IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, a political subdivision of the State of Nevada; NEVADA COMMISSION, ON PEACE OFFICER STANDARDS & TRAINING, Appellants. vs. ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township, Respondent.	Electronically Filed Aug 12 2019 04:35 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO. 72993

APPEAL

From the U.S. District Court of Nevada
The Honorable Jennifer Dorsey, U.S. District Court Judge
U.S. District Court of Nevada Case No. 2:17cv03017-JAD-CWH

APPELLANT CLARK COUNTY'S OPENING BRIEF

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
THOMAS D. DILLARD, JR., ESQ.
Nevada State Bar No. 6270
9950 West Cheyenne Avenue
Las Vegas, NV 89128
Attorney for Appellant CLARK COUNTY

NRAP 26.1 DISCLOSURE

Clark County is a governmental party and thereby exempt from the disclosure rule.

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ROUTING STATEMENT

This subject matter of this appeal shall be heard by the Supreme Court pursuant to NRAP 17(a)(6) as a question of law certified by the federal court.

ISSUE CERTIFIED FOR REVIEW

Does NRS 258.007 give the Clark County Board of County Commissioners the power to remove a constable from office, or can a constable be removed only with a *quo warranto* action?

STATEMENT OF THE CASE

A. Nature of the Appeal

This subject matter on appeal involves a certified question of law from the U.S. District Court of Nevada as to whether the an elected official that fails to comply with the POST certification requirement of NRS 258.007(1) automatically forfeits his office by operation of law pursuant to NRS 258.007(2) or is instead entitled to additional due process and must be removed only by a quo warranto action. There are thus potentially two issues of law pertaining to this appeal. First, whether the office forfeiture penalty of NRS 258.007(2) is self-executing. If not, whether the only way to oust a non-compliant elected constable from office is through a *quo warranto* procedure pursuant to NRS 35.010 *et. seq*.

The facts are undisputed that Robert Eliason ("Eliason"), the last elected North Las Vegas Constable, has not become a category II, certified peace officer by the extended deadline allowed under NRS 258.007(1).[1] Presently, over three

[1] NRS 258.007(1) states:

years have elapsed since the deadline passed and he remains in office because of the preliminary injunction entered by the state court on August 16, 2017 without completing the required training. [Joint Appendix ("JA")98-101]. The question of law pertains to Clark County's potential statutory remedies to remove the non-compliant constable from office. Eliason has attempted to limit removal of public officers from office only to the procedure prescribed by NRS 35.010, or *quo warranto*. Eliason seeks to define *quo warranto* as the only "proper procedure" because "Clark County does not have the authority to maintain a *Quo Warranto* action." [JA 93].

Eliason obtained a preliminary injunction order from the state court prior to removal to the U.S. District Court of Nevada. The order granting the preliminary injunction, prepared by Eliason, should have been narrowly tailored to whether NRS 258.007 provides Clark County an independent basis for removal because

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> Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, . . . shall become certified by the Peace Officers' Standards and Training Commission as a category II police officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.

that was all that was at stake with the particular agenda item.[2] Clark County argued that NRS 258.007(2) was a self-executing statute that caused Eliason to forfeit his office after he failed to obtain a category II certification by the time allotted set forth in NRS 258.007(1). In other words, Clark County interpreted the statute to hold that the forfeiture of Eliason's office went into effect immediately at that time without the need of subsequent court action. The state district court disagreed with Clark County's interpretation and concluded that NRS 258.007 was not self-executing, but required a separate judicial action to effect a forfeiture of office. Clark County maintains this interpretation was contrary to the legislative intent and the plain language of the statute. Clark County further contends now that this misinterpretation was aggravated by the inclusion of some *dicta* in the order indicating that *quo warranto* is the exclusive remedy to oust a Nevada public official from office.

