IN THE SUPREME COURT OF THE STATE OF NEVADA

HONORABLE JUDGE CATHERINE RAMSEY, NORTH LAS VEGAS MUNICIPAL JUDGE,

Appellant,

vs.

THE CITY OF NORTH LAS VEGAS AND BARBARA A. ANDOLINA City Clerk of NORTH LAS VEGAS, BETTY HAMILTON, MICHAEL WILLIAM MORENO, and BOB BORGERSEN, individually and as Members of "REMOVE RAMSEY NOW,"

Respondents.

SUPREME COURT NO. 68450

RESPONDENT BETTY HAMILTON, MICHAEL WILLIAM MORENO, AND BOB BORGERSEN'S MOTION TO STRIKE IMPROPER PORTIONS OF APPELLANT'S REPLY TO RESPONDENTS' ANSWERING BRIEFS AND REQUEST FOR SANCTIONS

Respectfully Submitted by:

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On August 25, 2015, this Court issued its Order granting a motion to strike the supplemental opening brief filed by Appellant Judge Catherine Ramsey ("Judge Ramsey") and denying a request for sanctions related thereto, which relief was sought by Respondents Betty Hamilton, Michael William Moreno, and Bob Borgersen (collectively "Recall Respondents"). The Court, in striking Judge Ramsey's supplemental opening brief, found that a prior order allowing supplementation of the record did not otherwise allow for "what essentially amounts to second opening brief." (*See* Order dated August 25, 2015, Document No. 15-25827, at pgs. 1-2.) The Court denied Recall Respondents' request for sanctions, however, likely based upon the mistaken understanding, referenced in its Order (see Doc. No. 15-25827 at pg. 1), that Recall Respondents were also seeking to strike Judge Ramsey's supplemental appendix, which was not the case.

Recall Respondents have now been forced to bring a motion to strike for the second time, based on Judge Ramsey's inclusion of new arguments in Appellant's Reply to Respondents' Answering Briefs ("Reply"), which is in clear violation of the provisions of NRAP 28 and this Court's Order dated August 25, 2015. Recall Respondents again respectfully request this Court issue sanctions against Judge

Ramsey and her counsel of record for their continuing disrespect of the Court and its appellate rules.

II.

ARGUMENT

Contained within Judge Ramsey's Reply are three (3) arguments, which were not raised in her Opening Brief. Specifically, Judge Ramsey for the first time in her Reply set forth the following arguments: (1) that judges are not public officers (*see* Reply, pgs. 7-9); (2) that the trial court lacked jurisdiction based on the alleged flaws in the recall petition (*see* Reply, pgs. 9-14); and (3) that application of the doctrine of cumulative error warrants the requested relief (*see* Reply, pgs. 22-24). Because none of these arguments were included in Judge Ramsey's Opening Brief, none were therefore argued in Recall Respondents' Answering Brief. Their inclusion in the Reply alone constitutes a violation of the requirements of NRAP 28 that warrants this Court granting Recall Respondents' motion to strike in its entirety as to each of these improper arguments. *See* NRAP 28(c).[1]

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[1] NRAP 28(c) mandates that any brief filed in reply to a respondent's answering brief "must be limited to answering any new matter set forth in the opposing brief." Although the instant Motion focuses on the improper attempt by Judge Ramsey to introduce multiple new arguments in her Reply, Recall Respondents defer to the Court's determination whether any of the arguments set forth in the Reply actually amount to a proper answer to a new matter set forth in the answering brief, as opposed to an improper restatement of arguments already made in the Opening Brief.

What is even more egregious, however, and supports Recall Respondents' requests for sanctions in addition to the remedy of striking the improper portions of the Reply, is the fact that at least two of these new arguments have language taken verbatim from Judge Ramsey's supplemental opening brief, which was previously struck pursuant to the Court's Order dated August 25, 2015. For purposes of comparison to the Reply, true and correct copies of the relevant portions of Judge Ramsey's previously struck supplemental opening brief, including the caption page, table of contents, and first two argument sections, are excerpted and attached hereto as **Exhibit A**.

The most blatant example of Judge Ramsey's disregard of the Court's Order dated August 25, 2015 is the new argument set forth in the Reply at pages 22-24, which concerns the doctrine of cumulative error. The cumulative error doctrine argument was, in fact, the very first argument made in the previously struck supplemental opening brief, and except for a new first paragraph added for purposes of the Reply, the Court will see that the entirety of the argument in the Reply is a verbatim copy of the argument as it appeared in the supplemental opening brief at numbered pages 4-6. *See* **Exhibit A**, pgs. A5-A7.

In addition, the new argument that judges should not be considered public officers was also included in the previously struck supplemental opening brief. It was the second argument emphasized by Judge Ramsey, in fact, immediately

following the argument concerning the cumulative error doctrine. And, while the argument in the Reply is not a verbatim copy of what appeared in the supplemental opening brief, several passages contain identical wording. *See* **Exhibit A**, pgs. A7-A9.

