commission.

Respectfully submitted this 26th day of March 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Opening 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 26th day of March 2008.

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CERTIFICATE OF 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 serving the foregoing document(s) entitled **PETITIONER'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 26th day of March 2008.

Shawna L. Liles

FILED

DISTRICT COURT

SEP 9 1 51 PM '99

CLARK COUNTY, NEVADA

CLERK

YVONNE ATKINSON GATES,

Petitioner,

vs.

Case No. A393960
Dept. No. ____
Docket "G"

THE COMMISSION ON ETHICS, an agency of the State of Nevada; the STATE OF NEVADA; and DOES 1-20

/

DECISION

This matter arises out of an investigation by the Nevada Commission on Ethics (hereinafter "NCOE") of Petitioner Yvonne Atkinson Gates, Chairperson of the Clark County Commission. Petitioner was investigated concerning her involvement in the granting of concession contracts in Terminal "D" of McCarran International Airport in Las Vegas Nevada, which is owned and operated by Clark County.

Host Marriott is the master concessionaire for food and beverage concessions at the Airport, and WH Smith is the master concessionaire for other retail concessions. Pursuant to agreements with these master concessionaires, thirteen concessions in the new terminal "D" would be granted to Disadvantaged Business Enterprises (hereinafter "DBE"). Under federal law, DBEs are businesses in which at least 51% of the ownership of the business is held by a member or members of federally-recognized minority classes, namely racial minorities, ethnic origin minorities, and women.

Due to previous problems encountered in the selection process for Airport concessions,

a system was designed whereby the master concessionaires would, without input from the Clark County Commission, select the 13 DBEs to operate in Terminal "D." The County Commission would then have the opportunity to approve or reject the applicants chosen by the master concessionaires.

Prior to the close of the application process, Petitioner placed certain names on a list of applicants that she felt the County Commission would support if they were selected by the master concessionaires. Included on this list were Michael Chambliss and Judy Klein. Petitioner had known Chambliss for 17 years. Chambliss had served on Petitioner's campaign for her County Commission seat, and he served as Petitioner's "eyes and ears" in the Las Vegas Community. Klein was known to Petitioner as an active member of the Democratic party in Las Vegas, as well as a fundraiser who had organized hundreds of thousands of dollars to be contributed to Petitioner's campaign funds.

This list eventually made its way to the master concessionaires before the application process was closed to the public. This list then became the *de facto* list of applicants that the master concessionaires chose to grant the concessions to. This list of applicants was then approved by the Clark County Commission. Petitioner did not disclose her relationship with either Chambliss or Klein, and voted to approve them as concessionaires.

When information came to light that Petitioner had written a list of applicants who received contracts, a public uproar ensued. Two third-party requests for an opinion from the NCOE were requested by citizens, and the NCOE also decided by its own motion to investigate this matter.

On June 27, 1998, after the investigation was complete, Petitioner was found to have violated NRS 281.481(2) by placing Michael Chambliss' name on a list of concessionaires that the Clark County Commission would support. Petitioner was also found to have violated NRS 281.481(2) by placing Judy Klein on that same list.

Petitioner was then found to have violated NRS 281.501(3)(b) by not disclosing her relationship with Michael Chambliss before voting to grant him a concession contract. Petitioner was also found to have violated NRS 281.501(3)(b) by not disclosing her relationship to Judy Klein before voting to grant her a concession contract.

Next, Petitioner was found to have violated NRS 281.501(2)(c) by not abstaining from voting to grant Michael Chambliss a concession contract. Petitioner was also found to have violated NRS 281.501(2)(c) by not abstaining from voting to grant Judy Klein a concession contract.

Notwithstanding the fact that Petitioner was found to have violated these ethical rules, Petitioner was found not to have violated NRS 281.481(2), NRS 281.501(2)(c) or NRS 281.501(3)(b) willfully. 'Willfully' as used by the NCOE is a term of art meaning that sanctions should be imposed on the subject of the investigation. Therefore, no penalties and no sanctions were imposed on Petitioner.