Following the removal of the case, Eliason moved for a declaratory order

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[2] NRS 258.007(2) states:

> If a constable does not comply with the provisions of subsection 1, the constable **forfeits** his or her office and a vacancy is created which **must be filled** in accordance with NRS 258.030 [by the board of county commissioners]. (emphasis added).

from the U.S. District Court of Nevada that sought to improperly elevate the exclusive remedy *dicta* part of the state court order to stand as the law of the case. Clark County opposed and moved for reconsideration of the order granting the preliminary injunction. The U.S. District Court certified the issue to obtain guidance from this Honorable Court. The foregoing makes clear that the plain language of NRS 258.007 is to render the office forfeited by operation of law upon non-compliance with the training certification deadline. Moreover, that *quo warranto* is to be sure not the only "proper procedure for determining a forfeiture of office " and this argument is plainly inconsistent with Nevada statutory law that was not contemplated by the state court when granting Eliason a preliminary injunction.

B. <u>District Court Proceedings Below</u>

1. On July 14, 2017, Eliason obtained an *ex parte* order for a temporary restraining order enjoining the Board of County Commissioners ("BCC") from proceeding with item 67 on the agenda for the public meeting on July 18, 2017 to declare his office forfeited by operation of law. [JA 92, 107].

2. On August 16, 2017, the Eighth Judicial District Court of Nevada, the Honorable Judge Elissa F. Cadish, entered an order granting Eliason's motion for a preliminary injunction and enjoined Clark County from "proceeding during the

pendency of this action in voting on or declaring the forfeiture of Robert Eliason of the Office of Constable of North Las Vegas Township or filling a vacancy for the office "unless such vacancy is declared pursuant to a Nevada court in a writ of quo warranto." [JA 98-101]. The district court declined to issue a writ of prohibition on the issue, however. [JA 99]. The order (prepared and submitted by Eliason) further, *in dicta*, stated the following:

> Pursuant to Heller v. Legislature, 120 Nev. 458, 463-64, 93 P.3d 746, 751 (2004), Quo Warranto is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provision of law including that in NRS 258.007.

[JA 100]. The order also stated that "Clark County does not have authority to maintain a Quo Warranto action." Id. The state court thus implicitly found that the only parties that had standing to pursue such an action were the State of Nevada and a person who claims a right to hold, maintain, or assume a given public office when that right is disputed or contested. See NRS 35.030; NRS 35.050.

3. Clark County then removed the item from the BCC meeting agenda scheduled for July 28, 2017 and has taken no action with respect to the issue since that time pursuant to the Eighth Judicial District Court's order. [JA 107].

4. On November 2, 2017, Eliason filed a First Amended Complaint and included, for the first time, a federal claim for relief pursuant to the American

With Disabilities Act of 1990, 42 U.S.C. § 1201. [JA 01-11].

5. On December 8, 2017, Defendant Clark County removed the action to the U.S. District Court of Nevada based upon federal question jurisdiction and filed an answer in federal court. [JA 33-39].

6. On February 5, 3018, the State of Nevada Office of the Attorney General issued AG Opinion No. 2017-14. [JA 133-136]. In express disagreement with portions of the court's order granting a preliminary injunction, the summary conclusion of the AG opinion states the following:

> *Quo warranto* is **not the exclusive remedy** to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.

[JA 134]. The AG opinion further stated:

> The question here concerns the removal of a constable for failure to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. . . . Nonfeasance, as such, is a basis for removal pursuant to NRS 283.440.

[JA136].

7. On August 17, 2018, Eliason filed in the U.S. District Court of Nevada a motion for declaratory judgment pursuant to 28 U.S.C. § 2801. [JA 91-

95]. Eliason, in so doing, requested the U.S. District Court of Nevada to declare as a matter of law the following:

(a) only the Nevada State courts may declare a forfeiture of an elected official's office;

(b) Clark County possesses no unilateral authority under Nevada law "to declare that Robert L. Eliason has forfeited his office and that a vacancy exists for the North Las Vegas Constable; and

(c) Agenda Item 67 which was on the BCC hearing over a year ago is illegal under Nevada law.

