No.

In the Supreme Court of the United States

THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First, Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.

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OPINIONS BELOW

The en banc opinion of the Nevada Supreme Court (App., *infra*, 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (App., *infra*, 40a-95a), and the opinion of the Commission on Ethics of the State of Nevada (App., *infra*, 96a-112a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech."

Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev. Rev. Stat.") provides in pertinent part that:

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by * * * [h]is commitment in a private capacity to the interests of others.
>
> * * * * *
>
> 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 [the public officer's] household;

(b) Who is related to [the public officer] by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs [the public officer] or a member of his household;

(d) With whom [the public officer] 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.

Nev. Rev. Stat. § 281A.420(2), (8)(a) (2007).

STATEMENT

In a divided decision, the Nevada Supreme Court invalidated a content-neutral recusal provision governing elected officials' voting by subjecting it to the most rigorous First Amendment standard of review—strict scrutiny. That holding is incorrect and squarely conflicts with the decisions of other appellate courts that apply either the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or rational-basis review. Indeed, the decision below creates the intolerable situation where state and federal courts in Nevada are governed by different standards.

The Nevada Supreme Court's decision calls into question a century of common-law recusal restrictions and casts doubt on the validity of widely adopted recusal statutes. The decision exposes other

states' recusal schemes to legal challenge and invites litigation questioning a host of other common restrictions on voting by local elected public officials, ranging from states removing subjects from local control to federal spending programs that provide incentives for municipalities to adopt certain programs. Because the decision below misapplies bedrock First Amendment principles and deepens an entrenched, three-way split among appellate courts, this Court's review is warranted.

1. The Nevada Legislature enacted the Ethics in Government Law (the "Law") to ensure that the State's public offices are "held for the sole benefit of the people" and "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees." Nev. Rev. Stat. § 281A.020(1), (2)(b) (2009). To that end, the Law establishes recusal requirements mandating that a public official "avoid conflicts between [his] private interests * * * and those of the general public whom the public officer * * * serves." Nev. Rev. Stat § 281A.020(1)(b) (2009). The law includes a provision prohibiting various "public officers," including local legislators,[1] from voting on matters on which their "commitment in a private capacity to the interests of others" would "materially affect[]" the "independence of judgment of a reasonable person in [the public officer's] situation."

[1] See Nev. Rev. Stat. § 281A.160 (2009). Because the Nevada Constitution provides that the Legislature is the sole judge of its conduct, the Law does not govern the conduct of state legislators. See Nev. Const. art. 4, § 6.

Nev. Rev. Stat. § 281A.420(2)(c) (2007).[2] The Law defines those disqualifying "commitment[s]" as those involving: (a) "member[s] of [the public officer's] household"; (b) relatives by "blood, adoption, or marriage"; (c) employers of the public officer or a member of the officer's household; (d) persons with whom the public officer "has a substantial and continuing business relationship"; and (e) "any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." Nev. Rev. Stat. § 281A.420(8)(a)-(e) (2007).

Nevada's Ethics in Government Law is administered and enforced by the State's Commission on Ethics. See generally Nev. Rev. Stat. § 281A.200 (2009). The Legislature structured the eight-member Commission to provide non-partisan, expert enforcement of the Law. See, *e.g.*, Nev. Rev. Stat. § 281A.200(2) (2009) (requiring "at least two" members to be "former public officers" and "at least one" member to be an actively-licensed attorney); Nev. Rev. Stat. § 281A.200(2)–(3) (2009) (dividing power to appoint members equally between the Nevada Legislative Commission and the Governor);

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[2] At the time of relevant events, the provision of the Ethics in Government Law was codified at Nev. Rev. Stat. § 281.501 (2006). The provision was recodified without substantive change the following year at Nev. Rev. Stat. § 281A.420 (2007). In 2009, the provision was amended again to require recusal only in "clear cases," but the Nevada Supreme Court did not believe that change cured the perceived overbreadth of the recusal statute. See App., *infra*, 2a n.2. Nor did the change affect the standard of review applied by the court to the recusal statute.

Nev. Rev. Stat. § 281A.200(4) (2009) (prohibiting "more than four members" of the Commission from being "members of the same political party"); Nev. Rev. Stat. § 281A.200(5) (2009) (imposing specified prohibitions on the members' outside activities). The Law grants the Commission authority to "investigate and take appropriate action regarding an alleged violation" of the Ethics in Government Law, Nev. Rev. Stat. § 281A.280(1) (2009), including the imposition of civil penalties for willful violations, Nev. Rev. Stat. § 281A.480(1)–(3) (2009). The Commission is also empowered to render, upon request, binding advisory opinions that "interpret[] the statutory ethical standards and apply[] the standards to a given set of facts and circumstances." Nev. Rev. Stat. § 281A.440(1)–(2) (2009).

2. Respondent Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada, an incorporated subdivision of the State. See generally Nev. Const. art. 8 § 8. In early 2005, a developer submitted an application for a hotel/casino project known as the "Lazy 8" to the Sparks City Council for required approval. App., *infra*, 3a. The developer retained as a "consultant" Carlos Vasquez, a "longtime professional and personal friend" of Carrigan's who had served as Carrigan's campaign manager "[d]uring each of his election campaigns," including his then-pending effort to be reelected to the City Council. *Ibid.* Vasquez's consulting firm also provided services to Carrigan's campaign at cost. App., *infra*, 44a, 88a, 105a.

The Lazy 8 project came before the Sparks City Council for tentative approval in August 2006. Carrigan was aware that his relationship with

Vasquez was potentially disqualifying under the Ethics in Government Law. He was also "aware that he could have asked * * * for an advisory opinion" from the Commission on whether his relationship with Vasquez required abstention, App., *infra*, 100a. Carrigan instead sought the advice of the Sparks City Attorney, who told him that his obligations under the Law could be discharged by publicly disclosing the relationship before voting on the Lazy 8 matter. *Id.* at 4a. After making the suggested disclosure, Carrigan voted to approve the Lazy 8 project. The measure failed by a single vote. *Id.* at 99a.

3. The Commission received several complaints that Carrigan had violated the Ethics in Government Law by voting on the Lazy 8 matter. In October 2007, after a hearing at which both Carrigan and Vasquez testified, App., *infra*, 97a, the Commission issued a written opinion "censuring Carrigan for * * * failing to abstain from voting on the Lazy 8 matter," *Id.* at 4a. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his company had provided services to Carrigan's three campaigns at cost; Carrigan considered Vasquez's assistance "instrumental" to Carrigan's three successful campaigns; and Carrigan, by his own admission, confided in Vasquez "on matters where he would not confide in his own sibling." *Id.* at 105a.

The Commission concluded that "a reasonable person would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." App., *infra*, 111a. The Commission determined that the "sum total of [Carrigan and

Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated under [Nev. Rev. Stat. § 281A.420(8)(a)-(d)]," including a family relationship and a "substantial and continuing business relationship." *Id.* at 105a-106a. The Commission thus unanimously concluded that Carrigan had violated Nev. Rev. Stat. § 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." *Id.* at 111a. But the Commission determined that "Carrigan's violation was not willful," and so imposed no civil penalty besides censure. *Id* at 112a.[3]

4. The First Judicial District Court denied Carrigan's petition for judicial review and affirmed the Commission's decision. App., *infra*, 40a-95a. The court held that Nev. Rev. Stat. §§ 281A.420(2) and (8)(e) (2007) "are facially constitutional under the *Pickering* balancing test" and constitutional as applied to Carrigan. *Id.* at 63a. Under the *Pickering* test, "the 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.'" *Id.* at 60a (quoting *Connick* v. *Myers*, 461 U.S. 138, 150-51 (1983)). The court reasoned that "the free speech and associational rights of public officers * * * are not absolute," *id.* at

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[3] The Commission concluded that two other ethics complaints against Carrigan, alleging that he had "secured or granted unwarranted privileges" in violation of Nev. Rev. Stat. § 281.481(2), and that he had voted on a matter in which he had an undisclosed pecuniary interest, in violation of Nev. Rev. Stat. § 281.501(4), were not well founded. App., *infra*, 106a-109a.

58a, and that the state's "vital" "interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest," *id.* at 61a-62a.[4] The court also rejected Carrigan's argument that the Ethics in Government Law was unconstitutionally overbroad and vague. *Id.* at 70a, 81a.

5. A divided Nevada Supreme Court reversed, holding Nev. Rev. Stat. § 281A.420(8)(e) (2007) facially unconstitutional. App., *infra*, 1a-17a. The majority observed that "[b]ecause voting is a core legislative function, it follows that voting serves an important role in political speech." *Id.* at 11a. The majority thus concluded that "voting by an elected public officer on public issues is protected speech under the First Amendment." *Ibid.* The majority then held that the interest balancing required under *Pickering* was inappropriate because an elected public officer's "relationship with the state differs from that of most public employees." *Id.* at 12a. An elected officer's "'employer' is the public itself," the majority reasoned, "at least in the practical sense, with the power to hire and fire," and an elected officer is someone "about whom the public is obliged to inform itself." *Ibid.* (quoting *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007)).

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[4] The district court also rejected Carrigan's arguments that the Commission's decision violated Nevada's Administrative Procedure Act. App., *infra*, 54a-56a. Those conclusions are not at issue here.

Having rejected the *Pickering* framework, the majority concluded that "[a] strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." App., *infra*, 11a; see also *id.* at 13a (quoting *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010), for the proposition that "[l]aws that burden political speech are subject to strict scrutiny").

The majority acknowledged that the recusal requirement "furthers a compelling state interest" by "promoting the integrity and impartiality of public officers." App., *infra*, 16a. Nonetheless, the majority declared that subsection 8(e), which requires recusal when a person has a "commitment or relationship that is substantially similar" to one of the relationships explicitly enumerated in Nev. Rev. Stat. § 281A.420(8)(a)-(d), "is not narrowly tailored" because it "does not inform or guide public officers as to what relationships require recusal." *Id.* at 17a. The majority thus concluded that the recusal requirement "is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment." *Ibid.*

6. Justice Pickering dissented. She acknowledged "the communicative element in a public official's vote." App., *infra*, 23a (citing *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting)). Justice Pickering observed, however, that the recusal requirement's "target is conduct—acts of governance—not personal, expressive speech." *Id.* at 26a. Noting decisions of the First and Eighth Circuits, Justice Pickering concluded that the proper standard of review for a "content-neutral" (App., *infra*, 23a) "law limiting an elected official's ability to

vote on matters as to which he has an actual or apparent conflict of interest" is the *Pickering* balancing test, rational-basis review, or "at most" intermediate scrutiny. *Id.* at 24a-27a (discussing *Mullin* v. *Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002), and *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997)). She rejected the majority's conclusion that *Pickering* was inapplicable to city council members who stand for election, noting that the Seventh Circuit has applied *Pickering* to elected officials. *Id.* at 25a (citing *Siefert* v. *Alexander*, 608 F.3d 974 (7th Cir. 2009), reh'g en banc denied, 2010 U.S. App. LEXIS 18163 (7th Cir. Aug. 31, 2010)).

Justice Pickering also concluded that the "substantially similar" language of the recusal statute was not overbroad. App., *infra*, 33a-39a. She noted that the words of the provision are "not free-standing," but are to be read in light of the other relationships explicitly enumerated in the provision. *Id.* at 37a. Furthermore, the provision was consistent with "the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest." *Id.* at 38a. Finally, Justice Pickering warned that "applying First Amendment strict scrutiny * * * to invalidate state conflicts-of-interest laws that govern local government officials who vote is a mistake that * * * opens the door to much litigation and little good." *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

I. THE NEVADA SUPREME COURT'S DECISION DEEPENS A THREE-WAY SPLIT OVER WHETHER AND HOW THE FIRST AMENDMENT APPLIES TO REGULATION OF VOTING BY ELECTED PUBLIC OFFICIALS

This Court has long recognized that *speech* by elected officials qualifies for First Amendment protection, *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), but it has never decided how, if at all, the First Amendment relates to *voting*. See *Spallone* v. *United States*, 493 U.S. 265, 274 (1990) (declining to reach the issue); see also *Doe* v. *Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment) ("Plaintiffs point to no precedent from the Court holding that legislating is protected by the First Amendment."). Although the four Justices who reached the question in *Spallone* concluded that "the act of publicly voting on legislation * * * is quintessentially one of governance" rather than speech, 493 U.S. at 302 n.12 (Brennan, J., dissenting), lower courts have splintered over whether public officials' votes amount to protected speech and, if so, which standard of review applies to regulations on official voting.

Along with the Fifth Circuit, the Nevada Supreme Court now holds that a "strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." App., *infra*, 11a. That rigorous standard of scrutiny renders recusal statutes "presumptively invalid," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), and statutes would only "rarely" survive that test. *Burson* v. *Freeman*, 504 U.S. 191, 200 (1992).

In contrast, the First, Second, and Ninth Circuits evaluate restrictions on voting under the intermediate standard of review applicable to speech by government employees. Finally, the Seventh and Eighth Circuits—echoing Justices Brennan and Scalia—reject equating speech to voting and hold that restrictions affecting voting are subject to rational-basis review.