Petitioner filed a Petition for Judicial Review and a Complaint for Declaratory Relief. Petitioner advanced four main arguments: (1) That NRS 281.481(2), NRS 281.501(2)(c) and NRS 281.501(3)(b) are unconstitutionally vague; (2) That the NCOE engaged in "ad hoc" rulemaking by expanding the Nevada Ethics in Government Law without legislative

permission; (3) That the make-up of the NCOE violates the Separation of Powers doctrine; and (4) That the NCOE itself was an unlawful delegation of legislative authority.

This Court's review of the decision of the NCOE is dictated by NRS 233B.135 which controls judicial review of an agency decision. The Nevada Supreme Court has also given guidance to a district court reviewing the decision of the NCOE. In Nevada Commission on Ethics v. JMA/Lucchesi, 110 Nev. 1 (1994), the Court wrote that a district court should give great deference to the decision of the NCOE, as they were vested with the power to "construe" the Nevada Ethics in Government Law. Id. at 5-6.

However, the Nevada Supreme Court has also held that the district court has the power to conduct a *de novo* review of an agency's interpretation of a statute. In Department of Motor Vehicle and Public Safety v. Jones-West Ford, Inc., 114 Nev. 766 (1998) the Court wrote that "[a] reviewing court may decide pure questions of law without affording the agency any deference . . . A 'pure legal question' is one 'that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the court. An example . . . might be a challenge to the facial validity of a statute.'" Jones-West Ford, 114 Nev. at 770 (Quoting Beavers v. State, Dep't of Mtr. Vehicles, 109 Nev. 435, 438 (1993)). See also Manke Truck Lines v. Public Service Comm'n, 109 Nev. 1034, 1036-37 (1993) (holding that questions of statutory construction are purely legal issues to be reviewed without any deference whatsoever to the conclusions of the agency).

Thus, this Court has the power to decide *de novo* whether these sections on the Nevada Ethics in Government are unconstitutionally vague, and whether the NCOE exceeded its

authority in its interpretation of these statutes.

A. ARE NRS 281.481(2), NRS 281.501(2)(c) AND NRS 281.501(3)(b) UNCONSTITUTIONALLY VAGUE?

The Nevada Supreme Court has spoken on the issue of whether a statute is unconstitutionally vague. In State of Nevada v. Glusman, 98 Nev. 412, 420 (1982), the Court held that a statute is vague if the statute "'either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application'" (quoting Connally v. General Construction Co., 269 U.S. 385 (1926)). Therefore, "a statute must provide to a person of ordinary intelligence adequate notice of what conduct is prohibited and sufficient guidelines to preclude arbitrary and discriminatory enforcement of the statute." Erwin v. State of Nevada, 111 Nev. 1535, 1543-44 (1995). However, there is no command that a legislature list each and every command with perfect specificity. As the Nevada Supreme Court held in Woofter v. O'Donnell, 91 Nev. 756 (1975) The Nevada Constitution does not require the legislature to draft legislation with impossible standards of specificity.

In interpreting an allegedly vague or ambiguous statute, there are several factors that the court must consider. The overriding factor is the purpose and intent of the legislature in enacting the statute. In State of Nevada v. Glusman, 98 Nev. 412, 425 (1982), the Court wrote that, "[t]he words of a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose." Also, in Woofter v. O'Donnell, 91 Nev. 756, 762 (1975), the Court held that, "[w]here the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not

nullify its manifest purpose." See also 73 AmJur 2d Statutes §145 , which states that, "[i]n the interpretation of statutes, the legislative will is the all-important or controlling factor."

A district court must also attempt to construe the statute as constitutional if possible. "Where the intent of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to effectuate rather than nullify its manifest purpose." Sheriff of Washoe County v. Martin, 99 Nev. 336, 340 (1983)

Therefore, this Court is instructed to attempt to interpret these statutes in a way that will preserve the constitutionality of the statute, further the intent of the legislature when the statutes were enacted, and give some deference to the interpretation given the statute by the NCOE.