8. On August 30, 2018, Clark County opposed Eliason's Motion for Declaratory Judgment and filed a Counter-Motion for Reconsideration of the Order Granting Eliason a Preliminary Injunction.[JA 103-117].

9. On March 22, 2019, the Honorable Judge Jennifer Dorsey granted an alternatively argued request by Defendant Nevada Commission on Peace Officer Standards & Training (State of Nevada POST Commission) and entered an Order Certifying a Question to the Supreme Court of Nevada under NRAP 5 regarding the interpretation of NRS 258.007 and also the legality of the preliminary injunction order.[JA 46-47, 49-55].

10. The U.S. District Court of Nevada concluded that because the most recent adverse order was the preliminary injunction entered in the state court, Defendant Clark County should be the Appellant in this appeal. [JA 54].

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STATEMENT OF THE FACTS

1. In 2013, the Nevada Legislature passed NRS 258.007 placing requirements on certain constables of larger townships to comply with certain Nevada Peace Officers Standard and Training ("POST") requirements set forth in NRS Chapter 289.[3]

2. The City of North Las Vegas, in Clark County, Nevada, qualified as one of those larger townships at that time because it had a population well in excess of 220,000 and it is located in Clark County, that had a population then of approximately 2,000,000.[4]

3. Eliason was duly elected in November of 2014 and took office as the North Las Vegas Constable on January 4, 2015.[5]

4. On June 9, 2015, the Nevada Legislature amended NRS 258.007 to increase the population for townships that required POST certified constables.

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[3] There was an amendment to NRS 258.007 made on June 9, 2015 that did not change the requirements for Eliason to become a category II peace officer in Nevada that were put in place with the original legislation effective July 1, 2013. Contrary to Eliason's suggestion otherwise in the courts below, the law did not place additional requirements on him after he took office. [JA 120-21].

[4] www.cityofnorthlasvegas.com/Departments/CityManager/PDFs/EconomicDevelopment/North_Las_Vegas_Overview_March-2013.pdf

[5] www.nvsos.gov/SOSelectionPages/results/2014StateWideGeneral/Clark.aspx; Verified Complaint at para. 9.

However, this amendment did not change the requirement for the Constable of North Las Vegas because of its large population. The Legislature further left unchanged the language of NRS 258.007(2), stating: "[i]f a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030." [JA 121].

5. On November 5, 2015, Eliason obtained a six month extension from the State of Nevada POST Commission pursuant to NRS 289.550 and consequently had until July 4, 2016 (to complete the minimum standards of training for category II peace officers pursuant to NRS 289.150) in order to continue to legally hold his elected office. [JA 17].

6. On June 29, 2016, the State of Nevada POST Commission sent the Clark County Board of Commissions a written notice that Eliason had not met the requirements of NRS 289.550; consequently, he was declared an uncertified peace officer. The notice further stated that this failure to complete the training resulted in the forfeiture of his office pursuant to NRS 258.007 and provided Clark County a notification that he does not have any peace officer powers. [JA 22-23, 123-24].

7. On July 5, 2017, a year following the POST notification and due to Eliason's ongoing non-compliance, the Assistant County Manager cleared item 67

for the agenda for the July 18, 2017 meeting. The agenda item proceeded with Clark County's statutory obligations under NRS 258.330[6] to fill the vacancy of the North Las Vegas Constable's office which had been forfeited pursuant to NRS 258.007(2). [JA 31-32].

8. On July 14, 2017, Eliason obtained from the Eighth Judicial District Court a temporary restraining order precluding the Board of County Commissioners from proceeding with item 67 of the agenda until the matter could be heard by the court. [JA 107].

9. On August 18, 2017, Eliason then obtained an order granting a preliminary injunction against Clark County from declaring that he had forfeited his office and appointing someone to fill the vacancy. [JA 98-101].

