ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

Docket No. 51920

District Court No. 07-OC-012451B

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APPELLANT'S OPENING BRIEF

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COMES NOW, Appellant Michael A. Carrigan, by and through the undersigned counsel of record, and files his Opening Brief.

Respectfully submitted this 23rd day of July 2008.

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I.

STATEMENT OF THE ISSUES

There are four primary issues for the Court to consider in this appeal:

1. Whether the District Court erred in concluding that Nevada Revised Statute (NRS) 281A.420(8) (formerly NRS 281.501(8)) is not unconstitutionally vague;

2. Whether the District Court erred in concluding that NRS 281A.420(2) (formerly NRS 281.501(2)) is not unconstitutionally vague;

3. Whether the District Court erred in concluding that the vagueness that permeates NRS 281A.420(8) and NRS 281A.420(2) does not chill protected political speech in violation of the First Amendment to the United States Constitution;

4. Whether the Order of the District Court, coupled with the Opinion of the Nevada Commission on Ethics in this case, amounts to a prior restraint of protected political speech.

II.

STANDARD OF REVIEW

Constitutional challenges present questions of law that are subject to this Court's de novo review. *Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 711 (Nev. 2007); *City of Las Vegas v. Dist. Ct.*, 146 P.3d 240, 245 (Nev. 2006).

III.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal stems from the Nevada Commission on Ethics' improper application of certain unconstitutionally vague provisions of Nevada's Ethics in Government Law. In particular, on August 29, 2007, the Commission found that Sparks City Councilman Michael A. Carrigan should have abstained from voting on a certain matter before the City Council. Joint Appendix (JA) 0279-0291. The specific statutes invoked by the Commission do not adequately delineate the boundaries of lawful behavior and therefore public officers across Nevada are required to guess as to the applicability of the Ethics in Government Law.

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B. Course of Proceedings

The Nevada Commission on Ethics convened on August 29, 2007 to review the actions of Councilman Carrigan related to his August 23, 2006 vote to tentatively approve a planned development handbook. *Id.* Applying the unconstitutionally vague statutes that are the subject of this appeal, the Commission determined that Carrigan should have abstained from voting on the matter, and found him guilty of a non-willful violation of NRS 281A.420(2). *Id.*

Councilman Carrigan subsequently sought Judicial Review of the Commission's decision. The First Judicial District entertained the petition, noting that it was a "close call," but in an order dated May 28, 2008, affirmed the Commissions' decision. JA 0369, lns. 3-4; JA 0378-0414. Because the effect of the District Court's order coupled with the Commission's decision in this case amounts to a prior restraint on protected speech, Carrigan filed a First Amendment Petition for Writ of Mandamus with this Court on June 13, 2008. (Supreme Court Case # 51850) On June 19, 2008, this Court denied the petition, finding that an appeal from the District Court's order afforded Councilman Carrigan an adequate legal remedy, precluding writ relief.

Councilman Carrigan then filed a timely notice of appeal from the District Court's order, and the matter now resides before this Court. JA 0417-0418.

C. Statement of Facts

On February 16, 2005, Red Hawk Land Company submitted an application to the City of Sparks Planning Department proposing the transfer of a tourist commercial zoning designation and a gaming entitlement from the Wingfield Springs development in Sparks, Nevada to another Red Hawk development - Tierra Del Sol - along the Pyramid Highway in Sparks.[1] This project is known colloquially as the "Lazy 8." The transfer application was based upon a 1994 development agreement that allowed for the future transfer of development credits if the credits remained unused. The Lazy 8 is a source of public consternation, with a small group of residents of unincorporated Washoe

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[1] Certain facts presented here are not contained in the record presently before the court, but are indispensable for an accurate historical overview. Although these facts have little to no bearing on the issues on appeal here, they are nonetheless important for the purpose of framing the factual recitations. Please see Supreme Court Case #'s 49504, 49682, and 20521 for more information regarding the underlying land use dispute.

County and the Sparks Nugget being the most vocal opponents of the project. At an August 23, 2006 public meeting, the Sparks City Council voted three to two to deny Red Hawk's application for tentative approval of the proposed Tierra Del Sol planned development handbook, which included the transfer of the gaming entitlement. At this meeting, Red Hawk Land Company was represented by a number of people, including Carlos Vasquez, who is a paid consultant to Red Hawk.

Subsequently, Red Hawk filed a lawsuit (Second Judicial District Court Case # CV06-02078) against the City on August 25, 2006, alleging that the denial of the application was a breach of the 1994 development agreement and that the breach caused damages in excess of $100 million. Through negotiations with Red Hawk, and after contemplating its options and assessing the legal obstacles in defending the Red Hawk Complaint, the City elected to settle the lawsuit. The Stipulation, Judgment and Order entered by the Second Judicial District Court of Nevada on September 1, 2006 obligated the City to tentatively approve Red Hawk's application.

Two weeks later, several nearly identical ethics complaints were filed against Sparks City Councilman Michael Carrigan with the Nevada Commission on Ethics. JA 0009-0041. The complaints alleged that Councilman Carrigan used his position as a Sparks City Councilman to secure unwarranted benefits for himself from Carlos Vasquez and that Mr. Vasquez had an "undue influence" over Councilman Carrigan. *Id.*

Mr. Vasquez has been friends with Councilman Carrigan since 1991, and served as the volunteer campaign manager for Councilman Carrigan during his initial election to the Sparks City Council in 1999, and each of his subsequent re-elections. JA 0280-0281.