The legislative declaration and findings concerning the Nevada Ethics in Government Law are contained in NRS 281.421. The statute states that "[a] public office is a public trust and shall be held for the sole benefit of the people." It also states that "[a] public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves." The legislature found that the increasing complexity of life enlarges the potentiality for conflict of interests, and, in order to enhance the people's faith in the integrity and impartiality of public officers and employees, guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

In a joint hearing between the Senate Government Affairs and Assembly Elections Committees held on March 28, 1977, the Senators and Assemblymen seemed most concerned about public employees using their positions for personal monetary gain.

Assemblyman Mann stated that a conflict of interest should be when some legislation that a legislator is involved in results in a monetary gain for him. Joint Hearing Report, p. 2. Senator Raggio agreed with this, saying that ethics should deal with the problem where a legislator is financially rewarded because of introducing a measure that a client wanted. Id. at p. 3. Assemblyman Dini said that the basic concept of the code of ethics is that nobody should be trying to line their pockets by serving in a public office. Id. at p. 4.

Because there is no specific mention of "friendships" or "cronyism" in the legislative history, Petitioner argues that the Legislature was not concerned with the type of relationships that are at issue in the instant case. In response, the NCOE argues that the Legislature was concerned about any transaction that would bring the government negative publicity and make the public think that the government was acting unethically. However, while the Legislature may have intended to include friendships and other relationships of this type in the Ethics in Government Law, it has failed to do so in the 22 years since this law was passed, as it has been amended in some way in nearly every Legislative session. So far, the Legislature has failed to include such a broad definition to this law.

I. Analysis of vagueness of NRS 281.481(2)

Petitioner argues that the phrase "any other person" is unconstitutionally vague as used in NRS 281.481(2), as it fails to provide adequate notice of what conduct is prohibited. A strict, straightforward reading of the statute would prohibit a public officer or employee from using his position to secure or grant "unwarranted privileges, preferences, exemptions or advantages" for himself or any other person.

However, the petitioner argues that the phrase "any other person" was meant only to refer back to the phrases "himself," "any member of his household" and "business entity in which he has a significant pecuniary interest." Petitioner urges the use of the doctrine of *ejusdem generis*, whereby "[g]eneral and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that the general words are restricted to a sense analogous to the less general." Orr Ditch Co. v. District Court, 64 Nev. 138, 147 (1947). If this doctrine were followed, then the phrase "any other person" would only apply to a person who is a member of the employees household, or persons with whom the employee had a business relationship.

Following this line of argument, Petitioner urges this court to interpret the phrase "any other person" to actually mean "any other such person," thus limiting the phrase to the public employee himself, the employee's family, or a business entity in which the employee is involved to a significant degree.

In reply, the NCOE urges this Court to liberally interpret the phrase as the NCOE did, allowing "any other person" to take on its literal meaning, thus precluding the employee from granting unwarranted privileges to anyone. The purpose of the Nevada Ethics in Government Law, which is to instill confidence in the general public that public employees are not out to line their own pockets, or use government to further their own interests, gives some support to this contention.

Further, there is support for the proposition that the legislature purposely phrased the Nevada Ethics in Government Law in general language so that it would apply to a variety of

distinct situations. In fact, Senator Bryan stated that it would be impossible to draft ethics legislation that would cover every possible case. Id. at p. 3. The NCOE is specifically empowered, under NRS 281.511(2) with the task of rendering an opinion "interpreting the statutory ethical standards" and applying those standards to a given set of facts and circumstances.

However, if the Legislature intended this statute to cover every situation and person imaginable, then it could have simply stated that a public officer could not secure an unwarranted privilege for "any person." Because the Legislature, a very deliberate body, took the time and effort to qualify this phrase by listing family and business relationships, neither the NCOE nor this Court can simply expand the meaning to every person imaginable. If the Legislature feels that this would be the wiser course of action, it is free to amend this language at the next legislative session.

The Legislature has chosen not to include "friendships" or "cronyism" in the language of NRS 281.481. This section had never been interpreted to include "friendships" or "cronyism." However, there is an argument that a literal reading of the statute would include these relationships.

This statute cannot be fairly said to give clear notice to a person of reasonable intelligence that granting a privilege to "any person" may be a violation of the statute. It is not clear when a public employee or officer may come under the scrutiny of the NCOE based on this section of the statute. As demonstrated by recent political activities in Las Vegas, it has left many politicians guessing as to whether their actions are a violation of this statute.