10. Eliason has still not obtained a Nevada POST category II certificate, despite being now well over three years late, which is required for him to continue to officiate in the office of the North Las Vegas Constable pursuant to NRS 258.007(1).

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[6] NRS 258.030 states: "Except for those townships that the boards of county commissioners have determined do not require the office of constable, if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners **shall** appoint a person to fill the vacancy pursuant to NRS 245.170." (emphasis added).

SUMMARY OF THE ARGUMENT

First, Eliason forfeited his office when he did not receive a POST category II peace officer certification after his six month extension expired pursuant to NRS 258.007(2)("a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030"). The operative word in this statute is "forfeits" and in this context holds that the expiration of the deadline without compliance with the training requirements means that he is no longer legally the constable at that time. Put differently, the Nevada legislature intended as evidenced by the express language of the statute to make NRS 258.007(2) to be self-executing. Several courts have concluded that the word "forfeit" when attached to the occurrence or non-occurrence of a triggering event establishes that the provision is self–executing and so the failure to complete the work within the time specified results in a forfeiture of the office by the mere fact itself of non-compliance. Therefore, Clark County did not then have to undertake any separate legal action or convince the Attorney General of the State of Nevada (the only governmental entity with standing to commence a writ of quo warranto) to do so.

Second, Eliason may be removed from office through other means that a writ of quo warranto filed by the Attorney General of the State of Nevada or a

person having a claim to his constable office. The state court order granting Eliason's preliminary injunction motion made an unnecessary conclusion of law that quo warranto is the exclusive remedy to remove Eliason from office. This conclusion of law as to exclusivity of remedy, one that was not briefed before the district court, is in direct violation of the express terms of both NRS 283.440 (permitting any complainant to seek removal of a public official for nonfeasance) and NRS 258.010 (allowing Clark County to abolish the constable's office). This Court should therefore state that the Constable of North Las Vegas may be removed outside of a *quo warranto* action.

ARGUMENT

I. The Plain Language of NRS 258.007(2) Establishes that the Forfeiture of the Office Provision is Self-Executing and Thus the *Quo Warranto* Statute is Inapplicable.

Eliason forfeited his office as of self-executing statutory law pursuant to NRS 258.007(2) when he did not obtain a category II peace officer certification from Nevada POST by the end of the day on July 4, 2016. NRS 258.007 states:

> 1. Each constable of a township whose population is 100,000 or more . . . shall become certified by the Peace Officers' Standards and Training Commission as a category II police officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the commission, for good cause

shown, grants in writing an extension of time, which must not exceed 6 months.

2. If a constable does not comply with the provision of subsection 1, the constable **forfeits** his or her office and a vacancy is created which **must** be filled in accordance with NRS 258.030. (emphasis added).

The word forfeit in the statute was intentionally chosen by the Nevada Legislature and is dispositive of the certified question. The word forfeit in this context means that the issue is resolved upon the non-occurrence of the required act and the matter is full and final.[7] It has been widely recognized that the use of the word "forfeit" when used as a consequence for failure to perform a required act, when used in a statute or in a contract, is proof positive that the drafter intended the provision to be self-executing. See e.g., State v. Murphy, 347 Mo. 484, 148 S.W.2d 527 (S.C. 1941)(en banc); Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365 (1873); In re Brooklyn, etc., Ry. Co., 72 N. Y. 245 (1878); see also 63 Am.Jur.2d Public Officers and Employees § 188, p. 742; McQuillin, Municipal Corporations, vol. 4, § 1796. In other words, the word expresses the intention that the forfeiture shall take place upon the happening of the identified contingency without the necessity of a judicial declaration or the imprimatur of

[7] Black's Law Dictionary (11th ed. 2019) states that *forfeiture* means "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, neglect of duty. Title is instantly transferred to another, such as the government . . . ."