Councilman Carrigan disclosed this relationship prior to the public hearing on the Red Hawk application, and unequivocally stated that he was not in a position to reap any type of benefit from the project, and that he could faithfully and impartially discharge his duties as an elected official in this case. JA 0281. Nevertheless, the Commission commenced an investigation into the actions of Councilman Carrigan, and ultimately charged Councilman Carrigan with (1) using his position in government to secure an unwarranted benefit for Mr. Vasquez; (2) failing to make an adequate disclosure of his relationship with Mr. Vasquez; and (3) failing to abstain from voting on the Red Hawk application on August 23, 2006. JA 0055-0056

On September 20, 2006, the Sparks City Council voted to ratify the September 1, 2006 settlement as a perfunctory, prophylactic measure taken to eliminate even the slightest concern that the City's decision to settle the Red Hawk action occurred outside the boundaries of Nevada's Open Meeting Law. *See*, NRS 241.037.[2]

On October 6, 2006 the City of Sparks was sued again regarding the Lazy 8 – This time by the Sparks Nugget and a group of citizens. (Second Judicial District Court # CV06-02410). In that case, City's decision to settle the lawsuit was alleged to be faulty because of an alleged violation of Nevada's planning and zoning laws. The Second Judicial District Court dismissed this lawsuit on jurisdictional grounds, never reaching the merits of the case. The subsequent appeal presently resides with this Court. (Supreme Court Case #'s 49504, 49682, 150251).

On August 27, 2007, Red Hawk sought final approval of the Tierra Del Sol planned development handbook from the Sparks City Council. This time, applying a different standard of review as required by NRS 278A.540, the City Council voted three to two to grant final approval of the application.

The Nevada Commission on Ethics convened on August 29, 2007 and held a hearing regarding the ethics complaints filed against Councilman Carrigan. JA 0279-0291. The Commission found that the Councilman (1) did not use his position in government to secure or grant unwarranted privileges, preferences, exceptions or advantages for Carlos Vasquez; and (2) that Councilman Carrigan adequately disclosed his relationship with Mr. Vasquez. *Id.* However, the Commission applied an unconstitutionally vague statute and inconsistently determined that Councilman Carrigan should have abstained from voting on the Red Hawk application at the August 23, 2006 meeting of the Sparks City Council due to his connection to Mr. Vasquez, despite concluding that a majority of Councilman Carrigan's constituency favored the proposed Red Hawk application. *Id.*

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[2] There has never been an official finding or formal opinion issued by the Nevada Attorney General that the City Council violated Nevada's Open Meeting Law. Therefore, the City maintains that the September 1, 2006 "Stipulation, Judgment and Order" did not require any subsequent approval or ratification by the City Council in a meeting conducted pursuant to Nevada's Open Meeting Law, and that the September 20, 2006 meeting was held only to demonstrate the City Council's commitment to the Open Meeting Law.

Thereafter, on September 21, 2007, the Sparks Nugget and the same group of citizens filed another lawsuit against the City of Sparks (Second Judicial District Case # CV07-02180). This lawsuit requests that the Second Judicial District Court invalidate the August 27, 2007 vote of the Sparks City Council based on the August 29, 2007 findings of the Nevada Commission on Ethics. A motion to dismiss this action is presently pending in Department Six of the Second Judicial District Court.

The Commission on Ethics published a formal opinion regarding its findings at the August 29, 2007 hearing on October 8, 2007. JA 0279-0291. Councilman Carrigan filed a Petition for Judicial Review in Carson City on October 9, 2007. JA 0292-0295; JA 0296-0335. On December 14, 2007, the Sparks Nugget and the same group of citizens filed a Motion to Intervene in the original lawsuit filed against the City of Sparks by Red Hawk (Second Judicial District Court Case # CV06-02078, *supra*) based on the August 29, 2007 decision of the Commission. The motion argues that the September 20, 2006 vote of the Sparks City Council ratifying the September 1, 2006 settlement is invalid because Councilman Carrigan should not have voted on the issue. The motion was granted, and the Interveners filed a counter-claim against Red Hawk and a cross-claim against the City of Sparks. Motions to dismiss these claims are currently pending in Department Six of the Second Judicial District Court.

Finally, on May 12, 2008 a hearing regarding Councilman Carrigan's Petition for Judicial Review was held in Department Two of the First Judicial District Court. JA 0292-0295; JA 0296-0335. In an Order dated May 28, 2008, the District Court upheld the decision of the Nevada Commission on Ethics. JA 0378-0414.

IV.

ARGUMENT

A. NRS 281A.420(8) is Unconstitutionally Vague

A statute is unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application..." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Nevada Comm'n on Ethics v. Ballard*, 120 Nev. 862, 868, 102 P.3d 544, 548 (2004). The

void-for-vagueness doctrine derives from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Silvar v. District Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). The Nevada Supreme Court has established a two-part test for determining whether a statute is unconstitutionally vague: a statute is facially invalid if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. *Id.*; *City of Las Vegas v. District Court*, 118 Nev. 859, 862, 59 P.3d 477, 480 (2002).

The focus of the first prong of the vagueness test is to protect "those who may be subject to potentially vague statutes," *Silvar*, 122 Nev. at ___, 129 P.3d at 688 (2006), and to "guarantee that every citizen shall receive fair notice of conduct that is forbidden." *City of Las Vegas*, 118 Nev. at 864, 59 P.2d at 481 (2002). The notice required under the first prong "offers citizens the opportunity to conform their...conduct to that law." *Silvar*, 122 Nev. at ___, 129 P.3d at 685 (2006). While absolute precision in drafting statutes is not necessary, the Legislature "must, at a minimum, delineate the boundaries of unlawful conduct." *City of Las Vegas*, 118 Nev. at 863, 59 P.3d at 480 (2002). Additionally, where the Legislature does not define each term it uses in a statute, the statute will only survive a constitutional challenge if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision. *Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975). In particular, questions of vagueness must be more closely examined where, as in this case, First Amendment rights are implicated. *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (noting that even if a statute is not so vague as to violate due process, it may be impermissibly vague under the First Amendment if it chills protected speech).

