ADDENDUM

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF MICHAEL CARRIGAN, City Councilman, City of Sparks /

Requests for Opinion No. 06-61, 06-62, 06-66 & 06-68

MOTION TO DISMISS

MICHAEL CARRIGAN, Sparks City Councilman, by and through the undersigned counsel of record, herein moves for a complete dismissal of each and every charge alleged against him. This Motion to Dismiss is supported by the following Statement of Points and Authorities and by all other documents on file with the Commission in this matter.

Respectfully submitted this 15th day of August 2007.

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I.

STATEMENT OF POINTS AND AUTHORITIES

A. The Disclaimer Contained in Most Nevada Commission on Ethics Opinions Eliminates All Potential Precedential Value.

Every opinion of recent relevance published by the Nevada Commission on Ethics contains the following Disclaimer:

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

In most of the Commission's written opinions that contain the above Disclaimer, it is printed entirely in capital letters and in bold font. The final sentence is of particular concern, not only to Councilman Carrigan, but to any public official summoned before this Commission. Essentially this Disclaimer gives the Commission the ability to apply the law arbitrarily with no regard to precedent, even when no discernable factual distinction exists.

Making this case particularly confusing, Commissioner Keele and Chairman Kosinski appeared to be remarkably unhappy[1] with a legal opinion published by the Sparks City Attorney's Office on August 17, 2006. Specifically, and despite the above-referenced Disclaimer, the presiding Commissioners complained about the absence of any citation to opinions published by the Nevada Commission on Ethics. See, NCOE Exhibit 11, Bates-stamped pages 000343-000344. Adhering to the admonition set out in the Commission's Disclaimer, the City Attorney's August 17, 2006 opinion cited California and Illinois law, because of the absence of any law or precedent established in Nevada. *Id.* Judicial decisions regarding Nevada's Ethics in Government Law are simply unavailable.

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[1] The above listed Commissioners served on a two member panel which considered the "Executive Director's Report and Recommendation" (NCOE Exhibit 3) and ultimately determined that "just and sufficient" cause existed to bring charges against Councilman Carrigan before the entire Nevada Commission on Ethics. The hearing conducted by this panel is referred to as a "Panel Hearing," the transcript of which is contained in the record as NCOE Exhibits 11 and 12.

thus necessitating a reliance on sister states for any type of legal precedent.

In light of the above Disclaimer, a competent attorney would not advise a client to rely on the published opinions of the NCOE.[3] It is with some trepidation that the prior written opinions of this Commission - setting forth the above referenced Disclaimer - are cited in support of this Motion to Dismiss.

B. The Requirements of NRS 281.501(4) Were Satisfied by Councilman Carrigan's Disclosure on August 23, 2006.

NRS 281.501(4) requires a public official to disclose sufficient information concerning his personal interests. At the August 23, 2006 meeting of the Sparks City Council, Councilman Carrigan made the following disclosure:

> *"Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any action I take tonight, and therefore according to NRS 281.501 I believe this disclosure of information is sufficient and that I will be participating in the discussion and voting on the issue. Thank you."* Subject Exhibit K-2; Audio CD of August 23, 2006 Meeting at 6:07:11.

Based on the foregoing quotation, it is difficult to imagine that Councilman Carrigan was required to disclose more information regarding his relationship with Carlos Vasquez. The only other aspect of Councilman Carrigan's relationship with Mr. Vasquez that this Commission could conceivably be concerned with is the in-kind campaign contributions made by Mr. Vasquez to Councilman Carrigan.

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[3] Especially troubling is the fact that good faith reliance upon the advice of counsel is recognized as a complete defense to the element of willfulness in ethics cases. NRS 281.511. Additionally, public officials who sincerely attempt to comply with the law by consulting with counsel, and who receive advice consistent with the Nevada Ethics in Government Law, should not be found in violation, even if there is some subsequent disagreement regarding the advice given. AGO 98-27 (9-25-1998). By disclaiming the precedential value of its published opinions, the NCOE has effectively forced attorneys to rely on case law from other jurisdictions when advising clients on the Nevada Ethics in Government Law. The notion that the law recognizes a defense based upon good faith reliance on the advice of counsel, but the practices of the NCOE obligate the citation of extra-jurisdictional decisions (which do not directly contemplate Nevada law) is quite problematic.

However, the prior opinions of both the Nevada Commission on Ethics and the Attorney General could not be clearer: "NRS 281.501(4) does not require a public officer to disclose campaign contributions that have been reported pursuant to NRS 294A.120 or NRS 294A.125 in a timely manner."[3] *In Re: McDonald*, CEO 99-61 (9-18-2000), cited. *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001); *Attorney General Opinion* 98-29 (11-5-1998). Public policy strongly encourages the giving and receiving of campaign contributions, and adequate protection against corruption and bias is afforded through statutory disclosure requirements. AGO 98-29 (11-5-1998). Once an elected official properly files his contribution and expenditure report, it becomes public information. *Id.* Additional disclosure is therefore not required. *Id.*

In the case at hand, the disclosure made by Councilman Carrigan at the August 23, 2006 meeting of the Sparks City Council, coupled with the complete and timely filing of his financial disclosure forms with the Secretary of State, amounts to a total disclosure of Councilman Carrigan's relationship with Mr. Vasquez. There is simply nothing more for Councilman Carrigan to disclose. Accordingly, it is respectfully submitted that Councilman Carrigan did not violate NRS 281.501(4) because he disclosed every aspect of his relationship with Mr. Vasquez. Due to the impossibility of a more complete disclosure, the complaint against Councilman Carrigan must be dismissed.

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[3] Many Nevada Commission on Ethics Opinions that make note of this finding then go on to mention that while NRS 281.501(4) does not require a public official to disclose campaign contributions, it does not prohibit such disclosure in the event that the contributions may appear significant enough in relationship to the public official's total campaign budget to raise the question of the contributions' effect on the public official's independence of judgement. See, *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001). Essentially, the NCOE has opined that a public official can be punished for failing to disclose information that is otherwise not legally required to be disclosed by NRS 281.501(4). If the Nevada Legislature had intended to include campaign contributions within the purview of NRS 281.501(4), it would have. It would appear that the Commission's attempt to expand its jurisdiction, based upon the plain language of NRS 281.501(4), goes far beyond the intent of the laws enacted by the Legislature.

C. NRS 281.501(2) Did Not Require Councilman Carrigan to Abstain From Voting on The Lazy 8 Matter on August 23, 2006.

It is well established in Nevada that a public official's abstention from voting is disfavored except in cases of absolute necessity. A public official is dissuaded from abstaining for four reasons: (1) abstention deprives the public, and specifically an elected official's constituents, of a voice in matters which come before public officers and employees; (2) public officers and employees should have an opportunity to perform the duties for which they were elected or appointed, except where objective evidence exists that private commitments would materially affect one's independence or judgment; (3) compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment; and (4) in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or appointing authority. *In Re: Woodbury*, Commission on Ethics Opinion 99-56 (12-12-1999), *In Re: Montandon*, CEO 01-11 (12-14-2001); *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001); *In Re: Glenn*, CEO 01-15 (2-1-2002); *In Re: Griffen*, CEO 01-27, 01-28 (2-25-2002); *In Re: Wright*, CEO 02-21 (12-9-2002); *In Re: Eklund-Brown*, CEO 02-23 (2-27-2003).

Pursuant to NRS 281.501, a public officer is required to abstain from voting only if there exists ***objective evidence*** that a reasonable person in the public officer's situation would have his independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others. (Emphasis added) AGO 98-27 (9-25-1998). In fact, this Commission's own interpretation of NRS 281.501(2) requires each public official to make his own determination of whether the independence of judgment of a reasonable person in his situation would be materially affected by the circumstances surrounding the situation.[4] *In Re: Woodbury*, CEO 99-56 (12-22-1999).

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[4] The policy espoused in *Woodbury* illogically requires an elected official to make a *subjective* determination about an *objective* standard. Effectively, the elected official is left with nothing more than a Hobson's choice. Because this Commission has failed to provide elected officials in the State of Nevada with any more guidance on this topic than to use "discretion," and because every prior written opinion of the NCOE is disclaimed as to precedent, there are simply no standards for an elected official to rely on when making the determination that *Woodbury* requires.

Here. Councilman Carrigan did make a subjective determination as to whether a reasonable person in his situation would be affected by his relationship with Mr. Vasquez, as suggested in *Woodbury*. Without established guidelines by which this determination should be made, a finding by this Commission that Councilman Carrigan violated NRS 281.501(2) would be grossly unjust.

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*[1] arrangement. *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001). 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 at the same meeting. *Id.* The NCOE 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 CEO 95-51 the NCOE 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 officer, a public officer 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 (6-6-97). Also see, NCOE Exhibit 10.

In the instant case, it has not been alleged by the NCOE that Councilman Carrigan either failed to report or improperly reported *any* campaign contribution. In fact, in direct contradiction to the complaints on file (NCOE Exhibit 1) the "Executive Director's Report and Recommendation Regarding Just and Sufficient Cause" confirms that Councilman Carrigan's "final 2006 in-kind

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[1] "*Quid pro quo*" literally means "something for something" in Latin. See, *Black's Law Dictionary* (West Group, Seventh Edition); *American Heritage Dictionary of the English Language* (Second College Edition); *New Dictionary of Cultural Literacy* (Third Edition).

contributions report shows ten entries for 'consulting services' received from Mr. Vasquez for various dates from August through November, totaling $9,000.00." *See*, NCOE Exhibit 3, page 6.