any other municipal entity. See Los Angeles Athletic Club v. Board of Harbor Comm'rs of Los Angeles, 130 Cal.App 376, 387-88, 20 P.2d 130, 135 (1933)("Whether a breach of conditions, by the grantee of a franchise, works a forfeiture *ipso facto* depends on the language of the grant or the governing statute . . . If the statute provides that failure to complete the work within the time specified by the municipality works a forfeiture, the statute is self–executing, and failure to complete the work within the time specified ipso facto forfeits its franchise."); Crutchfield v. Collins, 607 S.W.2d 478, 482 (Tenn. 1980)(noting that the language in the constitution specifies with particularity the acts for which an official forfeits his office and this provision is self-executing).

In these circumstances, the courts should thus give effect to that intention whenever the question is presented in a judicial inquiry. When interpreting a statutory provision, the court must first look to the plain language of the statute. See Clay v. Eighth Jud. Dis. Ct., 305 P.3d 898, 902 (Nev. 2013). Legislative intent is the controlling factor in statutory construction. State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The courts thus avoid statutory interpretation that renders language meaningless or superfluous and if the statute's language is clear and unambiguous, this court should enforce the statute as written. Clay, 305 P.3d at 902. "Likewise, this court will interpret a rule or statute in harmony with other

rules and statutes." Id.

The language of the law in question is plain and unambiguous and this Court should heed the legislative intent and give effect to the law according to its plain and obvious meaning. The statute affirmatively states the office is forfeited upon the failure to become a category II peace officer at the appointed time. The statute further imposes a non-discretionary duty of Clark County to fill that vacancy. There is no question of fact in this case that Eliason did not meet this certification requirement and so the forfeiture of his office occurred by operation of law as of July 5, 2016.

Eliason in the courts below effectively sought to rewrite the statute by ignoring the plain meaning of the terms "forfeit" and "must" in an attempt to transform this mandatory, self-executing, and immediate forfeiture and office vacancy into a non-immediate, discretionary process (requiring a court to grant a petition which has very limited standing). Despite the fact that NRS 258.007(2) expressly holds that Clark County must fill the vacancy created by the forfeiture, Eliason obtained an injunction precluding Clark County from taking action to fill the vacancy and also precluding it from taking any judicial action to remove him because it cannot bring a *quo warranto* action.

Eliason's interpretation contravenes a cardinal rule of statutory construction

to avoid an interpretation that renders a statute in whole or in part superfluous or a nullity. See Miller v. Ignacio, 112 Nev. 930, 937, 921 P.2d 882, 886 (1996); see also Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 154 Cal.App.4th 1536, 1544, 65 Cal.Rptr.3d 665 (2007); In re Maricopa County Super. Ct. No., 54 P.3d 380, 383 (Ariz. App. 2002); Coon v. City & County of Honolulu, 98 Haw. 233, 250, 47 P.3d 348, 365 (2002); State v. Beard, 22 P.3d 116, 121 (Idaho Ct.App.2001). Eliason's failure to give heed to the forfeiture provision disregards the plain meaning and seeks to rewrite the statute and subvert the intent of the legislature. Application of Pioneer Mill Co., 53 Haw. 573, 497 P.2d 549, 552 (1972) (holding that the failure to effectuate the plain meaning of the forfeiture of judgeship provision would "rewrite the Constitution").

The case Eliason principally relied upon in the courts below does not suggest that there is any other way to interpret the subject statute. The case of Lueck v. Teuton, 125 Nev. 674, 219 P.3d 895 (2009) has no legal or factual through-line connecting it to the pertinent statute or this case. The case involves a Nevada citizen's attempt to remove a temporarily appointed district court judge from office. The petitioner filed a writ of *quo warranto* to remove Judge Teuton from office after the attorney general refused to do so. The Court examined NRS Chapter 35 and determined the legislature did not authorize *quo warranto* actions

by private citizens with only a general interest in seeing state law upheld.[8] The Court noted that pursuant to NRS 35.050, only persons "claiming to be entitled to a public office," or otherwise through the attorney general and "on the leave of the court," may commence a *quo warranto* action against the alleged unlawful officeholder or usurper. Lueck, 125 Nev. at 679, 219 P.3d at 898. The petitioner's writ was denied because he did not claim to be entitled to the office.