A. The Fifth Circuit And The Nevada Supreme Court Apply Strict Scrutiny To Restrictions On Voting By Elected Public Officials

In the opinion below, the Nevada Supreme Court explicitly joined the Fifth Circuit in applying strict-scrutiny review to laws regulating voting by elected officials. App., *infra*, 11a-13a. According to the Fifth Circuit, there is "no question that political expression such as [council members'] * * * votes on City matters is protected speech under the First Amendment." *Colson* v. *Grohman*, 174 F.3d 498, 506 (1999). Restrictions affecting such speech, in turn, are subject to "strict scrutiny" in the Fifth Circuit. See *Jenevein* v. *Willing*, 493 F.3d 551, 558 (2007).

In *Jenevein*, the Fifth Circuit recognized that a deferential standard of review applies to regulations limiting the speech of government employees. 493 F.3d at 557. But the court reasoned that an *elected* government employee has a "relationship with his employer differ[ent] from that of an ordinary state employee" because the employer of elected officials "is the public itself, at least in the practical sense, with the power to hire and fire." *Ibid.* In light of this difference—and because elected officials' expressions of views are "political speech at the core of the First

Amendment"—the Fifth Circuit applied strict scrutiny when assessing an ethics commission's order censuring an elected judge for speaking publicly about a pending case. *Id.* at 555, 557-558. The Fifth Circuit later confirmed that its analysis in *Jenevein* extends to all elected officials, not judges alone, and that strict scrutiny would apply to a statute that limits city council members' speech. *Rangra* v. *Brown*, 566 F.3d 515, 525-526, reh'g en banc granted, 576 F.3d 531, vacated as moot, 584 F.3d 206 (2009).[5]

B. Three Circuits Analyze Voting Restrictions Under The Government-Employee Speech Doctrine

The First, Second, and Ninth Circuits have concluded that voting by elected public officials is protected by the First Amendment, but those courts depart from the Fifth Circuit and the Nevada Supreme Court by applying a more flexible, less stringent standard of judicial review to measures that restrict elected officials' speech. Rather than strict scrutiny, these courts have adopted the

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[5] Two other circuits have rejected application of the government-employee speech doctrine to speech by elected public employees, but those circuits have not specified which standard should apply instead. See *Phelan* v. *Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246-1247 (10th Cir. 2000) (rejecting application of *Pickering* to an elected member of school board of trustees but declining to identify alternative standard of review); *Clarke* v. *United States*, 886 F.2d 404, 413, 416 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699, 700 (D.C. Cir. 1990) (refusing to apply *Pickering* to city council members but declining to select standard of review). *Clarke* also held that legislative votes qualify as protected speech, 886 F.2d at 411-413, while the Tenth Circuit has not addressed the question.

balancing test developed in government-employee speech cases, which weighs state interests against "the interests of [a government employee], as a citizen, in commenting upon matters of public concern." *Pickering* v. *Board of Education*, 391 U.S. 568 (1968); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006); *Connick*, 461 U.S. at 150-151.

In *Miller* v. *Town of Hull*, 878 F.2d 523, 532 (1989), the First Circuit held 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," and "[t]his is especially true when the agency members are elected officials." In a later case, however, the First Circuit noted that First Amendment protection for public officials' votes "is far from absolute," and ruled that voting restrictions should be analyzed under the *Pickering* standard because "public officials voting on matters of public concern * * * retain First Amendment protection '*so long as* [their] speech does not unduly impede the government's interest'" in efficient public services. *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 37 (2002) (emphasis added) (quoting *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993)).

The Second Circuit has also concluded that "[v]oting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment." *Camacho* v. *Brandon*, 317 F.3d 153, 161, 163 (2003). But it has nonetheless held that restrictions affecting a city

council member's voting freedom are properly analyzed "under *Pickering*." *Id.* at 163.[6]

Likewise, the Ninth Circuit has held that "the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540, 545 (2010) (quoting *Stella* v. *Kelley,* 63 F.3d 71, 75 (1st Cir. 1995)). At the same time, however, that court has invoked the *Pickering* balancing test when analyzing rules that constrain speech by city council members. *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 646 (2000). In *DeGrassi*, for instance, the Ninth Circuit weighed a council member's interest in fully participating in council meetings against the government's interest in preventing "potential conflict between [one's] role as a Council member and [one's] personal interest." See *ibid.* Citing *Pickering*, the court concluded that such conflict-of-interest rules were "reasonable" and permissible under the First Amendment. *Ibid.*

By departing from the Ninth Circuit's balancing test and treating restrictions on legislative voting as presumptively invalid under the First Amendment, the Nevada Supreme Court has done more than perpetuate doctrinal confusion; it has rendered the constitutionality of state and municipal voting rules dependent on where suit is filed. If an elected official

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[6] The plaintiff in *Camacho* was a non-elected legislative aide, but he asserted a third-party claim on behalf of Fuentes, an elected councilman. 317 F.3d at 159-160. Accordingly, the court's analysis turned on "whether Fuentes' activities"—which included voting against the mayor's budget—"enjoyed the protection of the First Amendment." *Id.* at 160.

of one of Nevada's seventeen counties, seventeen school districts, or eighteen cities challenges a voting rule in state court, strict scrutiny will apply. If the official files the *same* challenge in a Nevada federal court, the Ninth Circuit's balancing test will stand as binding precedent. When the meaning of the First Amendment turns on the happenstance of the court in which a suit is filed, an untenable conflict arises that requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve a conflict between the Eleventh Circuit and the Florida Supreme Court over which First Amendment standard of review applied to a disputed injunction).

C. Two Circuits Reject The Equation Of Speech And Voting And Thus Apply Rational-Basis Review

Unlike four circuits and the Nevada Supreme Court, the Seventh and Eighth Circuits have refused to equate elected public officials' voting with speech.[7] Writing for the Seventh Circuit, Judge Posner rejected the assumption that "freedom of speech is enlarged or contracted by rules" affecting state legislators' votes because in that context, "'the right to vote, per se, is not a constitutionally protected right,' and the right to speak is." *Risser* v. *Thompson*, 930 F.2d 549, 553 (7th Cir. 1991) (quoting *Rivera-*

[7] The Sixth Circuit has recognized that jurists are divided on this point. See *Zilich* v. *Longo*, 34 F.3d 359, 363 & n.3 (1994) (stating that legislative voting "may" be speech but noting the conflict between the First Circuit and Justice Brennan's *Spallone* dissent).

Rodriguez v. *Popular Democratic Party*, 457 U.S. 1, 9 (1982)). The court acknowledged that "the power of one's speech can indeed be augmented or diminished by voting power," but it dismissed that connection as too tenuous to transform voting into speech. *Ibid.* Judge Posner then concluded that equating speech and public officials' voting is an "analogy gone wild." *Ibid.* Consequently, the court rejected the plaintiff-legislators' First Amendment claim without further analysis and effectively endorsed rational-basis review for restrictions affecting voting. See *id.* at 553-554 (noting that statute was a "rational measure" to accomplish a legislative goal).[8]

Similarly, the Eighth Circuit has recognized that measures regulating elected public officials' voting have only a "conceivabl[e]" relationship to elected officials' free-speech rights. *Peeper*, 122 F.3d at 623 n.4. In *Peeper*, the governing board of a county ambulance district—a political subdivision of a state—prohibited one of its publicly elected members from voting on employee-related matters because her

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[8] Although the Seventh Circuit did not explicitly articulate which standard of review it was applying, its rationale dictates that rational-basis review applies by default. See, *e.g.*, *Lyng* v. *Auto. Workers*, 485 U.S. 360, 370 (1988) ("Because the statute challenged here has no substantial impact on any fundamental interest * * * we confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'") (quoting *Dep't of Agric.* v. *Moreno,* 413 U.S. 528, 533 (1973)). Even if, contrary to *Risser*, the Seventh Circuit were to equate legislative voting and speech, it would apply *Pickering* to restrictions on such speech, in conflict with the decision below. See *Siefert*, 608 F.3d at 985 (applying *Pickering* to restrictions on speech by elected officials).

husband worked for the district. *Id.* at 620-621. Peeper was "directed to recuse herself" from "hearing, participating in, or voting upon" employee issues. *Id.* at 621. The Eighth Circuit concluded that this voting restriction did not implicate Peeper's free-speech rights, *id.* at 623 n.4, and therefore eschewed the "rigid strict-scrutiny standard" in favor of "rational-basis review." *Id.* at 623.

* * * * *

The courts are deeply divided about whether and how the First Amendment applies to laws and rules that regulate voting by elected officials. The standards range from strict scrutiny, which would render even content-neutral conflict-of-interest provisions presumptively unconstitutional, to rational basis review, under which courts accord states and localities broad latitude to adopt rules requiring office-holders to refrain from voting on matters in which they have an interest. In between are the circuits that apply the *Pickering* balancing standard. This three-way conflict, and the deeper doctrinal confusion that it represents, shows no sign of abating absent review by this Court.

II. THE NEVADA SUPREME COURT ERRED IN APPLYING STRICT SCRUTINY TO RESTRICTIONS ON VOTING BY ELECTED OFFICIALS

The Nevada Supreme Court concluded that because voting is a form of speech, all restrictions affecting voting by elected public officials are subject to strict scrutiny. App., *infra* 11a-13a. Even if such voting is considered speech, however, strict scrutiny is clearly the wrong standard to apply. This Court

has reserved strict scrutiny for restrictions on private speech that "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 643 (1994). The Court has applied a less exacting standard to laws that do not target the "speaker's point of view," *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), to regulations that seek to advance government interests unrelated to the suppression of ideas, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000), or that target only the "secondary effects" of speech. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Indeed, in the context of public employee speech, the Court has refused to apply strict scrutiny even to content-based official action. See *Garcetti*, 547 U.S. at 418. This Court's decisions clearly support the application of a more deferential standard to assess restrictions affecting the voting of elected officials.

A. This Court's Decisions In A Number Of Contexts Indicate That Restrictions On Voting By Elected Public Officials Should Not Be Subject To Strict Scrutiny

Legislative voting could be characterized as pure speech, analogized to an ordinary citizen's vote, or treated as expressive or government conduct. Regardless of how it is characterized, strict scrutiny is not the proper standard to assess a regulation of voting like the one at issue here.

1. If voting by elected public officials is considered pure speech, one appropriate framework would be the balancing standard established for government employee speech in *Pickering* and

Connick and recently refined in *Garcetti*. Under that test, speech made by a government employee "on a matter of public concern" and not "pursuant to official duties" may be protected by the First Amendment. *Garcetti*, 547 U.S. at 418, 421. The government may even restrict speech based on its content, when the "interest in the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's interest in speaking. *Connick*, 461 U.S. at 150.

The Nevada Supreme Court's conclusion that the *Pickering* standard applies to appointed officials but not elected ones is inconsistent with this Court's decision in *United States* v. *Nat'l Treasury Emp. Union ("NTEU")*, 513 U.S. 454 (1995). There, this Court applied *Pickering* to § 501(b) of the federal Ethics Reform Act of 1989, which prohibited an "officer or employee" of the federal government from accepting compensation for an "appearance, speech or article." *Id.* at 459-460. Though the plaintiffs were low-level executive branch employees, the ban applied equally to the legislative and judicial branches. *Id.* at 458. Noting that the "the Government ha[d] based its defense of the ban on abuses of honoraria by Members of Congress," the majority struck down § 501(b) only as applied to the plaintiffs, leaving it intact as to elected officials. *Id.* at 472-473, 479-480. In reaching that conclusion, this Court compared the burdens imposed and the governmental interests supporting the ban as applied to low-level Executive Branch employees with the burdens and interests implicated for lawmakers. *Id.* at 469–470, 472–73. None of the opinions in that case so much as hints that a different First

Amendment standard might apply to elected officials and employees. Although *NTEU* did not squarely address the issue, it strongly suggests that *Pickering* would apply to elected officials just as it applies to employees.

2. If legislative voting is instead considered expressive conduct, it should be subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting) ("While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance."). Under that standard, a regulation on conduct that burdens speech only incidentally is permissible as long as it is content-neutral and "narrowly focuses on [a] substantial interest." *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

Nevada's recusal provision is unquestionably content-neutral because its application to conduct does not "depend[] on [its] likely communicative impact." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989). The conditions triggering the recusal requirement—"commitment in a private capacity to the interests of others," Nev. Rev. Stat. § 281A.420(2)(c)—do not depend on likely communicative impact. The regulation is solely designed to prevent conflicts of interest, which all agree is a compelling governmental interest. Accordingly, as a content-neutral regulation of expressive conduct, Nev. Rev. Stat. § 281A.420(2)(c) would easily survive *O'Brien*'s requirement that it "narrowly focuses on [a] substantial interest." *Clark*, 468 U.S. at 296.

3. If voting by elected public officials warrants the same level of protection as the voting of ordinary citizens, this Court's observation in *Burdick* v. *Takushi*, 504 U.S. 428, 432–433 (1992), is the place to begin: it is, the Court concluded, an "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Instead, restrictions on a citizen's right to vote are subject to a "more flexible standard." *Id.* at 434 (citing *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-789 (1983)). That standard "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' * * * against the precise interests put forward by the State." *Ibid.* (quoting *Anderson*, 460 U.S. at 789).

4. Finally, voting by elected public officials may not be entitled to any special constitutional protection at all. As the Seventh Circuit has recognized with respect to state legislators, "the right to vote, per se, is not a constitutionally protected right." *Risser*, 930 F.2d at 553 (quoting *Rivera-Rodriguez*, 457 U.S. at 9); see also *Peeper*, 122 F.3d at 623 (expressing doubt that voting is expressive speech). If voting by elected public officials is not constitutionally protected, it follows that restrictions affecting voting should be subject only to rational-basis review. *See Peeper*, 122 F.3d at 623 (applying rational basis review to voting restriction).

However voting by elected public officials is characterized, the Nevada Supreme Court's decision conflicts with this Court's First Amendment jurisprudence. There is no basis in this Court's case law for applying strict scrutiny to such voting; all lines of relevant cases suggest another standard

applies. Cf. *Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring in judgment).

B. *Citizens United* Does Not Support Applying Strict Scrutiny

The Nevada Supreme Court cited this Court's decision in *Citizens United* for the proposition that "[l]aws that burden political speech are subject to strict scrutiny." App., *infra*, 13a (quoting *Citizens United*, 130 S. Ct. at 898). But *Citizens United* does not remotely support the reasoning below. In that decision, this Court applied strict scrutiny to the Bipartisan Campaign Reform Act of 2002, a content-based restriction on corporate funding of traditionally protected political speech. 130 S. Ct. at 900. The voting regulated by the Nevada recusal statute, however, has never enjoyed the constitutional solicitude this Court has shown electioneering communications of the sort at issue in *Citizens United*. The bare, unadorned statement from *Citizens United* relied upon by the court below thus provides no support for applying strict scrutiny to voting by elected public officials.

III. THIS CASE PRESENTS IMPORTANT ISSUES ABOUT THE STANDARD GOVERNING FIRST AMENDMENT REVIEW OF STATE RECUSAL REQUIREMENTS

State recusal requirements prevent conflicts of interest from distorting public decisionmaking. For over a century, courts acting under common law principles have required public officials to recuse themselves from matters when their service presents an actual or potential conflict. In addition, states

have broadly enacted recusal statutes establishing standards for disqualification. These efforts embody a recognition that "an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States* v. *Miss. Valley Generating Co.,* 364 U.S. 520, 549 (1961). By regulating conflicts of interest, these provisions seek to prevent both corruption and the appearance of corruption. See David Orentlicher, *Conflicts of Interest and The Constitution*, 59 Wash & Lee L. Rev. 713, 719-720 (2002). This Court has "long recognized" that those are important governmental interests. See *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976)).

By applying strict scrutiny to Nevada's recusal statute, and by invalidating as facially overbroad a provision requiring recusal of persons who have a "commitment or relationship that is substantially similar" to explicitly proscribed family, household, employment, and business relationships, the decision below calls into question the validity of numerous state recusal standards that are widely recognized as critical for effective enforcement. Absent this Court's review, the decision below threatens to undermine enforcement of states' ethics laws and immerse states in litigation over the constitutionality of their recusal requirements. This petition thus presents an issue of exceptional national importance. Cf. Texas Pet. for Reh'g En Banc at 14, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. May 8, 2009) (successfully seeking en banc review of decision holding that Texas Open Meetings

Act was subject to strict scrutiny as an infringement of elected legislators' speech, noting "nationwide importance" of issue); Brief Amicus Curiae of 19 States Supporting Reh'g, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. Sept. 4, 2009).

A. The Decision Below Calls Into Question Statutory Recusal Provisions

All fifty states regulate public officials' conflicts of interest.[9] As of 2000, approximately thirty-seven states require public officials not to vote on matters presenting a conflict of interest. See Office of Legislative Research, Conn. Gen. Assembly, Voting Restrictions in State Ethics Codes (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm. In contrast to the recusal provision at issue here, which narrowly applies to conflicts that are "substantially similar" to four specific types of commitments or relationships, many states' statutes employ very general language to prevent circumvention and abuse. See Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation,* 107 U. Pa. L. Rev. 985, 985 (1959) (noting that conflict-of-interest laws for public officials are often drafted in general and broad terms). The decision below calls the validity of general recusal standards into question.

In some states, the requirements for recusal are stated at a most general level. See, *e.g.*, Va. Code Ann. § 30-108 (2001) ("A legislator who has a

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[9] For a comprehensive list of these provisions, see National Conference of State Legislatures, Voting Recusal Provisions (Oct. 2009), http://www.ncsl.org/?TabId=15357.

personal interest in a transaction shall disqualify himself from participating in the transaction."). Others broadly define the types of relationships that might subject an official to recusal. See, *e.g.*, N.C. Gen. Stat. § 138A-37(a) (2006) ("[N]o legislator shall participate in legislative action if the legislator knows the legislator or *a person with which the legislator is associated* may incur a reasonably foreseeable financial benefit from the action") (emphasis added). New Jersey requires public officials to recuse based on a number of specific relationships that are "incompatible with the discharge" of official duties. See N.J. Admin. Code. § 19:61-7.4(d)-(e) (2010). However, the state's regulation also provides more generally that an "incompatible financial or personal interest may exist in other situations which are not clearly within the provisions above * * *, depending on the totality of the circumstances." *Id.* § 19:61-7.4(f).

The decision below thus calls into question a large number of other states' recusal provisions and could subject them to litigation. If the Nevada provision, which specifies that relationships "substantially similar" to four specified disqualifying relationships does not speak with the requisite "high level of [statutory] clarity," App., *infra*, 14a, other states' provisions are obviously vulnerable to legal challenge. See, *e.g.*, Ariz. Rev. Stat. Ann. § 38-503(B) (1968) (requiring recusal when the official or a relative has "a substantial interest in any decision of a public agency"). At a minimum, the decision below exposes other states to litigation to defend the constitutionality of these provisions, which until now were understood to pose no constitutional difficulties.

State recusal provisions are too important for this risk to escape this Court's notice. Because application of strict scrutiny threatens to unsettle longstanding state efforts to avoid conflicts of interest, this Court's review is warranted.

B. The Decision Below Casts Doubt On The Constitutionality Of A Century Of Common Law Governing The Recusal Obligations Of Public Officials

For more than a century, courts applying common law principles have required public officials to recuse themselves from matters in which they have a conflict of interest. See *President & Trs. of San Diego* v. *San Diego & Los Angeles R.R. Co.*, 44 Cal. 106, 113 (1872). Although most states have since adopted recusal statutes, the common law remains significant for two reasons. First, it is used to interpret state recusal statutes, as these statutes largely track common law standards. *Randolph* v. *City of Brigantine Planning Bd.*, 963 A.2d 1224, 1230 (N.J. Super. Ct. App. Div. 2009). Second, because these statutes do not always codify the entirety of a state's common law governing conflicts of interests, the common law remains an independent source of recusal obligations for public officials. See *e.g.*, *Carney* v. *State Bd. of Fisheries*, 785 P.2d 544, 547-48 (Alaska 1990); *Price* v. *Edmonds*, 337 S.W.2d 658, 660 (Ark. 1960).

The decision below calls into question this entire body of law. Compared to the detailed and specific provisions of the Nevada Ethics in Government Law, the common law standards are far more general and thus open to legal challenge. Under the common law, there is "[n]o definite test" governing recusal. *Van*

Itallie v. *Borough of Franklin Lakes*, 146 A.2d 111, 116 (N.J. 1958). Instead, recusal is required whenever the "peculiar facts and circumstances of the particular case" might reasonably suggest a conflict of interest to an objective person. *Anderson* v. *City of Parsons*, 496 P.2d 1333, 1337 (Kan. 1972); see also *Sec. Nat'l Bank of Mason City* v. *Bagley*, 210 N.W. 947, 951 (Iowa 1926); *Siesta Hills Neighborhood Ass'n* v. *City of Albuquerque*, 954 P.2d 102, 105 (N.M. Ct. App. 1998). One court has recognized four broad categories requiring recusal, including three specific relationships like those identified by the Nevada Ethics in Government Law, plus a broader category for an "indirect personal interest." *Hanig* v. *City of Winner*, 692 N.W.2d 202, 208-209 (S.D. 2005) (citing *Wyzykowski* v. *Rizas*, 626 A.2d 406, 414 (N.J. 1993)). Under that standard, courts have routinely disqualified officials in situations similar to those of this case. See, *e.g.*, *Kremer* v. *City of Plainfield*, 244 A.2d 335 (N.J. Super. Ct. Law Div. 1968) (requiring a council member to recuse himself where his nephew was a partner in the law firm representing an applicant); *Kloter* v. *Zoning Comm'n of Vernon Fire Dist.*, 227 A.2d 563, 566-567 (Conn. C.P. 1967) (holding a public official was required to recuse himself where the applicant was his long-time accountant and tax adviser).

The common law's case-by-case approach has never before been thought to raise constitutional questions. But the decision below now places this important and longstanding body of law at risk by subjecting it to the presumptive invalidity of strict scrutiny and providing a basis for constitutional challenges. See generally 28 U.S.C. §§ 1983, 1988.

At the very least, one can expect the decision below to spawn countless challenges by local officials against this important body of law.

C. Applying Strict Scrutiny To Voting By Elected Public Officials Would Call Into Question A Host Of Routine Restrictions Placed On Local Governments

It is well established that states have substantial discretion in determining how much local control to afford political subdivisions, such as municipalities. See *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). Accordingly, a state legislature's judgments about whether to permit local control on an issue or to resolve it through the state legislature has never before been thought to present a constitutional question. If voting is considered pure political speech and voting restrictions are subject to strict scrutiny, however, the ability of states to remove matters from local control would encounter a significant new obstacle. Local officials could claim that such restrictions impair their First Amendment rights and are therefore presumptively invalid under strict scrutiny. A few examples suffice to illustrate the scope of litigation that could ensue under this approach.

Public officials' voting discretion in approving local health and safety laws is routinely limited by measures designed to make those laws consistent with state and federal regulations. Thus, state legislators may impose new requirements requiring local governments to take specified action where they previously had a choice—by, for example, prohibiting development unless certain environmental conditions are met. See, *e.g.*, *City of Cambridge* v. *Attorney*

General, 571 N.E.2d 386 (Mass. 1991) (holding that state may require local governments to approve health insurance plans giving their employees the same benefits as other state employees); *State Bd. of Health* v. *City of Greenville*, 98 N.E. 1019 (Ohio 1912) (holding that state may require city officials to approve the installation of sewage purification works by coercing the officials' votes through threats of penalties); *Consol. Rail Corp.* v. *Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987) (holding that municipal government could not pass an ordinance requiring trains to travel at a speed lower than that imposed under federal regulations).

Such restrictions have never been invalidated before on the basis of the First Amendment, as they neither target nor primarily affect public officials' right to express themselves. But under the decision below, officials could claim that the voting restriction impairs their previous ability to vote on the subject, in contravention of their First Amendment rights, and the restriction would be subject to strict scrutiny. Thus, such provisions are now constitutionally vulnerable and an attractive target for litigation.

Similarly, in order to prevent corruption and promote efficiency, state governments have traditionally limited public officials' discretion in approving contracts between local governments and vendors by imposing procedural and substantive regulations. The most common of these restrictions is to require public officials to approve the vendor who submitted the lowest responsible bid in a competitive process. See *Los Angeles Dredging Co.* v. *City of Long Beach*, 291 P. 839 (Cal. 1930); *426 Bloomfield Ave. Corp.* v. *City of Newark*, 621 A.2d 59, 62 (N.J. Super.

Ct. App. Div. 1993). The purpose of these restrictions, obviously, is not to limit an elected public official's right to free speech. But under the decision below, such restrictions—particularly when newly adopted—may be subject to challenge for impairing a local official's ability to vote on the subject.

Even routine federal conditional spending programs and mandate programs could be subject to challenge under the decision below. Under such programs, the federal government may require local governments to take certain actions as a condition of receiving federal grant money. While the courts have recognized that Congress has broad authority to impose such conditions, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (holding conditional spending constitutional despite its impact on public officials' choice); *California* v. *United States*, 104 F.3d 1086 (9th Cir. 1997) (rejecting claim that conditional federal assistance eliminates voluntary choice), conditional spending programs could be subject to challenge because they necessarily restrict the ability of local public officials to vote in a particular way. Under the reasoning of the decision below, officials could claim that a conditional spending program has placed an unconstitutional condition on their right to vote. Similar challenges could be made to state mandates requiring local officials to implement programs that advance state public policy. See *Opinion of the Justices*, 238 N.E.2d 855 (Mass. 1968). Thus, the decision below will subject well established and routine inter-governmental programs to novel constitutional challenges that will necessarily disrupt and burden their operation.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE ISSUE

This case presents an ideal opportunity to resolve this important and recurring issue. This case squarely presents a single question of federal law: what protection the First Amendment affords to an elected official's vote. The case's procedural history reveals no disputes over facts, the meaning or application of state law, or jurisdiction that would interfere with this Court's resolution of the First Amendment issue. In his petition seeking state court review of the Commission's decision and before the Nevada Supreme Court, Carrigan challenged neither the censure's factual basis nor the Commission's interpretation or application of state law. The Nevada Supreme Court's holding that Nev. Rev. Stat. § 281A.420(8)(e) violated the First Amendment rested solely upon interpretation and application of federal law. Its opinion reveals no state grounds that would supply an alternative basis for its judgment.

The issue is now ripe for review. In both the Nevada District Court and Supreme Court, the First Amendment question was fully briefed and conclusively decided. The Nevada Supreme Court's majority and dissenting opinions explored the issue thoroughly. That discussion marshaled differing perspectives from among the federal courts of appeals, which have wrestled with the issue for well over a decade. Nothing more would be gained from allowing the issue to percolate further.[10]

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[10] This case warrants review regardless of what action this Court takes on the pending petitions in *Siefert* v. *Alexander*, 10-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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405 (filed Sept. 22, 2010), and *Bauer* v. *Shepard*, 10-425 (filed Sept. 24, 2010). Both cases involve restrictions on the actual speech of judges, including restrictions on individual and party fundraising solicitation and endorsements of political candidates. See Pet. for Cert. 2, *Siefert*; Pet. for Cert. 3-9, *Bauer*. Neither case presents an opportunity to address the proper standard of review to apply to restrictions on voting by elected public officials, nor would they address whether voting is a form of speech protected by the First Amendment.

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October 27, 2010

Appendix A

Nevada Supreme Court Opinion

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.	No. 51920 FILED JUL 29, 2010

Before the Court En Banc.[1]

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether the Nevada Commission on Ethics' censure of an elected public officer for alleged voting violations under NRS

[1]The Honorable Ron Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

281A.420(2)(c) violates the First Amendment.[2] NRS 281A.420(2)(c) sets forth one of the legal standards for determining whether a public officer must abstain from voting on a particular matter, based on the officer's "commitment in a private capacity to the interests of others." NRS 281A.420(8) defines this commitment to include four specific prohibited relationships between a public official and others and describes a fifth catchall definition as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." The catchall definition of a prohibited relationship by a public official in NRS 281A.420(8)(e) confronts the First Amendment on appeal.

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[2]NRS 281A.420 was formerly NRS 281.501. 2007 Nev. Stat., ch. 538, § 3.8, at 3372. While the Commission's decision referred to NRS 281.501, the parties' briefs have referred to the 2007 version of the statute, NRS 281A.420, which we likewise follow in this opinion.

We acknowledge that the Legislature further amended NRS 281A.420 in 2009. 2009 Nev. Stat., ch. 257, § 9.5, at 1057. However, contrary to the assertions made by the dissent in footnote 5, we conclude that these amendments are insufficient to cure the statute's constitutional deficiencies. In particular, we note that the statute still does not provide sufficient limitations on what relationships may require abstention from voting. The language cited in footnote 5 of the dissent also does nothing to define the "clear cases" that require abstention from voting. Therefore, the statute remains overbroad and not the least restrictive means to promote the statute's goals. Accordingly, we reject the dissent's contention that this appeal should only be analyzed on as-applied basis.

We first conclude that voting by public officers on public issues is protected speech under the First Amendment. Because NRS 281A.420(2)(c) directly involves the regulation of protected speech by a public officer in voting, we next determine that the definitional statute NRS 281A.420(8)(e) must be strictly scrutinized under a First Amendment overbreadth analysis. Applying a strict scrutiny standard, we conclude that NRS 281A.420(8)(e) is unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech. Consequently, the district court erred in its interpretation of NRS 281A.420(8)(e) and its application to NRS 281A.420(2)(c), and thus, we reverse the district court's order.

FACTS

Appellant Michael A. Carrigan was first elected to the Sparks City Council in 1999 and has twice been reelected. During each of his election campaigns, Carrigan's longtime professional and personal friend, Carlos Vasquez, served as his campaign manager. In addition to serving as Carrigan's campaign manager, Vasquez worked as a consultant for the Red Hawk Land Company. In that role, Vasquez was responsible for advising Red Hawk on various matters pertaining to the development of a hotel/casino project known as the Lazy 8.

In early 2005, Red Hawk submitted an application to the City of Sparks regarding the Lazy 8 project. The Sparks City Council set the matter for a public hearing. Before the hearing, and in light of the longstanding relationship between Carrigan and

Vasquez, Carrigan consulted the Sparks City Attorney for guidance regarding any potential conflict of interest. The City Attorney advised Carrigan to disclose, on the record, any prior or existing relationship with Vasquez before voting on the Lazy 8 matter. Taking the City Attorney's advice, Carrigan made the following disclosure before casting his vote:

> I have to disclose for the record . . . that Carlos Vasquez, a consultant for Redhawk, . . . is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight.
>
> [T]herefore, according to [NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue.

A few weeks after Carrigan cast his vote, respondent Nevada Commission on Ethics received several complaints regarding a possible conflict of interest. The Commission reviewed the complaints and authorized an investigation.

Upon completion of the investigation, the Commission issued a written decision censuring Carrigan for violating an ethics law, NRS 281A.420(2), by failing to abstain from voting on the Lazy 8 matter.[3] The Commission found that Carrigan

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[3]The Commission determined that Carrigan's action did not constitute a willful violation of NRS 281A.420(2), and thus, it did not impose a civil penalty. NRS 281A.480.

had improperly voted on the Lazy 8 "matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [his] commitment in a private capacity to the interests of others." *See* NRS 281A.420(2)(c). To reach this conclusion, the Commission evaluated the legislative history of the definitions of prohibited relationships by a public official contained in NRS 281A.420(8) and determined that the Legislature enacted NRS 281A.420(8)(e) to cover "commitments and relationships that, while they may not fall squarely within those enumerated in [NRS 281A.420(8)(a)-(d)], are substantially similar to those enumerated categories because the independence of judgment may be equally affected by the commitment or relationship." In particular, the Commission found that Carrigan's relationship with Vasquez came within the scope of NRS 281A.420(8)(e), in that the relationship "equates to a 'substantially similar' relationship to those enumerated under [NRS 281A.420(8)(a)-(d)]" and "[is] illustrative of [relationships] contemplated by [NRS 281A.420(8)(e)]." In other words, the Commission found that Carrigan should have known that his relationship with Vasquez fell within the catchall definition and prevented him from voting on Red Hawk's application for the Lazy 8 project.

Carrigan filed a petition for judicial review with the district court to challenge the Commission's decision. The district court denied the petition based on its determination that the state has a strong interest in having an ethical government, which outweighs a public officer's and state employee's

protected free speech voting right. The court further rejected Carrigan's challenges to the constitutionality of the statute, based on overbreadth and vagueness. This appeal followed. The Legislature of the State of Nevada was granted permission to file an amicus brief in support of the Commission's position.

DISCUSSION

Carrigan challenges the constitutionality of the Commission's censure on several grounds: overbreadth, vagueness, and unconstitutional prior restraint on speech. To resolve this appeal, we focus on Carrigan's First Amendment challenge in which he argues that NRS 281A.420(8)(e) is unconstitutional in violation of his free speech rights.[4] Carrigan asserts that voting by a public officer is protected speech and therefore the statute should be reviewed under a strict scrutiny analysis, and under that analysis, the statute must be declared unconstitutional because the statute is not narrowly tailored to meet a compelling government interest. *See Citizens United v. Federal Election Comm'n,* 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010). The Commission and the Legislature (as amicus) assert that the district court properly concluded that the statute should be reviewed under a less strict

[4]In light of our resolution on Carrigan's overbreadth challenge, we need not address Carrigan's vagueness and prior restraint arguments in resolving this appeal. *See Director, Dep't Prisons v. Arndt,* 98 Nev. 84, 86, 640 P.2d 1318, 1320 (1982) (noting that "[i]t is well settled that this court will not address constitutional issues unless the[y] are requisite to the disposition of the case").

standard as outlined by the United States Supreme Court in *Pickering v. Board of Education,* 391 U.S. 563 (1968). Under that standard, they argue, the interests of the state in preventing corruption outweigh Carrigan's free speech right to vote on an issue in which he has a disqualifying interest. Alternatively, the Commission contends that if strict scrutiny applies, NRS 281A.420 is constitutional because: "(1) Nevada has a compelling state interest in promoting ethical government and guarding the public from biased decision makers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitutes the least restrictive means available to further the state's compelling interest."

In resolving this First Amendment challenge, we initially address whether voting on a particular matter by an elected public officer is protected speech under the First Amendment. Concluding that it is protected speech, we next consider Carrigan's overbreadth challenge. In doing so, we address the appropriate standard to apply in reviewing Carrigan's overbreadth challenge and determine that a strict scrutiny standard is required. Applying a strict scrutiny standard to the statute at issue, we conclude that subsection 8(e) is overbroad in violation of the First Amendment.[5]

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[5]The dissent disagrees with our analysis of this case, challenging our conclusions that subsection 8(e) of NRS 281A.420 is unconstitutionally overbroad and disputing the application of a strict scrutiny standard. The dissent's challenges to our conclusions are unpersuasive, however, as the dissent misunderstands the pertinent issue raised in this

Standard of review

This court, like the district court, reviews an appeal from an "administrative decision for clear error or abuse of discretion." *Grover C. Dils Med. Ctr. v. Menditto,* 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). While the instant matter involves an appeal from an administrative decision, Carrigan's arguments on appeal present purely legal questions, which we review de novo. *Howard v. City of Las Vegas,* 121 Nev. 691, 693, 120 P.3d 410, 411 (2005).

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appeal. The dissent improperly focuses on the question of whether recusal is an appropriate requirement to promote the Legislature's goal of avoiding impropriety when a publicly elected official has a conflict of interest. We do not dispute that requiring recusal under certain circumstances is appropriate and related to addressing conflict of interest concerns. But that is not the issue on appeal. The issue on appeal is whether the statute that establishes the recusal requirement provides sufficient limitations and explanations concerning when recusal is required to avoid overreaching into unnecessary situations. In other words, the dissent focuses on whether the required conduct is appropriate, instead of focusing on whether the statute creating the required conduct is constitutional. The dissent, in essence, reviews this case under an as-applied challenge concerning whether requiring recusal is allowed, instead of reviewing it as a facial challenge regarding whether the statute that creates the recusal requirement does so with sufficient limitation and clarity to avoid violating constitutional rights. We do not conclude that NRS 281A.420(8)(e) is unconstitutional because the Legislature can never require recusal; it is unconstitutional because the Legislature failed to establish the appropriate circumstances under which recusal can be required in accordance with constitutional protections. Because the dissent focuses on an entirely different issue than that raised in this appeal and addressed by this opinion, we do not respond further to the specific arguments made or legal authorities relied upon by the dissent.

Also, because the constitutionality of a statute is a question of law, our review is de novo. *Sheriff v. Burdg,* 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

Voting by public officers

The Ethics in Government statute at issue in this case is NRS 281A.420.[6] NRS 281A.420(2)(c) requires that

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [his] *commitment in a private capacity to the interests of others.*

(Emphasis added.) NRS 281A.420(8) defines the "commitment in a private capacity to the interests of others" as 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*

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[6]NRS 281A.010 provides that NRS Chapter 281A "may be cited as the Nevada Ethics in Government Law."

> *is substantially similar to a commitment or relationship described in this subsection.*

(Emphasis added.) Central to this controversy is paragraph (e).

The act of voting by a public officer is protected speech under the First Amendment

Initially, we must determine whether NRS 281A.420 regulates protected speech under the First Amendment. Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to state governments through the Fourteenth Amendment. *See Gitlow v. New York,* 268 U.S. 652, 666 (1925). Although this court has not directly addressed whether voting on matters by an elected public officer is protected speech, other courts have recognized that "[t]here is no question that political expression such as [a city council member's] positions and votes on City matters is protected speech under the First Amendment." *Colson v. Grohman,* 174 F.3d 498, 506 (5th Cir. 1999); *accord Connick v. Myers,* 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982))); *see also Miller v. Town of Hull, Mass.,* 878 F.2d 523, 532 (1st Cir. 1989) (stating that "we have no difficulty finding 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"). Recently we recognized in *Commission on Ethics v. Hardy,* 125 Nev. ___, ___, 212 P.3d 1098,

1106 (2009), that "voting on legislation is a core legislative function."[7] Because voting is a core legislative function, it follows that voting serves an important role in political speech. Based on our recognition of voting as a core legislative function, and in connection with other jurisdictions' holdings that voting in a legislative setting is protected speech, we conclude that voting by an elected public officer on public issues is protected speech under the First Amendment.

Overbreadth

A strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues

Having concluded that voting by an elected public officer on public issues is protected speech under the First Amendment, we must next determine the appropriate standard to apply in reviewing the constitutionality of NRS 281A.420(8)(e). Carrigan argues that a strict scrutiny standard applies because voting is protected free speech. The Commission contends, and the district court agreed, that Carrigan's free speech rights must be analyzed under the two-part balancing inquiry enunciated by the United States Supreme Court in *Pickering v. Board of*

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[7]Despite the dissent's assertions, we do not cite to *Hardy* for the propositions that First Amendment protection is extended to a local government official's vote on a land use matter, such a vote is core political speech, or that *Hardy* specifically speaks to the issue in this case. We do, however, cite to *Hardy* for the proposition that voting on legislation is a core legislative function and that political speech is a core function of a public officer. *Hardy,* 125 Nev. at ___, 212 P.3d at 1106.

Education, 391 U.S. 563 (1968), because Carrigan, as an elected city council member, is a state employee. Therefore, the Commission argues that the state's interests, as Carrigan's employer, in establishing an efficient government must be balanced with Carrigan's free speech rights as an employee.

The *Pickering* balancing test is a lower standard of review used in situations involving a state employee. 391 U.S. at 568. This standard is based on the view that the state, as an employer, has a stronger interest in regulating an employee's speech than in regulating the speech of the general public, in order to promote efficiency in the public services it offers, while also recognizing that a citizen does not forfeit all free speech rights when working for the government. *Id.* Under the *Pickering* balancing test, the court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

Carrigan's relationship with the state differs from that of most public employees, however, because he is an elected officer "about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire." *Jenevein v. Willing,* 493 F.3d 551, 557 (5th Cir. 2007). While Carrigan is employed by the government, he is an elected public officer, and his relationship with his "employer," the people, differs from that of other state employees. *Id.* Therefore, the district court erred in applying the *Pickering* balancing test.

Instead, a strict scrutiny standard applies. NRS 281A.420 establishes requirements for when a public officer must refrain from exercising speech by abstaining from voting on certain public issues. Thus, the statute deals directly with regulating speech, and as recognized in *Hardy,* political speech is a core function of a public officer. Strict scrutiny is therefore the appropriate standard. *See Citizens United v. Federal Election Comm'n,* 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010) (stating that "[l]aws that burden political speech are subject to strict scrutiny") (internal quotations omitted); *Nordyke v. King,* 563 F.3d 439, 460-61 (9th Cir. 2009) (stating that a law that directly regulates speech is subject to strict scrutiny).

NRS 281A.420(8)(e) is facially overbroad

We now consider Carrigan's overbreadth challenge to NRS 281A.420(8)(e) under the applicable strict scrutiny standard. In determining whether the statute is unconstitutionally overbroad, we must keep in mind that this is a facial challenge.[8] A facial challenge requires striking a balance between the

[8]While generally a facial challenge cannot be maintained by someone whose conduct the statute could validly regulate, there is an exception to this rule under First Amendment overbreadth challenges based on the danger that an overbroad statute's "'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 799 (1984) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). Thus, the Commission's arguments that the statute should not be declared invalid because it could be constitutionally applied to Carrigan are unavailing, and we need not consider them further.

competing interests of protecting the exercise of free speech rights—as an overbroad statute "deters people from engaging in constitutionally protected speech"—with the potential harm in invalidating a statute that may be constitutional in some of its applications. *United States v. Williams,* 553 U.S. 285, 292 (2008). Because invalidating a statute for overbreadth is "strong medicine," it should "not be casually employed." *Id.* at 293 (internal quotations omitted).

Under a strict scrutiny standard, the United States Constitution demands a high level of clarity from a statute seeking to regulate constitutionally protected speech. *See Smith v. Goguen,* 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). An overbroad law tends to chill the exercise of First Amendment rights by sweeping "'within its ambit other activities that in ordinary circumstances constitute an exercise of' protective First Amendment rights." *City of Las Vegas v. Eighth Judicial Dist. Ct.,* 118 Nev. 859, 863 n.14, 59 P.3d 477, 480 n.14 (2002) (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940)). Under a facial overbreadth challenge, a statute should not be held void "'unless it is substantially overbroad in relation to the statute's plainly legitimate sweep.'" *Silvar v. Eighth Judicial Dist. Ct.,* 122 Nev. 289, 298, 129 P.3d 682, 688 (2006) (quoting *Coleman v. City of Richmond,* 5 Va. App. 459, 364 S.E.2d 239, 243 (1988)). A strict scrutiny standard "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United,* 558 U.S. at ___, 130 S. Ct. at 898 (internal

quotations omitted).[9]

Carrigan contends that NRS 281A.420(8)(e) is not narrowly tailored since the Commission arbitrarily determines whether a public officer's relationships are "substantially similar" to the other relationships listed in subsection 8. Carrigan argues that because the subsection 8(e) definition of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" does not provide sufficient limitations on what relationships may require abstention from voting, the statute is overbroad and is therefore not the least restrictive means available to promote the statute's goals. The Commission contends that NRS 281A.420(8)(e) is constitutional because it promotes a compelling state interest in maintaining an ethical government and protecting

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[9]Strict scrutiny has been described as ranking "among the most important doctrinal elements in constitutional law." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*. 54 UCLA L. Rev. 1267, 1268 (2007). Strict scrutiny is distinct from other forms of review and "varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.'" Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny,* 48 Am. J. Legal Hist. 355, 359-60 (2006) (footnotes omitted); *see United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Greater New Orleans Broadcasting Ass'n. Inc. v. United States,* 527 U.S. 173, 183 (1999) ("the Government bears the burden of identifying a substantial interest and justifying the challenged restriction").

the public from bias, and the restrictions constitute the least restrictive means available to further the state's compelling interest.

We agree with the Commission that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law. *See* NRS 281A.020 (public policy for Nevada Ethics in Government Law). Thus, arguably, NRS 281A.420(8)(e) meets the first requirement under a strict scrutiny standard; the statute furthers a compelling state interest. The statute fails, however, to meet the "narrowly tailored" requirement.

NRS 281A.420(2)(c) requires that a public officer refrain from voting when, among other things, "the independence of judgment of a reasonable person in his situation would be materially affected by . . . his commitment in a private capacity to the interests of others." The phrase "commitment in a private capacity to the interests of others" is defined in part in NRS 281A.420(8)(e), which in relevant part states that this includes "a commitment to a person" with whom the public officer has a "commitment or relationship that is substantially similar" to one of the relationships outlined in subsection 8. NRS 281A.420(8)(e).

The definition of a "commitment in a private capacity" in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad in its regulation of

protected political speech.

There is no definition or limitation to subsection 8(e)'s definition of any relationship "substantially similar" to the other relationships in subsection 8. This catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal. Thus, the statute has a chilling effect on the exercise of protected speech, for it threatens punishment for noncompliance, which "deters people from engaging in constitutionally protected speech." *Williams,* 553 U.S. at 292.

Based on the overly broad definition in NRS 281A.420(8)(e) of what constitutes a "commitment in a private capacity," NRS 281A.420(2)(c)'s abstention requirement for this category of relationships lacks necessary limitations to its protected speech regulation. Thus, NRS 281A.420(8)(e)'s application to a wide range of differing commitments and relationships is not narrowly tailored. Accordingly, NRS 281A.420(8)(e) is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment.

Therefore, we declare NRS 281A.420(8)(e) unconstitutionally overbroad in violation of the First Amendment and reverse the district court's order.[10]

We concur: HARDESTY, CHERRY, SAITTA and GIBBONS, JJ.

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[10]Because issues as to other portions of the statute are not raised, this opinion only addresses these limited sections and does not make a determination as to the remainder of the statute.

PICKERING, J., dissenting:

Before today, no published decision has held that an elected local official engages in core political speech when he or she votes on an individual land use matter. Likewise, no published decision reviewing the ethical propriety of such a vote has subjected the applicable legislative prohibition against conflicts of interest to strict scrutiny or invalidated it on overbreadth grounds. Because I believe charting this course is both unprecedented and unwise, I respectfully dissent.

Separation of powers

Our decision in *Commission on Ethics v. Hardy,* 125 Nev. ___, 212 P.3d 1098 (2009), on which the majority relies, did not extend First Amendment protection to a local government official's vote on a land use matter[1] or declare such a vote to be core political speech. At issue in *Hardy* was whether, for

[1]The Sparks City Council vote underlying this proceeding came before us in *Adams v. City of Sparks,* Docket Nos. 49504/49682/50251 (Order of Affirmance, July 21, 2009), where we held that the Lazy 8 vote represented a land use decision reviewable, if at all, by a petition for judicial review under NRS 278.3195(4). Although policy-setting land use planning ordinances qualify as legislative, local governments exercise quasi-adjudicative or administrative powers when they decide individual zoning or land use matters. *See Garvin v. Ninth Dist. Ct.,* 118 Nev. 749, 765, 59 P.3d 1180, 1190-91 (2002) (noting that our ballot initiative law holds individual land use decisions to be nonlegislative and hence not appropriate for direct democratic vote). Conflict-of-interest rules and due process concerns apply to individual land use decisions. *See Hantges v. City of Henderson,* 121 Nev. 319, 325-27, 113 P.3d 848, 851-53 (2005) (dictum).

separation-of-powers purposes, a member of the Nevada Legislature engages in core legislative speech when voting on state legislation. *Id.* at ___, 212 P.3d at 1104-07. Citing *Brady v. Dean,* 173 Vt. 542, 790 A.2d 428 (2001), we held that the Legislature could not delegate to an executive branch agency—the Ethics Commission—the power to police state legislators' conflicts of interests in voting. *Hardy,* 125 Nev. at ___, 212 P.3d at 1105-06. The basis for our decision was not that the First Amendment requires strict scrutiny of conflict-of-interest rules for elected officials who vote. It was that Nevada's constitutional provisions vesting authority in the Legislature to discipline its members, Nev. Const. art. 4, § 6, and mandating separation of powers at the state level, *id.* art. 3, § 1(1), prohibit the Legislature from outsourcing member discipline to an executive branch agency. *Hardy,* 125 Nev. at ___, 212 P.3d at 1108. Only the Legislature, in other words, can discipline its members for legislative speech, including votes violating that body's conflict-of-interest rules.

Hardy doesn't speak to the issue in this case, where a state ethics-in-government statute is being applied to a local governmental official who votes. A local government exercises such powers as the Legislature and Constitution confer. Nev. Const. art. 8, § 8; *see* 2 Eugene McQuillin, *The Law of Municipal Corporations* § 4:5 (3d ed. 2006). A corollary proposition is that, "[u]nless restricted by the constitution, the legislature may prescribe the qualifications, tenure, and duties of municipal officers." 2 McQuillin, *supra,* § 4:124, at 356. While Nevada's separation-of-powers guarantee prohibits the Legislature from outsourcing member discipline

to an executive branch agency, nothing in our Constitution limits the Legislature's authority to subject local governmental officials to state ethics laws administered by the Nevada Ethics Commission. Indeed, the *Brady* decision, on which *Hardy* principally relies, emphasizes that it only addresses state-level legislators and does not call into question conflict-of-interest statutes that apply to local governmental officials. *See Brady,* 790 A.2d at 433 (the "conflict-of-interest cases on which plaintiffs rely all involved elected officials of political subdivisions such as cities and towns which do not raise similar separation-of-power concerns").[2]

First Amendment and acts of governance

An elected official's vote on a matter of public importance is first and foremost an act of governance. The official has broad common law and, at the federal level, Speech and Debate Clause immunity for his vote. *See* S. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting,* 101 Yale L.J. 233, 235-36 (1991) (discussing U.S. Const. art. I, § 6). But thus far the Supreme Court has not overlaid that immunity with First Amendment protection for the act of governance that an official's vote on a public matter represents. *Id.* at 245.

Whether the First Amendment protects an official's vote qua governance was raised but not decided in *Spallone v. United States,* 493 U.S. 265 (1990), an appeal of a contempt order issued against

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[2]Carrigan makes no argument that applying Nevada's ethics laws violates the Nevada Constitution's home-rule provision.

the City of Yonkers and its city council members for not passing an ordinance required by a federal consent decree. Justice Brennan would have upheld the contempt citation against both the City and its council members and reached the First Amendment issue. *Id.* at 281-306 (dissenting). Writing for four members of the Court, he characterized as "unpersuasive" the argument that the First Amendment protected a city council member's vote "yea" or "nay" on the ordinance to which the City had stipulated in the federal consent decree:

> Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive. *While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance* . . . .

Id. at 302 n.12 (emphasis added). *See Clarke v. United States,* 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc) (vacating as moot an earlier panel opinion that held, pre-*Spallone,* that Congress could not, consistent with the First Amendment, coerce the votes of the District of Columbia Council; noting that this was an "important" issue "of first impression" that "would carry broad implications" for federal, state, and local governments and might "open[ ] the door to more litigation than we can now appreciate");

Zilich v. Longo, 34 F.3d 359, 363-64 (6th Cir. 1994) (holding that a former city council member's First Amendment rights were not violated by a resolution authorizing suit against him for having violated the council's residency requirement, even though alleged to be in retaliation for his politics: "Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations and individuals"; the "manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views," including the plaintiff's "right to oppose the mayor" and the "defendants' right to oppose" the plaintiff "by acting on the residency issue" (internal quotation and citation omitted)); *Rangra v. Brown,* 584 F.3d 206 (5th Cir. 2009) (dismissing appeal after vacating panel decision, 566 F.3d 515, *reh'g granted,* 576 F.3d 531, that had concluded that elected local and state government officials' decision-making represents political speech, requiring the Texas Open Meeting Act to survive strict scrutiny review); *cf. Doe v. Reed,* 561 U.S. ___, ___ & n.2, 130 S. Ct. 2811, 2817-18, 2820 n.2 (2010) (recognizing that a citizen engages in both expressive and legislative speech in signing a referendum petition and declining strict scrutiny review of Washington's Public Records Act's application to signers who wished to remain anonymous).

Voting by a public official is conduct—an act of governance. Still, as Justice Brennan noted in *Spallone,* a public official's vote also "arguably contains a communicative element," 493 U.S. at 302

n.12; an elected official's vote defines his beliefs and positions in a way words alone cannot. Thus, the First Amendment was held to protect the communicative element in a public official's vote in *Miller v. Town of Hull, Mass.,* 878 F.2d 523 (1st Cir. 1989), on which the majority relies.

Miller was a retaliation case under 42 U.S.C. § 1983. In *Miller,* the First Circuit affirmed a judgment after a jury trial awarding elected members of a town redevelopment authority damages against the board of selectmen who removed them, the jury found, not for a permissible reason but in retaliation for their vote on a housing development for the elderly. 878 F.2d 523. The expressive component of the redevelopment authority members' votes in *Miller* was what was singled out and punished: The board members were retaliated against for *how* they voted, not *because* they voted.

There is a difference the majority does not acknowledge between "'retaliatory First Amendment claims' and 'affirmative' First Amendment claims, such as 'facial challenges to statutes.'" *Velez v. Levy,* 401 F.3d 75, 97 (2d Cir. 2005) (quoting *Greenwich Citizens Comm. v. Counties of Warren,* 77 F.3d 26, 31 (2d Cir. 1996)). Because a First Amendment retaliation claim succeeds does not mean that the right vindicated is absolute, or that a statute that implicates such a right while regulating related conduct in a content-neutral way must pass strict scrutiny to survive facial challenge. First Circuit cases that have followed *Miller* make the point unmistakably. Thus, in *Mullin v. Town of Fairhaven,* 284 F.3d 31, 37 (2002), the First Circuit refined *Miller,* stating that, while "[w]e have extended First

Amendment protection to votes on 'controversial public issue[s]' cast by 'a member of a public agency or board[,]' . . . *[t]his protection is far from absolute*." *Mullin,* 284 F.3d at 37 (emphasis added) (quoting *Miller,* 878 F.2d at 532). The court then proceeded to analyze Mullin's First Amendment retaliation claim under the flexible *Pickering v. Board of Education,* 391 U.S. 563 (1968), standard the majority rejects—paradoxically, at the same time it embraces *Miller*. *See also Mihos v. Swift,* 358 F.3d 91, 109 (1st Cir. 2004) ("we articulate the First Amendment right at stake here as the right of a public official to vote on a matter of public concern properly before his agency without suffering retaliation from the appointing authority *for reasons unrelated to legitimate governmental interests*"; applying *Pickering* balancing) (emphasis added).

The *Pickering/Garcetti v. Ceballos,* 547 U.S. 410 (2006), line of cases speaks to the First Amendment rights of public employees and holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti,* 547 U.S. at 421. Restricting a public employee's official speech "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

The majority deems *Pickering/Garcetti* inapplicable because Carrigan is elected and his constituents, not the government, are his ultimate employer with the power to hire or fire him. But this

is an overly simplistic view. It does not take into account the Legislature's control over local governments in our state constitutional scheme and the constitutional and policy-based imperative of non-self-interested governmental decisionmakers, especially in the quasi-adjudicative setting. Even though Carrigan is an elected official, I thus would affirm the district court's ruling that *Pickering/Garcetti* balancing applies to Carrigan's challenge to Nevada's Ethics in Government Act. *See Siefert v. Alexander,* 608 F.3d 974, 985-86 (7th Cir. 2010) (applying *Pickering/Garcetti* balancing, not strict scrutiny, to challenge by judge campaigning for reelection to ethics regulations; rejecting the argument that *Pickering/Garcetti* depends on who can hire or fire the government official and noting that, "It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time."); *Shields v. Charter Tp. of Comstock,* 617 F. Supp. 2d 606, 615-16 (W.D. Mich. 2009) (applying *Pickering/Garcetti* to elected member of the Township Board and noting that, "[u]nlike an ordinary citizen, [Shields] represents the Township when he speaks at a public board meeting [making] his constitutional rights ... more analogous to the employee in *Garcetti* than to a private citizen sitting in the audience").

Strict scrutiny v. rational basis or intermediate review

Here, Carrigan has not brought a retaliation claim. He challenges whether Nevada's Ethics in Government Law can constitutionally apply to him,

even when the purpose is prophylactic—to avoid conflicts of interest—not retaliatory. Of note, the Law does not regulate *how* councilmember Carrigan votes. It provides that he should not vote at all on "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c).[3] Its target is conduct—acts of governance—not personal, expressive speech.

A law limiting an elected official's ability to vote on matters as to which he has an actual or apparent conflict of interest does not trigger strict scrutiny. It commands either rational basis, *Peeper v. Callaway County Ambulance District,* 122 F.3d 619, 622-23 (8th Cir. 1997), or at most the intermediate level of review given laws regulating conduct that incidentally regulate speech, *see Clarke v. United States,* 886 F.2d 404, 413-14 (D.C. Cir. 1989) (citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968)), *vacated as moot,* 915 F.2d 699 (D.C. Cir. 1990) (en banc) (alternative holding), as applied in candidate ballot access cases. *Monserrate v. New York State Senate,* 599 F.3d 148 (2d Cir. 2010).

At issue in *Peeper* was a board resolution prohibiting a newly elected ambulance board member from voting on certain matters because her husband worked for the ambulance district. 122 F.3d at 620-

[3]The Ethics in Government Act was amended in 2009, which resulted in some of its sections being renumbered. Unless otherwise noted, I have followed the majority's convention and refer to the pre-2009 version of the Act in this dissent.

21. Although the Eighth Circuit invalidated parts of the resolution because it went further than the state conflict-of-interest law required, it used rational basis review and rejected strict scrutiny as inappropriate. *Id.* at 622-23. In its view, "[a]n individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office," making it appropriate to "employ the same constitutional test for restrictions on an officeholder as we do for restrictions on candidacy." *Id.* at 622. Quoting *Bullock v. Carter,* 405 U.S. 134, 143 (1972), and *Anderson v. Celebrezze,* 460 U.S. 780, 788 n.9 (1983), *Peeper* noted that the existence of barriers to a candidate's right of access to the ballot does not in and "of itself compel close scrutiny," and stressed that, "[t]he Supreme Court has upheld restrictions on candidacy that are unrelated to First Amendment values and that protect the integrity and reliability of the electoral process itself." 122 F.3d at 622-23. *Accord Franzwa v. City of Hackensack,* 567 F. Supp. 2d 1097 (D. Minn. 2008) (rejecting First Amendment challenge by an elected board member to his temporary suspension by his fellow board members from voting privileges for what they erroneously believed was his disqualification; judged under a rational basis standard, the board, which had the power to judge the qualifications of its members, reasonably believed that the plaintiff's residency qualification was in doubt).

The Second Circuit pursued much the same analysis in *Monserrate v. New York State Senate,* 599 F.3d 148 (2d Cir. 2010), which presented a First Amendment challenge to the New York State

Senate's expulsion of an elected senator following his domestic violence conviction. As the Eighth Circuit did in *Peeper,* the Second Circuit drew on *Anderson v. Celebrezze,* and analogized post-election discipline of elected officials to pre-election candidacy restrictions. *Id.* at 154-55 (also citing *Burdick v. Takushi,* 504 U.S. 428, 432 (1992)). In both the pre- and post-election context, "the rights of voters and the rights of candidates [or elected officials] do not lend themselves to neat separation." *Id.* (internal quotation omitted). The court affirmed that "[t]he district court did not err in declining to apply strict scrutiny," and elaborated that:

> . . . it is an erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Rather, it is useful to look to a more flexible standard in which the rigorousness of our inquiry into the propriety of a state [action] depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights. When such rights are subjected to severe restrictions, the [action] must be narrowly drawn to advance a state interest of compelling importance; but when such rights are subjected to less than severe burdens, the State's important . . . interests are generally sufficient to justify the restrictions. Therefore, if the burden imposed is less than severe and reasonably related to the important state interest, the Constitution is satisfied.

Id. at 154-55 (internal quotations and citations omitted).

"It seems clear enough," the court held, that "this flexible framework, used in ballot access cases, is not limited to the pre-vote context," but applies as well to cases applying post-election restrictions on elected officials. *Id.* at 155. Given the New York Senate's "important interest in upholding its reputation and integrity," and the "reasonab[le] relat[ionship]" between that interest and Monserrate's expulsion, the court denied Monserrate relief.[4] *Id.* at 155-56. In so doing, it noted that the expulsion had the effect of depriving his constituents of elected representation until a successor was chosen. *Id.* at 156. Because the voters of every senate district were likewise subject to having the senate's expulsion rules applied to their

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[4]Had Monserrate been expelled to punish him for *speech* outside the senate as opposed to *conduct,* a different analysis and result would obtain. Thus, in *Bond v. Floyd,* 385 U.S. 116 (1966), the Supreme Court invalidated a state's refusal to seat a federal legislator based on his outspoken opposition to the Selective Service system and the Vietnam war. *Jenevein v. Willing,* 493 F.3d 551 (5th Cir. 2007), cited by the majority to support strict scrutiny review, makes the same point. *Jenevein* involved an elected judge's televised broadcast rebuking a lawyer for improper attacks on the judiciary. *Id.* at 553-57. While the court invalidated part of the censure the judge received based on the judge's First Amendment right to comment publicly on a matter of public interest, it upheld the censure to the extent the judge used his courtroom and robes to stage his broadcast. *Id.* at 560-61. The judge's First Amendment right to speak out on a matter of public concern that involved him did not give him the right to use his courtroom as a pulpit. Of note, the Seventh Circuit rejected *Jenevein*'s strict scrutiny approach in favor of the more capacious *Pickering/Garcetti* standard, which accommodates both the public interest in unbiased judicial officers and the individual elected officer's First Amendment interests. *Siefert,* 608 F.3d at 984-86.

elected representative, this did not offend their First or Fourteenth Amendment rights. *Id.* at 156-57.

No doubt requiring Carrigan to recuse himself on matters involving his longtime friend and then-current campaign manager, Vasquez cost Vasquez, his other clients, and others of Carrigan's constituents their representation by Carrigan, and deprived Carrigan of his right to express himself by voting on matters involving Vasquez or Vasquez's lobbying clients. Applying Monserrate's "flexible framework," however, the burden is justified.

Statutorily imposed limits on a local government official's vote on a matter as to which his personal loyalties conflict, or appear to conflict, with his public duties do not severely or discriminatorily burden the official or his constituents. A public official, under Nevada's Ethics in Government Law, is not required to recuse so long as the official's "commitment in a private capacity to the interest of others . . . is not greater than that accruing to any other member of the general business, profession, occupation or group." NRS 281A.420(2)(c). It is only when, as the Commission found here, "the independence of judgment of a reasonable person in [the public officer's] situation would be materially affected by . . . his commitment in a private capacity to the interests of others" that recusal is required. *Id.* Even then, the official "may otherwise participate in the consideration of [the] matter," NRS 281A.420(2); he just may not vote on or advocate the passage or defeat of the matter in which he has a disqualifying personal interest. At least in the adjudicative setting, moreover, recusal is the preferred, more narrowly tailored way to avoid corruption or the appearance of

corruption. *Citizens United v. Federal Election Comm'n,* 558 U.S. ___, ___, 130 S. Ct. 876, 910 (2010) (discussing *Caperton v. A.T. Massey Coal Co.,* 556 U.S. ___, 129 S. Ct. 2252 (2009), as "limited to the rule that the judge must be recused, not that the litigant's political speech could be banned"); *see also Republican Party of Minn. v. White,* 536 U.S. 765, 794 (2002) (noting that, in the adjudicative context, a state "may adopt recusal standards [for its elected judges] more rigorous than due process requires").[5]

The justification for requiring recusal in matters involving conflicts of interest on the part of elected public officials is strong. The Legislature passed

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[5]Acknowledging the difficult balance between constituents' rights to public representation and personal interests giving rise to disqualifying conflicts of interest, the 2009 Legislature added the following paragraph to NRS 281A.420:

> Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this [statute] are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's . . . commitment in a private capacity to the interests of others. NRS 281A.420(4)(b) (2009).

This clarifying language was not part of NRS 281A.420 when Carrigan voted on the Lazy 8 matter and the Commission and the district court considered whether he violated the statute in his vote. Even accepting arguendo that strict scrutiny applies, the passage of this amendment militates against the overbreadth analysis the majority pursues and suggests the more prudent course would be to analyze this appeal on an as-applied basis.

Nevada's Ethics in Government Law "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees [by establishing] appropriate separation between the roles of persons who are both public servants and private citizens." NRS 281A.020(2)(b). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court upheld statutory limits on citizens' direct candidate contributions in order to ensure "against the reality or appearance of corruption" of elected officials—deeming the government's interest in preventing actual or perceived quid pro quo corruption of elected officials sufficient to justify the undeniable incursion on private citizens' First Amendment rights such contribution limits represent. In *Citizens United,* 558 U.S. at ___, 130 S. Ct. at 908, the Supreme Court reaffirmed *Buckley*. If the government's interest in "ensur[ing] against the reality or appearance of corruption," *Citizens United,* 558 U.S. at ___, 130 S. Ct. at 908, can justify the direct contribution limits upheld in *Buckley,* Nevada's concern with local government official's actual or apparent conflicts of interest surely justifies the limited disqualification stated in NRS 281A.420(2)(c).

At common law, "[a] member of a local governing board is deemed to be a trustee for the citizens of the local entity." 2 *Antieau on Local Government Law* § 25.08[1] (2009). In such an official, "[t]he law tolerates no mingling of self-interest. It demands exclusive loyalty, and if a local legislator has an interest that is of such personal importance that it impairs his or her capacity to act in the interest of the public, he or she cannot vote." *Id.* Numerous cases so hold, applying long-established common law.

See 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2010) ("A council member who has a direct personal interest, a financial interest, or an appearance of impropriety in a matter coming before the council is not eligible to vote in that matter on the grounds that to allow such a practice violates public policy. The proper thing to do in such a case is for the member to recuse or disqualify himself, or abstain from voting.") (footnotes omitted; collecting cases dating back as far as 1878). Statutes regulating conflicts of interest by public officials supplement these common law rules, both in Nevada and elsewhere. *See* M. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking,* 65 N.D. L.Rev. 161, 175-79 (1989).

"A 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional." *Republican Party of Minn.,* 536 U.S. at 785 (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 375-77 (1995) (Scalia, J., dissenting)). I submit that this presumption applies here.

Overbreadth

Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that Carrigan's relationship with Vasquez was disqualifying.[6] Nor does the majority debate that,

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[6]Carrigan was in the final weeks of a contested reelection when he voted on the Lazy 8 matter. His campaign manager, fund raiser and longtime political adviser was Carlos Vasquez, whose lobbying client was the Lazy 8 on whose application Carrigan voted. The Commission found:

as applied, NRS 281A.420(2) and (8) legitimately required Carrigan to abstain from voting on the Lazy 8 matter. Majority opinion *ante* at 620 n.5. Nonetheless, Carrigan wins reversal because the majority concludes that, since strict scrutiny applies, so does the overbreadth doctrine, and that NRS 281A.420(8)(e), read in isolation from the rest of the statute to which it relates, is unconstitutionally overbroad. With this conclusion I cannot agree.

Overbreadth analysis is an exception to the basic rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v.*

> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant, and campaign manager [Vasquez], who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

As the district court noted, the legislative history of NRS 281A.420 supports the Ethics Commission's finding that this relationship was disqualifying. *See* Hearing on S.B. 478 Before Senate Comm. on Gov't Affairs, 70th Leg. (Nev., March 30, 1999) (while a prior campaign association would not necessarily be disqualifying, if the relationship "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").

Oklahoma, 413 U.S. 601, 610 (1973). The rule against hypothetical challenges rests "on more than the fussiness of judges"; it "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610-11. As an exception to the rule against deciding cases based on hypotheticals, the overbreadth doctrine is strictly limited. It applies only to "statutes which, by their terms, seek to regulate only spoken words," burden "innocent associations," or delegate "standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints." *Id.* at 612-13 (internal quotation omitted).

In *Broadrick,* the Court rejected an overbreadth challenge by Oklahoma government employees to a state personnel statute patterned on the federal Hatch Act, which proscribes partisan political activities by government employees. Concededly, the Act's broad terms could be read to prohibit some constitutionally protected speech. However, it fairly applied to the conduct engaged in by the employees before the Court. Since the statute sought "to regulate political activity in an even-handed and neutral manner" and reached "a substantial spectrum of conduct that [was] manifestly subject to state regulation," the government employees' overbreadth challenge failed. *Id.* at 616. In reaching this conclusion, the Court cautioned against too easy or promiscuous resort to overbreadth analysis in conduct cases. The function of

> facial overbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure

> speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid . . . laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. at 615.

Broadrick disposes of Carrigan's overbreadth challenge. Here, the challenged statute applies to conduct: the governmental act of voting on a local land use matter. Even granting that an elected official's vote on a public matter carries an element of expressive speech, the statute is content-neutral. It regulates *when* an official may or may not vote, not *how* he or she should vote. Its justification lies in avoiding corruption or the appearance of corruption and in promoting the public's faith in the integrity of its local government. Such a statute, applying in a content-neutral way to both conduct and speech in the government setting, should not fall to overbreadth analysis.

The majority does not identify the protected conduct that NRS 281A.420(8)(e)'s declared overbreadth improperly catches in its sweep. *But see United States v. Stevens,* 559 U.S. ___, ___, 130 S. Ct. 1577, 1587 (2010) ("[t]he first step in overbreadth

analysis is to construe the challenged statute" preparatory to deciding whether "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (quotations and citations omitted). Instead, the majority offers the *ipse dixit* that "[t]he definition of a 'commitment in a private capacity' in subsection 8(e) fails to sufficiently describe what relationships are included within NRS 281A.420(2)(c)'s restriction. As a result, the statute's reach is substantially overbroad." Majority opinion *ante* p. 623.[7]

Read in isolation and parsed word-for-word, paragraph (e) of NRS 281A.420(8) can be seen as imprecise. But it is not free-standing. It refers to the rest of NRS 281A.420, which explains when disqualification is required (situations in which "the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others," NRS 281A.280(2)); identifies the types of

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[7]This statement seems more appropriate to a void-for-vagueness than an overbreadth challenge but Carrigan does not have a legitimate vagueness challenge. The Ethics Commission is available to rule in advance on whether a disqualifying conflict of interest exists; Carrigan admits he had six months lead time before the Lazy 8 application came to a vote; his sanction was a civil rebuke, not a criminal penalty. He thus cannot prevail on a void-for-vagueness challenge. *Compare Holder v. Humanitarian Law Project,* 561 U.S. ___, ___, 130 S. Ct. 2705, 2719 (2010) ("a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim . . . for lack of notice"), *with Broadrick,* 413 U.S. at 608 n.7 (rejecting the government employees' vagueness challenge to lack of notice given that there was a review board available, as here, to rule in advance on the permissibility of their proposed conduct).

relationships that are disqualifying (household, family, employment, or business, NRS 281A.280(8)(a)-(d)); and then, under those headings, provides for disqualification based on "[a]ny other commitment or relationship that is substantially similar" to those listed, NRS 281A.420(8). Given the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest—and the elusive nature of conflicts of interest—the statute could have ended with the general proscription in NRS 281A.420(2) and passed muster. *Cf.* 2 Antieau, *supra,* § 25.08[1], at 25-47 ("The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. No definitive test has been devised."). Stating a general rule, followed by a list that ends with a catchall, does not make a statute unconstitutionally overbroad:

> [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.

United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973); *see* 2A Norman A. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:17, at 358-60 (2007) ("Where general words follow specific words in a statutory enumeration, the general words are

construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," thus inherently limiting the statute's terms).

* * * * *

The vote in this case did not signify much in the end, because Carrigan's vote was in the minority. But applying First Amendment strict scrutiny and overbreadth precepts to invalidate state conflicts-of-interest laws that govern local governmental officials who vote is a mistake that I fear opens the door to much litigation and little good.

Appendix B

Nevada District Court Opinion

Case No.: 07-OC-012451B

Dept. No.: II

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

MICHAEL A. CARRIGAN, Fourth City Ward Council of the City of Sparks, Petitioner, vs. THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, Respondent.	ORDER AND JUDGMENT DENYING THE PETITIONER'S PETITION FOR JUDICIAL REVIEW AND AFFIRMING THE FINAL DECISION OF THE NEVADA COMMISSION ON ETHICS

PROCEDURAL HISTORY

On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council, filed a Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS 233B.130-233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the Commission

found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor, confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project.[1]

In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or Hearing on this matter. The Legislature

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[1]At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a new chapter to be numbered as NRS Chapter 281A. See, Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 28IA.

conditionally filed its Amicus Curiae Brief along with its Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any oral argument or hearing on this matter.

On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12, 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H. ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the Legislature as Amicus Curiae.

Having considered the pleadings, briefs, documents, exhibits and administrative record on file in this case and having received oral argument from the parties and Amicus Curiae, the Court enters the following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada Revised Statutes as NRS Chapter 281A.

3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)[2] All five members of the City Council were present at the meeting and actively participated in the discussion regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

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[2]Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.) Vasquez started serving as campaign manager in January or February 2006, and he served in that capacity until Councilman Carrigan was reelected at the November 2006 general election. Id. In prior elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both 1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999. (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid for providing printing, advertising and public relations services for Councilman Carrigan's three campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his companies did not make any profit from these services. Id.

6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact,

Councilman Carrigan would confide in Vasquez regarding political matters that he would not normally discuss with members of his own family such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything. When you are running a campaign you have to take a look at all the factors that could affect that candidate and that community." (ROA000046.)

7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project. (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his many community and business contacts, and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. Id.

8. Vasquez's primary occupation is to act as a paid public relations political advocate and strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and public relations services, and one of his specialties is providing such services to developers who are seeking approval from local governments for their planned developments. (ROA000041-53.)

9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting, lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to oversee public relations regarding the project, and he was actively and openly involved in efforts to manage information in the media and to influence and improve the public's opinion regarding the project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City Council's approval of the project. Id.

10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id. For example, Vasquez met numerous times with Councilman Carrigan and other council members to discuss the project. At those meetings, Vasquez sought support for the project through discussions and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed information directly to Red Hawk, which then changed the specifications of the project to obtain the support of Councilman Carrigan and other council members. Id.

11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan made the following disclosure, as found in the transcripts of the meeting:

> Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue. Thank you.
>
> (ROA000507.)

12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

13. After receiving additional testimony at the meeting from supporters and opponents of the Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.) Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206- 209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer, Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and Moss) and two opposed (Carrigan and Schmitt). Id.

14. In September 2006, four members of the public filed separate but similar ethics complaints against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's participation in the City Council meeting violated the Ethics Law because, at the time of the meeting, Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was acting as a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project. Id.

15. On August 29, 2007, the Commission held a hearing and received testimony and evidence concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman Carrigan. (ROA000012-13.)

16. Subsection 2 of NRS 281A.420 provides in relevant part:

> [I]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
>
> (a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

17. In its final decision, the Commission determined that when Councilman Carrigan voted upon the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c). (ROA000011-13.)

18. In reaching its conclusion, the Commission relied upon the statutory definition of "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS 281A.420:

> 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.

(Emphasis added.) (ROA000006-8.)

19. The Commission found that Councilman Carrigan's relationship with Vasquez came within the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated under NRS 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" (ROA000008.)

20. Because the Commission found that the independence of judgment of a reasonable person in Councilman Carrigan's situation would be materially affected by his commitment in a private capacity to the interests of his campaign manager, political advisor, confidant and close personal friend, the Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to abstain from voting. Specifically, the Commission stated:

> Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reason-able person's independence of judgment would be materially affected by his private commitment.
>
> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

(ROA000012.)

Petitioner's Claims

21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging the Commission's final decision.

22. First, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is in violation of constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments.

23. Second, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is affected by error of law. NRS 23313.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in that subsection without receiving any evidence that rebutted the presumption.

24. Third, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is not supported by reliable, probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

25. Fourth, Councilman Carrigan contends that the Commission's final decision should be reversed

under the Administrative Procedure Act because the final decision is arbitrary and capricious and characterized by abuse of discretion. NRS 233B.135(3)(f).

26. Finally, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision violates his constitutional rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically, Councilman Carrigan contends that his constitutional rights to due process were violated because Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an appearance or implied probability of bias and which disqualified them from participating in the Commission's hearing regarding the ethics complaints against Councilman Carrigan.

27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

Standard of Review

28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must prove that substantial rights have been prejudiced by the final decision of the Commission because the final decision is:

> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

29. In reviewing the final decision of the Commission, the standard of deference accorded to the Commission's determinations turns largely on whether the determinations are more appropriately characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121 Nev. 523, 527 (2005).

30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at 527-28.

Under that deferential standard, the Court may 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. Thus, the Court must 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 Vehicles, 121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

31. In addition to giving deference to the Commission's findings of fact, the Court must give deference to the Commission's conclusions of law when they are closely tied to the Commission's view of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered to undertake an independent de novo review, and the Court is not required to defer to the Commission's legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v. Nev. Cement Co., 117 Nev. 960, 964 (2001).

32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the

Commission is clothed with the power to interpret the ethics statutes as a necessary precedent to its administrative action and "great deference should be given to that interpretation if it is within the language of the statute." Nev. Tax Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co., 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the *language of the statutes and is consistent* with *legislative intent*. JMA/Lucchesi, 110 Nev. at 5-7; City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

33. Councilman Carrigan contends that legislative voting is protected speech under the First Amendment and that he had a constitutional right as an elected public officer to engage in such protected speech when he voted on the Lazy 8 project. Because the Commission concluded that subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and as applied to him because they impermissibly restrict his protected speech in violation of the First Amendment. In response, the Legislature raises several arguments in opposition to Councilman Carrigan's constitutional challenge to the validity of the statutory provisions.

34. First, the Legislature contends that the First Amendment was not applicable under the circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative proceeding, but was an administrative proceeding at which the City Council and its members were required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing political, professional and personal relationship with Vasquez which created an appearance or implied probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are subject to review under the First Amendment in this case, the balancing test established by the United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital interest in ethical government outweighs any interest

Councilman Carrigan has to vote upon a matter in which he has a disqualifying conflict of interest.

36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical government and guarding the public from biased decisionmakers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitute the least restrictive means available to further the state's compelling interest.

37. Although the Legislature makes a cogent argument that the First Amendment was not applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case. Instead, even assuming that the First Amendment was applicable under the circumstances, the Court finds that under the Pickering balancing test, any interference with protected speech is warranted because of the state's strong interest in either having ethical government or the appearance of ethical government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan.

38. 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. Clement v. Fashing, 457 U.S. 957, 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

39. Several cases from the First Circuit have found that "[v]oting by members of municipal boards, commissions, and authorities 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. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir. 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit recognizes that voting by public officers is constitutionally protected speech, the First Circuit also recognizes that "Mills protection is far from absolute," and that when a public officer claims his First Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 7476; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

> We have extended First Amendment protection to votes on "controversial public issues" cast by "a member of a public agency or board." Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue."); see also Stella v.

> Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995). This protection is far from absolute, however. In their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment protection "so long as [their] speech does not unduly impede the government's interest . . . in the efficient performance of the public service it delivers through" its pointed officials. O'Connor, 994 F.2d at 912 (citing cases). Accordingly, to determine the scope of First Amendment free speech protections applicable to public officials, we have employed a three-part test extracted largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

Mullin, 284 F.3d at 37.

40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper standard of review for this case. Under the Pickering balancing test, the 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 balancing 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).