A public officer must report campaign contributions in excess of $100.00 to the Secretary of State for each year of his elected term on or before January 15 of the following year. *See*, NRS 294A.120.[6] Councilman Carrigan reported the in-kind contributions on January 11, 2007, four days *before* he was required to by law. *See*, NCOE Exhibit 7, Bates-stamped pages 000253-000259. Additionally, it has never been alleged, nor is there any "objective evidence" to support the notion that Councilman Carrigan accepted these in-kind donations from Mr. Vasquez with the understanding that Mr. Vasquez would receive anything in return, the very definition of a *quid pro quo* relationship.

In *Boggs-McDonald*, the Las Vegas City Council Member accepted in-kind contributions from Station Casinos and neither disclosed them, nor abstained from voting when Station Casinos came before the Las Vegas City Council as a real party in interest. See, *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001). In this case, Councilman Carrigan disclosed his relationship with Mr. Vasquez. However, Mr. Vasquez was only a hired representative, and not the real party in interest before the Sparks City Council. Under the finding of this Commission in *Boggs-McDonald*, not only was Councilman Carrigan entitled to vote on the matter in question, he was apparently not required to disclose his relationship with Mr. Vasquez.

It would be fundamentally unjust for this Commission to find Councilman Carrigan in violation of NRS 281.501(2), when the facts of the present case do not even rise to the level of the *Boggs-McDonald* case in which the NCOE found no violation of NRS 281.501(2), let alone surpass

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[6] Complainants rely on NRS 281.561 concerning the non-reporting of campaign contributions by Councilman Carrigan. Not only is this statute unrelated to the reporting of campaign contributions (it is in fact the financial disclosure statute) but it requires a public officer to file a financial disclosure with the Secretary of State for each year of his elected term on or before January 15 of the following year, which in this case would be January 15, 2007. The complaints filed against Councilman Carrigan in this matter, NCOE Exhibit 1, are all dated between September 15, 2006 and September 23, 2006, more than three months before a complete report of campaign contributions was due to the Secretary of State. Each of the complaints lacks merit based on the mere fact that it is grounded in an accusation, the non-reporting of campaign contributions, that as demonstrated by the NCOE's own exhibits is simply not true.

Boggs-McDonald. The Complainants and this Commission have not alleged even an indicia of evidence that would imply a *quid pro quo* agreement between Councilman Carrigan and Mr. Vasquez, let alone "direct evidence" as required by the NCOE in prior matters. See, *In Re: Boggs-McDonald*, CEO 01-12 (8-8-2001); *In Re: Wood*, CEO 95-51 (6-6-97). Applying the NCOE's own standards and interpretations of NRS 281.501(2), it is clear that Councilman Carrigan did not violate the provisions of NRS 281.501(2) and the complaint must be dismissed.

D. Councilman Carrigan Did Not Violate NRS 281.481(2) Because He Did Not Actually Secure an Unwarranted Privilege for Mr. Vasquez.

On page 10 of the "Executive Director's Report and Recommendation," the NCOE's own investigator states: "it does not appear that Mr. Carrigan used his public position to obtain an unwarranted benefit for Mr. Vasquez." See, NCOE Exhibit 3, Bates-stamped page 000089. Although the NCOE staff *did not* find just and sufficient cause for the Commission to hold a hearing and render an opinion regarding a violation of NRS 281.481(2) in this case, the charge was nonetheless brought by Chairman Kosinski at the Panel Hearing in this matter. An inspection of the transcript of the Commission's "Continued Panel Hearing" (NCOE Exhibit 12) reveals the basis for Chairman Kosinski's opinion.[7] Chairman Kosinski opined that a prior hearing before the NCOE included discussion about the term "secure," and that in his opinion the term "secure" included any attempt

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[7] In obvious disagreement with Chairman Kosinski's position, Commissioner Keele accurately noted that Councilman Carrigan was on the losing side of the August 23, 2006 Sparks City Council vote regarding the Lazy 8 Casino. Commissioner Keele correctly concluded that because the vote cast by Councilman Carrigan ultimately failed, Councilman Carrigan could not be found to have *actually* secured or granted an unwarranted privilege to Mr. Vasquez. Nowhere in NRS 281.481(2) is it declared that a perceived "attempt" violates Nevada's Ethics in Government Law. Furthermore, Commissioner Keele definitively states: "He did not in any way use his position to secure or grant that unwarranted situation." NCOE Exhibit 12, Bates-stamped page 000379, lines 18-20.

to secure. Using his own definition of "secure".[8] Chairman Kosinski concluded that just and sufficient cause existed for the Commission to hold a hearing and render an opinion concerning a potential violation of NRS 281.481(2) in this case. See, NCOE Exhibit 12, Bates-stamped pages 000379-000381.

Although no evidence indicates that Councilman Carrigan used his position as a public official to even *attempt* to secure an unwarranted privilege for Mr. Vasquez, a statement confirmed by the NCOE's own investigators and Commissioner Keele (NCOE Exhibit 3, Bates-stamped page 000089; NCOE Exhibit 12, Bates-stamped page 000379, lines 18-20), Commissioner Kosinski has nevertheless charged Councilman Carrigan with *actually* securing an unwarranted privilege for Mr Vasquez. This allegation against Councilman Carrigan is a legal impossibility. NRS 281.481(2) does not include an attempt to secure an unwarranted privilege as violative of the statute. NRS 281.481(2) expressly states, in relevant part: "A public officer or employee shall not use his position in government to secure or grant unwarranted privileges..." The word "attempt" appears nowhere in the statute, which quite obviously requires completion of the act in question before a violation can occur. Essentially, Councilman Carrigan has been charged with a violation that does not exist within the boundaries of the statute, and which all credible evidence in this case does not support.

Additionally, Councilman Carrigan's vote, alone, is insufficient to confer any type of privilege. In a case involving an alleged violation of NRS 281.481(1), the Commission held that a member of the Clark County Board of Commissioners had not violated NRS 281.481(1) because she did not have the power or authority to confer an unwarranted privilege. *In Re: Kenny*, CEO 00-54 (9-

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[8] Of the 20 possible definitions of "secure" found in Webster's Dictionary, none is even remotely similar to "an attempt to secure." Similarly, the American Heritage Dictionary defines "secure" as: assured; guaranteed. The language of NRS 281.481(2) is clear and unambiguous and therefore must be taken at its plain meaning. It is not within the authority of this Commission to expand the definition of the term "secure" as it relates to this statute or any other. Had the Nevada Legislature intended to include an attempt to secure an unwarranted privilege within the purview of NRS 281.481(2), the statute would have read: "A public officer or employee shall not use his position in government to secure or grant, or attempt to secure or grant..." The statute does not contemplate the concept of an attempt, and there is absolutely no reasonable argument to the contrary.

20-2001). In the instant case, no evidence indicates that Councilman Carrigan attempted to secure an unwarranted privilege for Mr. Vasquez, but, even if he had, Councilman Carrigan lacked the power or authority to do so. Councilman Carrigan's unsuccessful vote in the Lazy 8 matter was just one of five, which is certainly insufficient to secure an unwarranted privilege on a matter which required an affirmative vote of three members of the entire five-member City Council to succeed.

It is respectfully submitted that in the absence of any evidence tending to prove that Councilman Carrigan actually secured an unwarranted privilege for Mr. Vasquez, the charged violation of NRS 281.481(2) must be dismissed.

E. Councilman Carrigan Did Not Violate NRS 281.481(2) Because No *Quid Pro Quo* Agreement Existed With Mr. Vasquez.

The Nevada Commission on Ethics applies the following two-prong test to determine whether a public officer has violated NRS 281.481(2): first, whether a public official's conduct benefitted some person or business entity; and second, whether the public official intended such conduct to so benefit the person or business entity. *In Re: Barrett*, CEO 01-08A (2-1-2002); *In Re: Hawkes*, CEO 01-08B (2-12-2002). To be sure, nearly all of a public official's conduct benefits some person or business entity, accordingly, the first prong of the test is easily satisfied. However, the second prong is a more difficult proposition. The *Barrett* and *Hawkes* opinions provide surprisingly little explanation of what factors are involved in determining whether or not a public official "intended" to confer a benefit upon a person or business entity, therefore the factors must be extrapolated from other opinions involving a similar law.

NRS 281.481(1) is effectively the inverse of NRS 281.481(2). Where NRS 281.481(2) contemplates a public official using his position in government to confer a benefit upon another person, NRS 281.481(1) prohibits a public official from using his position in government to secure a benefit for himself from another person. In previous opinions regarding NRS 281.481(1), the Nevada Commission on Ethics has found that the "intent" of the provision is to prohibit "a public officer or employee from violating the public trust by taking official action in exchange for a personal benefit (i.e., a "*quid pro quo*"), thereby departing from the faithful and impartial discharge of public duties." *In Re: Kenny*, CEO 00-54 (9-20-2001). Presumably, NRS 281.481(1) and 281.481(2), each

of which prohibits the use of one's position in government to secure a benefit, either for oneself or another person, are both rooted in the same foundational underpinnings: to prevent public officials from entering into *quid pro quo* arrangements with other persons or business entities.