Eliason suggests this case stands for the proposition that only the Attorney General or a person claiming to be entitled to the office of North Las Vegas Constable's office represent the only persons having standing to remove him from his office. This is a fair reading of those having standing pursuant to NRS Title 35. The case however does not set the limits on the universe of possibilities as to how an office holder can lose his or her office due to nonfeasance or misfeasance. Clearly, the duly elected Nevada legislature is empowered to pass legislation creating alternative means of removal of a state officeholder from office, just like it did when it passed NRS Chapter 35 (Quo Warranto). This is of course precisely what occurred when the legislature passed NRS 258.007 creating a self-executing statute removing a constable from office upon failure to fulfill Nevada POST

[8] The writ of "*quo warranto* generally is available to challenge an individual's right to hold office to oust the individual from officer if the individual's claim to it is invalid.

requirements in the allotted time. The Legislature determined it was absolutely necessary for an elected constable, who utilizes police powers in an urban area, to be certified by Nevada POST or he or she would be replaced by a person who had the proper peace officer certification. The preliminary injunction order clearly defeats this legislative purpose.

Further, the legislature also plainly passed a very specific statute applying only to constables and only to requiring some elected constables to be certified as a peace officer, as opposed to the general *Quo Warranto* statute of Title 35 that has application generally to all public offices. This Court should not construe the general *Quo Warranto* statute to preempt the very constable specific provision of NRS 258.007. See, e.g., Hinck v. United States, 550 U.S. 501, 506, 127 S.Ct. 2011 (2007) (describing the "well-established principle" that "a precisely drawn, detailed statute preempts more general remedies"); EC Term of Years Trust v. United States, 550 U.S. 429, 433, 127 S.Ct. 1763 (2007) (same); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S.Ct. 1989 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

Eliason does not argue that he has complied with the POST certification requirements of NRS 258.007(1). He rather only contends Clark County lacks

authority to move forward on replacing him as the North Las Vegas Constable under NRS 38.007(1). This argument is at odds with the plain language of the statute. Eliason's concession that he has not obtained a category II peace officer certification from Nevada POST by the extended deadline of July 4, 2016 triggered the self-executing forfeiture provision of NRS 38.007(2). Eliason consequently forfeited his office by operation of statutory law at that time. The only thing left undone at that point under NRS 258.007(2) was Clark County appointing a category II peace officer replacement to fill the vacancy. There is absolutely no statutory requirement for Clark County to obtain a judicial declaration before replacing Eliason in this public office (even if it could under Title 35 as required by the preliminary injunction order).

Clark County therefore had full authority afforded by NRS 258.007(2) and NRS 258.030 to put the matter on a public meeting agenda and fulfill its ministerial duty set forth in these statutes. The Court must accordingly answer the certified question by holding that Clark County has power to remove a constable from office pursuant to NRS 258.007.

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II. A Writ of *Quo Warranto* is Not the Exclusive Remedy to Remove a Constable under the Nevada Revised Statutes.

The Eighth Judicial District Court erred when it included language in the order on an issue that was collateral to the interpretation of NRS 258.007, namely, that quo warranto was the only way to remove Eliason from office as the North Las Vegas Constable. The only issue pertinent to the motion for a preliminary injunction was whether Clark County agenda item 67 was unlawful to recognize that Eliason forfeited his office based on NRS 258.007(2) and to move forward with the appointment of a replacement. The state court did not consider the application of NRS 283.440 or NRS 258.010 to the circumstances and entered an order that is completely at odds with these statutes. This Court must therefore declare that Nevada law permits a constable to be removed outside of a *quo warranto* action.