Finally, if Judge Ramsey is allowed to file her Reply without the three new arguments removed, she will essentially be given the opportunity for further briefing to the Court without its permission, which also constitutes a violation of NRAP 28. *See* NRAP 28(c). NRAP 28 also contains a provision that authorizes this Court to strike any brief, or portion thereof, that is so obviously non-compliant with the rules and prejudicial to an opposing party, and to assess attorney's fees or other monetary sanctions against the offending lawyer. *See* NRAP 28(j).

III.

CONCLUSION

For all of the foregoing reasons, Recall Respondents respectfully request that the Court direct the Clerk of the Court to strike any and all improper portions of Judge Ramsey's Reply including, but not limited to, the entirety of the argument found in the Reply at pages 7-9 that judges are not public officers; the entirety of the argument found in the Reply at pages 9-14 that the trial court lacked jurisdiction based on the alleged flaws in the recall petition; and, finally, the entirety of the

argument found in the Reply at pages 22-24 that the application of the doctrine of cumulative error warrants relief.

Recall Respondents further respectfully request that this Court award sanctions in the form of reimbursement in full for the attorney's fees and costs they have incurred for needing to bring a motion to strike for the second time in order to obtain relief from improper arguments advanced by and on behalf of Judge Ramsey.

Dated this 10th day of September, 2015.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni & Savarese, hereby certifies that on the 10th day of September, 2015, she served a copy of the **RESPONDENT MICHAEL BETTY HAMILTON, MICHAEL WILLIAM MORENO, AND BOB BORGERSEN'S MOTION TO STRIKE IMPROPER PORTIONS OF APPELLANT'S REPLY TO RESPONDENTS' ANSWERING BRIEFS AND REQUEST FOR SANCTIONS**, by Electronic Service with the Nevada Supreme Court in accordance with the Master Service List addressed to:

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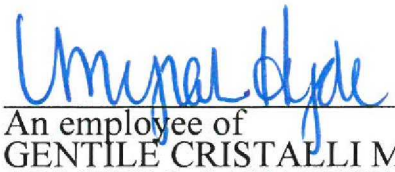

An employee of
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EXHIBIT A

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MICHAEL WILLIAM MORENO, and BOB BORGERSEN, individually
and as Members of "REMOVE RAMSEY NOW"

Respondents.

Eighth Judicial District Court, Clark County
The Honorable Eric Johnson, District Court Judge
District Court Case A-15-719406-P
Consolidated with District Court Case A-15-719651-C

APPELLANT'S SUPPLEMENT TO THE WRIT PETITION NOW IDENTIFIED AS THE APPEAL OPENING BRIEF

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when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

Id at 6 and 7.

I. CUMMULATIVE ERROR DOCTRINE

The recall process was loaded with legal and factual errors which individually could justify reversal and a directive to dismiss the recall petition. When the errors are considered together as a whole, reversal becomes more compelling. Nevada law recognizes the doctrine of cumulative error: when there have been numerous errors in a trial that ultimately are found to be prejudicial to a party but any single error standing alone is not sufficient to justify a reversal. This doctrine has been applied only in published decisions in criminal cases in Nevada. Big Pond v. State, 101 Nev. 1 (1985) but should be extended to civil cases as well. In Beck v. Haik, 377 F.3rd 624, 645 (6th Cir. 2004), the court concluded that a majority of courts believe that the doctrine should extended to civil cases. It was expressly made applicable to civil cases in Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 395 (W .Va. 1995) when the collection of errors at a trial "has made any resulting judgment inherently unreliable."

The cumulative error doctrine in civil cases has taken root in federal court decisions as this quotation from Jerden v. Amstutz, 2006 U.S. App. LEXIS 686 (9th Cir. 2006) asserts at pages 23-24:

We are considering these errors cumulatively. See, e.g., Gonzales v. Police Dept., City of San Jose, Cal., 901 F.2d 758, 762 (9th Cir. 1990) ("Considered together, there is no doubt that a remand is required in light of the cumulative effect of the two material errors."); Gordon Mailloux Enters., Inc. v. Firemen's Ins. Co. of Newark, N.J.,366 F.2d 740, 742 (9th Cir. 1966) ("We conclude it too must be reversed; although the errors requiring reversal, if considered separately, were perhaps [24] harmless, their cumulative effect was prejudicial."). Many of our sister circuits have similarly held that cumulative error in a civil trial may suffice to warrant a new trial even if each error standing alone may not be prejudicial. See, e.g., Beck v. Haik, 377 F.3d 624, 645 (6thCir. 2004) ("Since a jury reaches its verdict in light of the evidence as a whole, it makes no sense to try to analyze errors in artificial isolation, when deciding whether they were harmless."); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 188 (7th Cir. 1993); Malek v. Fed. Ins. Co., 994 F.2d 49, 55 (2d Cir. 1993); Hendler v. United States, 952 F.2d 1364, 1383 (Fed. Cir. 1991); but see SEC v. Infinity Group Co., 212 F.3d 180, 196 (3d Cir. 2000). (Id at 23-24).

