IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

HONORABLE CATHERINE RAMSEY NORTH LAS VEGAS MUNICIPAL JUDGE,

Appellant,

vs. **No. 68450**

THE CITY OF NORTH LAS VEGAS; BARBARA A. ANDOLINA, CITY CLERK OF NORTH LAS VEGAS; BETTY HAMILTON; MICHAEL WILLIAM MORENO; AND BOB BORGENSEN, INDIVIDUALLY AND AS MEMBERS OF "REMOVE RAMSEY NOW",

Respondents.

_____/

AMICUS CURIAE BRIEF OF THE NEVADA JUDGES OF LIMITED JURISDICTION

(In Support of Appellant's Opening Brief)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock:

None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg

3. If litigant is using a pseudonym, the litigant's true name:

Not applicable.

DATED: August 10, 2015

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AMICUS INTEREST AND AUTHORITY TO FILE BRIEF

The Nevada Judges of Limited Jurisdiction (NJLJ) is a voluntary association of Justice Court and Municipal Court judges from throughout Nevada. The NJLJ's mission is to provide the highest quality of service by limited jurisdiction judges in Nevada. The organization strives to ensure that limited jurisdiction judges practice in a fair and efficient manner—resolving disputes by interpreting and applying the law correctly, and by being consistent and impartial in protecting the rights and liberties of those who appear in our courts. The NJLJ works to strengthen and protect the rights of individuals, preserve communities, and inspire public confidence in the judiciary.

The NJLJ also provides education and lobbying activities for limited jurisdiction judges. The organization meets at least twice yearly for judicial education; and the organization participates in the Nevada Judicial Leadership Summit held every four years.

The NJLJ believes the present case will have a serious impact on judges and on the sound administration of justice throughout Nevada, including judges in limited jurisdiction courts. This appeal involves an issue of significant importance to judges regarding the availability of recall elections to remove sitting judges from office. This important issue deals with the interpretation and application of constitutional provisions dealing with judges, and the extent to which constitutional provisions conflict with each other and must be harmonized.[1]

The NJLJ and other associations of judges, such as the Nevada District Judges' Association, have filed amicus briefs in cases where this court's decision might have a material impact on judges and on the sound administration of justice. E.g., *City of Sparks v. Sparks Mun. Court,* 129 Nev. __, 302 P.3d 1118 (2013);

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[1] The positions taken in this brief are those of the NJLJ, but not necessarily those of all individual members of the NJLJ.

Landreth v. Malik, 127 Nev. __, 251 P.3d 163 (2011); *In re Mosley*, 120 Nev. 908, 102 P.3d 555 (2004).

A motion seeking permission to file this brief is being filed concurrently with this brief.

ARGUMENT

The three branches of government established by the Nevada Constitution are intended to be co-equal. See Nev. Const. art. 3, § 1; *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (recognizing that Nevada Constitution establishes that "each branch of government is considered to be co-equal").

Although members of the three branches of Nevada government are intended to be co-equal, constitutional provisions—particularly as interpreted by the district court in this case—provide for unequal methods of removing members of the three branches from office. Elected members of the Executive Branch and members of the Legislature may be removed from office before expiration of their terms by only two methods: impeachment[2] and recall.[3] Under the district court's decision in the present case, members of the Judicial Branch may be removed from office by three methods: impeachment, recall and removal by the Nevada Judicial Discipline Commission.[4]

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[2] See e.g., Nev. Const. art. 4, § 6 (Legislature may expel a member); Nev. Const. art. 5, § 18 (Governor may be impeached); Nev. Const. art. 7, § 2 (Governor and other state officers may be impeached).

[3] See Nev. Const. art. 2, § 9 (recall of public officers).

[4] Actually, Nevada appellate judges and district judges may be removed from office by yet another method, namely, removal from office by the Legislature for "any reasonable cause . . . which may or may not be sufficient grounds for impeachment." Nev. Const. art. 7, § 3. Thus, under the district court's interpretation of the Constitution in this case, there would be four methods of removing Nevada appellate and district judges from office.

Unlike elected executive officers or legislators, judges are not politicians. Judges are bound by strict ethical limitations on what they can say to the public, when they can campaign for election, and when they can raise money for an election. They cannot comment on pending cases or on their decisions, and as such, they are severely limited in defending themselves against unjustified attacks by the media, by citizen organizations and by general members of the public.[5] Therefore, judges are arguably the most vulnerable elected officials in the three branches of government.