Therefore, the statute is unconstitutionally vague.

2. Analysis of vagueness of NRS 281.501(2)(c) and NRS 281.501(3)(b)

The petitioner argues that NRS 281.501(2)(c) and NRS 281.501(3)(b) are vague due to their use of the phrase "commitment in a private capacity to the interests of others." Petitioner feels that the phrase has no established legal meaning and makes no sense. Petitioner also argues that this phrase has never been used in a statute before in Nevada, and is not used in ethics statutes of other states. The petitioner argues that, since this statute's enactment in 1977, it has never been interpreted to apply to relationships such as the Petitioner had with Chambliss and Klein. Petitioner finally argues that no one can honestly assert that a well-settled and ordinary meaning of this phrase can be derived from common understanding, since current public officers and employees are unsure about what the phrase means. Therefore, petitioner argues that, because the statute is so vague, she was not put on notice of what type of behavior was prohibited.

In response, the NCOE argues that the statute has not been interpreted to include friendships only because the issue has not previously been brought to the attention of the NCOE. Also, the NCOE argues that, since the statute is aimed at whether or not a reasonable person's judgment would be affected by such a commitment to the interests of another, it would be impossible to list in the statute every situation where an abuse could possibly exist. Rather, the NCOE believes that the legislature chose to leave the determination to the NCOE, which could then apply a "reasonable person" standard to the broad range of factual situations that would come before them in the ensuing years.

Examining the plain language of the statute, it seems clear that NRS 281.501(2)(c) commands a legislator not to vote on a matter if their judgment would reasonably be materially affected by the interests of another in a private capacity. The statute goes on to say that the judgment of a reasonable person would not be materially affected where the resulting benefit accruing to him or the other person whose interest to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. NRS 281.501(3)(b) commands a legislator to disclose any type of relationship which would reasonably affect his judgment before voting, abstaining or otherwise acting on a matter.

This means that, if there is no special benefit going to a public employee or to another person through the public employee, then there is no reason to think that the public employee's judgment would be affected by the relationship. However, if the public employee or the other person stands to gain something of value that was not available to everyone else in that person's group, then there would be a danger that the independent judgment of the public employee might be threatened. In such cases, the public employee should first disclose the relationship, and then should either vote or abstain from voting, based on the seriousness of the relationship and the commitment to the interest of another in a private capacity.

The question then becomes whether Petitioner was put on notice that, if a friend or acquaintance came before the Clark County Commission, Petitioner had to disclose her relationship and perhaps abstain from voting on the matter. This Court finds that Petitioner was not given the required notice. This statute had never been used to require a Legislator or other

public employee to disclose and abstain from every vote where a friend or acquaintance came before the body.[1] As both parties acknowledge, Nevada is still a fairly small state where people still know each other. Especially in the political arena, it is virtually impossible to conduct business without developing friendships and acquaintances like those at issue. If public officers and employees were required to abstain from voting on every issue where a friend was involved, government as we know it would come to a standstill.

Therefore, this Court finds that NRS 281.481(2) , NRS 281.501(2)(c) and NRS 281.501(3)(b) are all unconstitutionally vague, as they did not give Petitioner the notice and the knowledge necessary to avoid violating the statutes as they have been interpreted by the NCOE. If the Legislature wishes to include these relationships in the future, it is the body that will have to specify such relationships more clearly in the statutory language.

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[1] It is interesting to note that, in the 1999 legislative session, the Legislature again refused to define this statute to encompass all type of relationships. The most recent amendment to NRS 281.501 reads:

8. As used in this section, "commitment in a private capacity to the interest 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 section.

Therefore, even under the latest amendment by the Legislature, which occurred after this NCOE investigation and Opinion, the phrase "commitment in a private capacity to the interests of others" still would not specifically cover the relationships at issue in this case.