In fact, in deciding a case in which a violation of NRS 281.481(2) was alleged, the Nevada Commission on Ethics published the following:

> *"[W]e cannot find a violation based upon the evidence presented and two public policy concerns raised at hearing. The first public policy concern raised by Mr. Wood concerns the heart of the electoral process: namely, that citizens donate to candidates with whom they agree and that when a public officer acts on behalf of a constituent who donated to his campaign, the public officer's act cannot be a per se departure 'from the faithful and impartial discharge of his public duties' under NRS 281.481(1) or 'unwarranted' under NRS 281.481(2) because such a finding would unduly interfere with a free electoral process. We agree that democracy, as practiced in the United States, allows citizens to actively participate in a candidate's candidacy through the donation of money or services and that this practice cannot be discouraged. We are concerned, though, with the acts of the candidate once in office, and NRS 281.481(1) or (2) could be violated by an elected official who received campaign funds from a constituent* ***in return for a promise to do a particular act upon election.*** " (Emphasis added). *In Re: Wood*, CEO 95-51 (6-6-1997).

Based on the prior opinions of the NCOE, it is clear that the purpose of NRS 281.481(2), like NRS 281.481(1), is to prevent public officials from entering into *quid pro quo* agreements.

Campaign contributions do not automatically trigger a conflict of interest. AGO 98-29 (11-5-1998). With regard to the ethical standards of public officers, a campaign contribution made to a

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public officer is treated differently than a pecuniary interest of a public officer. *Id.* A campaign contribution is considered a constitutional right[9] on the part of the contributor to participate in the electoral process, while a pecuniary interest is afforded no protection at all in the ethical realm of government. *Id.* Pursuant to NRS 281.501, only a pecuniary interest which amounts to a conflict of interest will require disclosure and abstention. *Id.* Had the legislature intended for campaign contributions to trigger a possible conflict of interest, the legislature could have included campaign contributions in NRS 281.501. *Id.* It is very clear that a campaign contribution alone, without some objective evidence to the contrary, is not indicative of a *quid pro quo* agreement.[10]

In this case, no *quid pro quo* agreement between Councilman Carrigan and Mr. Vasquez has even been alleged, let alone demonstrated with objective facts. The Commissioners presiding over the Panel Hearing failed to address the issue of whether or not such an agreement existed (See, NCOE

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[9] 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). Indeed, 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 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.

[10] If a political contribution automatically disqualifies the recipient after his election from considering and acting on matters in which the contributor has an interest, an enterprising group or individual could disqualify all known adverse candidates for municipal office by making nominal contributions to the campaign of each such candidate. Future proposals of the contributor would then be considered by a panel from which all known adversaries have been disqualified.

Exhibits 11-12), and the complaints filed with the Commission[1] merely suggest that the relationship between Councilman Carrigan and Mr. Vasquez gives Mr. Vasquez an "undo" [sic] influence over Councilman Carrigan. See, NCOE Exhibit 1, Bates-stamped pages 000003, 000011, 000017. Based on prior opinions of the Nevada Attorney General and this Commission, campaign contributions alone do not give rise to the type of relationship or agreement required to violate NRS 281.481(2). Accordingly, the complaints filed against Councilman Carrigan by private citizens and this Commission are entirely without merit.

It is respectfully submitted that in the absence of any evidence proving a *quid pro quo* agreement between Councilman Carrigan and Mr. Vasquez, indeed, in the absence of any evidence proving anything more than a properly reported, constitutionally sanctioned campaign contribution, the charged violation of NRS 281.481(2) must be dismissed.

F. Councilman Carrigan Did Not Violate NRS 281.481(2) Because There Was a Colorable Reason for The Decision He Made on The Lazy 8 Project.

In previous opinions, the Nevada Commission on Ethics has repeatedly found no violation of NRS 281.481(2) when a prudent or colorable reason for an elected official's decision exists. See, *In Re: Wood*, CEO 95-51 (6-6-1997); also see, *In Re: Glenn*, CEO 01-15 (2-1-2002).

In *Wood, supra*, a member of the Henderson City Council placed an item on the Council's agenda relating to an amendment to a settlement agreement. *In Re: Wood*, CEO 95-51 (6-6-1997). The settlement agreement in question was between the City and persons who had made campaign contributions to Mr. Wood's campaign. *Id.* The Commission found that Mr. Wood did not violate NRS 281.481(2) because whatever privileges were obtained for the campaign contributors were not "unwarranted in light of the colorable reason for reviewing the settlement agreement." *Id.*

In *Glenn, supra*, Mr. Glenn was the chairman and an elected member of the Humboldt General

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[1] The complaints filed with the Commission, NCOE Exhibit 1, all allege a violation of NRS 281.481(1). This Commission has not charged Councilman Carrigan with a violation of NRS 281.481(1), after finding "absolutely no evidence whatsoever" that Councilman Carrigan violated the provisions of NRS 281.481(1). NCOE Exhibit 12, Bates-stamped page 000385, lines 9-11.

Hospital Board of Trustees, and a member of a partnership which owned two professional office buildings near a third professional office building owned by the General Hospital. *In Re: Glenn*, CEO 01-15 (2-1-2002). The Commission found that Mr. Glenn did not violate NRS 281.481(2) by voting to increase the rent charged for professional office space in the building owned by the General Hospital because there was no evidence that Mr. Glenn used his position as an elected official to secure an unwarranted benefit for another person or business entity, and because Mr. Glenn's vote in the matter was a "prudent financial decision based upon an analysis by the board of fair market rental rates." *Id.*

Those opinions notwithstanding, the term "unwarranted" is defined by NRS 281.481(2)(b) as "without justification or adequate reason." In the case at hand, there is only one definitive barometer as to whether or not Councilman Carrigan's position was unwarranted: the Official 2006 Washoe County General Election Results. See, Subject Exhibit J, Bates-stamped page 000059. The 2006 general election was held on Tuesday, November 7, 2006 - just over 2 months after the August 23, 2006 meeting of the Sparks City Council when Councilman Carrigan unsuccessfully voted to approve the Lazy 8 project. *Id.* Councilman Carrigan's opponent in the 2006 election, James deProsse, estimated "approximately 70%" of the people he spoke with while campaigning in Sparks opposed the approval of the Lazy 8 project. Subject Exhibit K, Bates-stamped page 000067. Mr. DeProsse was summarily defeated in the election by Councilman Carrigan, 61.62% to 38.38%. Subject Exhibit J, Bates-stamped page 000059.

Even more telling as to whether or not Councilman Carrigan's position on the Lazy 8 project was unwarranted, is the result of the other 2006 election for Sparks City Council. In that election, Councilwoman Judy Moss, who voted opposite Councilman Carrigan, and against the Lazy 8 project at the August 23, 2006 Sparks City Council Meeting, *was not* retained by the citizens of Sparks. *Id.*

Councilman Carrigan had a legitimate, colorable reason for voting the way he did on the Lazy 8 project at the August 23, 2006 Sparks City Council meeting. It is very clear from the results of the 2006 election that his vote represented the will of his constituents, and did not secure *any* unwarranted benefit for Mr. Vasquez. Accordingly, the charged violation of NRS 281.481(2) is meritless, and should be dismissed.

II.

CONCLUSION

Based on the foregoing, Sparks City Councilman Michael Carrigan requests that each and every charge alleged against him before this Commission be dismissed.

Respectfully submitted this 13th day of August 2007.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

_____/

Docket No. 51920

SUPPLEMENTAL BRIEF FOR RESPONDENT THE COMMISSION ON ETHICS OF THE STATE OF NEVADA

Appeal from the First Judicial District Court of the State of Nevada
District Court No. 07-OC-012451B

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COUNTER-STATEMENT OF THE ISSUES

The outstanding issues in this appeal are:

1. Whether the District Court correctly determined that Nevada's recusal statute, NRS 281A.420(2), (8) (2007), is not unconstitutionally vague as applied to Mr. Carrigan?[1]

2. Whether Mr. Carrigan failed to preserve for this Court's review a claim based on an asserted First Amendment right of association?

3. If not, whether the neutral and narrowly-tailored recusal provision in NRS 281A.420(2) infringes on First Amendment rights of association?

INTRODUCTION

Although most of his brief is devoted to persuading this Court to address the concerns of hypothetical officials, candidates, and campaign volunteers who are not before it, *see* Supp. Br. 12-30, Councilman Carrigan told the U.S. Supreme Court that he was only making an as-applied challenge to the Ethics in Government Law. Br. for Resp. 21, *Nev. Comm'n on Ethics v. Carrigan*, No. 10-568, 131 S. Ct. 2343 (2011). It is useful, then, to consider at the outset the question that is actually before the Court. Carrigan argues that no person of "common intelligence" could be expected to know that it was improper for him to vote on a casino proposal brought before the Sparks City Council by his ongoing re-election campaign's main outside vendor, his longtime friend, and his three-time campaign manager, who was then serving the casino developer as a $10,000-a-month professional political

[1] Consistent with prior opinions and briefing, this brief cites to the 2007 version of the statute. *See* Supp. Br. 1 n.1.

consultant. Despite Carrigan's best efforts to create uncertainty, NRS 281A.420 plainly prohibits his vote in a matter in which someone with whom he had an "ongoing business relationship" (or a relationship substantially similar to a business relationship) had a personal stake. Any concerns about hypothetical close cases are irrelevant to this as-applied challenge, and neutralized by the availability of a statutory advisory-opinion mechanism—an option Carrigan knew about before voting but chose (for his own reasons) not to employ. And for all his brief's talk of hypothetical candidates and volunteers, Carrigan has shown nothing to suggest that such a straightforward and universal prohibition would significantly impair political relationships. There is no reason for this Court to stretch to address hypothetical constitutional questions not presented on the facts of this case—particularly when Carrigan first raised those concerns at the eleventh hour. The Court should affirm.