A. Rules of interpretation

The Commission on Judicial Discipline (the Commission) was added to the Nevada Constitution in 1976 as § 21 of Article 6. Prior to that time, a judge could be removed from office by impeachment under Article 7 or by recall under Article 2. When the Commission was created by the Constitution, the Commission was given the power to remove a judge from office. Nev. Const. art. 6, § 21(1). This power, however, was expressly stated to be "in addition to the provision of Article 7 for impeachment." *Id.* (emphasis added). The new provision in the Constitution did not state that the Commission's power would be in addition to the provision of Article 2 for recall.

Judge Ramsey's writ petition—which this court is now treating as the opening brief for this appeal—analyzes rules of interpretation applicable in this situation. Specifically, the petition discusses the rule of interpretation under which the inclusion of one thing requires the exclusion of another which would logically have been considered at the time. Pet. pp. 26-28.

The NJLJ hereby joins in Judge Ramsey's analysis of the rules of interpretation dealing with the Commission's powers. We respectfully contend

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[5] A judge's right to make statements about pending cases is severely limited. Nev. Code of Judicial Conduct, Canon 4.1(A)(12)-(13).

that if the Constitution's 1976 amendment creating the Commission had intended the new Commission's removal power to be "in addition to the provisions of Article 2 for recall and Article 7 for impeachment," the Constitution's language creating the new Commission could have easily and clearly said so. But it did not. Instead, the Constitution's amendment creating the Commission was more limited. It only provided that the Commission's power to remove a judge would be "in addition to the provision of Article 7 for impeachment." (Emphasis added.)

Accordingly, the NJLJ agrees with Judge Ramsey's contention that the Constitution must be interpreted in a manner that reflects the limitation in Article 6, § 21(1), namely, that the Commission's power to remove a judge is in addition to Article 7 impeachment, and only Article 7 impeachment.

B. Public policy considerations for interpreting Nevada Constitution, and the need for an independent judiciary

This court appropriately considers public policy in interpreting the Nevada Constitution. See *Landreth*, 127 Nev. at __, 251 P.3d at 166. The NJLJ contends that in evaluating Article 6, § 21, the court should give serious consideration to important public policy implications of the court's decision. Specifically, we contend that protecting judicial independence should be a primary consideration in this court's interpretation of the Constitution in this appeal. This critical public policy is reflected in the Preamble to the Nevada Code of Judicial Conduct, which provides that "[a]n independent, fair and impartial judiciary is indispensable to our system of justice." The Nevada Legislature recognizes this public policy in NRS 1.462, which deals with the Commission, and which states that proceedings before the Commission are "designed to preserve an independent and honorable judiciary."

Judges are already subject to midterm removal from office by impeachment or by the Commission, and judges are subject to end-of-term removal from office

by the voters in a re-election campaign. These three methods provide more than enough survival pressure on judges. An additional method of midterm removal from office, namely, a recall election, provides another unnecessary and unwarranted layer of pressure on judges, which will erode judicial independence. Indeed, a judge could be subjected to multiple attempts at recall during a single term of office, creating even more pressure on the judge and more erosion of judicial independence.

Ethics rules absolutely prohibit judges from being swayed by public clamor or fear of criticism. Nev. Code of Judicial Conduct, Canon 2.4(A). "An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family." Canon 2.4 Commentary. "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." *Id.*

If a judge is assigned to a politically sensitive case, or to a case that involves issues of significant public and social concerns, the judge might be concerned about the fallout from an unpopular decision. But the judge cannot sidestep the case and refuse to take it. "A judge shall hear and decide matters assigned to the judge, except when disqualification is required [by law]." Nev. Code of Judicial Conduct, Canon 2.7.

Canon 2.7 is a reflection of Nevada case law, which holds that "a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification." *Ivey v. District Court*, 129 Nev. __, 299 P.3d 354, 358 (2013) quoting *Millen v. District Court*, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006). Thus, even if a judge believes voluntary recusal is appropriate due to a challenge against the judge based upon bias or prejudice, the judge nevertheless must reject

recusal in the absence of a compelling legal ground. *Ham v. District Court*, 93 Nev. 409, 415-16, 566 P.2d 420, 424 (1977).