Previously, this Court invalidated the entire Ethics in Government Law based on unconstitutionally vague financial disclosure provisions that required public officers to file a financial statement detailing, among other things, economic interests "within the jurisdiction of the officer's public agency." *Dunphy v. Sheehan*, 92 Nev. 259, 263, 549 P.2d 332, 335 (1976). In that case, the

Court found the phrase "within the jurisdiction of the officer's public agency" unconstitutionally vague for the purposes of financial disclosure laws. *Id.* at 264. By way of illustration, the Court wrote:

> *[L]et us suppose that a city councilman, or his spouse, or his child, owns extensive economic interests within the county of his residence, but not within the boundaries of the city which he serves. Must he disclose such interests? They are not within the jurisdiction of his public agency. He must determine for himself whether to expose such interests to public scrutiny, and does not know if a failure to disclose may subject him to a criminal penalty. Examples of this initial 'jurisdictional' determination may be multiplied a hundredfold, and points to a basic vagueness in the law. The public office holder should not have to guess regarding his duty to disclose.* Id. at 265.

In *Dunphy*, public officers were forced to make a determination regarding the disclosure of economic interests on their own, at the risk of being penalized if their decision was later found to be erroneous. *Id.* That is precisely the situation in this case.

NRS 281A.420(8) enumerates various relationships that amount to a "commitment in a private capacity to the interests of others" under the Nevada Ethics in Government Law.[3] In this case, the Nevada Commission on Ethics and the First Judicial District Court made use of two subsections of NRS 281A.420(8) when they determined that Councilman Carrigan had a commitment in his private capacity to the interests of Mr. Vasquez – subsection (d) and subsection (e). See JA 0279-0291; JA 0408, lns. 4-13; JA 0410, lns.13-18. Subsections (d) and (e) are unconstitutionally vague, deceptive and uncertain.

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[3] **NRS 281A.420** Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
   (a) Who is a member of his household;
   (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
   (c) Who employs him or a member of his household;
   (d) With whom he has a substantial and continuing business relationship; or
   (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

NRS 281A.420(8)(d) classifies a "substantial and continuing business relationship" as a "commitment in a private capacity to the interests of others." The phrases "business relationship" and "substantial and continuing" have never been defined by the Nevada Legislature. No state case law or published opinion of the Commission on Ethics exists to clarify what these phrases mean - in the context of the Ethics in Government Law or otherwise. Is a business relationship an attempt to turn a profit, or is making money not a relevant factor? Does it include volunteer relationships? Are political relationships encompassed by this subsection? If a public officer is a party to a business relationship, what standards are used to determine if the relationship is substantial and continuing? Is a relationship substantial because it represents a certain percentage of an individual's income, or is there some unidentified, previously determined amount of money? Is money even involved in the analysis? Is a relationship continuing because it exists for some undefined fixed period of time, or is there an unpublished standard that contemplates frequency of dealings? Without guidance from Nevada's Legislature, Nevada's Courts, or the Nevada Commission on Ethics, there can be no well settled or commonly understood meaning of "business relationship" or the conditions that make a business relationship "substantial and continuing." Consequently, public officers across Nevada are to guess at the boundaries of the statute. Where terms contained in a statute are so poorly defined as to leave persons "guessing" at what behavior is, or is not, lawful, the statute is void-for-vagueness. *Childs v. State*, 107 Nev. 584, 585, 816 P.2d 1079, 1079-1080 (1991).

NRS 281A.420(8)(e) provides that any relationship that is "substantially similar" to any other relationship enumerated in NRS 281A.420(8) also amounts to a "commitment in a private capacity to the interests of others." The phrase "substantially similar" establishes a standard that is so subjective and so expansive, that it is impossible for a person of ordinary intelligence to discern which relationships fall within the purview of the statute – nearly any relationship could be made to satisfy the broad and unfettered grasp of NRS 281A.420(8)(e). The Legislature, the Nevada Courts, and the Commission on Ethics have never established standards BY which a relationship is analyzed for substantial similarity under NRS 281A.420(8)(e). Without a statutory or well settled and commonly understood definition of the term "substantially similar," public officers in the State of Nevada must rely on their own best guesses and advice from similarly confused attorneys, while the Nevada

Commission on Ethics is left to its own unfettered predilections to determine whether a relationship is substantially similar to one of the relationships enumerated in subsection (e).

Underscoring the unconstitutional implementation of NRS 281A.420(8), the Commission on Ethics specifically found that the nature of Councilman Carrigan's relationship with Mr. Vasquez was political and not for profit:

> *Councilman Carrigan and Mr. Vasquez both testified that Mr. Vasquez worked in a volunteer capacity on all three of Councilman Carrigan's campaigns for Sparks City Council and that Mr. Vasquez never profited from any of Councilman Carrigan's campaigns. Mr. Vasquez testified that everything he and his companies did for Councilman Carrigan was at cost and that any related funds were a "pass-through," that is, Mr. Vasquez' companies would do work on the campaigns, or farm out the work, and then be reimbursed for costs from Councilman Carrigan's campaign fund.* JA 0286.

The United States Supreme Court has made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S. Ct. 303, 38 L.Ed.2d 260 (1973). Carlos Vasquez testified that he volunteered for Councilman Carrigan's campaigns because he believed Carrigan would be "a great candidate" and a "great council person." JA 0158, lns. 16-18 (Transcript of hearing before the Nevada Commission on Ethics). Additionally, Mr. Vasquez explained that he donated his time to Councilman Carrigan's campaigns because he "believed in Mr. Carrigan as a political candidate" and that he "thought the City needed some help at the time." JA 0159, lns. 2-5. Mr. Vasquez' participation in Councilman Carrigan's campaigns amounts to political volunteerism that is protected by the United States Constitution – not a "business relationship" that is "substantial and continuing," or a relationship that is "substantially similar" to any other relationship included in NRS 281A.420(8).