STATEMENT OF THE CASE AND FACTS

Because the prior opinions and briefing set forth the facts and procedural history at length, *see Carrigan v. Comm'n on Ethics*, 126 Nev. ___, 236 P.3d 616 (2010); *Carrigan*, 131 S. Ct. at 2343; Supp. Br. 2, this brief only addresses matters omitted from Carrigan's supplemental brief.

In early 2005, a developer submitted an application for the "Lazy 8" hotel-casino project to the Sparks City Council, of which Michael Carrigan is a member. *Carrigan*, 236 P.3d at 618. The developer paid $10,000 a month to retain as a consultant Carlos Vasquez, Carrigan's "longtime professional and personal friend" who had served as his campaign manager "[d]uring each of his election campaigns," including his then-current one. *Id.*; J.A. 190. Vasquez had been Carrigan's "close personal friend[]" for years; the two "routinely

discuss[ed] political matters . . . throughout [Carrigan's] terms in office, not just during political campaigns, and [Carrigan] considered Vasquez to be a trusted political advisor and confidant." J.A. 381. In each campaign, Vasquez and his companies provided services to Carrigan's campaign at cost. *Id.* at 286, 381, 409. During the 2006 election, some 89 percent of Carrigan's campaign expenditures were made through Vasquez's advertising firm. *See* Joint App'x at 120, 131, 141, *Carrigan*, No. 10-568, 131 S. Ct. 2343 (available at http://ethics.nv.gov/COE_website_files /coe_USSC.html).

The Lazy 8 project came before the City Council for tentative approval on August 23, 2006—some six months after the developer first engaged Vasquez, one week after Vasquez had helped Carrigan win his primary election, and eleven weeks before Carrigan's general election victory. *Carrigan*, 236 P.3d at 630 n.6, 631 n.7; J.A. 281, 394-95. Carrigan was aware that his relationship with Vasquez was potentially disqualifying—and concerned enough about it to seek the advice of counsel; however, he chose not to obtain an advisory opinion from the Commission about his obligation to abstain. J.A. 282. At the meeting, Carrigan disclosed his relationship with Vasquez and voted to approve the Lazy 8 project, which failed by one vote. *Id.* at 281.

After an August 2007 hearing at which both Carrigan and Vasquez testified, *id.* at 279-80, the Commission concluded that Carrigan had violated NRS 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." J.A. 290. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his companies had provided services to Carrigan's three campaigns at cost; Carrigan had testified that Vasquez's assistance was "instrumental" to his three successful campaigns;

and they had a "close personal" relationship in which Carrigan confided in Vasquez "on matters where he would not confide in his own sibling." *Id.* at 285-86. The Commission then unanimously held that a reasonable official in Carrigan's situation "would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." *Id.* at 290. Because Carrigan had relied on the advice of counsel, however, the Commission determined that his "violation was not willful" and imposed no fine. *Id.*

Carrigan raised three relevant constitutional challenges in the District Court: that the recusal provision impermissibly restricted speech, was overbroad, and vague. *Id.* at 297, 313-24. On appeal, Carrigan presented as the issues for review whether the provision is "unconstitutionally vague," whether it "chill[s] protected political speech," and whether the District Court's order was a prior restraint on speech. A.O.B. 1.[2] This Court agreed with the speech argument, stating that it "need not address" the vagueness challenge. *Carrigan*, 236 P.3d at 619 n.4. The Supreme Court of the United States unanimously reversed, declining to reach right-of-association arguments Carrigan made for the first time in that Court, or his vagueness challenge. *Carrigan*, 131 S. Ct. at 2351.

STANDARD OF REVIEW

To the extent Carrigan asserts facial challenges to the recusal statute, he has articulated questions of law. However, Carrigan's as-applied challenges present mixed questions of law and fact. This Court reviews findings of fact for clear error, and their legal consequences de novo. *Somee v. State*, 124 Nev. ___, 187 P.3d 152, 157-58 (2008).

[2] This brief uses the abbreviations from Carrigan's brief, at Supp. Br. 2-3 n.2.

ARGUMENT

I. The Recusal Provision Is Not Vague, Much Less Unconstitutionally Vague.

Because his conduct plainly falls within the scope of NRS 281A.420, Carrigan cannot show, as he must, that the "statute is vague as applied to the particular facts at issue." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718-19 (2010). And Carrigan's concern about confusion among *hypothetical* candidates and officials is wholly irrelevant, as "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.* at 2719 (quoting *Village of Hoffman Estates v. Flipside*, 455 US 489, 495 (1982)); *accord State v. Castaneda*, 126 Nev. ___, 245 P.3d 550, 556 (2010).[3] Because this Court employs in vagueness challenges a strong working "presumption that statutes are constitutional," Carrigan faces, and has not overcome, the "burden of making a clear showing of invalidity." *Castaneda*, 245 P.3d at 552 (internal quotation marks omitted).

A. The recusal provision gives ample notice of what conduct is prohibited.

Carrigan does not dispute that the four enumerated bases for recusal in NRS 281A.420(8)(a)-(d) are clear and widely used. *See* Supp. Br. 7-8. Carrigan's only vagueness claim is that NRS 281A.420(8)(e), which requires recusal for relationships "substantially similar" to the four "specific" relationships (Supp. Br. 9), is so "hopelessly vague" that "people of 'common intelligence must necessarily guess at its meaning.'" *Id.* at

[3] Despite sprinkling facial arguments throughout his brief, *see* Supp. Br. 1 (asserting that the recusal provision "is unconstitutionally vague"), and relying liberally on facts not present in this case, Carrigan does not even attempt to show—as he must in a facial challenge—that the statute "is void in *all* its applications." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. ___, 217 P.3d 546, 550 (2009) (emphasis added).

8 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Carrigan's assertion is textually mistaken and virtually without support in case law.

"[M]athematical precision is not possible in drafting statutory language"; a law must only "delineate the boundaries of unlawful conduct" by "deem[ing] unlawful" "[s]ome specific conduct . . . so individuals will know what is permissible behavior and what is not." *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 118 Nev. 859, 862, 59 P.3d 477, 481 (2002). Because this Court interprets the ethics laws "in the context of the entire statutory scheme," *Nev. Comm'n on Ethics v. Ballard*, 20 Nev. 862, 866, 102 P.3d 544, 546-47 (2004), subsection 8 must be read in light of subsection 2's prohibition against wielding governmental authority where "the independence of judgment of a reasonable person . . . would be materially affected." NRS 281A.420(2).

The Legislature provided further guidance about this "objective criteri[on]," *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525-26 (1994), by tying the "substantially similar" requirement to the four well-established categories. General terms at the end of a list are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003); *accord Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. ___, 252 P.3d 668, 673 n.4 (2011) ("the general word or phrase will be interpreted to include only persons or things of the same type as those listed"). Rather than sweeping in entirely new types of relationships, subsection 8(e) allows the Commission to address

relationships that implicate the same concerns animating the four categories, such as a relationship with a domestic partner, roommate, or fiancee.[4]

As the Commission and District Court both found, Carrigan's relationship with Vasquez plainly meets this standard. The men had a close, 15-year friendship—a relationship Carrigan conceded was closer than with his own sister. J.A. 75, 136, 286. Vasquez served as Carrigan's campaign manager for three campaigns in a row, including the 2006 effort whose two elections straddled the August 23 meeting. *Id.* at 78, 83-84, 87-88. Carrigan's campaign had extensive business contacts with Vasquez's advertising firm, which received 89 percent of Carrigan's 2006 campaign expenditures. Contrary to Carrigan's suggestion, Supp. Br. 8, the fact that Vasquez provided services at cost arguably only heightens concerns about "independence of judgment," because a "reasonable candidate in [Carrigan's] position" would be eager to continue receiving below-market services in his ongoing election efforts. Carrigan has not suggested that he had another source of at-cost services. If nothing else, the close friendship and business contacts rendered the relationship "substantially similar" to a family member or a "substantial and continuing business relationship." NRS 281A.420(8)(b), (d).

Carrigan's hyperbolic suggestion that subsection (8)(e) is "hopelessly vague" ignores the fact that States and Congress routinely use the phrase "substantially similar" in a range

[4] Carrigan suggests canons of construction are irrelevant to vagueness challenges. *See* Supp. Br. at 9 (suggesting layperson cannot "be expected to have heard of interpretative canons"). But in considering vagueness claims, courts routinely apply such canons. *See, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2929-30, 2932 (2010). And canons merely reflect everyday rules for interpreting language.

of contexts, including criminal prohibitions and areas implicating the First Amendment.[5] Carrigan cites not a single reported decision invalidating this common phrase for vagueness. To the contrary, the federal Courts of Appeals have "unanimously" rejected vagueness challenges to the federal Analogue Act, *United States v. Turcotte*, 405 F.3d 515, 531 (7th Cir. 2005), which imposes severe criminal penalties on transactions in substances whose chemical structure is "substantially similar to" scheduled controlled substances, 21 U.S.C. § 802(32)(A) (2008).