A. Clark County Has Standing to Pursue the Removal of the North Las Vegas Constable from Office for "Nonfeasance" Pursuant to NRS 283.440.

The Nevada Legislature in NRS 283.440 clearly gave Clark County standing to take action to remove Eliason as the Constable of North Las Vegas for "nonfeasance" when he failed to comply with the training and certification requirements imposed by NRS 258.007(1). The statute erects a procedure for

persons, including municipal entities, to seek the removal of a person from any office in Nevada that is not expressly exempted for both malfeasance and nonfeasance. The district court's order making the determination that *quo warranto* was the exclusive procedure to remove Eliason from office and, that Clark County had no standing to file any such action, is plainly inconsistent with this statute.

AG Opinion No. 2017-14 correctly determined that NRS 283.440 is an alternative basis for removal and Clark County has standing to file a complaint in court requesting removal of Plaintiff from the office. [JA 133-136]. This Court, therefore, should not answer the certified question in a matter that effectually affirms the legally unsound dicta in the order granting a preliminary injunction that is clearly inconsistent with NRS 258.440 as correctly interpreted by the Attorney General's office.

NRS 283.440 (Removal of certain public officers for malfeasance or nonfeasance: Procedure; appeal) is a separate procedure than *quo warranto* that the district court failed to account for when issuing the preliminary injunction order. NRS 283.440(1), in pertinent part, states the following:

> 1. Any person who is now holding or who shall hereafter hold any office in this State and who refuses or neglects to perform any official act in the manner and form

prescribed by law, or who is guilty of any malpractice or malfeasance in office, may be removed therefrom as hereinafter prescribed in this section . . . .

2. Whenever a complaint in writing, duly verified by the oath of **any complainant**, is presented to the district court alleging that any officer within the jurisdiction of the court:

. . .

(b) Has refused or neglected to perform the official duties pertaining to the officer's office as prescribed by law; or

(c) Has been guilty of any malpractice or malfeasance in office,

the court shall cite the party charged to appear before it on a certain day, not more than 10 days or less than 5 days from the day when the complaint was presented. On that day, or some subsequent day not more than 20 days from that on which the complaint was presented, the court, in a summary manner, shall proceed to hear the complaint and evidence offered by the party complained of. If, on the hearing, it appears that the charge or charges of the complaint are sustained, the court shall enter a decree that the party complained of shall be deprived of the party's office.

3. The clerk of the court in which the proceedings are had, shall, within 3 days thereafter, transmit to the Governor **or the board of county commissioners of the proper county**, as the case may be, a copy of any decree or judgment declaring any officer deprived of any office under this section. The Governor or the board of county commissioners, as the case may be, shall appoint some

> person to fill the office until a successor shall be elected or appointed and qualified. . . .

(emphasis added).

The statute plainly gives "any complainant" standing to file a verified complaint in court alleging that the constable refused or neglected to perform duties prescribed by law for failure to the failure to comply with NRS 258.007(1). As summarized by the attorney general's office, "any person may make a certified complaint against a constable who has refused or neglected to perform his official duties as prescribed by law." [JA 135]. After the complaint is filed, "the court will issue an order to show cause to consider the charges of the complaint. NRS 283.440(2)." Id. Therefore, the district court's order, prepared by Eliason, stating in *dicta* that *quo warranto* was the one and only way to remove him from office and Clark County does not have standing to pursue any such action is plainly erroneous.

If the district court had occasion to consider NRS 283.440 it would have held otherwise. It was error for the district court to accept the unnecessary and unlawful language in the order prepared by Eliason to immunize him from any adverse action taken by Clark County for failure to comply with NRS 258.007(1). The question certified by the U.S. District Court of Nevada as to whether *quo*

warranto is the exclusive remedy for Clark County to remove Eliason from office must be answered in the negative. Clearly, even if the Court finds that NRS 258.007(2) is not self-executing and Clark County must institute a separate judicial action, NRS 283.440 permits Clark County to do so.