Effectively, the vagueness that permeates NRS 281A.420(8) enables the Commission on Ethics to unilaterally eviscerate a constitutionally protected relationship under color of Nevada law. Foreclosing upon an elected officer's ability to vote on particular matters because a person or group

associated with the matter made a campaign contribution to that officer threatens protected speech and associational freedoms. There would be no reason to contribute or volunteer for a political campaign if the contribution obligated the recipient to abstain from acting on the issues that spawned the contribution in the first place. Conversely, if a political contribution automatically disqualifies the recipient after his election from thereafter voting on matters in which the contributor has an interest, an enterprising group or individual could disqualify all known adverse candidates for municipal office by simply making nominal contributions or volunteering for the campaign of each such candidate.

The unconstitutional vagueness of NRS 281A.420(8) demands any of three intolerable results: (1) public officers in Nevada will continue to be forced to gamble with their positions as public servants by voting on matters without understanding the parameters of the statute or risking the discontent of their constituency by abstaining unnecessarily and thereby failing to perform the function of their position; (2) political contributions that led to the election of a candidate will render that candidate ineffective; (3) political contributions, volunteerism and citizen involvement will dissipate across the State of Nevada.

Demonstrating the inherent vagueness that permeates NRS 281A.420(8), the Commissioners presiding over the August 29, 2007 hearing were unable to agree among themselves on which provision of the statute Councilman Carrigan's relationship fell under. Commissioner Jenkins believed that Councilman Carrigan's relationship with Carlos Vasquez was substantially similar to a substantial and continuing business relationship. JA 0249, lns. 6-9. Commissioner Hsu did not think that the relationship was like a substantial and continuing business relationship at all, *Id.*, lns. 23-25, instead, he found that the relationship was substantially similar to a familial relationship. JA 0250, lns. 1-2. In contrast, Commissioner Cashman found that a substantial and continuing business relationship did exist between Councilman Carrigan and Mr. Vasquez. JA 0253, lns. 10-12. Since the administrative body charged with enforcing the Ethics in Government Law was unable to come to a collective interpretation and application of NRS 281A.420(8)(d) and 281A.420(e), it is certainly unreasonable to expect that an elected official, vested with ordinary intelligence, could comprehend what conduct is prohibited.

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Under the second prong of the vagueness test, a statute is unconstitutional if it "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *City of Las Vegas v. District Court*, 146 P.3d 240, 245 (2006). A particular fear of this Court has been that absent adequate guidelines, a statute may permit standard-free application. *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (2006) (quoting *Koleander v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)).

In *Silvar*, this Court analyzed and struck down a Clark County loitering ordinance because law enforcement officers had too much discretion in determining whether the ordinance had been violated. *Id.* at 295-96. Like the ordinance in *Silvar*, NRS 281A.420(8) is susceptible to arbitrary and discriminatory enforcement. Because subsections (d) and (e) lack statutory, well settled or ordinarily understood definitions, the Nevada Commission on Ethics, and in this case the First Judicial District Court, is forced to rely on broad, unfettered discretion when interpreting, applying, and enforcing those provisions of the statute. NRS 281A.420(8) fails to provide the clear language necessary to bridle that discretion, therefore the statute encourages, authorizes, or at least fails to prevent its own arbitrary and discriminatory enforcement. Accordingly, NRS 281A.420(8)(d) and 281A.420(8)(e) fail to satisfy the second prong of the vagueness test set forth by this Court.

B. NRS 281A.420(2) is Unconstitutionally Vague

NRS 281A.420(2) requires public officers in the State of Nevada to abstain from voting on matters when the independence of judgment of a reasonable person would be materially affected in any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his commitment in a private capacity to the interests of others. The Commission and the First Judicial District Court did not address the first two conditions, but specifically invoked the third, as defined by NRS 281A.420(8). See JA 0279-2091; JA 0408, lns. 4-13; JA 0410, lns.13-18. A statute which "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally*, 269 U.S. at 391 (1926); *Dunphy*, 92 Nev. at 262, 549 P.2d at 334 (1976); *Ballard*, 120 Nev. at 868, 102 P.3d at 548 (2004). Because the definition proffered by NRS 281A.420(8) is unconstitutionally vague, there is no reliable way for an ordinary public officer to

determine whether or not he is required to abstain from voting in certain situations without guessing. Accordingly, in cases such as this, where the application of NRS 281A.420(2) relies on subsections (d) or (e) of NRS 281A.420(8), NRS 281A.420(2) is unconstitutionally vague.

C. The Vagueness of NRS 281A.420(8) and NRS 281A.420(2) Offends the First Amendment

In Nevada, planning and zoning decisions have long been characterized as "legislative." *McKenzie v. Shelly*, 77 Nev. 237, 240-42, 362 P.2d 258, 269-70 (1961); *Nova Horizon, Inc. v. Reno*, 105 Nev. 92, 94, 769 P.2d 721, 722 (1989).

Here, the Red Hawk Land Company submitted an application to the City of Sparks Planning Department on February 6, 2005. The application proposed the transfer of a tourist commercial zoning designation and a gaming entitlement from the Wingfield Springs development in Sparks, Nevada, to another Red Hawk development known as Tierra Del Sol along the Pyramid Highway in Sparks. At an August 23, 2006 public meeting, the Sparks City Council voted three to two to deny Red Hawk's application. The vote cast by Councilman Carrigan is the subject of this appeal. Because the August 23, 2006 vote related to a planning and zoning decision, it is appropriately classified as "legislative."