"[P]erfect clarity" has "never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Accordingly, the Supreme Court has rejected vagueness challenges to language far less specific than here. *E.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 568 (1973) (prohibition on taking "active part in political management"); *Colten v. Kentucky*, 407 U.S. 104, 108, 110 (1972) (prohibition on congregating "with intent to cause public inconvenience, annoyance or alarm"). Carrigan's failure to cite on-point case law is striking given the wide range of state and local ethics provisions that require disqualification based

[5] See 2 U.S.C. § 431(23)-(24) (used to define "mass mailing" and "telephone bank" for purposes of campaign-finance regulation); 2 U.S.C. § 1602(8)(B)(xiii) (used to define scope of regulated "lobbying contact[s]"); 11 U.S.C. § 1122(a) (involving bankruptcy plans); 15 U.S.C. § 78*l*(g)(5) (defining class of securities issuers required to register with Securities Exchange Commission); 30 U.S.C. § 921(c)(4) (miners' benefits); IND. CODE § 6-1.1-20-3.6(g)(2) (2010) (providing that after referendum fails, "a substantially similar project" cannot be put to public vote for one year); 705 ILL. COMP. STAT. 405/2-13.1(1)(b)(ii)(E) (2010) (eliminating duty to reunite minor with parent convicted of offense that is "similar and bear[s] substantial relationship to" specified offenses); KAN. STAT. ANN. § 21-36a16 (2011) (unlawful to facilitate commission of enumerated drug offenses "or any substantially similar offense from another jurisdiction").

on language significantly more general than NRS 281A.420(8)(e).[6] And Carrigan's theory would doom the venerable, and until now unquestioned, standard for judicial recusal. *See* Nev. Code of Judicial Conduct, Rule 2.11(A) (2010) ("any proceeding in which the judge's impartiality might reasonably be questioned"); 28 U.S.C. § 455(a) (same).

Remarkably, Carrigan contends that this Court *already decided* his vagueness challenge in an opinion that expressly reserved vagueness as a question the Court "need not address." *Compare* Supp. Br. 5-6, *with Carrigan*, 236 P.3d at 619 n.4.[7] Carrigan relies on the opinion's discussion of overbreadth. But that analysis did not survive Supreme Court review, as it was predicated not only on the proposition that an official's vote is protected speech, but also on the resulting understanding that "strict scrutiny" applies, "demand[ing] a high level of clarity" and "shift[ing] the burden of proof to the government." *Id.* at 622-23 & n.9. This Court also understood Carrigan as pressing a "*facial challenge*," *id.* at 622—a claim since abandoned.[8] Carrigan, not the State, bears the burden to prove vagueness and

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[6] *See, e.g.*, SEATTLE MUN. CODE § 4.16.070(1) (2011) (requiring disqualification where "it could appear to a reasonable person" that an official's impartiality is impaired because of "a personal or business relationship not covered under [a list of enumerated relationships]"); N.J. STAT. ANN. § 40A:9-22.5(d) (2010) ("a direct or indirect financial or personal involvement that might reasonably be expected to impair [their] objectivity or independence of judgment"); R.I. GEN. LAWS § 36-14-5(a) (2011) (requiring disqualification where official has "any interest, financial or otherwise, direct or indirect" that is in "substantial conflict" with the proper discharge of his public duties).

[7] Not one of the five Justices who joined the majority opinion gave any indication of agreeing with the dissent's suggestion that the majority had confused overbreadth and vagueness. *Contra* Supp. Br. 7.

[8] *Compare* Br. for Resp. 21, *Carrigan*, No. 10-568, 131 S. Ct. 2343 ("This is an as-applied challenge because Carrigan's claim and the relief that would follow is limited to him." (internal quotation marks omitted)), *with* Supp. Br. 30 (seeking vacatur of Carrigan's censure).

must overcome a presumption that statutes are valid. Rather than a "high level of clarity," the Legislature need not speak with "mathematical precision," *City of Las Vegas*, 118 Nev. at 864, 59 P.3d at 481, to avoid vagueness.

Carrigan also struggles to downplay the advisory opinion mechanism. As Carrigan knew before the August 23 vote, J.A. 282, a public officer may seek a confidential opinion from the Commission as to "the propriety of [his] . . . future conduct," NRS 281A.440(1), and whether a relationship requires recusal, NRS 281A.460. The Commission issues advisory opinions to "interpret[] the statutory ethical standards and apply the standards to a given set of facts and circumstances." NRS 281A.440(1)-(2). The U.S. Supreme Court has long held the availability of such mechanisms to be critically important to vagueness analysis. *E.g.*, *Letter Carriers*, 413 U.S. at 580 ("It is [] important . . . that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law"); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 & n.7 (1973) (State Personnel Board can "rule in advance on the permissibility of particular conduct").

Carrigan's complaint that a process that *could* take up to 45 days is "not much of an option in the heat of a legislative battle," Supp. Br. 12, does not explain why the process was inadequate here. Carrigan "admit[ted] he had six months lead time before the Lazy 8 application came to a vote," *Carrigan*, 236 P.3d at 631 n.7, and that he knew of the opinion process but chose to consult a lawyer, J.A. 144, despite the Commission's practice of providing informal guidance on a few days' notice. Carrigan's worries about others'

conduct are misplaced in his as-applied challenge. *Humanitarian Law Project*, 130 S. Ct. at 2718-19. His critique that the mechanism is unavailable to an "aspirant to office or prospective volunteer" (Supp. Br. 12) is irrelevant because the recusal law does not impose penalties on them, much less "criminal sanctions" like the sole case Carrigan cites, *see id.* at 13 (quoting *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1976)). Everyone subject to the Commission's (civil) jurisdiction may obtain an advisory opinion.

Carrigan also points to the divergence between the City Attorney's interpretation and the Commission. Supp Br. 9. But the City Attorney's analysis was facially incomplete: It unequivocally stated that "[t]he *only* type of bias which may lead to disqualification . . . must be grounded in facts demonstrating that *the public official* stands to reap either financial or personal gain or loss." Joint App'x at 91-92, *Carrigan*, No. 10-568, 131 S. Ct. 2343 (emphasis added). The City Attorney *completely failed* to analyze the provision at issue here, NRS 281A.420(2)(c), involving commitments in a private capacity to the interests of others. *See* Joint App'x in No. 10-568, at 87 n.1; J.A. 268 (noting omission). Carrigan's complaint about being asked to "second-guess" his lawyer ignores the Commission's decision not to impose any civil penalty because Carrigan's actions were not "willful." J.A. 290; NRS 281A.480(5). Moreover, in drafting the statute, the Legislature made only the *Commission's* advisory opinions—not advice from counsel—a safe harbor. *See* NRS 281A.440(1). Carrigan instead seeks to constitutionalize an advice-of-counsel defense for every civil law. We know of no support for that breathtaking proposition.

Carrigan is mistaken that the Commissioners could not agree on a basis for disqualification and so "declined to specify." Supp. Br. 10. The Commission held

unanimously that Carrigan was disqualified because of his "close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" J.A. 286. He attempts to manufacture disagreement by citing individuals' *initial statements* when first discussing the matter after the close of testimony. *See* J.A. 222 ("[W]e have to talk and think and reason out loud and then ultimately come to a decision.").[9] But if disagreement among *judges* does not even establish "ambiguity," *see Reno v. Koray*, 515 U.S. 50, 64-65 (1995), the differences Carrigan cites (real and imagined) cannot render a statute *unconstitutionally* vague. *See United States v. Jackson*, 968 F.2d 158, 163 (2d Cir. 1992). At bottom, Carrigan seems to suggest a law is unconstitutional unless its text provides perfect clarity to a layperson about any possible factual situation. That exacting test—which would doom volumes of existing law—is simply not required by the Due Process Clause. *See, e.g.*, *City of Las Vegas*, 118 Nev. at 864, 59 P.3d at 481.

Apparently conceding that his conduct ran squarely afoul of the Legislature's intent to require recusal for situations where "a person [who] ran your campaign time, after time, after time, and you had a substantial and continuing relationship," J.A. 285, Carrigan argues that legislative history is irrelevant in vagueness cases. But Carrigan's own authorities

[9] Carrigan's criticism of how the District Court paraphrased the statutory categories, Supp. Br. 10, is a makeweight. Members of a household or relatives under NRS 281A.420(8)(a)-(b) are fairly understood as "personal" relationships, and an employer or business partner, NRS 281A.420(8)(c)-(d), undoubtedly is a "professional" relationship. Carrigan gives no reason to think Justice Alito's hypothetical at oral argument expressed his final view on an issue no Justice addressed in writing. *Cf.* Supp. Br. 11. And because Carrigan's relationship with Vasquez was, at a minimum, substantially similar to a "substantial and continuing business relationship," and by Carrigan's admission closer than that of a sibling, J.A. 286, there is no need to consider whether his relationship with Vasquez was substantially similar to that with a second cousin.

establish the opposite. In *United States v. Harriss*, 347 U.S. 612, 620-23 & n.12 (1954), the Court looked repeatedly to "[t]he legislative history of the Act" to "make[] clear" and "indicate[]" the scope of the statute's sweep, in the course of rejecting a vagueness challenge.[10] This Court takes the same approach. *See, e.g.*, *Sheriff v. Burdg*, 118 Nev. 853, 858, 59 P.3d 484, 487 (2002) (relying on "exhibit" "presented" to "Assembly Committee on Judiciary" in evaluating vagueness challenge to criminal statute).[11]

B. The recusal provision does not authorize arbitrary or discriminatory enforcement.

No ill-advised vagueness argument would be complete without a claim of arbitrary enforcement, and Carrigan does not disappoint. Supp. Br. 13-14. However, Carrigan's halfhearted effort to cast himself as the victim of arbitrary enforcement by the Commission

[10] Carrigan relies heavily on *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), but the Ninth Circuit no longer follows the rule articulated in that 50-year-old decision. *See Info. Providers' Coal. for Def. of First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) ("[t]he legislative history of [47 U.S.C. §] 223(b) . . . make[s] it clear" that the statutory term "indecent" is not unconstitutionally vague). Nor do other circuits. *See United States v. Desurra*, 865 F.2d 651, 653 (5th Cir. 1989) ("[Defendants] cannot complain that the Analogue Act is unconstitutionally vague when the legislative history of the Act discloses that crimes of the sort committed by these defendants were a primary target of the Act."); *United States v. Rybicki*, 354 F.3d 124, 132-34 (2d Cir. 2003) (en banc); *United States v. Salisbury*, 983 F.2d 1369, 1379 (6th Cir. 1993).