Recall elections are not favored in Nevada. See Strickland v. Waymire, 126 Nev. Adv. Op 25, 235 P.3d 605, 612 (2010):

> "Recall is aimed at removing officials who have acted 'corruptly' in the sense that they are no longer representing the people but are serving the interests of a powerful minority," Elizabeth Garrett, Democracy in the Wake of the California Recall, 153 U. Pa. L. Rev. 239, 272 (2004), or who have "gone back on key promises [such that] the people should be able to make use of the recall process to undo a selection process in which they were effectively sold a false bill of public goods." Vikram David Amar, Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience, 92 Cal. L. Rev. 927, 946 (2004) (footnote omitted). Nevada adopted its recall provision in 1912, just a year after California did. Cal. Const. art. XXIII, § 1 (1911). In Nevada, as in California, "there is no evidence to suggest that framers, adopters, and early users of the recall measure saw it as a mechanism to rerun an ordinary election in which there had been no dishonesty and after which there had been no evidence of special interest group capture." Amar, supra, at 946; 27 The American Nation: A History 164 (Albert Bushnell Hart ed., Harper 1918). And, as we have noted, the "[s]tate has a [particular] interest in 'safeguarding' the recall procedure" given that "a recall petition attacks a

public official whom the public has already once elected and, if successful, requires a costly special election at the taxpayers' expense." Citizens for Honest Gov't v. Sec. of State, 116 Nev. 939, 949, 11 P.3d 121, 127 (2000).

None of the reasons noted in this passage have any application to Appellant's situation. Appellant has performed her functions as a Municipal Court Judge as prescribed by law. Appellant is being attacked for purely partisan political reasons, namely, she is asserting independence for the judicial branch of the North Las Vegas Municipal government[1] and opposing city efforts to remove funds from the court budget.

II. JUDGES ARE NOT PUBLIC OFFICERS SUBJECT TO RECALL

As the constitutional argument addressing the issue if Appellant is even subject to recall have been addressed on pages 15-33 of the Writ (now incorporated as Appellant's Opening Brief) and is now supplemented by the record.

Appellant is a judicial officer. Judicial Officers are Article 6 officials as defined by the Nevada State Constitution and can only be removed by a process outlines and established in Article 6 of the Nevada State Constitution. Other Nevada statutes support the position that the procedure for removal from office of legislative and executive officers is identified in Article 2 while the one for judicial officials is identified in Article 6. The Nevada Legislature has defined public officer and judges differently. (see NRS§ 281.005, NRS§ 281A.160 which

[1] See Sparks v. Sparks Muni Ct., 129 Nev. Adv. Op. 38, 302 P.3d 1118 (2013) which gives the Court the inference authority to control its own affairs.

substituted NRS§ 281.4836, NRS§ 281.559 and NRS§ 281.561). Case law also supports this fact that the distinction between public officers and judicial officers is deliberate. See Nevada Judges Association v. Lau, 910 Nev. 898, 112 Nev. 51 (1996). The legislative history of Article 6, section 21 also makes it clear this Article was intended as the exclusive procedure for removing judges in the State of Nevada. A copy of the argument is contained in Petitioner's Emergency Petition for Injunction filed on 6-4-15, and incorporated herein.

The District Court erred when stated the only issue is his mind that in 1912 when Nevada adopted the recall petition did the citizens perceive that to include judicial officers[2]. The very issue contemplated is already moot as a later provision was adopted by the legislature and voted by the people. Judge Johnson also points out that the legislature could have easily made provision in the amendment's language to modify Article 2 section 9 if that was their intent. It is also well known by the legislature, that the newer provision supersedes an earlier provision and the latter controls, thus there would be no need to do so. The legislative history and background paper clearly shows recall was discussed at the time the amendment was passed, and the outcome was recalling a judge was purposefully not included. The clear intent at the time of passage of Article 6 was you cannot recall a judge and to permit the Judicial Discipline Committee exclusive authority

[2] 6-18-15 Transcript, p. 33, lines 20-25, Appellant's Appendix, V.I 035

over judges. Judge Johnson points out Nevada Citizens plainly want the right to elect their judges. Nevada Citizens also have the right not to re-elect a judge if they are dissatisfied with their performance. The District Court gives his own opinion that history suggests they also want the right to remove their judges by recall[3]. The suggestion contradicts what the actual legislative history and background paper says.

For the District Court to find that judges are public officer and subject to recall rendered the exclusive jurisdiction provision in Article 6 unconstitutional as well at rendered the definition of public officer not including judges in NRS§ 281.161 unconstitutional, along with many of the other provisions separating the judicial officers from the executive and legislative branches. That is against the will of the people. Even the current opinion of the Attorney General is that judges are not public officers. The concept that judges are not public officers has not changed over time in the statues. Nor should this Court find that judges are not public officers as clearly identified in the statute, or render the exclusive jurisdiction provision of Article 6 inapplicable.

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[3] 6-19-15 Transcript, p. 20, Appellant's Appendix, V.I 062