Although no Nevada Court has previously answered the question of whether legislative voting is protected speech, all three federal courts that have directly considered the issue concluded that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment. *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989); *Clarke v. United States*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski v. City of Madison*, 558 F.Supp. 664 (W.D.Wisc. 1983). A legislator's vote is inherently expressive, *Clarke*, 886 F.2d at 411 (D.C.Cir. 1989), and legislative voting has been recognized by the United States Supreme Court as the "individual and collective expression of opinion." *Hutchison v. Proxmire*, 443 U.S. 111, 133, 99 S.Ct. 2675, 2697, 61 L.Ed.2d 411 (1978). Voting by public officials comes within the "heartland of First Amendment doctrine," and "...the status of public officials' votes as constitutionally protected speech is established beyond peradventure of doubt". *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995). Simply put, there can be no more definitive expression of an opinion protected by the First Amendment than when an elected official votes on a controversial subject. *Mihos v. Swift*, 358 F.3d 91, 107, 109 (1st

Cir. 2004); *Miller*, 878 F.2d at 532 (1st Cir. 1989). That Councilman Carrigan's vote occurred in the heat of a controversial land use decision only strengthens the protection afforded to Carrigan's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. *See Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949).

The Constitution demands a high level of clarity from a law if it threatens to inhibit the exercise of a constitutionally protected right, such as the right of free speech or religion. *Colautti v. Franklin,* 439 U.S. 379, 391, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979); *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604, 87 S.Ct. 675, 683-684, 17 L.Ed.2d 629 (1967). An unconstitutionally vague law tends to chill the exercise of First Amendment rights by causing citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964)).

Councilman Carrigan is not asserting that he has a protected right to vote when he has a disqualifying conflict of interest. Carrigan's argument is that NRS 281A.420(8) is unconstitutionally vague, NRS 281A.420(2) is vague because it relies on NRS 281A.420(8), and that the vagueness of these laws extends to, and impermissibly chills, otherwise protected core political speech in violation of the First Amendment. As a practical matter, Carrigan's only option to ensure compliance with the imprecise standards of NRS 281A.420(8) and NRS 281A.420(2) is to abstain from voting, even when abstention is not necessarily warranted or required by law. Because the Commission on Ethics is free to determine what constitutes a "business relationship" that is "substantial and continuing," or which relationships are "substantially similar" to relationships enumerated in NRS 281A.420(8), without providing any legitimate guidance or standards to public officials in the State of Nevada, the challenged statutes allow the unnecessary abridgment of protected political speech, and are therefore void.

State statutes that burden political speech, such as NRS 281A.420(8) and NRS 281A.420(2), are subject to strict scrutiny, and the statutory restriction of speech is upheld only if it is narrowly

tailored to serve a compelling state interest. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct.1407, 1421 (1978). The broad purview of NRS 281A.420(8) includes any actual or implied relationship that the Commission on Ethics arbitrarily determines to be "substantially similar" to any of the other relationships specifically enumerated in the subsection. Because of the uncertainty that accompanies these unconstitutionally vague standards, relationships that do not amount to a "commitment in a private capacity to the interests of others" but for the unfettered discretion and personal predilections of the Commission on Ethics, are necessarily encumbered, and the reach of NRS 281A.420(2), through its reliance on NRS 281A.420(8), is not restricted to a narrow category of unprotected speech. Accordingly, NRS 281A.420(8) and NRS 281A.420(2) are not narrowly tailored, and the statutes do not employ the least restrictive means available to regulate conflicts of interest. Therefore, NRS 281A.420(8) and NRS 281A.420(2) do not survive strict scrutiny and violate the First Amendment.[4]

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[4] The First Judicial District Court incorrectly applied the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to the situation in this case. JA 0391, lns. 14-17. When a court applies the *Pickering* balancing test, it must arrive at a balance between the interests of the employee, *as a citizen*, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-1735 (1968) (emphasis added). Here, Councilman Carrigan is speaking as an elected representative of the citizens of Sparks, not as a private citizen.

To the extent this Court is inclined to consider the *Pickering* balancing test, the scales of justice still tip decisively in favor of Councilman Carrigan. Public officers in Nevada have a strong interest in voting their conscience on important issues without having to suffer retaliatory recriminations from the Nevada Commission on Ethics. *See, e.g., Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("It is essential that public employees be able to speak freely without fear of retaliatory dismissal."). The public also has a substantial interest in members of public authorities being able to freely cast their votes in accordance with their best judgment, without fear of political interference and intimidation. *See Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (noting "public interest in encouraging the vigorous exercise of official authority"). Together, Carrigan's interest and the public's interests weigh heavily on Carrigan's side of the *Pickering* balance. Although the State has an interest in securing the ethical performance of governmental functions, that alone is not strong enough to overcome the interest of the citizenry of Sparks in representative government. NRS 294A.100 limits the amount of money, or value of services, any person can contribute to a campaign for public office in Nevada.

E. Through its Reliance on NRS 281A.420(8), NRS 281A.420(2) is Overbroad.

A statute is unconstitutionally overbroad and void on its face if it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of" protected First Amendment rights. *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

The overbreadth doctrine invalidates laws, such as NRS 281A.420(2), that infringe upon First Amendment rights. Even minor intrusions on First Amendment rights will trigger the overbreadth doctrine. *Silvar,* 122 Nev. 289, 129 P.3d at 688 (2006). The "First Amendment freedoms need breathing space to survive, [so] government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Because it has a chilling effect on free expression and thus impacts the "breathing space" of First Amendment rights, an overbroad law is unconstitutional. *Silvar*, 122 Nev. 289, 129 P.3d at 688 (2006).