[11] Carrigan reads *Gallegos v. State*, 123 Nev. 289, 163 P.3d 456 (2007) exactly backward. There, the operative legal principle was that "when a Nevada statute is modeled after a federal statute, '[i]t must be presumed that the exclusion of [a] provision in the Nevada statute [is] deliberate and [is] intended to provide a different result from that achieved under the federal . . . statute.'" *Id.* at 294, 163 P.3d at 459 (quoting *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1180, 969 P.2d 938, 940 (1998)). The sole evidence this Court cited to justify applying the *Lane* presumption was material from a legislative hearing before the Senate Judiciary Committee. 123 Nev. at 294 & n.16, 163 P.3d at 459 & n.16. On that basis, this Court concluded that the Legislature deliberately chose not to define a particular term, even though it was defined in federal law. *Gallegos* thus supports considering legislative history in a vagueness challenge.

is pure fantasy. As noted, during the debate over subsection 8(e), the Legislature discussed a hypothetical case eerily similar to this one, contrasting an officer's relationship with a one-time campaign volunteer, which would not be cause for recusal, with a "person [who] ran your campaign time, after time, after time," which would be. J.A. 468. That the Commission's censure here follows directly from this legislative history weighs heavily against Carrigan's claim of arbitrary enforcement.

Carrigan's offhand and unsubstantiated claims of "discriminatory application" and "impermissible motive" (Supp. Br. 14) are not credible absent record evidence that the bipartisan Commission has failed to censure someone similarly situated or was guided by some improper purpose. The Commission, however, evenhandedly sanctioned a Lazy 8 *opponent* for his vote at the same August 23 meeting because of an undisclosed business relationship with the Nugget, a competing casino that opposed the Lazy 8 (which the Lazy 8's developer brought to the Commission's attention). *See In re Salerno*, No. 08-05C (Nev. Comm'n on Ethics Dec. 2, 2008), Ex. A. And the Commission's processes, which include a preliminary investigation to ensure charges are well founded, public hearings with live testimony, public deliberations, and written opinions subject to judicial review, are worlds apart from the "arbitrary enforcement" in cases like *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

The U.S. Supreme Court has struck down prohibitions on "'annoying'" or "'indecent' [conduct]—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Humanitarian Law Project*, 130 S. Ct. at 2720. But a statute covering official relationships "substantially similar" to household and

family members, employers, or business associates cannot plausibly be construed as providing "'no standard of conduct . . . at all,'" or inviting recourse to a "purely subjective determination." *Castaneda*, 245 P.3d at 553 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)); J.A. 436 ("a relationship that is as close as family or as close as a business partner") (Hearing on S.B. 478, Mar. 30, 1999).

II. Carrigan Failed to Preserve His Right-of-Association Argument.

Most of Carrigan's brief addresses an alleged First Amendment association right, Supp. Br. 14-30, that he failed to preserve for review.[12] "[F]airness to the defendant, and sound judicial administration," *Five Star Capital Corp. v. Ruby*, 124 Nev. ___, 194 P.3d 709, 715 (2008), bar Carrigan from injecting new arguments at this late date.

[12] Carrigan's association claim may not even be justiciable. Where an agency has statutory jurisdiction to adjudicate claims, "failure to exhaust all available administrative remedies before proceeding in district court . . . renders the controversy nonjusticiable" and unripe for judicial review. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). This Court expressly requires exhaustion for as-applied constitutional claims, which often involve a "factual evaluation" that is "best left to the [agency], which can utilize its specialized skill and knowledge to inquire into the facts of the case." *Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 841, 59 P.3d 474, 477 (2002). Exhaustion allows agencies to "resolve[] disputes without the need for judicial involvement." *Allstate*, 123 Nev. at 571-72, 170 P.3d at 993-94. Before the Commission, Carrigan did not press any association argument related to the recusal provision in NRS 281A.420 (then codified at NRS 281.501 (2003)), in his motion to dismiss or hearing motion. *See* Addendum 2-7; J.A. 209-14. *Cf. City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. ___, 191 P.3d 1175, 1178 n.12 (2008) ("[i]f an affirmative defense is not properly asserted . . . it is waived"). Carrigan's attorney mentioned association in his *closing argument* to the Commission, after the close of testimony. Even then, he invoked association only as to the adequacy of Carrigan's "August 23 disclosure"—involving a different portion of the statute the Commission found Carrigan did not violate, and which is not at issue here. *See* J.A. 220-22, 289. As a result, Carrigan now asks this Court to adjudicate an association argument related to NRS 281A.420(8)(e) without the benefit of relevant fact-finding from the Commission.

Rule of Appellate Procedure 28(a)(4) requires "a statement of the issues presented for review." Rule 28(a)(8)(A) further requires an appellant to set forth "[his] contentions and the reasons for them, with citations to the authorities and parts of the record on which [he] relie[d]." This Court has long deemed waived arguments which an appellant has failed to "cogently argue" in its brief, with appropriate reference to "relevant authority." *See, e.g.*, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Maresca v. State*, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987).

Carrigan's assertion that he put the Nevada courts "fairly [] on notice" of his association claim, Supp. Br. 28, is contrary to both the District Court and this Court's expressed understanding of his briefs—surely a more natural and credible indication of the meaning of his arguments than Carrigan's cherry-picking of isolated phrases from discussions of free speech, overbreadth, and vagueness claims. The District Court understood Carrigan to have raised only three constitutional challenges to the relevant provisions, none of which involved association. *See* J.A. 385-86; *Carrigan*, 236 P.3d at 619. Carrigan's briefs supported that view. His "[i]ssues [p]resented" made no mention of association. P.O.B. 4-5. Apart from passing references to association in the overbreadth section of his opening brief, *see* Supp. Br. at 29 (citing P.O.B. 15, 17), Carrigan points to arguments made for the first time in his reply, *id.* at 29 (citing P.R.B. 8, 11), which the District Court either did not recognize as distinct arguments, or declined to consider as untimely. *See Weaver v. State*, 121 Nev. 494, 502 & n.13, 117 P.3d 193, 198-99 & n.13 (2005) (declining to consider argument made "only in [a] reply brief").

This Court also gave no indication of understanding Carrigan to have pressed or preserved an association claim, explaining that he had "challenge[d] the constitutionality of the Commission's censure on several grounds: overbreadth, vagueness, and unconstitutional prior restraint on speech." *Carrigan*, 236 P.3d at 619. Having sustained his "overbreadth challenge," this Court enumerated the remaining claims as "vagueness and prior restraint." *Id.* at 619 n.4. Carrigan's briefs support this understanding. In his Statement of the Issues required by Rule 28(a)(4), Carrigan made no mention whatsoever of association. *See* A.O.B. 1. His briefing focused principally on speech claims. *Id.* at 5-6; *id.* at 12 ("freedom of speech guarantee"); *id.* at 13 ("Carrigan's argument is that . . . [the provisions] extend[] to, and impermissibly chill[], otherwise protected core political speech."); *id.* at 19-23 ("prior restraint" on "speech"). Carrigan also argued that the recusal provision was facially overbroad in light of its "chilling effect on free expression." *Id.* at 15. Although Carrigan cited in passing authorities that touch upon associational rights, he did so in the context of an overbreadth challenge that was focused on speech. *See id.* at 15-19 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Woodland Hills Residents Ass'n, Inc. v. City Council*, 609 P.2d 1029 (Cal. 1980)).[13]

Don't take our word for it: Carrigan's own Brief in Opposition to certiorari in the U.S. Supreme Court omitted any reference to a "right of association" claim, stating that he "raised *three* distinct constitutional challenges": a free speech claim, a vagueness claims,

[13] A passing reference to association in the *conclusion* of Carrigan's appellant's brief, *see* Supp. Br. at 29 (quoting A.O.B. 23), cannot remedy a failure to present and argue the issue. And mentioning association in support of a *vagueness* challenge, *see* Supp. Br. 29 (citing A.O.B. 9), is not a freestanding association claim.

and a "prior restraint" on speech claim. Br. in Opp'n at 24-25, *Carrigan*, No. 10-568, 131 S. Ct. 2343 (emphasis added). Not until his merits brief in the U.S. Supreme Court did Carrigan make the extensive association arguments now found in his supplemental brief. The sharp contrast between those substantial arguments, and the few isolated references in Carrigan's prior briefing in the Nevada courts, only confirms that he failed to preserve the claim.[14]

III. The Recusal Provision Does Not Infringe on Associational Rights.

Carrigan's association claim in any event fails. Focusing on the rights of parties not before the Court, Carrigan asserts that the nondiscriminatory recusal provision imposes "severe" burdens, such as on a First Amendment right of Vasquez's *client* to "engage the entire [City Council]" (Supp. Br. 19) through its lobbyist of choice. And Carrigan envisions burdens on the "relationship" between hypothetical "volunteers" and candidates. *Id.* 17-21. He would subject the provision to strict or intermediate scrutiny.

