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Elizabeth A. Brown  
Clerk of Supreme Court

7 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

8 JENNIFER HENRY,

Case No. 75675

9 Petitioner,

10 v.

11 NEVADA STATE COMMISSION ON  
12 JUDICIAL DISCIPLINE,

13 Respondent.  
14 \_\_\_\_\_/

15 **OPPOSITION TO EMERGENCY MOTION FOR STAY**

16 **UNDER NRAP 27(e)**

17 COMES NOW Respondent, the Nevada Commission on Judicial Discipline,  
18 by and through its appointed Prosecuting Officer, Thomas C. Bradley, and hereby  
19 opposes Petitioner Jennifer Henry's *Emergency Motion For Stay Under NRAP*  
20 *27(e)*. Respondent's Opposition is made and based on the following Memorandum  
21 of Points and Authorities.

22 DATED this 22<sup>nd</sup> day of May, 2018.

24 /s/ Thomas C. Bradley  
25 Prosecuting Officer Thomas C. Bradley, Esq.  
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1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Petitioner Henry is a hearing master with the Eighth Judicial District Court in  
4 Clark County, Nevada. On October 10, 2017, Respondent Nevada State  
5 Commission on Judicial Discipline (“Commission”) filed a Formal Statement of  
6 Charges against Petitioner. The formal hearing to resolve those charges is  
7 scheduled to take place in Reno, Nevada on May 29, 2018 and is scheduled to be  
8 complete in one day. On April 27, 2018, Petitioner filed a *Petition For Writ Of*  
9 *Prohibition* against the Commission in which she claims the Commission is without  
10 constitutional authority to hold a disciplinary proceeding against her. [NV S.Ct.  
11 Doc. 18-16078.] On May 18, 2018, this Court ordered Respondent to file an  
12 Answer within 15 days. [NV S.Ct. Doc. 18-19054.] On May 18, 2018, Petitioner  
13 Henry filed an *Emergency Motion for Stay Under NRAP 27(e)* [NV. S.Ct. Doc. 18-  
14 19175] in which she asks this Court to stay the May 29<sup>th</sup> public hearing until such  
15 time as this Court decides her *Petition For Writ Of Prohibition*. On May 21, 2018  
16 this Court issued an Order stating, “[H]aving considered the petitioner’s motion, we  
17 conclude that a temporary stay is warranted pending our receipt and consideration  
18 of any opposition from respondent.” [NV S.Ct. Doc. 18-19270.]

19 **II. ARGUMENT**

20 **A. Governing Standards**

21 When determining whether to issue a stay, courts consider the following four  
22 factors:

- 23 1. Whether the object of the appeal or writ petition will be defeated if  
24 the stay is denied;  
25 (2) Whether appellant/petitioner will suffer irreparable or serious  
26 injury if the stay is denied;  
27 (3) Whether respondent/real party in interest will suffer irreparable or  
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1           serious injury if the stay is granted; and

2           (4) Whether appellant/petitioner is likely to prevail on the merits in the  
3           appeal or writ petition.

4       *See Hansen v. Eighth Judicial District Court*, 116 Nev. 650, 657, 6 P.3d 982, 986  
5       (2000); *see, also, United States v. Bogle*, 855 F.2d 707, 708 (11<sup>th</sup> Cir. 1988)  
6       (describing the showing necessary under Rule 8 of the Federal Rules of Appellate  
7       Procedure, the federal counterpart to NRAP 8, as a “heavy burden.”)

8           As explained below, none of the stay factors listed in *Hansen* support the  
9       issuance of a stay, and Petitioner’s request should be denied.

10       **B. Application Of The NRAP 8 Factors Warrants The Denial Of Petitioner’s**  
11       **Motion To Stay**

12           **1. Petitioner Not Likely To Prevail On The Merits**

13           Petitioner asserts that this Court should issue a writ of prohibition pursuant to  
14       NRS 34.330 because under Article 6, Section 21 of the Nevada Constitution, the  
15       Commission’s authority is limited to a justice of the Supreme Court, a judge of the  
16       court of appeals, a district judge, a justice of the peace, and a municipal judge. Nev.  
17       Const. Art. 6 § 21(1). Petitioner notes hearing masters are not specifically  
18       mentioned in that list.

19           Petitioner further claims that although the legislature adopted NRS § 1.428 in  
20       1997, which specifically adds “[a]ny other officer of the Judicial Branch of this  
21       State . . . including . . . a magistrate, court commissioner, special master or referee,”  
22       to the persons subject to the jurisdiction of the Commission, when NRS § 1.428  
23       was adopted, the Nevada Legislature acted outside its authority, and that “[t]he only  
24       way it could expand the jurisdiction of the Commission is by constitutional  
25       amendment.” *Petition For Writ* at p. 10.