Claims of overbreadth are also entertained in cases where the reviewing court is of the opinion that rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915,

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Moreover, NRS 294A.100 controls the timeframe in which political donations can be made. Failure to comply with the provisions of NRS 294A.100 is a category E felony. Any concerns that the state may have regarding the campaign contributions made by Mr. Vasquez to Councilman Carrigan's campaigns are mitigated by the limitations placed on campaign contributions by state law. By finding that Councilman Carrigan's vote on the Lazy 8 project accurately reflected the will of his constituents and that Carrigan sufficiently disclosed his relationship with Mr. Vasquez, the Commission on Ethics essentially found that no actual impropriety existed in this case. JA 0281, #15; JA 0289. Therefore, the notion that Councilman Carrigan should have abstained from voting on the Lazy 8 matter because of the political contributions from Mr. Vasquez - the government's interest in this case for purposes of *Pickering* balancing - is based entirely on a supposed appearance of impropriety. The contributions in this case did not violate NRS 294A.100, and were properly reported under NRS 294A.120. Accordingly, any concern that the government may have regarding the ethical performance of governmental functions is alleviated by the limitations imposed on campaign contributions by NRS Chapter 294A. If properly received and reported campaign contributions amount to a disqualifying conflict of interest under NRS Chapter 281, the Ethics in Government Law will serve as the de facto limitation on campaign contributions without specifically enumerating the point at which a contribution becomes a disqualifying conflict of interest. Therefore, if a *Pickering* balancing test is applied to this situation, the interests of Councilman Carrigan, Nevada's public officers, and the public at large overwhelmingly militate in favor of Councilman Carrigan's First Amendment right to vote on projects before the Sparks City Council.

37 L.Ed.2d 830 (1973).

NRS 281A.420(2) requires public officers in the State of Nevada to abstain from voting on matters when the independence of judgment of a reasonable person would be materially affected in any of three cases: (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his commitment in a private capacity to the interests of others as defined by NRS 281A.420(8). NRS 281A.420(8)(d) and 281A.420(8)(e) are unconstitutionally vague. Therefore, in cases such as this, when NRS 281A.420(2) relies on subsection (d) or (e) of NRS 281A.420(8), it is also unconstitutionally vague.

The act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment. *Miller*, 878 F.2d 523 (1st Cir. 1989); *Clarke*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski*, 558 F.Supp. 664 (W.D.Wisc. 1983). When a public officer in Nevada is not required to abstain from voting under NRS 281A.420(2), he has a constitutionally protected interest in voting on matters before his board or agency. Because the definitions proffered by NRS 281A.420(8)(d) and 281A.420(8)(e) are unconstitutionally vague, there is no reliable way for an ordinary public officer to determine whether or not he is required to abstain from voting in certain situations without guessing. Therefore, NRS 281A.420(2) ensnares rights that are protected by the Constitution, either through the chilling effect the vagueness has on the free exercise of a public officer's First Amendment rights, or through the arbitrary and discriminatory enforcement of the statute by the Nevada Commission on Ethics.

In Nevada, public officers are not required to abstain from voting on matters that concern or involve a donor of campaign *In Re: Boggs-McDonald*, CEO 01-12; *In Re: Wood*, CEO 95-51. Case law from other states concludes that a conflict of interest does not necessarily exist where a board member has received a campaign contribution. These decisions are harmonious with the previous findings of the Nevada Commission on Ethics. In a Washington case, the court concluded an administrative decision maker's participation after receiving campaign contributions from an interested party does not necessarily violate the appearance of fairness doctrine. In *Snohomish County Improvement Alliance v. Snohomish County*, 808 P.2d 781 (Wa. 1991), the court held when two council members participated in a quasi-judicial proceeding after contemporaneously receiving

campaign contributions from interested parties, they did not violate the appearance of fairness doctrine. In deciding this, the court stated: "Moreover, such participation by said Council members was not a conflict of interest . . . The mere receipt of campaign contributions by a councilmember does not constitute a 'direct or indirect substantial financial or familial interest..." *Id.* at 786. The court implied there may have been another result had there been a failure to report the campaign contributions. *Id.* In *Woodland Hills v. City Council*, 609 P.2d 1029 (Cal.1980), the California Supreme Court held that absent bribery or some significant conflict of interest, a campaign contribution is not sufficient to require recusal of a council member prior to a vote on projects of developers who gave the contributions. *Id.* at 1032. Although the trial court found the party before the council member had made substantial contributions of money to the campaign (exceeding $9,000), it found the challenger was not denied a fair hearing. *Id.* The court concluded it was not improper for a member of the council to vote on the projects nor were they required to disqualify themselves in such circumstances because expression of political support by campaign contribution does not prevent a fair hearing before an impartial city council when the contributions were lawfully made and received, and disclosed pursuant to laws governing campaign contributions. *Id.* at 1032. The court discussed the importance of the political contribution in that it is an exercise of fundamental freedom protected by the First Amendment of the United States Constitution. Because of this importance the court stated, "to disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms." *Id*, at 1033.

Here, no *quid pro quo* relationship has been alleged. The campaign contributions made to Councilman Carrigan by Mr. Vasquez were made for valid and constitutionally protected purposes. JA 0203, lns. 17-24. Mr. Vasquez donated his time to Councilman Carrigan's campaigns long before the Lazy 8 project appeared on the horizon. See Exhibit B. Mr. Vasquez' contributions to Councilman Carrigan's campaigns were never conditioned on, or otherwise tied to, a particular vote or issue. *Id.*, lns.17-24. The Commission on Ethics found that "a majority of Councilman Carrigan's constituency favored the Lazy 8." JA 0281, #15.