Not so. This case involves a straightforward disqualification based on an unexceptional combination of private interests and personal and business relationships. Vasquez's interest in the casino—the basis for recusal—was private and pecuniary, not

[14] In applying claim preclusion principles to foreclose claims that "could have been asserted" earlier, this Court has observed that "'fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end,' . . . 'even though the substantive issues have not been [adjudicated], especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding.'" *Five Star*, 124 Nev. ___, 194 P.3d at 715 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982)); *cf. Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 171, 400 P.2d 621, 625 (1965) ("There must be some end to the litigation, and appellant may not proceed to advance one theory after another . . . ."). These concerns apply strongly here.

political. His relationship with Carrigan did not center on shared views about the Lazy 8; indeed, Vasquez apparently had no views about that matter until its developer put him on a $10,000-a-month retainer. J.A. 190. Nor was Carrigan's relationship with Vasquez, a professional political consultant, *id.* at 77, typical of candidate and "campaign volunteer." Vasquez managed *three* successful campaigns (including one during the Lazy 8 vote) and provided Carrigan, at cost and below-market-price, the services of his advertising and printing firms. The recusal statute should be upheld under reasonableness review because it advances an important governmental interest and does not burden substantially more association than necessary. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428 (1992).

A. The recusal provision imposes no material burden on rights of association and petitioning.

Carrigan contends that subsection 8(e) imposes "severe burdens" (Supp. Br. 14) on "the relationship between the legislator/candidate and her campaign volunteers," and on volunteers' right to petition government, *id.* at 15, 18. He is mistaken.

1 *The censure was not "based on" a political relationship.*

Whatever modest plausibility Carrigan's arguments have depends on distorting the statute and the facts of this case. Section 8(e) does not, as Carrigan claims, "take[] aim" at "political relationship[s]." Supp. Br. 14, 17. Nor does it treat political loyalty "as a new-fangled sort of corruption," (*id.* at 25) or require disqualification whenever "a former campaign manager" or "volunteer[]" has an interest that comes before the public official, *id.* at 20. It is, rather, a neutral law that requires recusal for relationships "substantially similar" to four ongoing relationships that Carrigan concedes are like those covered in "standard

[recusal] statutes"—"relationship[s] that [are] as close as family or as close as a business partner." *Id.* at 4; J.A. 436.

Notwithstanding Carrigan's selective citation of the record, the Commission's censure rested on specific findings of fact that Carrigan and Vasquez had a "close, substantial and continuing . . . friendship," J.A. 280, and that "Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three of his political campaigns," *id.* at 281. Consistent with the Legislature's intent, the Commission rejected the idea that an official's mere relationship with "someone who had previously worked on [his] campaign" requires recusal. *Id.* at 285.

Rather, the Commission's analysis and unanimous conclusion focused on the longstanding friendship between the two men, the existence of an ongoing business relationship, and their resulting financial interests. The Commission expressly rejected Carrigan's "narrow interpretation" of the statutory term "business relationship," concluding that such a relationship may exist even if "money is [not] made." *Id.* at 285-86. Notwithstanding "at-cost or pass-through" payment arrangements, the Commission observed that "Vasquez and his companies provided public relations and advertising services to Councilman Carrigan." *Id.* at 286. Those factors, combined with Vasquez's role as Carrigan's "close personal friend[] [and] confidant" and three-time campaign manager meant the relationship "equate[d] to a 'substantially similar' relationship" to those

enumerated in the statute: "a close personal friendship, akin to a relationship to a family member," and a "substantial and continuing business relationship." *Id.*[15]

As to Carrigan's suggestion that Vasquez worked for Carrigan to further "policies he favors," Supp. Br. 18, the record gives no indication that Vasquez supported Carrigan because of his position on the Lazy 8 project or even had any view on it until its developer hired him and he gained a financial interest. Rather, Carrigan admits that Vasquez supported his candidacy *without regard to* issue positions. A.O.B. 17.

Carrigan's heavy reliance on Justice Kennedy's concurring opinion in *Carrigan*, 131 S. Ct. at 2352, is misplaced. *See* Supp. Br. 15. The factual basis for Justice Kennedy's discussion of *potential* constitutional concerns is lacking here. Not one of Justice Kennedy's hypothetical "examples" involved recusal based on a public official's *business* relationship or financial interests. *See Carrigan*, 131 S. Ct. at 2352; *see also id.* (concern about addressing association "on this record"). More importantly, Justice Kennedy acknowledged that his reading of the statute was not the "necessary one," finding it less than "apparent" how the law applied to his examples. *Id.* at 2352-53. That statement reflects that, unlike the U.S. Supreme Court, for which "the words of [Nevada's] highest court

[15] In their initial deliberations, several individual Commissioners specifically focused on the presence of business ties. *See* J.A. 228, 249 (finding a "substantial and continuing business relationship" or one "substantially similar" because "business is business") (Commissioner Jenkins); *id.* at 253 (finding a "continuing business relationship, whether there's money exchanged or not") (Commissioner Cashman); *id.* at 254 (finding a "substantial and continuing business relationship" because of "the exchanging of business-type activities," "checks going back and forth," and "money exchang[ing] hands") (Vice Chairman Hutchison).

[would be] the words of the statute," *NAACP v. Button*, 371 U.S. 415, 432 (1963), this Court may construe the recusal statute to avoid constitutional concerns.[16]

2 *The recusal provision does not burden associational rights.*

Likely because the facts of this case do not support his constitutional claims, Carrigan speculates about burdens to hypothetical "campaign volunteer[s]" and "candidate[s]." Supp. Br. 17-21. These concerns are irrelevant in Carrigan's as-applied challenge, and in any case disappear on a closer look.

Carrigan insists that disqualification for political relationships is a particular "theme" (Supp. Br. 16) of the Commission's, citing one decade-old decision involving a since-superseded version of the statute. *See id.* at 16 (citing *In re Gates*, Nos. 97-54 et al. (Nev.

[16] Carrigan is mistaken in asserting that no other State ethics authorities have required recusal where a relationship involved politics. Supp. Br. 4. Relationships otherwise covered by generally applicable recusal requirements are not exempt because they involve politics. Rhode Island, for instance, requires recusal where an official has "any interest, financial or otherwise, direct or indirect" that is "in substantial conflict with the proper discharge of [an official's] duties," including where a "business associate" may have a direct monetary gain or loss. R.I. GEN. LAWS § 36-14-5(a), -7(a) (2011). The Rhode Island Ethics Commission has applied those provisions to require a Zoning Board member who was also the Vice-Chairman of a Democratic Town Committee to recuse from matters in which the Chairman of that Committee acted as an attorney. The Commission explained that "fellow officer[s]" of the political group qualified as "business associate[s]" because they "direct the [group's] financial objectives." *In re Giorgio*, Advisory Op. No. 2004-1 (R.I. Ethics Comm'n 2004) (available at http://www.ethics.ri.gov/advisory/ individual/2004/2004-001.htm). *See also In re Perez*, Advisory Op. No. 2001-64 (R.I. Ethics Comm'n 2001) (requiring member of a Board of Canvassers to recuse from any matter involving the mayoral candidate whose campaign that member was managing) (available at http://www.ethics.ri.gov/advisory /individual/2001/2001-064.htm). New Jersey similarly prohibits local officials from voting on a matter that benefits a "close friend in a non-financial way." *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. Ct. App. Div. 2006) (quoting *Wyzykowski v. Rizas*, 626 A.2d 406, 414 (N.J. 1993)). That provision has been applied to disqualify an official because of close friendship and "political allegiance." *Ward v. Zoning Bd. of Adjustment*, No. BER-L-5354-08, 2009 WL 1498705 (N.J. Super. Ct. Law Div. May 15, 2009).

Comm'n on Ethics, Aug. 26, 1998) (*available at* http://ethics.nv.gov)). There, the Commission censured members of a county government body for promoting friends' applications for airport concessions for which they lacked relevant business experience. The decision says little about how the Commission construes current law because, as the opinion emphasized, the Legislature had not yet added the language at issue here "defin[ing] th[e] types of interpersonal interests or relationships that would trigger disclosure and abstention." If anything, the opinion shows that the political nature of *some* of the relationships was purely incidental, emphasizing the "many facets of their lives" in which officials were connected to the would-be contractors, including being "best friends" and assisting on a business matter; some had *no* political ties.

While political relationships is a "theme" of Carrigan's brief, two cases in a *decade* (only one involving statutory language still in force)—out of hundreds of advisory opinions—undercuts the plausibility of Carrigan's fevered hypotheticals. Supp. Br. 17-21. Indeed, the Commission has carefully declined even to exercise jurisdiction over complaints that implicate "the relationships between legislators and lobbyists" or "campaign practices," rather than an official's commitment in a private capacity to the interests of others. *See In re Interim Finance Committee*, No. 92-07 (Nev. Comm'n on Ethics Nov. 17, 1992) (available at http://www.ethics.nv.gov). Thus, in a decade of actual practice, the narrow recusal provision has not caused Carrigan's hypothesized string of recusals. Carrigan cites no case in which the transient (and completed) affiliation of an ordinary campaign volunteer was treated as substantially similar to "a relationship to a family member" or a "substantial and continuing business relationship." J.A. 286. The Commission explained that recusal is

not supported in the mere case of "a[n official] and someone who had worked on her campaign," *id.* at 285, belying Carrigan's concern for "[t]he very act of volunteering," Supp. Br. 19.

Also meritless is Carrigan's worry that recusal would be triggered when a person in a covered relationship supports official action for *policy* reasons, preventing officials from "voting on an issue that is important to [their] political allies and supporters," such as legislation favored by "the NRA or NAACP." Supp. Br. 26. The recusal provision applies only to an official's commitment "in a *private* capacity" to "the *interests* of others," NRS 281A.420(2)(c) (emphasis added), indicating that only (typically pecuniary) private interests are covered. Moreover, the statute's mandatory presumption all but eliminates the need for recusal when the benefit or detriment to the interested party "is not greater than that accruing to any other member of the general business, profession, occupation or group" affected by the matter, NRS 281A.420(2)—which is usually the case when a person supports legislation for policy reasons.