26           Petitioner is very much mistaken.

27           In a nearly identical case, *In re Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997),  
28       Davis, who was a municipal court judge, claimed, in part, that the Commission

1 lacked jurisdiction to impose discipline on municipal court judges. *Davis*, 113 Nev.  
2 at 1210, 946 P.2d at 1038. At that time, the constitutional provision that had  
3 created the Commission provided, in part, that: “[a] justice of the supreme court or  
4 a district judge may . . . be censured, retired or removed by the Commission on  
5 judicial discipline.” *Davis*, 113 Nev. at 1211, 946 P.2d at 1038 (quoting Nev.  
6 Const. Art. 6, §21(1)). A year later, in 1997, the legislature enacted NRS § 1.1440.  
7 That statute, in pertinent part, provided that the Commission would have “exclusive  
8 jurisdiction over the censure, removal and involuntary retirement of justices of the  
9 peace and judges of municipal courts which is coextensive with its jurisdiction over  
10 justices of the supreme court and judges of the district courts . . .”. NRS § 1.440(1).

11 Davis claimed that the Commission lacked jurisdiction over the municipal  
12 court judges prior to the 1994 constitutional amendment and therefore could not  
13 discipline him for conduct that occurred prior to 1994. *Id.*

14 The Nevada Supreme Court rejected Davis’ claim, explaining that  
15 “[a]lthough the 1994 amendment . . . facially expand[ed] the scope of the  
16 Commission’s powers to include municipal court judges and justices of the peace,  
17 in actuality, the amendment simply clarified the legislature’s then existing authority  
18 to render these judicial officers subject to Commission discipline. Thus, the  
19 promulgation of NRS 1.440(1) by the 1997 Nevada legislature was within its  
20 constitutional prerogatives.” *Davis*, 113 Nev. at 1212, 946 P.2d at 1039; *see, also*,  
21 *Ramsey v. City of N. Las Vegas*, 133 Nev. Adv. Rep. 16, 392 P.3d 614, 618  
22 (2017)(“[T]he NCJC was intended to further the Legislature’s goals of unifying the  
23 court system in . . . which all judges were held to the same standards . . .”).<sup>1</sup>

24 In addition, the Court stated that when Article 7, §4 of the Nevada

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25 <sup>1</sup> NRS § 1.428 furthers the legislature’s goals of unifying the court system by  
26 defining a judge as “[a]ny other officer of the Judicial Branch of this State, whether  
27 or not the officer is an attorney, who presides over judicial proceedings, including,  
28 but not limited to, a magistrate, court commissioner, special master or referee[.]”  
*See* NRS § 1.428(6).

1 Constitution, which provides the legislature with “the mandate to provide for the  
2 removal from office any civil officer other than those in ‘this article previously  
3 specified’ is read together with article 6, section 21(9)(b) “it is apparent that the  
4 legislature was free to utilize the Commission as a medium for that purpose.”<sup>2</sup>  
5 Because the power of removal in this particular context also implies authority in the  
6 Commission to impose lesser sanctions, we hold that the Commission did have  
7 jurisdiction to either remove or impose any measure of discipline, including  
8 removal, in this matter.” *Davis*, at 1213.

9 Similarly, when the legislature adopted NRS 1.428 to include magistrates,  
10 court commissioners, and special masters or referees to the persons subject to the  
11 jurisdiction of the Commission, that amendment “simply clarified the legislature’s  
12 then existing authority to render these judicial officers subject to Commission  
13 discipline” and “was within its constitutional prerogatives.” *Davis*, 113 Nev. at  
14 1212, 946 P.2d at 1039.

15 Based on this Court’s decision in *Davis*, it is clear that Petitioner’s assertion  
16 that the Nevada Legislature acted outside its authority when it adopted NRS 1.428  
17 is simply not a correct statement of Nevada law, and as a result, Petitioner is highly  
18 unlikely to prevail on the merits of her claim. For that same reason, the object of  
19 Petitioner’s *Petition For Writ Of Prohibition* – an arrest of the Commission’s  
20 proceedings until a determination can be made regarding the jurisdiction of the  
21 Commission-- is unnecessary, and as a consequence, the denial of the requested  
22 stay will not defeat the object of her Petition.

23 The *Hansen* court stated that "when moving for a stay pending an appeal or  
24 writ proceedings, a movant does not always have to show a probability of success  
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26 <sup>2</sup> Article 7, §4 currently provides that: “Provision shall be made for the  
27 removal from Office of any Civil Officer other than those in this Article previously  
28 specified, for Malfeasance, or Nonfeasance in the Performance of his duties.”

1 on the merits, the movant must ‘present a substantial case on the merits when a  
2 serious legal question is involved and show that the balance of equities weighs  
3 heavily in favor of granting the stay.’ *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th  
4 Cir.1981)." *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (2000) (underscoring  
5 added).