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The notion that campaign contributions disqualify the recipient from participating in governmental decisions has been expressly and emphatically rejected by courts across the United States. *See, O'Brien v. State Bar of Nevada*, 114 Nev. 71, 952 P.2d 952 (Nev. 1998); *Cherradi v. Andrews*, 669 So.2d 326, (Fla.App 4th Dist. 1996); *J-IV Investments v. David Lynn Mach, Inc.*, 784 S.W.2d 106 (Tex.App. Dallas 1990). Foreclosing upon an elected official's ability to act on particular matters because a person or group associated with the matter had made a campaign contribution to that official threatens constitutionally protected political speech and association freedoms. "Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct.. 637-638, 46 L.Ed.2d 659, 691 (1976). While disqualifying contribution recipients from voting would not prohibit contributions *per se*, it would unconstitutionally chill contributors' First Amendment rights. See, *Woodland Hills Residents Assn., Inc. v. City Council*, 26 Cal.3d 938, 609 P.2d 1029 (1980); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), judgment aff'd, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed. 2d 284 (1982). Representative government would be thwarted by depriving certain classes of voters of the constitutional right to participate in the electoral process. Based on the prior opinions of the Nevada Commission on Ethics and decisions of courts around the United States, the campaign contributions made to Councilman Carrigan by Mr. Vasquez did not create an impermissible conflict of interest requiring Councilman Carrigan to abstain from voting on August 23, 2006. Mr. Vasquez' right to volunteer, and Councilman Carrigan's right to accept Mr. Vasquez' in-kind donations, are protected by the United States Constitution.

Even if this Court were to employ the more rigorous conflict standards that apply to judges, the campaign contributions from Mr. Vasquez to Councilman Carrigan do not amount to a disqualifying conflict of interest. In the context of judges, the Nevada Supreme Court has held that a campaign contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification. *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 644, 5 P.3d 1059 (2000) (quoting *In re Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988)). The Court remarked that such a rule would "severely and intolerably" obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign

contributions. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275; *see also O'Brien v. State Bar of Nevada,* 114 Nev. 71, 76 n. 4, 952 P.2d 952, 955 n. 4 (1998) (judge serving on state bar board of governors was not disqualified from voting on appointment to commission on judicial selection despite having received over $100,000.00 in campaign contributions from prospective appointee and her partner). In *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 5 P.3d 1059 (2000), the Las Vegas Redevelopment Agency filed petition for writ of mandamus or prohibition, challenging a trial judge's decision to disqualify himself in an eminent domain action, involving agency and landowners whose property was condemned for the development of a certain street. The Supreme Court held that contributions made to judge's successful campaign to retain his seat by casinos that stood to benefit from outcome of eminent domain action did not constitute proper grounds for judge's disqualification. *Id.* at 645. The Court then ordered the district judge to preside over the case because the campaign contributions were not an appropriate justification for his recusal, and therefore the judge was obligated to perform the function of the position he was elected to fill. *Id.*

Councilman Carrigan is obligated to represent the will of the citizens who reside in the Fourth Ward of the City of Sparks. The vagueness that permeates NRS 281A.420(8) and 281A.420(2) unconstitutionally silences both Councilman Carrigan and the citizens he represents.

F. Prior Restraint

Governmental regulations or actions that prohibit or limit the future dissemination of constitutionally-protected speech constitute prior restraints. *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981). The term is generally used to describe administrative and judicial orders forbidding certain communications when issued before such communications are to occur. *DVD Copy Control Ass'n., Inc. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (2003); *Hobart v. Ferebee*, 692 N.W.2d 509 (S.D. 2004). A prior restraint imposes in advance a limit upon the right to speak, *State v. Haley*, 687 P.2d 305 (Alaska 1984), or otherwise prevents the expression of a message. *Hamilton Amusement Center v. Verniero*, 156 N.J. 254, 716 A.2d 1137 (1998). The United States Supreme Court has condemned any system of prior restraint of first amendment rights. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The protection of political speech is a primary function of the guarantee of freedom of speech. *Del Papa v. Steffen*, 112 Nev. 369, 915 P.2d 245 (1996); *Kirksey v.*

City of Jackson, 663 F.2d 659 (5th Cir. 1981) (*decision clarified on denial of reh'g*, 669 F.2d 316 (5th Cir. 1982)); *CBS, Inc. v. F.C.C.*, 629 F.2d 1 (D.C. Cir. 1980) (*judgment aff'd*, 453 U.S. 367 (1981)). There is no more definitive expression of a political opinion protected by the First Amendment than when an elected official votes on a controversial subject. *Mihos*, 358 F.3d at 107, 109 (1st Cir. 2004); *Miller*, 878 F.2d at 532 (1st Cir. 1989).

Moving forward from the conclusions of the Nevada Commission on Ethics and the First Judicial District Court, Councilman Carrigan and every other public officer in the State of Nevada is still faced with the same disconcerting decision – to vote on matters before his respective governmental body without understanding the boundaries of an unconstitutionally vague statute, or abstain from voting and fail to represent the citizens that make up his constituency.

The First Judicial District Court determined that the challenged provisions of the Ethics in Government Law are not unconstitutionally vague because public officers are free to seek advisory opinions from the Commission on Ethics before they vote on a matter. In its Order, the District Court explained that Councilman Carrigan should have sought an advisory opinion from the Commission on Ethics if he were unsure of the boundaries of lawful behavior. JA 0395, lns. 1-7 ; JA 0373, lns. 21-24. Warnings from a court with respect to the exercise of speech have a bearing on whether there is a prior restraint. *Multimedia Holdings Corp. v. Circuit Court*, 544 U.S. 1301, 1306, 125 S.Ct. 1624, 161 L.Ed.2d 590 (2005). The District Court's conclusion presupposes that every possible factual scenario is either already covered by existing advisory opinions, or that an on-point advisory opinion will be issued in time for a concerned public officer to act (or not act) based on that guidance.[5] Nearly every opinion published in the last decade by the Nevada Commission on Ethics contains the following disclaimer:

> *Note: The foregoing opinion applies only to the specific facts and circumstances described herein. Facts and circumstances that differ from those in this opinion may result in an opinion contrary to this opinion. No inferences regarding the provisions*

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[5] Moreover, even if the supposition were accurate, it does not alter the fact that subsections (d) and (e) of NRS 281A.420(8) are insufficiently specific to put public officers in the State of Nevada on notice as to which relationships rise to the level of a "commitment in a private capacity to the interests of others."

of the Nevada Revised Statutes quoted and discussed in this opinion may be drawn to apply generally to any other facts and circumstances. See, e.g., JA 0291.