Recusal here had nothing to do with ordinary democratic "representation" or accountability—*i.e.*, that an elected official who "'favor[s] certain policies'" would "'favor the voters and contributors who support those policies.'" Supp. Br. 17, 25 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010)). Vasquez's private interest as a paid lobbyist was utterly unlike the situation of Carrigan's constituents, whose support for his candidacy was likely influenced by his position on the casino, and for whom "the resulting benefit or detriment accruing" from the casino's approval was "not greater than that accruing to any

other member" of the public (so that their interests would not support Carrigan's recusal). NRS 281A.420(2).

Carrigan's assertion that subsection 8(e) forces "volunteers" to "check [their] right to petition government at the campaign door," Supp. Br. 19, is simply wrong. When Vasquez appeared before the City Council as a paid advocate, his *client* was the entity petitioning. Even if this Court were concerned about the "right" of that *fourth* party to petition through the advocate of its choice in this as-applied challenge, it would not be infringed; Vasquez could still appear. The only "burden" Carrigan can manufacture is to the developer's "right to engage *the entire legislature* on a vote." *Id.* (emphasis added). But we know of no such "right." A legislator's spouse, relatives, and business associates certainly do not enjoy it. And such a right is implicated only when a volunteer has a close, *ongoing* relationship, and a distinct private interest in the matter being decided. Nor does the provision "penalize[]" volunteers' involvement (*id.* at 21), any more than it does marriage, joining a household, or being someone's employee.

On a halfway realistic view of the statute's negligible burdens, Carrigan's claim collapses. The statute falls far short of what the U.S. Supreme Court has held to constitute a violation of the right of association. That Court upheld the Hatch Act's broad-ranging *direct* prohibitions on government employees' participation in political activity. *Letter Carriers*, 413 U.S. at 567. Nevada's recusal provision, like every other, regulates the exercise of official government powers, not campaigns or elections. Without any evidence from the decade the law has been in effect, Carrigan hypothesizes that it incidentally

constrains the activities of a small number of individuals who have especially close relationships to legislators and private interests in matters before them.

While Carrigan cites the truism that the First Amendment precludes the government from "accomplishing indirectly" what it cannot do directly, Supp. Br. 22, the U.S. Supreme Court has never held that incidental effects as indirect and tenuous as those imagined here warrant heightened scrutiny. *E.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997) (upholding election regulation against association challenge, noting that statute did not "directly preclude[e] minor political parties from developing and organizing"); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 458 (2008) (upholding primary election regulation against association challenge, noting that statute did not directly control party's choice of nominee).[17]

3 *The recusal provision is subject to reasonableness review under the standard of* Burdick v. Takushi.

The U.S. Supreme Court traditionally has not applied even intermediate scrutiny to neutral regulations of elections, because of the deference owed States on matters of self-government. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005). They are instead subject to review for reasonableness under the standard of *Burdick v. Takushi*, 504 U.S. 428 (1992).

[17] *Davis v. FEC*, 554 U.S. 724 (2008), is not to the contrary. *Cf.* Supp. Br. 22-23. There, the Court held that an "unprecedented" penalty subjecting self-funding candidates to "discriminatory fundraising limitations," resulting in "fundraising advantages for opponents in the competitive context of electoral politics" imposed a "substantial burden." *Davis*, 554 U.S. at 738-40. The Court emphasized "the fundamental nature of the right to spend personal funds for campaign speech." *Id.* at 738. Nevada's recusal statute, by contrast, is a "generally applicable conflict-of-interest recusal rule" deeply rooted in tradition and history, *Carrigan*, 131 S. Ct. at 2348-51, that regulates evenhandedly the exercise of government authority by elected officials, creating no "discriminatory" incidental effects on "the competitive context of electoral politics."

Nevada's recusal provision is a core act of self-government, *see Gregory v. Ashcroft*, 501 U.S. 452, 462-463 (1991), that should not be invalidated to eliminate hypothetical and trivial barriers to campaign participation.

Application of strict scrutiny to the recusal statute would impose a "strong presumption of invalidity," and would "readily, and almost always, result[] in invalidation." *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion). That standard imposes grave burdens on the Legislature and local governments even when laws are upheld, requiring them to "show the existence of [a compelling] interest," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), and that the rule is narrowly tailored. Governments must develop an evidentiary record that clearly shows the necessity of their regulation, without the benefit of deference usually afforded legislative fact determinations. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818-19 (2000). And governments must demonstrate that the rules address existing, not anticipated, harms. *Button*, 371 U.S. at 438.

Applying intermediate scrutiny would also make constitutional challenges easy to bring. Even if recusal provisions are ordinarily upheld, routine judicial intervention in self-regulatory legislative processes is "inconsistent with sound principles of . . . separation of powers," *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006), and imposes significant systematic costs, *see id.* at 449 (Breyer, J., dissenting). Under intermediate scrutiny, governments will routinely be haled into court to "demonstrate that the recited harms are real, not merely conjectural," that "the regulation will in fact alleviate those harms in a direct and material way," and that the regulation does not "'burden substantially more [association] than is

necessary to further the government's legitimate interests.'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-665 (1994) (plurality opinion) (quoting *Ward*, 491 U.S. at 799). A sanctioned official could claim a law was underinclusive (*see* Supp. Br. 26-28) for compelling recusal where an adult sibling's or brother-in-law's interests are at issue, but not where (as here) the official's personal and financial relationship is closer but the third party is a nonrelative.

B. The recusal provision easily satisfies the First Amendment.

1 *Nevada has a compelling interest in promoting the integrity and impartiality of public officers.*

Carrigan concedes that "promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law." *Carrigan*, 236 P.3d at 623; Supp. Br. 24. Carrigan argues that Nevada has no legitimate interest in requiring recusal based on "political loyalty." Supp. Br. 24. But that was not the basis for the Commission's action, and recusal is not required for garden-variety campaign relationships. Carrigan's complaint that he had no direct "economic interest" in the Lazy 8 disregards the Legislature's judgment that certain "commitment[s] in a private capacity to the interests of others," NRS 281A.420(2), raise sufficient objectivity concerns to require recusal.

2 *The recusal provision is not underinclusive or overbroad.*

Even without subsection 8, subsection 2(c)'s basic prohibition against wielding governmental authority where "the independence of judgment of a reasonable person"

would be affected by a "commitment in a private capacity to the interests of others" is no more open-ended than many provisions the U.S. Supreme Court has upheld against First Amendment challenge. *See, e.g.*, *Arnett v. Kennedy*, 416 U.S. 134, 158-59 (1974) (plurality opinion) ("such cause as will promote the efficiency of the service"); *Broadrick*, 413 U.S. at 606 ("tak[ing] part in the management or affairs of any political party or in any political campaign"). Carrigan suggests the provision is underinclusive because the "Commission has never indicated" whether relationships with other "political supporters" would require recusal. Supp. Br. 27. But the Ethics in Government Law only seeks to address the same four types of relationships as every other recusal statute. The Commission does not have to transform NRS 281A.420 into a comprehensive code of campaign finance regulation to regulate *business* relationships.

The only overbreadth Carrigan has identified is that, he says, the State's interest would be achieved by requiring disclosure. But disclosure alone would not serve Nevada's stated interests. For officeholders with multiyear terms, distant re-election is an unreliable deterrent, particularly for officials who are term limited or choose not to run again. Constituents may re-elect a legislator notwithstanding a betrayal of the public trust, if he runs against an unpopular or unknown opponent, if voters believe seniority or ideology outweigh the conflict of interest, or if they agree with their representative's vote despite his reason for casting it. And the State's interest in the integrity of the office does not belong just to a representative's own constituents, but to *all* the people of the State. *Cf.* NEV. CONST. art. 15, § 2. Without recusal, a council member could disclose that he was married to a permit applicant and then cast the deciding vote to issue the permit. Such open self-

dealing undermines public confidence as much as hidden motives, but disclosure targets only the latter. Nevada reasonably concluded that a "complete prohibition" is necessary to advance its interest in ensuring that public offices are "held for the sole benefit of the people." NRS 281A.020(1) (2009).[18] Under intermediate scrutiny, there is no "least restrictive alternative" requirement and courts may not second-guess the legislature about "how much protection [of the government interest] is wise." *Ward*, 491 U.S. at 798. Disclosure alone would serve Nevada's interests "less well" than recusal, and thus is not constitutionally required. *Id.* at 800.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's ruling and uphold the Commission's censure of Mr. Carrigan.

Dated: September 28, 2011

Respectfully submitted,

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[18] Carrigan objects to an interpretation of NRS 281A.420 advanced in the Nevada Legislature's amicus brief in the Supreme Court of the United States. Supp. Br. 27. Even assuming that interpretation differs from the plain statutory text, the Legislature has delegated authority *to the Commission* to construe and administer that statute.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate 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 Rule 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.

September 28, 2011

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Nevada Rules of Appellate Procedure, I hereby certify that on this 28th day of September, 2011, a true and correct copy of the SUPPLEMENTAL BRIEF FOR RESPONDENT THE COMMISSION ON ETHICS THE STATE OF NEVADA and ADDENDUM, was electronically served pursuant to Rule 9 of the Nevada Electronic Filing Rules on the following:

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