B. DID THE NCOE ENGAGE IN IMPERMISSIBLE "AD-HOC" RULEMAKING?

The Petitioner argues that the NCOE engaged in impermissible "ad hoc" rulemaking because the NCOE exceeded its authority in its interpretation of the term "any other person" as contained in NRS 281.481(2), and the term "commitment in a private capacity to the interests of others" as contained in NRS 281.501(2)(c) and NRS 281.501(3)(b). Petitioner argues that such an interpretation was actually a "regulation" and should have gone through the Legislature pursuant to NRS 281.471(5).

In reply, the NCOE argues that it simply interpreted the existing statute. This did not include defining any new terms or enacting any new regulations, so it should not be considered "ad hoc" rulemaking. Further, the NCOE argues that, under Nevada Commission on Ethics v. JMA Lucchesi, 110 Nev. 1 (1994), the NCOE has the explicit authority to interpret and apply the Nevada Ethics in Government Law.

NRS 233B.038 defines a "regulation" as:

> "an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirement of any agency. The term includes a proposed regulation and the amendment or repeal of a prior regulation, but does not include: (1) a statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public; (2) a declaratory ruling; (3) An intra agency memorandum; (4) an agency decision or finding in a contested case; or (5) a regulation concerning the use of public roads or facilities which is indicated to the public by means of signs and signals."

Administrative agencies are not allowed to make regulations beyond the scope of the

statute which empowers and creates the administrative agency. In this case, the NCOE would be regulated by NRS 281.455, which creates the NCOE and NRS 281.471, which defines the duties of the NCOE. While NRS 281.471 gives the NCOE the power to create rules and regulations concerning the internal workings and procedures of the Commission, NRS 281.471(5) requires that the Commission "[r]ecommend to the legislature such further legislation as the commission considers desirable or necessary to promote and maintain high standards of ethical conduct in government." Therefore, if the NCOE wants to expand the Nevada Ethics in Government Law beyond its current parameters, it must go to the Legislature and ask it to draft new legislation.

There are several instances where the Nevada Supreme Court has found that an administrative agency has exceeded its authority and entered into the realm of "ad hoc" rulemaking. In Las Vegas Transit System, Inc. v. Las Vegas Strip Trolley, 105 Nev. 575 (1989) the court held that the Public Service Commission (hereinafter "PSC") exceeded its statutory authority. There, the PSC defined the words "trolley bus" or "trolley" where no definition had before existed. Thus, the PSC defined a new type of vehicle and the rules for operating such a vehicle on the Strip in Las Vegas. The court held that "the Commission engaged in ad hoc rule making by promulgating a standard of general applicability which effected policy without complying with the Nevada Administrative Procedure Act." Id. at 578. Thus, the court found that the Commission unlawfully adopted a "regulation" as defined in NRS 233B.038.

In Coury v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302 (1986), the PSC adopted

a new category of limousine, namely a "stretch" limousine. When the original regulations governing the use of limousines at the airport in Las Vegas were promulgated, there was no mention of such a vehicle as a "stretch" limousine in the regulations. The PSC drafted a new definition of a "stretch" limousine, along with rules governing their use at the Las Vegas airport. The court found that this was a "regulation" as defined in NRS 233B.038, as the new regulation was a "specific grant of authority to operate a special, previously undefined *kind* of limousine." Id. at 306. This regulation set a standard of general applicability that would effectuate policy.

A case where the Nevada Supreme Court found that an agency did not engage in "ad hoc" rulemaking was State v. GNLV Corp, 108 Nev. 456, (1992). There the court found that the Nevada Gaming Commission, in enforcing the letter of the law concerning what a "wager" was, was not engaging in "ad hoc" rulemaking. There, the Golden Nugget Casino sought to deduct losses the casino suffered as a result of giving away special tokens to slot club members as losses from wagering. The Nevada Gaming Commission defined a wager as when two people both have a chance of winning or losing, as the Nevada Supreme Court had defined it in an earlier case.

The court held the "an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute." Id. at 458. Thus, because the Gaming Commission was merely clarifying what a "wager" was, it was not engaging in the prohibited "ad hoc" rulemaking.