B. Clark County Has Authority Under Nevada Law to Abolish the Office of the North Las Vegas Constable Pursuant to NRS 258.010.

Clark County also has authority under state law to abolish the office of the North Las Vegas Constable on a determination that the office is "not necessary." NRS 258.010, in pertinent part, states:

> (3) In a county whose population:
> . . .
>
> (b) Is 700,000 or more, if the board of county commissioners determines that the office of constable is not necessary in one or more townships within the county, it may, by ordinance, abolish the office in those townships.
>
> For a township in which the office of constable has been abolished, the board of county commissioners may, by resolution, appoint the sheriff ex officio constable to serve without additional compensation.

Hence, Clark County has lawful authority to remove Eliason from office, outside of *quo warranto*, through abolishing the office altogether. This is another

avenue available for Clark County to remove Eliason from office upon exercising its discretion and finding the office is not necessary.[9] The law makes clear that, contrary to Eliason's assertion and insertion in the order otherwise, that only the Nevada state courts may cause him to be removed from office. The legislature has afforded Clark County that discretion. Again, the state court entered an order including the *quo warranto* without consideration of Clark County's statutory authority to abolish the office of the North Las Vegas constable. To be sure, Eliason should never have been able to obtain a preliminary injunction order that stands contrary to the clear authority given to Clark County pursuant to NRS 258.010. The Court should therefore notify the U.S. District Court of Nevada that Eliason can be removed from office under Nevada law without the filing of a *quo warranto* action.

CONCLUSION

For the foregoing reasons, Appellant Clark County respectfully requests that this Honorable Court answer the certified question of the U.S. District Court of Nevada by stating that NRS 258.007(2) is self-executing and Eliason forfeited his office by operation of the law. In addition, the Court should conclude, as a matter

[9] Clark County exercised this authority to abolish the City of Las Vegas' Constable office in 2013.

of clear statutory authority, that quo warranto is not the exclusive remedy to remove Respondent Robert Eliason from office as the North Las Vegas Constable.

DATED this 12th day of August, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

/s/ Thomas D. Dillard

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
9950 West Cheyenne Avenue
Las Vegas, NV 89129
(702) 384-4012
Attorneys for Defendant/Appellant
CLARK COUNTY

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with 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:

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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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of August, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

/s/ Thomas D. Dillard

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
9950 West Cheyenne Avenue
Las Vegas, NV 89129
(702) 384-4012
Attorneys for Defendant/Appellant
CLARK COUNTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August, 2019, I served the above **APPELLANT CLARK COUNTY'S OPENING BRIEF** through the Nevada Supreme Court e-filing system (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

Kelly A. Evans, Esq.
Chad R. Fears, Esq.
EVANS FEARS & SCHUTTERT, LLP
2300 W. Sahara Ave., Ste. 900
Las Vegas, Nevada 89102
P: 702-805-0290
F: 702-805-0291
kevans@efstriallaw.com
cfears@efstriallaw.com

Jeffery F. Barr, Esq.
ASHCRAFT & BARR, LLP
2300 W. Sahara Ave., Ste. 900
Las Vegas, Nevada 89102
P: 702-631-7555
F: 702-631-7556
barrj@ashcraftbarr.com

Attorneys for Plaintiff

///

///

Adam Paul Laxalt, Esq.
Attorney General
Michael D. Jenson, Esq.
Senior Deputy Attorney General
555 Wright Way
Carson City, Nevada 89711
P: 775-684-4603
F: 775-684-4601
mjensen@ag.nv.gov
Attorneys for Defendant
Nevada Commission on Peace
Officer Standards & Training

/s/ Melissa Burgener
An Employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI