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.

Supreme Court Case No. 51920

First Judicial District Court
Case No. 07-OC-012451B

AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA IN SUPPORT OF THE COMMISSION ON ETHICS OF THE STATE OF NEVADA

BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel
Nevada Bar No. 6781

Legislative Counsel Bureau
401 S. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830
Facsimile: (775) 684-6761

Attorneys for the Legislature of the State of Nevada

ORIGINAL

08-21995

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

NEVADA CONSTITUTION

NEVADA REVISED STATUTES

NEVADA BILLS

NEVADA LEGISLATIVE HISTORY

NEVADA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

ARGUMENT

I. Because the Councilman bears the burden of proof to show that the Commission's decision is invalid and because every possible presumption will be made in favor of the constitutionality of a statute, the Councilman bears a heavy burden to make a clear showing that subsections 2 and 8 of NRS 281A.420 are unconstitutional.

This is an appeal from a final decision of the Commission pursuant to the judicial review provisions of the Administrative Procedure Act (APA). NRS 233B.130-233B.150. Under the APA, the Commission's decision "shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court." NRS 233B.135(2). In addition, the Councilman bears the burden of proof to show that the Commission's decision is invalid. Id.; Weaver v. State, Dep't of Motor Veh., 121 Nev. 494, 498 (2005). Thus, the Commission's decision "shall be presumed correct, and the party challenging the decision has the burden of proving error." United States v. State Eng'r, 117 Nev. 585, 589 (2001).

The Councilman has limited his appeal to challenging the constitutionality subsections 2 and 8 of NRS 281A.420. Under the APA, the Court may set aside the Commission's decision if it is in violation of constitutional provisions. NRS 233B.135(3)(a). Because a challenge to the constitutionality of a statute is a question of law, the Court reviews the constitutional challenge de novo without any deference to the district court's decision. See Walker v. Dist. Ct., 120 Nev. 815, 819 (2004). In reviewing such a challenge, the Court presumes the statute is constitutional unless the contrary is clearly established. List v. Whisler, 99 Nev. 133, 137 (1983). "In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." Id. The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." Id. at 138. Because the Councilman bears the burden to show that the Commission's decision is invalid and because every possible presumption will be made in favor of the constitutionality of subsections 2 and 8 of NRS 281A.420, the Councilman bears a heavy burden to make a clear showing that the statute is unconstitutional.

II. Because the Councilman has not contested on appeal the sufficiency of the evidence supporting the Commission's findings of fact and conclusions of law, the Court must accept those findings of fact and conclusions of law as true and conceded and must uphold the Commission's conclusion that the Councilman violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project.

When reviewing the Commission's decision, the Court applies a deferential standard of review to the Commission's findings of fact. S. Nev. Operating Eng'rs v. Labor Comm'r, 121 Nev. 523, 527-28 (2005). Under that standard, the Court will not look beyond the administrative record or substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact. NRS 233B.135(3); Weaver, 121 Nev. at 498. Instead, the Court will uphold the Commission's findings of fact if they are supported by substantial evidence in the record, regardless of whether the Court would have reached the same view of the facts as the Commission. Wright v. State, Dep't of Motor Veh., 121 Nev. 122, 125 (2005). In addition, when the Commission's conclusions of law are closely tied to its view of the facts, those conclusions of law are entitled to deference and will not be disturbed on appeal if they are supported by substantial evidence in the record. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). In affirming the Commission's decision, the district court also entered findings of fact. In reviewing those findings of fact, the Court applies a deferential standard of review under N.R.C.P. 52, and the Court will not be set aside the district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence in the record. Dewey v. Redev. Agency, 119 Nev. 87, 93 (2003).

In his district court appeal, the Councilman claimed that the Commission's decision was not supported by reliable, probative and substantial evidence on the whole record and that it was arbitrary and capricious and characterized by an abuse of discretion. (JA0386.) The district court rejected the Councilman's claims and held as follows:

> 98. The Court finds that substantial evidence exists to support the Commission's conclusion that at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman Carrigan's situation would have been materially affected

by that commitment. Therefore, Councilman Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of NRS 281A.420.

99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy 8 project was a violation of subsection 2 of NRS 281A.420.

100. Therefore, the Court holds that the Commission's final decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

(JA0410.)

In his Opening Brief, the Councilman does not challenge these findings of fact and conclusions of law or the sufficiency of the evidence supporting them. By failing to raise such a challenge in his Opening Brief, the Councilman has abandoned and waived his right to make such a challenge on appeal. Kahn v. Morse & Mowbray, 121 Nev. 464, 480 n.24 (2005); Wash., Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 146 (1937); Comm'r of Internal Revenue v. Purdy, 102 F.2d 331, 332-33 (1st Cir. 1939). Furthermore, in light of this waiver on appeal, "the accuracy of the [Commission's] findings and conclusions and the sufficiency of the evidence to sustain them must be taken not only as true but as conceded." Gemsco, Inc. v. Walling, 324 U.S. 244, 250-51 (1945).

Thus, in reviewing this appeal, the Court must accept the Commission's findings of fact and conclusions of law as true and conceded, and the Court must uphold the Commission's conclusion that the Councilman violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project. The practical effect is that the Court must affirm the Commission's decision unless the Councilman makes a clear showing that the statute is unconstitutional. As will be established below, the Councilman has not made such a showing. Therefore, the Commission's decision must be affirmed.

III. By not contesting on appeal the Commission's conclusion that he violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project, the Councilman thereby concedes he has engaged in conduct which is clearly proscribed by the statute and, as a result, the Councilman is unable to prove that the statute is impermissibly vague in all its applications or as applied to him under the Due Process Clause of the Fourteenth Amendment.

To succeed on a facial challenge for vagueness under the Due Process Clause, a party must prove

that the statute "is impermissibly vague in all of its applications. A challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff v. Martin, 99 Nev. 336, 340 (1983) (citations omitted); In re T.R., 119 Nev. 646, 652 (2003). Thus, when a party has engaged in conduct which is clearly proscribed by the statute, the party is unable to prove that the statute is impermissibly vague in all of its applications or as applied to him under the Due Process Clause. See Hernandez v. State, 118 Nev. 513, 524 (2002); Westinghouse Beverage v. Dep't of Taxation, 101 Nev. 184, 187 (1985).

In his Opening Brief, the Councilman does not contest the Commission's conclusion that he violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project. As a result, the Councilman thereby concedes to the Commission's conclusion that he has engaged in conduct which is clearly proscribed by the statute. In light of his concession that he has engaged in conduct which is clearly proscribed by the statute, the Councilman is unable to prove that the statute is impermissibly vague in all its applications or as applied to him under the Due Process Clause of the Fourteenth Amendment. Consequently, the Councilman is limited to challenging the facial validity of the statute on First Amendment grounds. See Reno v. ACLU, 521 U.S. 844, 870-72 (1997); City of Las Vegas v. Dist. Ct., 118 Nev. 859, 863 n.14 (2002). As will be established below, the Councilman has not made a clear showing that the statute is unconstitutional on First Amendment grounds. Therefore, the Commission's decision must be affirmed.

IV. Because the Councilman's relationship with Vasquez created an appearance or implied probability of bias in favor of Red Hawk: (1) the Councilman was prohibited by the Due Process Clause from participating in the City Council meeting; and (2) he did not have a First Amendment right to vote on the Lazy 8 project and, therefore, his constitutional claims under the First Amendment fail as a matter of law.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996); S.O.C., Inc. v. Mirage

Casino-Hotel, 117 Nev. 403, 410 (2001).[1] Even though the text of the First Amendment places a limitation only on the actions of "Congress," the First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Id. Because the First Amendment is made applicable to the states through the Due Process Clause, it follows that the First Amendment does not protect conduct which the Due Process Clause forbids.

Consequently, this case falls at the intersection of the First and Fourteenth Amendments. The Councilman claims the First Amendment gave him a constitutional right to vote on the Lazy 8 project. However, because the City Council was performing an administrative function at the time of the vote, the parties who opposed the project had a constitutional right under the Due Process Clause to a fair hearing before a fair tribunal consisting of decisionmakers who do not have any disqualifying conflicts of interest. When balanced against each other, it is clear that the constitutional rights of the parties to a fair hearing before a fair tribunal outweigh any constitutional right claimed by the Councilman to vote on a matter in which he had a disqualifying conflict of interest.

Several courts have held that the act of voting by a public officer may be entitled to a certain level of protection under the First Amendment. Mihos v. Swift, 358 F.3d 91, 109 (1st Cir. 2004); Camacho v. Brandon, 317 F.3d 153, 160 (2d Cir. 2003); Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Colson v. Grohman, 174 F.3d 498, 506 (5th Cir. 1999); Stella v. Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Those courts, however, have also recognized that "[t]his protection is far from absolute." Mullin, 284 F.3d at 37. Thus, it has been held that a public officer does not have an absolute right under the First Amendment to participate or vote in every matter that comes before the public body. DeGrassi v. City of Glendora, 207 F.3d 636,

---

[1] Because the Court interprets the free speech protections of the Nevada Constitution (Art. 1, § 9) to be equivalent to the free speech protections of the First Amendment, the same legal standards apply under both the state and federal constitutional provisions. See S.O.C., Inc., 117 Nev. at 414-16.

645-47 (9th Cir. 2000) (city council member did not have First Amendment right to participate in council meeting where excluded member had potential conflict of interest regarding matter to be discussed); Mullin, 284 F.3d at 37-41 (member of town commission did not have First Amendment right to vote on matter where the member's actions violated the town's bylaws). Because voting by a public officer is not given absolute protection under the First Amendment, the threshold issue in this case is whether the First Amendment was applicable at the time and under the circumstances when the Councilman voted on the Lazy 8 project given that he had a substantial and continuing political, professional and personal relationship with Vasquez which created a disqualifying conflict of interest.

It has been a universal and long-established rule under the common law that members of municipal bodies are prohibited from voting on matters in which they have a disqualifying conflict of interest, and this common-law rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E. 146, 149 (Ga. 1888); Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v. Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-established" tradition under the common law of prohibiting certain conduct, this creates a "strong presumption" that the prohibition is constitutional under the First Amendment. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002). Thus, because the common law prohibits members of municipal bodies from voting on matters in which they have a disqualifying conflict of interest, no court has ever held that a member of a municipal body has a protected right under the First Amendment to vote on a matter in which he has a disqualifying conflict of interest.

The common-law rule of disqualification becomes a constitutional rule of disqualification under the Due Process Clause when a municipal body is performing an administrative function, such as making land use decisions involving specific projects or specific property. See Hantges v. City of

Henderson, 121 Nev. 319, 324-27 (2005) (discussing case law which holds that an appearance of bias or impropriety in land use decisions deprives interested parties of procedural due process). In the context of land use proceedings, "the character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process." Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 896 (6th Cir. 1991) (quoting Harris v. County of Riverside, 904 F.2d 497, 501-02 (9th Cir. 1990)). Thus, in determining whether a particular land use proceeding is subject to the Due Process Clause, courts do not rely on the label placed on those proceedings by state or local law. Id. Instead, courts apply well-established constitutional tests to distinguish between legislative functions and administrative functions. Id.

A municipal body performs both legislative functions and administrative functions. Nevadans for Prot. of Prop. Rights v. Heller, 122 Nev. 894, 914 (2006) ("Unlike the Legislature, which performs strictly legislative functions, a local government body performs administrative functions as well."). A municipal body performs a legislative function when it enacts a general land use or zoning law. McPherson Landfill, Inc. v. Bd. of County Comm'rs, 49 P.3d 522, 524-25, 531 (Kan. 2002); Thornbury Twp. v. W.D.D., Inc., 546 A.2d 744, 746-47 (Pa. Commw. Ct. 1988); City of Hobart v. Behavioral Inst., LLC, 785 N.E.2d 238, 246-49 (Ind. Ct. App. 2003); Turner, LLC v. City of Twin Falls, 159 P.3d 840, 846 (Idaho 2007). In contrast, a municipal body performs an administrative function (also known as an adjudicative function or a quasi-judicial function) when it applies existing land use or zoning laws to specific projects or specific property. Id. As explained by the Pennsylvania Commonwealth Court, "when an action of a governing body does not establish a rule of general application, but rather applies specific criteria to a single applicant and a single piece of property, the governing body is acting in its adjudicative capacity and not its legislative capacity." Thornbury Twp., 546 A.2d at 747.

In Nevada, this Court applies a similar test to distinguish between legislative measures and administrative measures in the context of land use laws proposed by the voters through municipal

initiative petitions. Garvin v. Dist. Ct., 118 Nev. 749, 764-66 (2002); Eller Media Co. v. City of Reno, 118 Nev. 767, 771-72 (2002). Under the Nevada Constitution, the voters may use municipal initiative petitions to propose legislative measures that create a permanent law of general application or lay down a general rule of conduct or course of policy for the guidance of the city's citizens, officers or agents. Id. However, the voters may not use municipal initiative petitions to propose administrative measures that regulate specific projects or specific property because the power to take such administrative action is reserved to the governing body of the municipality. Id. To distinguish between legislative measures and administrative measures, the Court applies the following test from Forman v. Eagle Thrifty Drugs & Mkts, Inc., 89 Nev. 533, 537 (1973):

> An ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents is purely legislative in character and referable, but an ordinance which simply puts into execution previously-declared policies, or previously-enacted laws, is administrative or executive in character, and not referable.

Eller Media, 118 Nev. at 772 (quoting Forman, 89 Nev. at 537). Under this test, it is well settled that land use measures which are intended to regulate specific projects or specific property are administrative in nature. Citizens for Pub. Train Trench Vote v. City of Reno, 118 Nev. 574, 582-85 (2002), and Glover v. Concerned Citizens for Fuji Park, 118 Nev. 488, 493-96 (2002), *both cases overruled in part on other grounds by* Garvin, supra.[2]

Thus, a city council performs an administrative function whenever the city council is required, under the particular facts and circumstances of a given case, to apply existing land use or zoning laws, rules or policies to specific projects or specific property. When a city council is performing an

---

[2] The Councilman cites two cases for the proposition that planning and zoning decisions in Nevada have long been characterized as "legislative." McKenzie v. Shelly, 77 Nev. 237, 240-42 (1961); Nova Horizon, Inc. v. City Council, 105 Nev. 92, 94 (1989). However, a close examination of those cases reveals that the municipal bodies were performing administrative functions because their planning and zoning decisions were subject to a "substantial evidence" standard of review. Unlike land use decisions involving specific projects or specific property, a municipal body's decision to enact general planning and zoning legislation is not subject to a "substantial evidence" standard of review. See Coronet Homes, Inc. v. McKenzie, 84 Nev. 250 (1968).

administrative function under such circumstances, it is required to comply with the procedural requirements of the Due Process Clause. As explained by the Kansas Supreme Court:

> [W]here the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative. In such quasi-judicial proceedings, it is incumbent upon the authority to comply with the requirements of due process in its proceedings. Thus, the proceedings must be fair, open, and impartial. A denial of due process renders the resulting decision void.

McPherson Landfill, 49 P.3d at 524.

The Indiana Court of Appeals has provided a similar explanation regarding the application of due process requirements to land use decisions:

> In the legislative arena, there is no constitutional due process requirement of a neutral decision maker. Rather, the "check" on legislative power is the ballot box. Thus, when a common council acts in a legislative capacity, it is not subject to the requirements of due process. Zoning or rezoning is a legislative determination, not an administrative or quasi-judicial determination based on fact finding. However, individual petitions for land use variances, like the one at issue here, are treated quite differently and are considered quasi-judicial proceedings entitled to due process protections.

City of Hobart, 785 N.E.2d at 246 (citations omitted and emphasis added).

In this case, when the City Council was determining whether to approve the Lazy 8 project, the City Council was not creating a permanent law of general application or laying down a general rule of conduct or course of policy for the guidance of its citizens, officers or agents. Rather, the City Council was reviewing an individual application requesting a land use change, and it was applying existing land use laws, rules and policies in the City's Master Plan to determine whether to approve a specific project on specific property at Tierra Del Sol. Thus, when the City Council voted upon the Lazy 8 project, it was not performing a legislative function. Instead, it was performing an administrative function and it was required to comply with the due process requirements for administrative proceedings. See Bing Constr. Co. v. County of Douglas, 107 Nev. 262, 265-66 (1991).

Under the Due Process Clause, the parties to administrative proceedings are entitled to a fair

hearing before a fair tribunal consisting of decisionmakers who do not have any disqualifying conflicts of interest. Gilman v. Bd. of Veterinary Med. Exam'rs, 120 Nev. 263, 269 (2004).[3] If a decisionmaker has a disqualifying conflict of interest and fails to withdraw from the proceedings, the tainted participation violates due process and ordinarily requires invalidation of the proceedings. See Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973); In re Ross, 99 Nev. 1, 7-15 (1983). Courts have consistently applied these due process principles to conclude that members of a local governing body who have a disqualifying conflict of interest are prohibited by the Due Process Clause from participating in land use decisions involving specific projects or specific property. Nasierowski Bros., 949 F.2d at 896-97; Thornbury Twp., 546 A.2d at 746-47; City of Hobart, 785 N.E.2d at 253-54. Thus, the pivotal issue in this case is whether the Councilman had a disqualifying conflict of interest under the Due Process Clause when he participated in the proceeding regarding the Lazy 8 project.

In determining whether a decisionmaker has a disqualifying conflict of interest, courts use the same standards that apply to the disqualification of judges. Withrow v. Larkin, 421 U.S. 35, 46-47 (1975); Gilman, 120 Nev. at 269; Turner, 159 P.3d at 846 ("[T]he Due Process Clause would therefore apply to the zoning board in the same way that it applies to judges."). Under those standards, a decisionmaker is disqualified not only for actual bias but for "an implied probability of bias" as well. Mosley v. Comm'n on Jud. Discipline, 117 Nev. 371, 378 (2001). The reason for such disqualification is that "our system of law has always endeavored to prevent even the probability of unfairness." Withrow, 421 U.S. at 47 (quoting In re Murchison, 349 U.S. 133, 136 (1955)). Thus, because "justice must satisfy the appearance of justice," the Due Process Clause requires the disqualification of a decisionmaker who has a conflict of interest that creates an appearance or implied probability of bias. Gilman, 120 Nev. at 269 (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980)).

---

[3] Because the Court interprets the due process protections of the Nevada Constitution (Art. 1, § 8, subsec. 5) to be equivalent to the due process protections of the Fourteenth Amendment, the same legal standards apply under both the state and federal constitutional provisions. See Gilman, 120 Nev. at 269.

In the judicial context, a judge is not disqualified when a party or attorney appearing before the judge has made contributions to the judge's campaign or has publicly endorsed the judge's candidacy. L.V. Redev. Agency v. Dist. Ct., 116 Nev. 640, 644-45 (2000); Nevius v. Warden, 114 Nev. 664, 666-67 (1998); In re Dunleavy, 104 Nev. 784, 790 (1988); Nathanson v. Korvick, 577 So. 2d 943, 944 (Fla. 1991); Zaias v. Kaye, 643 So. 2d 687, 687-88 (Fla. Ct. App. 1994). In addition, a judge generally is not disqualified when an attorney appearing before the judge served as the judge's campaign manager, solicited campaign contributions on behalf of the judge, or played another substantial role in the judge's election efforts during a *prior* campaign that ended years before the proceeding is held. See Ainsworth v. Combined Ins. Co., 105 Nev. 237, 260-61 (1989), *modified in part on other grounds by* Powers v. United Servs. Auto. Ass'n, 114 Nev. 690 (1998); Garcia v. Am. Income Life Ins. Co., 664 So. 2d 301, 302 (Fla. Ct. App. 1995), *review denied*, 673 So. 2d 29 (Fla. 1996); Gluth Bros. Constr. Co. v. Union Nat'l Bank, 548 N.E.2d 1364, 1368 (Ill. App. Ct. 1989).

However, if the proceeding is held during the same period as the judge's *ongoing* reelection campaign, the judge is disqualified when a party or attorney appearing before the judge is presently serving as the judge's campaign manager or is playing another substantial role in the judge's reelection efforts during the ongoing campaign. See MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1338 n.5 (Fla. 1990); Neiman-Marcus Group, Inc. v. Grey, 829 So. 2d 967, 968-69 (Fla. Ct. App. 2002); Dell v. Dell, 829 So. 2d 969, 970 (Fla. Ct. App. 2002); Caleffe v. Vitale, 488 So. 2d 627, 628-29 (Fla. Ct. App. 1986). Likewise, a judge is disqualified when a party or attorney appearing before the judge is actively soliciting campaign contributions on behalf of the judge or is publicly acting as the judge's campaign spokesman during an ongoing campaign. See, e.g., Pierce v. Pierce, 39 P.3d 791, 796-800 (Okla. 2001); Barber v. Mackenzie, 562 So. 2d 755, 757-58 (Fla. Ct. App. 1990), *review denied*, 576 So. 2d 288 (Fla. 1991); Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56, 74-75 (Miss. 1996), and at 79 (Banks, J., concurring in part and dissenting in part), *overruled in part on other grounds by*

Owens v. Miss. Farm Bureau Cas. Ins. Co., 910 So. 2d 1065 (Miss. 2005).

For example, in Caleffe v. Vitale, the court of appeals held that a trial judge was disqualified from presiding over a divorce proceeding because "the wife's attorney is actually running the judge's ongoing reelection campaign. Common sense tells us that this alone would give rise to a reasonable fear on the petitioner's part that a conflict of interest may exist." 488 So. 2d at 629. Consequently, the court held that the "specific and substantial political relationship" between the judge and the wife's attorney created an appearance of bias that required disqualification. Id. Similarly, in Barber v. Mackenzie, the court of appeals held that a trial judge was disqualified from presiding over a divorce proceeding because the wife's two attorneys were members of the judge's campaign committee, which was "actively conducting direct mail solicitation requesting contributions and endorsements." 562 So. 2d at 757. In explaining the need for disqualification, the court stated:

> The Committee was formed at least one year prior to the election, and plainly contemplates a course of activity on behalf of the judge during the year leading up to the election. There is a substantial and continuing relationship between the Committee and the trial judge, in a matter of great and immediate importance to the judge. . . . A fortiori, disqualification is called for here, where there is a continuing affiliation in a joint project lasting a considerable period of time. It is the nature of the relationship which compels the result. We conclude that a reasonable litigant in the position of movant would fear that the trial court will be aware of the membership and activities of her own contemporaneously active campaign committee, and will entertain a bias in favor of the side represented by her Committee members.

Id. at 757-58.

In this case, the record clearly establishes that the Councilman and Vasquez had a substantial and continuing political, professional and personal relationship which created an appearance or implied probability of bias and resulted in a disqualifying conflict of interest under the Due Process Clause. At the time of the meeting, the Councilman was involved in an ongoing and contentious reelection campaign where the primary issue was the Lazy 8 project. (JA0380-82.) During the campaign, Vasquez served as the Councilman's campaign manager and played a substantial and continuing role in

his reelection efforts, including: (1) soliciting campaign contributions; (2) acting as a campaign spokesman; (3) providing political consultation and advice; and (4) providing printing, advertising and public relations services through various companies. (JA0380-82.) Outside the context of the campaign, the Councilman considered Vasquez to be a trusted political advisor and confidant, and he would routinely discuss political matters with Vasquez. (JA0381.) Finally, the Councilman and Vasquez have a close personal friendship that has lasted for more than a decade. (JA0381.) In light of Vasquez's role as the Councilman's campaign manager, political advisor, confidant and close personal friend, the record contains overwhelming evidence that the Councilman and Vasquez had a substantial and continuing political, professional and personal relationship when the Lazy 8 project came before the City Council for approval.

During the same period that Vasquez was serving as the Councilman's campaign manager, Vasquez was also actively involved in Red Hawk's efforts to gain approval from the City Council for the Lazy 8 project, including: (1) managing public relations for Red Hawk; (2) engaging in discussions and negotiations with the Councilman and other council members; and (3) testifying at the City Council meeting as a paid lobbyist and advocate for Red Hawk and publicly urging the City Council to approve the project. (JA0380-83.) Thus, at the same time that Vasquez had a substantial and continuing political, professional and personal relationship with the Councilman, he also had a substantial and continuing political, professional and business relationship with his client, Red Hawk, regarding the Lazy 8 project.

Given the substantial and continuing relationship between the Councilman and Vasquez, a reasonable person would have had a legitimate fear that the relationship created an appearance or implied probability of bias in favor of Vasquez and his client, Red Hawk. That appearance or implied probability of bias was sufficient under the Due Process Clause to result in a disqualifying conflict of interest, even if the Councilman did not harbor any actual bias in favor of Red Hawk. Thus, because the

Councilman had a disqualifying conflict of interest under the Due Process Clause, it follows that the Councilman did not have a protected right under the First Amendment to vote on the Lazy 8 project. In the absence of a protected right under the circumstances, the First Amendment has no application to this case, and the Councilman's First Amendment claims must fail as a matter of law.

V. Assuming that subsections 2 and 8 of NRS 281A.420 are subject to intermediate scrutiny under the First Amendment, the statute is constitutional because under the Pickering balancing test, the state's vital interest in ethical government clearly outweighs any interest a public officer has to vote on a matter in which he has a disqualifying conflict of interest.

Although public officers and employees do not surrender their First Amendment rights as a result of their public service, it is well established that the free speech and associational rights of public officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). Because the free speech and associational rights of public officers and employees are not absolute, states may enact reasonable regulations limiting the political activities of public officers and employees without violating the First Amendment. Clements v. Fashing, 457 U.S. 957, 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

In Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the Supreme Court established a balancing test to determine the extent to which the state may regulate the free speech and associational rights of public officers and employees. Under the Pickering test, a court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in "promot[ing] efficiency and integrity in the discharge of official duties." Connick v. Myers, 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson, 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may impose significant restraints on the speech that "would be plainly unconstitutional if applied to the public at large." United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v.

Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion).

Thus, under the Pickering test, the state is given greater latitude to restrict the speech of public officers and employees to promote operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004); Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006). Several courts have held that under the Pickering test, the state may restrict a public officer's right to vote where the public officer's right is outweighed by the state's vital interest in securing the efficient, effective and ethical performance of governmental functions. Mullin v. Town of Fairhaven, 284 F.3d 31, 37-41 (1st Cir. 2002); Mihos v. Swift, 358 F.3d 91, 102-09 (1st Cir. 2004).

The Pickering test is typically used to review the constitutionality of adverse actions taken by the state against individual officers and employees after they have already exercised their First Amendment rights. Nat'l Treasury Employees, 513 U.S. at 465-67. The Pickering test is also used to review the constitutionality of statutes containing preventative rules designed to restrict speech by public officers and employees before it occurs. Id. at 465-77. In this case, the Councilman raises both types of claims. First, he claims subsections 2 and 8 of NRS 281A.420 are facially invalid because the statute contains preventative rules that restrict protected speech in violation of the First Amendment. Second, he claims the Commission violated his First Amendment rights when it applied the statute and took adverse action against him for voting on the Lazy 8 project. Because the state's vital interest in securing the efficient, effective and ethical performance of governmental functions clearly outweighs the Councilman's interest in voting on a matter in which he has a disqualifying conflict of interest, both the statute and the Commission's application of the statute are constitutional.

On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting on a matter when he has a "commitment in a private capacity to the interests of others." The purpose of the statute is to prevent a public officer from voting on a matter when private interests create an appearance

or implied probability of bias. Under such circumstances, a reasonable person would have a legitimate fear that the public officer's commitment to the private interests of others could potentially disrupt or undermine the public officer's efficiency, effectiveness and integrity in the discharge of his official duties. Thus, on its face, the statute serves the vital state interest of securing the efficient, effective and ethical performance of governmental functions. See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) ("The elimination and prevention of conflict of interest is a proper state purpose.").

Because the statute serves such a vital state interest, the balancing of interests under the Pickering test tilts heavily in favor of the state because the state's interests are at their zenith. In contrast, a public officer's interest in voting on a matter in which he has a disqualifying conflict of interest is entitled to little or no protection under the First Amendment. Indeed, allowing a public officer to vote under such circumstances would not only erode the public's confidence in ethical government but, as discussed previously, it would also violate the Due Process Clause if the public officer was voting in an administrative proceeding. Therefore, because the state's interest in securing the efficient, effective and ethical performance of governmental functions far outweighs any interest that a public officer may have in voting on a matter in which he has a disqualifying conflict of interest, it is clear that subsections 2 and 8 of NRS 281A.420 are facially constitutional under the Pickering balancing test.

It is also clear that subsections 2 and 8 of NRS 281A.420 are constitutional as applied to the Councilman. As discussed previously, in light of Vasquez's role as the Councilman's campaign manager, political advisor, confidant and close personal friend, the record contains overwhelming evidence that the Councilman and Vasquez had a substantial and continuing political, professional and personal relationship when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to create an appearance or implied probability of bias, and a reasonable person would have had a legitimate fear that the relationship could potentially disrupt or undermine the Councilman's efficiency, effectiveness and integrity in the discharge of his official duties. Under such

circumstances, the Councilman unquestionably had a disqualifying conflict of interest. Because the First Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the Commission acted constitutionally when it found that the statute prohibited the Councilman from voting on the Lazy 8 project. Accordingly, under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 do not violate the First Amendment either on their face or as applied.

VI. Assuming that subsections 2 and 8 of NRS 281A.420 are subject to strict scrutiny under the First Amendment, the statute is constitutional because requiring disqualified public officers to abstain from voting is the least restrictive means available to further the state's compelling interest in ethical government.

The Councilman argues that subsections 2 and 8 of NRS 281A.420 are subject to strict scrutiny under the First Amendment. However, as discussed in the previous section, the Pickering balancing test is the proper standard of review because the state may impose significant restraints on the protected speech of public officers and employees even when those restraints "would be plainly unconstitutional if applied to the public at large." Nat'l Treasury Employees, 513 U.S. at 465. Thus, Amicus Curiae contends that the Pickering balancing test, not strict scrutiny, is the proper standard of review for this case. Nevertheless, even assuming that subsections 2 and 8 of NRS 281A.420 are subject to strict scrutiny review, it is clear that the statute survives the more stringent level of review.

Under strict scrutiny review, legislation that restricts protected speech on the basis of the content of the speech or the identity of the speaker is "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). To overcome this presumption, a state must prove that: (1) it has a compelling interest which justifies the restrictions; and (2) the restrictions are narrowly tailored to further the state's compelling interest. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000). Restrictions are narrowly tailored if the state has chosen the least restrictive means available to further its compelling interest. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

A state has a compelling interest in maintaining standards of ethical conduct. Edenfield v. Fane,

507 U.S. 761, 770 (1993). A state also has a compelling interest in preventing the appearance of impropriety and corruption in the performance of governmental functions. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388-89 (2000). Lastly, a state has a compelling interest in ensuring that the actions of its public officers and employees are fair and unbiased both in appearance and in fact. Letter Carriers, 413 U.S. at 564-65. As explained by the Supreme Court, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." Id. at 565. Thus, in order to promote ethical conduct and prevent the appearance of impropriety, corruption and bias in the performance of governmental functions, a state has a compelling interest in guarding the public from biased decisionmakers. Republican Party of Minn. v. White, 536 U.S. 765, 775-77 (2002).

In Republican Party of Minnesota, the Supreme Court reviewed the constitutionality of a rule which prohibited judicial candidates from announcing their views on disputed legal or political issues during an election campaign. Id. at 768. In applying the strict scrutiny test, the Court recognized that the state has a compelling interest in promoting impartiality, preventing bias and ensuring that parties appearing before the judiciary are not denied due process. Id. at 775-77. However, the Court found that the rule prohibiting judicial candidates from expressing their views during a campaign was not narrowly tailored to further the state's interest in an impartial and unbiased judiciary because the rule was not crafted for the limited purpose of protecting identifiable parties in specific cases from biased judges. Id. Instead, the rule established a general prohibition which restricted judicial candidates from speaking in many situations and on many subjects that would not create an appearance of bias for any particular party. Id. Thus, because the rule was not the least restrictive means available to further the state's compelling interest, the rule did not survive strict scrutiny.

After the Supreme Court's decision in Republican Party of Minnesota, several federal courts have

found that rules requiring judges to recuse themselves when they have a disqualifying conflict of interest are narrowly tailored to further the state's compelling interest in an impartial and unbiased judiciary, especially because the rules are vital to due process and the administration of justice. Republican Party of Minn. v. White ("White II"), 416 F.3d 738, 755 (8th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1157 (2006); Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005); Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 705-08 (E.D. Ky. 2004). As explained by the Eighth Circuit, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case. Through recusal, the same concerns of bias or the appearance of bias that [the state] seeks to alleviate . . . are thoroughly addressed without 'burning the house to roast the pig.'" White II, 416 F.3d at 755 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

In light of this case law, it is well settled that the state has a compelling interest in guarding the public from biased decisionmakers and that statutes and rules which require public officers to abstain from acting in matters in which they have a disqualifying conflict of interest are narrowly tailored to further the state's compelling interest. In enacting the Ethics Law, the Legislature declared that "[a] public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves," and that "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281A.020. Based on this declaration of public policy, the Legislature undoubtedly intended the Ethics Law to further the state's compelling interests in promoting ethical conduct and preventing the appearance of impropriety, corruption and bias in the performance of governmental functions. Furthermore, by prohibiting a public officer from voting on a matter in which he has disqualifying conflict of interest under subsections 2 and 8 of NRS 281A.420, the Legislature also intended to further

the state's compelling interest in guarding the public from biased decisionmakers. Because disqualification of biased decisionmakers is the least restrictive means available to further the state's compelling interest in ethical government, it is clear that subsections 2 and 8 of NRS 281A.420 survive strict scrutiny.[4]

VII. Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague under the First and Fourteenth Amendments because the statute: (1) is intended to prohibit only unprotected speech and does not prohibit a substantial amount of protected speech; (2) contains sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can adequately understand the type of conduct that is prohibited by the statute; and (3) contains four very specific and concrete examples of prohibited conduct to guide and properly channel interpretation of the statute.

Overbreadth and vagueness are "logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983). A statute is overbroad on its face if it prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is vague on its face if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or encourages arbitrary and discriminatory enforcement by the officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868 (2004).

Because it is detrimental to society to invalidate a statute on its face when the petitioner's own conduct falls squarely within the statute and is not protected by the First Amendment, the Supreme Court has recognized that the overbreadth and vagueness doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). In addition, a statute should not be invalidated on its face "when a limiting construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not be invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First Amendment will not suffer if

---

[4] The Councilman argues that the definition of "commitment in a private capacity to the interests of others" is not narrowly tailored to restrict the least amount of protected speech. Because this is more appropriately characterized as an overbreadth argument, it will be addressed in the next section of the Amicus Brief which establishes that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague under the First and Fourteenth Amendments.

the constitutionality of [the statute] is litigated on a case-by-case basis." Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

Under the overbreadth doctrine, a statute is not overbroad merely because the statute, if construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth. Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City of Las Vegas v. Dist. Ct., 122 Nev. 1041, 1051-52 (2006).

When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it regulates political activity in an even-handed and neutral manner and is not attempting to suppress any particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to vote "yes" or "no" on the matter. Thus, the statute "is not a censorial statute, directed at particular groups or viewpoints," and it is subject to less exacting scrutiny for overbreadth. Id. at 616.

The scope of subsections 2 and 8 of NRS 281A.420, when construed consistently with the intended purpose of the statute, reaches only unprotected speech. The purpose of the statute is to prevent public officers from voting on matters when private interests create an appearance or implied

probability of bias. As noted previously, it has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting on matters in which they have disqualifying conflicts of interest, and this traditional rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); 56 Am. Jur. 2d Mun. Corps., Counties, and Other Political Subdivs. § 126 (2000) (and the cases cited therein). When there has been a "universal and long-established" tradition of prohibiting certain conduct, this creates a "strong presumption" that the prohibition is constitutional under the First Amendment. Republican Party of Minn., 536 U.S. at 785. Thus, because public officers have never had a First Amendment right to vote on matters in which they have disqualifying conflicts of interest, subsections 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained by this Court, "[e]ven if a law at its margins proscribes protected expression, an overbreadth challenge will fail if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" City of Las Vegas, 122 Nev. at 1051-52 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)). This is particularly true in a case like this where the Councilman's conduct falls squarely within the statute and is not protected by the First Amendment.

When the Legislature enacted the definition of "commitment in a private capacity to the interests of others" in Senate Bill No. 478 (1999), it clearly had in mind situations where a public officer's substantial and continuing relationship with his campaign manager would require abstention. In the legislative hearings on S.B. 478, Senator Dina Titus and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

> Senator Titus questioned:
> I just have a question of how this would fit with either the existing language or the new

> language. One of the cases that had a lot of notoriety involved a commissioner and someone who had worked on her campaign. Sometimes people who do campaigns then become lobbyists. If you could not vote on any bill that was lobbied by someone who had previously worked on your campaign, how would all of that fit in here. It is not really a business relationship or a personal relationship, but I don't [do not] know what it is.
>
> Mr. Scherer stated:
> . . . The way that would fit in . . . the new language that the Governor is suggesting is that it would not necessarily be included because it would not be a continuing business relationship. So the relationship would have to be substantial and continuing. Now, if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999).

In light of this legislative history, it would be detrimental to society to invalidate the statute on its face when the Councilman's conduct falls squarely within the intended scope of the statute and is not protected by the First Amendment. The statute also should not be invalidated on its face because the statute's impact on the First Amendment is so speculative or slight that the First Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by petitioners whose conduct, unlike that of the Councilman's, does not fall so squarely within the confines of the statute. Thus, to preserve the state's ability to protect the public from biased decisionmakers, the Court should reject the Councilman's facial challenge because the statute is not substantially overbroad.

Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable breadth, rather than meticulous specificity. Id. As explained by the Supreme Court:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Letter Carriers, 413 U.S. at 578-79.

When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for vagueness if it imposes only civil sanctions, instead of criminal penalties, since the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Hoffman Estates, 455 U.S. at 498-99; Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742 (Or. Ct. App. 1982) (ethics statute which imposed only civil sanctions was subject to less exacting scrutiny for vagueness). In this case, the Commission may impose only civil sanctions for a violation of the Ethics Law. NRS 281A.480. Therefore, subsections 2 and 8 of NRS 281A.420 are subject to less exacting scrutiny for vagueness.

Furthermore, when the government restricts the speech of its public officers and employees, it may use broad and general language even if such language would create "a standard almost certainly too vague when applied to the public at large." Waters, 511 U.S. at 673. For example, a federal statute allowed the government to remove a federal employee "for such cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974) (plurality opinion). An employee who was discharged for making public statements critical of his supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'" Id. at

161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

A federal district court has held that the rule of judicial conduct requiring judges to recuse themselves when their "impartiality might reasonably be questioned" is not overbroad or vague. Family Trust Found., 345 F. Supp. 2d at 708-10. Although the rule is stated in broad and general terms, the rule also contains four specific instances which require recusal: (1) personal bias or prejudice concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the controversy. The court held that the rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not vague because it provided enough guidance for a judge to determine, "in most instances," the circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at 710; see also Kan. Jud. Watch, 440 F. Supp. 2d at 1234-35; N.D. Family Alliance, 361 F. Supp. 2d at 1043-44.

In a similar vein, this Court has held that broad and general terms, like "unprofessional conduct," are not vague when used to define the ethical standards governing various professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v. Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the Court:

> [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt to specify in a statute or regulation all of the acts which come within the meaning of the term. The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the board the function of evaluating the conduct in each case.

Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

In this case, the broad and general phrase "[a]ny other commitment or relationship that is

substantially similar to a commitment or relationship described in this subsection" is a sufficiently clear catch-all provision that is designed to capture the infinite variety of factual situations in which private commitments and relationships will cause a public officer to have a disqualifying conflict of interest. Considering that it would not have been feasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying conflict of interest in the language of the statute, it was appropriate for the Legislature to enact a reasonable catch-all standard in broad and general terms and allow the Commission to apply that standard to specific conduct in each case. Because the language of the catch-all provision is expressly tied to the four types of private commitments and relationships already enumerated in the statute, the Legislature has given the Commission four very specific and concrete examples to guide and properly channel its interpretation of the statute.

The legislative hearings on S.B. 478 also offer the Commission further guidance regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer, Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

> [The new language in NRS 281A.420] would be, 'any substantially similar commitment or relationship.' Because I can tell you what the Governor was trying to get at was actually trying to make the language better by defining 'commitment in a private capacity to the interests of other.' That, I think, is even more vague than the language we have in here, which sets forth some categories. We also, though, on the other hand, did not want to specifically limit it to just these categories. But what we were trying to get at relationships that are so close that they are like family. That they are substantially similar to a business partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then we said, 'any substantially similar commitment or relationship.' That would express the view that we are trying to get at which is, it has got to be a relationship that is so close, it is like family, it is like a member of your household, it is like a business partner.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose and scope of the catch-all provision:

> Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any commitment or relationships that is substantially similar to any one of the relationships set forth in this paragraph." The intent of change, he stated, is to capture a relationship, not

> listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers them family. He commented with this change the ethics commission would still have some discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed out, it has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" . . . He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are. He declared this language to be an improvement on existing law and an appropriate balance between trying to provide guidance and trying to allow the ethics commission discretion.
>
> Chairman O'Connell concurred stating, "I do not think that that language could leave any doubt in anybody's mind about the relationship. In my looking at it, I think you did a terrific job with that, because it certainly does tell you exactly what kind of relationship you would have with the person and it would make it much easier to determine that before voting."
>
> Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a private capacity to the interests of others." He stressed the importance of attempting to give guidance without completely taking away the ethics commission's discretion.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

In the face of this legislative history, it is reasonable to expect a public officer of ordinary intelligence to understand the types of private commitments and relationships that are "substantially similar" to those he has with: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. As commonly defined, the term "substantial" means "being largely but not wholly that which is specified." Webster's Ninth New Collegiate Dictionary 1176 (1988). The term "similar" means having characteristics in common, strictly comparable, alike in substance or essentials; synonyms for the term include "analogous" and "parallel." Id. at 1098.

Through the exercise of ordinary common sense, a reasonable public officer could easily deduce that the four types of private commitments and relationships that are explicitly described in the statute

all involve close, substantial and continuing relationships. It follows by simple logic that the catch-all provision extends to "substantially similar" private commitments and relationships which also constitute close, substantial and continuing relationships akin to those commitments and relationships that are explicitly described in the statute. Because it should be easy for reasonable public officers to know when they have a close, substantial and continuing relationship with another person, they should have little difficulty in conforming their conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of further guidance, they can request advisory opinions from the Commission pursuant to NRS 281A.440(1) and 281A.460(5), and they can consult the abundance of case law, scholarly articles and legal treatises which discuss similar standards for disqualification under the Due Process Clause and the Code of Judicial Conduct. Thus, when construed consistently with the intended purpose of the statute, subsections 2 and 8 of NRS 281A.420 are not unconstitutionally vague.

Finally, in determining whether a statute is overbroad or vague, the Supreme Court considers whether there are any procedures in place allowing persons with doubts about the meaning of the statute to obtain clarification from the agency charged with its enforcement. Letter Carriers, 413 U.S. at 580; Broadrick, 413 U.S. at 608 n.7; Arnett, 416 U.S. at 160; Hoffman Estates, 455 U.S. at 498; cf. Dunphy, 92 Nev. at 264. The Supreme Court typically will not find the statute to be overbroad or vague if such persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting Letter Carriers, 413 U.S. at 580); Groener, 651 P.2d at 742-43.

Under the Ethics Law, a public officer may request an advisory opinion from the Commission regarding "the propriety of his own past, present or future conduct" and receive guidance from the Commission on whether to withdraw or abstain from participating in a matter. NRS 281A.440(1) and 281A.460(5). In this case, the Councilman failed to seek an advisory opinion from the Commission even though he had ample time and opportunity to do so. The record shows that Vasquez became the

Councilman's campaign manager in January or February 2006, more than 6 months before the City Council meeting. (JA0380.) During that period, the Councilman had actual knowledge of Vasquez's simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. Thus, the Councilman could have easily requested an advisory opinion from the Commission during this period, but he neglected to do so. Given that the Councilman failed to obtain clarification of the statute from the Commission when he had ample opportunity to do so, he cannot now claim that the statute is unconstitutionally overbroad and vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics commission regarding the propriety of his conduct).

VIII. The Commission's decision and the district court's order do not amount to a prior restraint of protected political speech.

The term "prior restraint" is used to describe administrative and judicial orders which forbid protected speech before the speech occurs. Alexander v. United States, 509 U.S. 544, 550 (1993). An administrative or judicial order does not amount to a prior restraint if the order does not prohibit future speech but merely penalizes past speech that is not protected by the First Amendment. Id. at 550-54. In this case, the Commission's decision and the district court's order do not amount to a prior restraint because they do not prohibit future speech but merely penalize the Councilman for past speech that is not protected by the First Amendment.

The Councilman interprets the Commission's decision and the district court's order as requiring a public officer to seek an advisory opinion from the Commission before voting. There is no such requirement in the Commission's decision or the district court's order. Furthermore, even if such a requirement existed, there are sufficient procedural safeguards in place to prevent an unconstitutional prior restraint. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 778-84 (2004). If a public officer elects to obtain an advisory opinion before the vote occurs, the public officer is entitled to the

whole panoply of procedural rights under the Ethics Law and the APA. Before the Commission could advise the public officer to abstain from voting on a particular matter, the Commission would have to conclude in the advisory opinion that the public officer had a disqualifying conflict of interest under the Ethics Law. Such a conclusion would mean there was no First Amendment right to vote on the matter, and thus the advisory opinion would not amount to a prior restraint on protected speech. If the public officer disagreed with the Commission's conclusion, the public officer would have the right to seek immediate judicial review under NRS 34.185, which provides for mandamus relief from an unconstitutional prior restraint. See Baby Tam & Co. v. City of Las Vegas, 199 F.3d 1111, 1113-1114 (9th Cir. 2000). Thus, there is no basis for the Court to conclude that the Commission's decision and the district court's order amount to a prior restraint of protected political speech.

CONCLUSION

Based on the foregoing, the Legislature respectfully requests the Court to find that the provisions of subsections 2 and 8 of NRS 281A.420 do not violate the First and Fourteenth Amendments, either on their face or as applied, and that the statute is therefore constitutional.

DATED: This **25th** day of August, 2008.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

By: _____

KEVIN C. POWERS
Senior Principal Deputy Legislative Counsel
Nevada Bar No. 6781
Legislative Counsel Bureau
401 S. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830
Facsimile: (775) 684-6761
Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Legislature's Amicus Curiae 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 the Amicus Curiae Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the Amicus Curiae 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 Amicus Curiae Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **25th** day of August, 2008.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

By: _____
KEVIN C. POWERS
Senior Principal Deputy Legislative Counsel
Nevada Bar No. 6781

Legislative Counsel Bureau
401 S. Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830
Facsimile: (775) 684-6761

Attorneys for the Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Legislative Counsel Bureau and that I served a true and correct copy of the Legislature's Amicus Curiae Brief, by depositing the same in the United States Mail, postage prepaid, on the **25th** day of August, 2008, addressed to:

Chester H. Adams, Sparks City Attorney
Douglas R. Thornley, Assistant City Attorney
431 Prater Way
Sparks, NV 89431

Adriana G. Fralick, General Counsel
Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

Catherine Cortez Masto, Attorney General
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701

Sharyon L. Jaun
An Employee of the Legislative Counsel Bureau