Finally, in State, Department of Insurance v. Humana Health Insurance of Nevada, Inc.,

112 Nev. 356 (1996), the Nevada Supreme Court held that the Department of Insurance did not promulgate a new "regulation" in further defining the term "home office." While the statute only listed two criteria to decide whether an insurance company's office in Nevada was a "home office" deserving of a tax credit, the Department of Insurance added several more criteria to the test. The court held that, because the Department of Insurance utilized guidelines that were clear, understandable, and well-known in the insurance industry, it did not engage in "ad hoc" rulemaking.

The instant case falls somewhere between the established boundaries of the above cases. While the NCOE was not defining a completely new term, as the PSC was in Coury and Las Vegas Transit, it was greatly expanding the known and understood parameters of the existing Nevada Ethics in Government Law. However, this new definition was not an expected or well-understood definition like that at issue in Humana Health.

While the plain language of NRS 281.481(2) contains the phrase "any other person," which seems like a very plain term, it had never been literally interpreted to mean "any other person" outside the sphere of family and business partners until the instant case. Thus, this new interpretation certainly expands the previous interpretation of the law, and it could easily be considered a "statement of general applicability" that "effectuates policy." It has affected and will affect the behavior of all public officials in the future. This is evidenced by the behavior of Las Vegas politicians in abstaining from votes because they were unsure of the reach of this new interpretation of the Nevada Ethics in Government Law. This has allowed votes of 1-0 and 3-0 to decide important issues in southern Nevada.

Thus, because it is not limited to the parties involved in the instant action, it could be considered a "statement of general applicability." Because it will determine how politicians will disclose and abstain in the future, it could also be considered to be "effectuating policy."

Even though the NCOE was not interpreting a brand new term, it certainly expanded the reach of the Nevada Ethics in Government Law. This decision has had severe repercussions in the political climate of Las Vegas. The implication of this new interpretation of the law is at least as far-reaching as a new definition of a trolley or a stretch limousine. Therefore, the NCOE was engaging in prohibited "ad hoc" rulemaking.

As stated in Public Service Commission v. Southwest Gas Corp., "the order is of such major policy concern and of such significance to all utilities and consumers that it cannot be characterized as a simple adjudication in a contested case and thus outside of the statutory definition of a regulation." 99 Nev. 268, 273 (1983).

Here, this interpretation of the Nevada Ethics Law is such an expansion of the prior understanding of the ethics Law that it must be considered a regulation. The intention of the prohibition against such rule making is that the agency may not substitute its judgment for that of the legislature. 2 Amjur 2d § 152.

CONCLUSION

The Opinion of the Nevada Ethics Commission is hereby OVERTURNED. Petitioner was not given the notice required by due process to know when she would be in violation of the Nevada Ethics in Government Law. Further, the NCOE has so greatly expanded the known parameters of the Nevada Ethics in Government Law as it was previously understood that the

NCOE engaged in impermissible "ad hoc" rulemaking.

It must be understood that this Court is in no manner endorsing the actions of Petitioner in making a list of concessionaires that the Clark County Commission would support. These actions disrupted and bypassed a system for choosing concessionaires that was put in place specifically to eliminate behavior like that of the Petitioner. These actions also brought the entire Clark County Commission, and public employees in general, into disrepute with the public. This was the reason that the Nevada Ethics in Government Law was enacted in the first place.

However, even though Petitioner's actions do not rise to a level of ethical purity that the public would like to see, Petitioner did not have adequate notice to know that these actions would put her in violation of the law. Therefore, the law cannot stand as it has currently been interpreted by the NCOE.

Because this Court has invalidated the actions of the NCOE as "ad-hoc" rulemaking, and has declared the statutes in question to be unconstitutionally vague, this Court will not reach the questions of separation of powers and delegation of legislative authority.

DATED this 2nd day of September, 1999.

JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF SERVICE BY U.S MAIL AND FACSIMILE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 3rd day of September, 1999, I served a copy of the foregoing document by transmitting the same via facsimile and U.S. Mail to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Supplemental 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 the Court's July 29 and August 8, 2011 Orders and all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 29, 2011

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Pursuant to Rule 25(d) of the Nevada Rules of Appellate Procedure and the consent of the parties, I hereby certify that on this 29th day of August, 2011, a true and correct copy of the Supplemental Brief of Appellant Michael A. Carrigan was served electronically on the following:

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