In *Ham*, a party requested the trial judge to disqualify himself voluntarily, based upon a claim of bias and prejudice. Although the judge denied any bias or prejudice, he nevertheless recused himself, apparently to avoid any appearance of impropriety. The *Ham* court issued a writ of prohibition, preventing the judge from voluntarily disqualifying himself. The court held:

> We find it incumbent as an obligation attendant to the performance of judicial duties and responsibilities that a judge should continue to serve in a case unless there exists certain circumstances or facts which would, for any number of reasons, necessitate disqualification so that the ends of justice would more fairly and impartially be served for all parties concerned. A trial judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary.

Id. at 415, 566 P.2d at 424.

Accordingly, when a judge receives a highly controversial case, with significant public interest and with a high potential for criticism, the judge cannot avoid the issues and decline to take the case. Nor can the judge allow the potential for public clamor or criticism to influence the judge's decision. Judges are therefore powerless in avoiding public criticism in controversial cases.

1. Court decisions preserving judicial independence

Courts have always been zealous protectors of judicial independence, recognizing myriad ways in which judicial independence can be compromised. Judicial selection, retention and removal methods can—if allowed to be abused—constitute sources of potential erosion of judicial independence.

"The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992).

Having judges on the bench whose decisions are free of political influence and who are able to vote their conscience is greatly to be desired, and should be encouraged. *Morial v. Jud. Commn. of State of La.*, 438 F. Supp. 599, 605 (E.D. La. 1977) reversed on other grounds in 565 F.2d 295 (5th Cir. 1977). "The public is the ultimate beneficiary of a fearless and independent judiciary, for a timid and subservient judiciary will be an uncertain guarantor of fundamental rights." *DePascale v. State*, 47 A.3d 690, 693 (N.J. 2012).

"[T]he compelling state interest purportedly served by [court rules] is to preserve judicial independence, that is, the ability of judges to make their decisions free of the control or influence of other persons or entities." *Spargo v. New York State Commn. on Jud. Conduct*, 244 F. Supp.2d 72, 88 (N.D.N.Y. 2003) vacated on other grounds in 351 F.3d 65, 2003 WL 22889369 (2d Cir. 2003).

The judiciary's core function is the resolution of cases or controversies. Because confidence in the disinterested character of judicatory functions is central to the judiciary's effectiveness, judges must remain free of external influences, and thereby be allowed to act and be perceived as acting in a neutral and impartial manner. *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1263 (9th Cir. 1988) cert. granted, judgment vacated on other grounds in *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989), quoting Frankfurter, *Advisory Opinions,* 1 Encyclopedia of the Social Sciences 475, 478 (1930).

Judges should enjoy the freedom to render decisions—sometimes unpopular decisions—without fear that their livelihood will be subject to political forces or outside reprisal. *Beer v. United States*, 696 F.3d 1174, 1184 (Fed. Cir. 2012). In this regard, judges must be able to settle disputes by addressing the issues based upon the law and the constitution, without fear of retribution if their decisions are unpopular. *People ex rel. N.R.*, 139 P.3d 671, 681 (Colo. 2006). It is "the genius of our government" that courts are independent and free of influence or interference from any extraneous source. *Id.*

> It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. *Such would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice.* These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national polity.

Id. (emphasis in original).

Judicial officers must fulfill their obligation to uphold constitutional and statutory rights of litigants before the court, notwithstanding that such decisions may be unpopular with the community. *In re Kinsey*, 842 So.2d 77, 89 (Fla. 2003). "This is fundamental to judicial independence." *Id.*

In *Matter of Duckman*, 92 N.Y.2d 141 (N.Y. 1998), the New York Court of Appeals dealt with discipline of a trial judge. Justice Titone's dissent contained an appropriate warning of the dangers to the judiciary—and to society as a whole—when a judge's unpopular decision results in criticism by public officials. "Judges whose rulings displease those public officials may find themselves singled out for exceptional, and possibly ruinous, scrutiny." *Id.* at 157. This "strikes at the heart

of the notion of judicial independence which is so critical to our tripartite system of government." *Id.* As Justice Titone further recognized:

> Our system of laws and the public's confidence in the judiciary rest in large measure on the notion that our Judges are free to rule on the issues before them without fear of retaliatory removal. Without that freedom, there is no assurance that the choices Judges make in situations often involving unpopular alternatives have the necessary level of integrity. There are few among us who have the courage and fortitude to take judicial stands at the risk of public humiliation and loss of office.