6 Here, Petitioner Henry failed to demonstrate that her writ petition even raises  
7 a substantial legal question given this Court's decision in *Davis*. Moreover, as  
8 discussed below, the Petitioner also failed to show that the balance of equities  
9 weighs heavily in favor of granting the stay.

## 10 **2. Remaining Factors**

11 Petitioner argues that the expenses involved in the hearing justify a stay.  
12 *Hansen* is once again on point. Echoing Petitioner Henry here, the petitioner in  
13 *Hansen* argued that it was entitled to a stay under NRAP 8 so that it would “not be  
14 required to participate ‘needlessly’ in the expense of lengthy and time-consuming  
15 discovery, trial preparation, and trial” because the petitioner was challenging the  
16 issue of jurisdiction. *Id.* at 658, 6 P.3d at 986-987. This Court rejected the  
17 petitioner’s argument and denied the stay, declaring “[s]uch litigation expenses,  
18 while potentially substantial, are neither irreparable nor serious.” Here, the  
19 Petitioner’s expenses will not be substantial. The May 29<sup>th</sup> hearing in Reno, Nevada  
20 is expected to last only one day, and Petitioner can easily travel from Clark County  
21 to Reno in a single day.

22 Petitioner also asserts that irreparable harm could be done to her reputation if  
23 this Court subsequently determines that the Commission lacked jurisdiction over  
24 her. In light of controlling case law, namely the *Davis* decision, such a result is  
25 highly unlikely. Further, the “judicial discipline proceedings ‘are neither civil nor  
26 criminal in nature; they are merely an inquiry into the conduct of a judicial officer  
27 the aim of which is the maintenance of the honor and dignity of the judiciary and  
28 the proper administration of justice rather than the punishment of the

individual.’” *Goldman v. Nevada Comm’n on Judicial Discipline*, 108 Nev. 251, 264 n.10 (Nev. 1992) (quoting *In re Diener*, 304 A.2d 587 (Md. 1973), *cert. denied*, 415 U.S. 989 (1974)). Therefore, Petitioner will not suffer irreparable harm.

Moreover, the Respondent will suffer harm with any delay. This Court has acknowledged that “unnecessar[y] delay” of the “underlying proceedings” supports the denial of a stay under NRAP 8. *See Hanson*, 116 Nev. at 658, 6 P.3d at 987. Here, such a delay will be unnecessary because Petitioner is not likely to prevail on the merits.

In a similar case, the Nevada Supreme Court found that a delay of the Commission proceedings would undermine the public's confidence in the integrity of the judicial discipline process and work to prejudice the Commission. *See Jones v. Nevada Commission on Judicial Discipline*, 2013 WL 4436476 (2013) (unpublished decision). The Court stated:

Ultimately, our exercise of jurisdiction over this petition, which was filed on the eve of the scheduled NCJD hearing regarding the disciplinary complaint against petitioner, would serve only to prevent the NCJD from resolving the underlying disciplinary proceeding in a timely manner.<sup>3</sup> Moreover, the continued delay of those proceedings would undermine the public's confidence in the integrity of the judicial discipline process and work to prejudice both petitioner and the NCJD.

*Id.* at \*1.

Finally, the object of the Petitioner’s writ will not be defeated because any result of the hearing will ultimately be reviewed by this Court. *See In re Assad*, 124 Nev. 391, 185 P.3d 1044.

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<sup>3</sup> The Petitioner implied that the Commission failed to act on the Complaint because Formal Statement of Charges were not filed until approximately one year after the Complaint was filed. During that year, the Commission performed its statutory duties to investigate the Complaint, send interrogatories to Petitioner, and determine whether formal charges should be filed.

### III. CONCLUSION

Nevada case law makes clear that Petitioner is unlikely to prevail on the merits of her claim. In addition, Petitioner has not demonstrated that the purpose of her *Petition For Writ Of Prohibition* will be defeated if a stay is denied, nor has she shown that she will suffer irreparable or serious injury if her request for stay is denied. As a result, Petitioner's request for an emergency stay under NRAP 27(e) should be denied and this Court should vacate the temporary stay order. [NV S.Ct. Doc. 18-19270.]

DATED this 22<sup>nd</sup> day of May, 2018.

/s/ Thomas C. Bradley  
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I further certify that this Response complies with the page limitations of NRAP 27(d)(2) because, exclusive of this Certificate of Compliance, this Response does not exceed ten (10) pages.

DATED this 22<sup>nd</sup> day of May, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the 22<sup>nd</sup> day of May, 2018, I served a true and correct copy of this *Response to Emergency Motion for a Stay* via the Nevada Supreme Court’s E-Flex filing system to the following :

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DATED this 22<sup>nd</sup> day of May, 2018.

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