Although the Commission on Ethics has never published an opinion clarifying the provisions of NRS 281A.420(8), or an opinion similar to that fact pattern presented in the instant case, this disclaimer eviscerates any precedential value of an opinion or decision of the Nevada Commission on Ethics, even in cases where a relevant publication exists. The Commission lacks jurisdiction to render advisory opinions where the request for an opinion seeks general guidance, *In re: Rural County District Attorney*, CEO 99-48, and the Commission is only authorized to opine on specific questions regarding specific facts and circumstances, *In re: Public Officer*, CEO 02-22; *In re: Eklund-Brown*, CEO 02-23. Therefore, the realistic effect of the District Court's finding coupled with the disclaimer detailed above is that Councilman Carrigan has no choice but to either seek a prior, binding advisory opinion from the Commission each and every time he has a concern regarding NRS 281A.420(8) or act without understanding the boundaries of the law and risk the myriad of penalties enumerated in NRS 281A.440. Requiring public officers to seek an advisory opinion from a panel before speaking or acting – for fear of disciplinary action and sanctions – is the "ultimate in prior restraint." *Spargo v. New York State Comm'n on Judicial Conduct*, 2003 WL 2002762, N.D.N.Y. (2003) (not reported in F.Supp.2d – vacated on basis of Younger Abstention by *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003)).

As a practical matter, seeking an advisory opinion every time a public officer is unsure regarding the interpretation or application of an unconstitutionally vague statute is not a viable solution or cure of the constitutional infirmities of the Ethics in Government Law. The Nevada Open Meeting Law mandates that written notice of all meetings must be given at least three working days before the meeting. NRS 241.020(2). The Sparks City Council is required to hold regular meetings at least twice a month, at times established by ordinance. Sparks City Charter, Art. 2, Sec. 2.030(1). The Sparks Municipal Code (SMC) designates the second and fourth Mondays of each month as the times for regular meetings of the City Council. SMC 1.10.020(A). Accordingly, under NRS 241.020(2), the agenda for a regular meeting of the Sparks City Council is published on the first and third Wednesdays of each month, three working days prior to the meeting. The agenda and its

supporting material are also distributed to the Council Members three working days prior to a scheduled meeting – prior to the dissemination of this information, the Council Members are unaware of the issues on the agenda, and are therefore unable to identify any potential conflicts.

NRS 281A.440 allows the Commission on Ethics to take up to forty-five days to render an advisory opinion after receiving a request from a public officer. In practice, the Commission has declined to provide advisory opinions to the Sparks City Council until the concerned Council Member has received an opinion from the City Attorney's Office. Once the City Attorney's Office prepares a perfunctory opinion, a letter is drafted to the Commission explaining that the Council Member remains unsure of the interpretation of the Ethics in Government Law. These documents, along with the Commission's official opinion request form, are then faxed and mailed to the Executive Director of the Commission on Ethics. The Executive Director thereafter gathers information relating to the request for an advisory opinion and attempts to secure a quorum of the Commissioners to hold a hearing regarding the advisory opinion. Once a hearing is held, the resulting opinion is binding upon the public officer's future conduct. NRS 281A.440(1)(a). As there are only three working days between the date the Sparks City Council Members are provided with the agenda and supporting materials and the date of the actual City Council meeting, the Commission's procedure cannot be completed. Consequently, a public officer who requests an advisory opinion from the Commission on Ethics has three options: (1) a public officer may abstain from voting on an issue until the Commission issues an advisory opinion, at which time, in all likelihood, it will be too late for the public officer to represent the will of his constituents by voting; (2) a public officer may choose to risk fines, removal from office, and criminal prosecution by performing his duties as an elected representative of the citizens of Sparks by voting without any certainty regarding the boundaries of the law; or (3) although impermissible in some situations where statutory deadlines are implicated, the public officer may request that the public body table an issue until the Commission renders an advisory opinion. Thus, Councilman Carrigan is being forced to choose between delaying political speech that he has a right to make as a Sparks City Councilman and as an American Citizen, and risking fines, removal from office and potential criminal prosecution.

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By essentially forcing public officers to seek a binding advisory opinion regarding the boundaries of an unconstitutionally vague statute before speaking or acting – for fear of disciplinary action and sanctions – the Nevada Commission on Ethics and the First Judicial District Court have established a system of prior restraint that cannot be allowed.

V.

CONCLUSION

The Nevada Commission on Ethics and the First Judicial District Court have employed unconstitutionally vague and overbroad statutes to strip Councilman Carrigan of his First Amendment right to vote on legislative matters, his right to receive campaign contributions, Carlos Vasquez of his right to associate with political campaigns, and the citizens of Sparks, Nevada, of their voice in representative government. Moreover, the actions of the Commission and the District Court implicate the constitutionally guaranteed rights of all Nevadans, from the man or woman in the street to the long-time voter to all of the State's elected officers. Operating in a world apart from either the United States or Nevada Constitution the Commission on Ethics and the First Judicial District Court have established an informal system of prior restraint on political speech, irreparably damaging the most fundamental rights enjoyed by Americans and upon which our nation is based. Councilman Carrigan was elected to represent the citizens of Sparks, and is entitled to all of the privileges, rights and obligations that accompany his position as a City Councilman. For these reasons, the Opinion published by the Commission on Ethics and the Order entered by the First Judicial District Court must be vacated.

Respectfully submitted this 23rd day of July 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Opening 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

Respectfully submitted this 23rd day of July 2008.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(d), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **APPELLANT'S OPENING BRIEF** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

Adriana Fralick
Nevada Commission on Ethics
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Carson City, NV 89706

The Honorable Catherine Cortez Masto
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DATED this 23rd day of July 2008.

Shawna L. Liles