Id. at 160-61 (citations omitted).

Judicial independence is negatively impacted when a judge must consider potential public reaction to a decision that might be viewed as unpopular. In *Wagner v. Milwaukee County Election Com'n*, 666 N.W.2d 816 (Wis. 2003), the court discussed debate nearly 170 years ago at the State of Wisconsin's constitutional convention. One prominent member of the convention observed that when a judge faces election challenges based upon decisions on the bench, the judge ceases to be a representative of truth and justice; instead, the judge the becomes a representative of popular judgment, and the judge "will look forth to mark the blowing of the popular breeze and will steer the course of public justice by the popular current." 666 N.W.2d at 828.

2. Legal scholars urging judicial independence

Courts are not alone in recognizing the importance of judicial decisions without influence by popular pressure. Legal scholars also recognize this vital part of American jurisprudence. As one author observed, there are several facets of judicial independence. "The most obvious is the danger to judicial impartiality that comes from outside threats and retaliation following judicial decisions." Brown,

"*From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*," 28 U. Ark. Little Rock L. Rev. 1 (Fall 2005). In analyzing intimidation of judges in the context of recall elections, the author found:

> A variation of the danger inspired by the special retention election is the recall election. A judge issues an unpopular opinion, and recall petitions are then circulated with regard to that judge requiring X number of signatures and calling for a recall election. The judge must then campaign against his or her recall. That is a perfidious system. Why would any judge worth his or her salt want to serve and make the hard decisions that the job requires with the threat of recall constantly hanging over that judge's head? That is precisely what the recall mechanism is designed to do--intimidate judges.

Id. at 5-6.

The author also found that judicial independence is curtailed by judges who face subtle pressures to capitulate to what they perceive to be the majority will of the electorate on divisive issues. *Id.* at 7-8. The author concluded that "the procedures most states . . . already have in place to protect against judicial wrongdoing are satisfactory bulwarks." *Id.* at 6. These satisfactory procedures, all of which are available in Nevada, include: (1) the standard impeachment and conviction process; (2) the judicial discipline system; and (3) removal at the ballot box at the next election. *Id.* at 6-7.

Another author observed: "Judicial recall and impeachment should not be used to pressure a judge into ruling in favor of popular will. It is not a judge's job to follow popular opinion; their job is to follow the law." Falce, "*Judges Should be Accountable to the Law, Not Public Opinion*," Brennan Center for Justice (New York University School of Law, 2014). And in another law review article, the author noted:

> Elections can be used to intimidate judges who are legitimately doing their jobs. Litigants who are unhappy about the outcomes of their cases sometimes decide that the best course of action is to try to replace the judge.

James Scheppele, "*Are We Turning Judges into Politicians*," Loyola of Los Angeles Law Review (1-1-2005). The author discussed a real-life example involving the potential recall of a Sacramento judge who rendered an unpopular but legally-correct decision. A group opposed to the decision announced a recall effort. The author correctly observed:

> As a result, [the judge] may be required to raise large sums of money to fight a recall and, if unsuccessful, will lose his job. This situation demonstrates the danger that a judge may decide a case "based upon political positions and not based upon the facts, the law and the Constitution." It can be difficult for a judge to render an impartial decision when he or she has to wonder whether a particular decision will subject the judge to a recall. *Id.*

"[B]ecause judges are frequently called upon to render unpopular decisions, an independent judiciary would be destroyed if its members continuously had to gauge the impact of a decision on an unenlightened and overzealous electorate. Moser, "*Populism a Wisconsin Heritage: Its Effect on Judicial Accountability in the State*," 66 Marquette L.Rev. 1, 36 (1982).

3. Media encouragement of independent judiciary

In addition to courts and legal scholars, the media also recognizes the need for judges to make rulings that follow the law, even if the rulings are unpopular. For example:

> There is great danger when efforts are made to remove judges for their unpopular rulings. Judges should decide cases based on

> their best understanding of the law and the facts, not to please critics or avoid removal. Judicial independence is crucial to upholding the rule of law and history shows that it is lost when judges fear removal for their unpopular decisions. This is not a new realization. One of the grievances enumerated in the Declaration of Independence was how the King of England effectively controlled the judiciary by removing judges.

Opinion, "*Criticism of Judges Should Respect Position*," Orange County Register (April 24, 2015).

In 2010, three Iowa Supreme Court justices were recalled and removed from office by voters as a result of an unpopular decision that legalized same-sex marriage in the state. A New York Times editorial commented on the situation, noting that leaders of the recall campaign said the results "should be a warning to judges elsewhere." "*Ouster of Iowa Judges Sends Signal to Bench*," New York Times (November 3, 2010). The article provided Professor Chemerinsky's reaction to the recall:

> "What is so disturbing about this is that it really might cause judges in the future to be less willing to protect minorities out of fear that they might be voted out of office," said Erwin Chemerinsky, the dean of the University of California, Irvine, School of Law. "Something like this really does chill other judges." *Id.*

4. Application of public policy consideration regarding independent judiciary

The Nevada Constitution's provision for recall of public officers cannot be considered in a vacuum. It must be considered and interpreted in light of other provisions, and it must be interpreted in a way that does not harm the integrity and independence of the judiciary.

Judges can be removed from office pursuant to the Constitution's provisions allowing impeachment or removal by the Commission. These methods are more than enough to deal with judges who commit misconduct or ethical breaches. Also, the voters can decline to retain a judge when the judge runs for re-election, if the voters want to oust the judge. Consequently, judges are already under indirect pressure to render decisions that are not unpopular or that will not generate negative publicity. Yet judges are duty-bound to avoid and ignore such pressure and to render decisions based solely on the facts and the law, without fear of criticism.

The potential for multiple midterm recall petitions and recall elections will only encourage judges to abandon their independence and to decide cases based upon perceived popular will, rather than based solely upon the facts and the law. This will seriously erode independence of the judiciary. And this is presumably why the Commission was created in the first place—to help preserve and support an independent judiciary. If the recall provision of the Constitution is applied to judges, despite Article 6, § 21's indication that the Commission's power is in addition to impeachment (not recall), application of the recall provision to judges will be redundant, wholly unnecessary and contrary to sound public policy.[6]

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[6] Our Legislature has recognized the Commission's exclusive power to remove judges from office. In enabling legislation enacted shortly after the Nevada Constitution was amended to create the Commission, the Legislature passed NRS 1.440(1), which provides that the Commission "has exclusive jurisdiction over the public censure, removal, involuntary retirement and other discipline of judges . . . ." (Emphasis added). This statute is constitutional and is within the Legislature's authority. *Matter of Davis*, 113 Nev. 1204, 1212-13, 946 P.2d 1033, 1038-39 (1997).

CONCLUSION

The district court's ruling, if affirmed, will have significant impact throughout Nevada, creating potential jeopardy for every judge in our state. Judges already face the specter of removal from office by impeachment, by the Judicial Discipline Commission, and by the voters at an election near the end of judges' terms of office. If this court affirms, judges will face yet another obstacle to judicial independence—potential recalls if judges render decisions that are unpopular.

Other provisions of the Constitution provide the public with more than adequate protection from judges who commit serious improprieties or ethics violations. These other provisions also provide the public with more than adequate outlets for expression of dissatisfaction with judges. The public can complain to the Commission, seek action from legislators, speak out publicly, and campaign against judges running for re-election. The language of the Constitution and sound public policy dictate that midterm recall elections simply are not, and should not, be available as an additional, redundant source of judicial discipline.

Accordingly, the NJLJ respectfully contends that the district court's decision should be reversed.

DATED: August 10, 2015

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CERTIFICATE OF COMPLIANCE (NRAP 28.2)

1. I hereby certify that this amicus brief complies with the content requirements of NRAP 29, the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version X5 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the length limitations of NRAP 29(e) and 32(a)(7) because it contains 4,099 words (less than half of the length allowed for an opening brief).

3. Finally, 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: Aug. 10, 2015

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing Amicus Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served copies of this brief, postage prepaid, by U.S. mail to:

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DATED: 8/10/15