41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting upon a matter when he has a "commitment in a private capacity to the interests of others." The purpose of the statutory provisions is to prevent a public officer from voting upon a matter when private interests create an actual conflict of interest or the appearance of a conflict of interest. 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 their face, the statutory provisions serve 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.").

42. Because the statutory provisions serve 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 upon a matter in which he has a disqualifying conflict of interest is entitled to little or not protection under the First Amendment. Indeed, allowing a public officer to vote under such circumstances would seriously erode the public's confidence in ethical government. Therefore, because the state's interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS 281A.420 are facially constitutional under the Pickering balancing test.

43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied to Councilman Carrigan. Given Vasquez's role as Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend, the record contains substantial evidence that Councilman Carrigan 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 actual conflict of interest or the appearance of a conflict of interest, and a reasonable person would have had a legitimate fear that the relationship could potentially disrupt or undermine Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties. Under such circumstances, Councilman Carrigan 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 Councilman Carrigan was prohibited from voting upon the Lazy 8 project.

44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore, subsections 2 and 8 of NRS 281 A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute 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 unconstitutionally vague on its face if the statute: (1) fails to provide people of ordinary intelligence with 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).

46. In determining whether a statute is unconstitutionally overbroad or vague, the United States 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. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion); Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme Court typically will not find the statute to be unconstitutionally 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 v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct. App. 1982).

47. 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) & 281A.460. Each request so made by a public officer and each advisory opinion rendered by the Commission in response to such a request, and any motion, determination, evidence or hearing record relating to such a request, are confidential unless the public officer who requested the advisory opinion permits the disclosure of the confidential information or acts in contravention of the advisory opinion. NRS 281A.440(5).

48. In this case, Councilman Carrigan 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 Councilman Carrigan's campaign manager 6 months or more before the City Council meeting. (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory opinion and obtain clarification of the statute from the Commission when he had ample opportunity to do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or 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).

49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

50. The United States 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, 413 U.S. at 613. 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 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.

51. 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. ---, 146 P.3d 240, 247 (2006).

52. 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, because the statute "is not a censorial statute, directed at particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected speech. The purpose of the statute is to prevent public officers from voting upon matters when private interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest, and this traditional 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 public officers do not have a First Amendment right to vote upon 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.

54. 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 the Nevada Supreme 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, 146 P.3d at 247 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

55. In this case, Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was 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 (70th Sess. 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) (emphasis added).

56. In light of this legislative history, it would be detrimental to society to invalidate the statute on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute and

was 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 does not fall so squarely within the confines of the statute.

57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because: (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First Amendment.

58. 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 United States 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.

59. 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 United States 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, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was subject to less exacting scrutiny for vagueness).

60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which could result in severe consequences for a public officer, including referring the matter to the Attorney General or the appropriate District Attorney for a

determination of whether a crime has been committed and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court finds that because none of the actions which the Commission is authorized to take under NRS 281A.480 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law,* it would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable from office by impeachment only has committed a willful violation of the Ethics Law, the Commission is required to file a report with the appropriate person responsible for commencing impeachment proceedings. It is well established, however, that impeachment proceedings are not criminal proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev. Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose of an impeachment is to protect the state, not to punish the offender.").

63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is removable from office pursuant to NRS 283.440 has committed one or more willful violations of the Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer. It is well established, however, that removal

proceedings conducted pursuant to NRS 283.440 are civil proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction. Adler v. Sheriff, 92 Nev. 436, 439 (1976) ("The laws for removal of public officers are not criminal statutes nor are the proceedings criminal proceedings.").

64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in accordance with the applicable provisions governing his employment. It is well established, however, that disciplinary proceedings conducted against public employees are administrative proceedings, not criminal proceedings. Navarro v. State ex rel. Dep't of Human Res., 98 Nev. 562, 563-65 (1982); State ex rel. Dep't of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

65. Finally, NRS 281A.480(7) provides:

> 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions of the Nevada Revised Statutes which define crimes or prescribe punishments with respect to the conduct of public officers or employees. If the Commission finds that a public officer or employee has committed a willful violation of this chapter which it believes may also constitute a criminal offense, the Commission shall refer the matter to the Attorney General or the district attorney, as appropriate, for a determination of whether a

crime has been committed that warrants prosecution.

66. Even though the Commission is required to refer certain matters to the Attorney General or the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions. Rather, such a criminal prosecution could occur only under the criminal laws of this state.

67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all. (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less exacting scrutiny for vagueness.

68. 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 v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion). 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 United States 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)).

69. In a case challenging the constitutionality of the rule of judicial conduct which requires judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). The court found that while 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 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).

70. In a similar vein, the Nevada Supreme 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)).

71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" 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 have been infeasible 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 such a reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in each case.

72. Furthermore, 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 and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and public officers 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).

74. 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).

75. 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. Through the exercise of ordinary common sense, a reasonable public officer could readily 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 is not unreasonable to expect a public officer to know when he has a close, substantial and continuing relationship with another person, most public officers 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.

76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because: (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the statute from the Commission when he had ample opportunity to do so; (2) the statute 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) the statute contains four very specific and concrete examples of prohibited conduct to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

The Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case.

77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS

281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission. The Court disagrees.

78. The presumption contained in subsection 2 of NRS 281A.420 states:

> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

79. As illustrated by the following discussion on the record at the hearing, the Commission fully considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on the facts:

> COMMISSIONER HSU: I think people put too much emphasis on this language when I see people argue it when the resulting benefit or detriment accruing to him would not be greater than any accruing to any other member in a general business. There is only one lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard. It's not like the entire business profession of lobbyists are being affected uniformly. That's kind of what that language is there for.

So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the professional benefit by having this approved, and of course, the vote was that it got denied, the vote, but I just don't see how that language applies because it is not a broad application.

Again, . . . I just don't see how every—how the entire group of lobbyists is being affected by the passage or failure of this vote. Thanks.

* * *

COMMISSIONER JENKINS: . . . We might consider that Councilman Carrigan is a resident of his ward and the decision to participate in the vote and his bringing the motion and voting for it would not bring him or the project—well, him any greater benefit than any other resident of his ward. But you know, Vasquez just really throws a wrench in the whole thing, doesn't he?

VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . . [W]e're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about his commitment in a private capacity to the interests of others. So we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.

So I think that Commissioner Hsu's reasoning does, I think, apply . . . Mr. Vasquez was in a different position than the general business, profession, occupation or group in

> terms of the Lazy 8 and the passage of the matter that was before the Council on August 23rd.
>
> So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph does not necessarily save the day.
>
> COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

80. Therefore, the Court holds that the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

> **The Commission's 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.**

81. After review of the record, the Court finds that substantial evidence exists to support the Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 28IA.420 when he voted on the Lazy 8 project.

82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. City Plan Dev.. Inc. v. Labor Comm'r,121 Nev. 419, 426 (2005).

83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature declared:

> To 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.

NRS281A.020(2)(b).

84. Accordingly, the disclosure and abstention law holds public officers accountable to the public for complete disclosures of private commitments and for the proper exercise of their judgment to abstain or not to abstain, by requiring them to make that judgment after evaluating their private commitments and the effects of their decision on those private commitments. NRS 281A.420; see also In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

> [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.

86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of NRS 281A.420 as:

> [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.

87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type that the Legislature intended to encompass when adopting the definition of "commitment in a private capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the 1999 legislative session.

> [I]t 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" to one listed in section 15, subsection 7 of the bill. 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.

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

88. In response to Senator Titus' question as to how campaign managers fit into the statute, Mr. Scherer responded:

> The way that would fit in . . . 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).

89. The Court agrees with the Commission that the sum total of the relationship shared by Councilman Carrigan and Vasquez equates to a relationship such as those enumerated under NRS 281A.420(8)(a)-(d), including a close, personal friendship akin to family and a "substantial and continuing business relationship."

90. First, in addition to being a close personal friend, Councilman Carrigan would confide in Vasquez on matters where he would not his own family such as siblings. (ROA000035.)

91. Second, as Councilman Carrigan's volunteer campaign manager, Vasquez was instrumental in getting him elected three times to the Council. (ROA000022, 47.)

92. Third, companies owned by Vasquez were paid by Councilman Carrigan's campaign for providing printing, advertising and public relations services. These services were provided at cost, and Vasquez and his companies did not make any profit from these services. (ROA000051.)

93. Finally, as campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. As part of that solicitation, Vasquez relied on his many community and business contacts and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. (ROA000044.)

94. The Commission found that "[a] reasonable person in Councilman Carrigan's position . . . would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment." (ROA00012).

95. In Woodbury, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits. Nev. Comm'n on Ethics Op. No. 99-56, at 2. Before abstention is required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. Id.

96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice from the Sparks City Attorney, his legal counsel.

(ROA000112-114.) Neither Councilman Carrigan nor his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General Opinion (AGO 98-27). (ROA000112.)

97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that abstention is required:

> where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter . . . In such circumstances, the public official's independence of judgment would be materially affected.

(ROA000121.)

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.

Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters where a reasonable person's independence of judgment would be materially affected by a commitment in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification. NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * *
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> * * *

103. Based on these standards, and the fact that Councilman Carrigan waived any objections to the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due process were not violated.

Commissioner Hsu

104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent representation of The Nugget[3] by his law firm, Maupin Cox & LeGoy. However, there is no evidence that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's representation of The Nugget at the time of Councilman Carrigan's

[3]The Nugget is an opponent of the Lazy 8 project.

hearing. Additionally, The Nugget was not a party to the matter heard by the Commission.

105. Further, although Commissioner Hsu did vote in favor of a finding in violation of subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal knowledge of his law partner's subsequent representation of Vasquez's business interests. (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection. Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

Commissioner Flangas

107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The Nugget, required his disqualification.

108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably be affected by his commitment to a person who is related to him by blood, adoption or marriage "within the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable

person's independence of judgment would be materially affected by such a relationship.

109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was required based on his familial relationship to Alex and Amanda Flangas because that relationship is not within the third degree of consanguinity or affinity.

110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

111. Therefore, the Court finds that Councilman Carrigan has not established a due process violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

ORDER AND JUDGMENT

112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in

violation of the First Amendment; (2) subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's 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; and (5) Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

114. All parties shall bear their own costs and attorney's fees.

115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such notice of entry with the Clerk of Court.

DATED: This 28th day of May, 2008.

/s/
WILLIAM A. MADDOX
DISTRICT COURT JUDGE

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Appendix C

Nevada Commission on Ethics Opinion

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION CONCERNING THE CONDUCT OF MICHAEL CARRIGAN, Councilman, City of Sparks	Opinion Nos. 06-61, 06-62, 06-66 and 06-68

_____/

This matter came before a quorum[1] of the Nevada Commission on Ethics (hereinafter the "Commission") for a hearing on August 29, 2007, pursuant to Requests for Opinion filed with the Commission and a determination made on May 23, 2007, by a Commission panel finding just and sufficient cause for the Commission to hold a hearing on the matter and render an opinion on whether Councilman Carrigan's conduct violated the provisions of NRS 281.481(2), NRS 281.501(2), and/or NRS 281.501(4).

The issues before the Commission in this matter are limited to the following:

1. Did Councilman Carrigan use his official position in government to secure or grant

[1]The quorum consisted of Vice Chairman Hutchison and Commissioners Capurro, Cashman, Flangas, Hsu and Jenkins. Commissioner Keele and Chairman Kosinski served as the panel in this matter. Pursuant to NRS 281.462(4), panel members are prohibited from participating in any further proceedings of the Commission relating to the matter.

unwarranted[2] privileges, preferences, exemptions or advantages for himself or any person to whom he has a commitment in a private capacity to the interests of that person in violation of NRS 281.481 (2) by acting on the Red Hawk Land Company's ("Red Hawk") proposed Lazy 8 development project ("Lazy 8") at the August 23, 2006 Sparks City Council ("Council") meeting?

2. At the August 23, 2006 Council meeting, when the Council was considering approval of the Lazy 8, did Councilman Carrigan fail to sufficiently disclose his relationship with Carlos Vasquez, a consultant and spokesperson for Red Hawk, in violation of NRS 281.501(4)?

3. At the August 23, 2006 Council meeting, did Councilman Carrigan fail to abstain from voting on the Lazy 8 matter in violation of NRS 281.501(2)?

Notice of the hearing was properly posted and served. Councilman Carrigan was present with his counsel, David Creekman, Esq., Senior Assistant City Attorney and Doug Thornley, Esq., Assistant City Attorney and provided sworn testimony. Carlos Vasquez appeared as a witness and provided sworn testimony.

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[2]As used in NRS 281.481(2), "unwarranted" means without justification or adequate reason.

FINDINGS OF FACT

The Commission, after hearing testimony and considering the evidence presented, makes the following Findings of Fact:

1. Michael Carrigan is a Sparks City Council member representing Ward 4.

2. Carlos Vasquez is a consultant for Red Hawk.

3. Carlos Vasquez owns various companies that provide publics relations services for candidates running for public office and he also manages campaigns for candidates for public office.

4. Councilman Carrigan and Carlos Vasquez have been friends since 1991.

5. The friendship between Councilman Carrigan and Carlos Vasquez is close, substantial and continuing.

6. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 1999.

7. Councilman Carrigan was elected to the Sparks City Council in 1999.

8. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2003.

9. Councilman Carrigan was reelected to the Sparks City Council in 2003.

10. Carlos Vasquez served as Councilman Carrigan's volunteer campaign manager in 2006.

11. Councilman Carrigan was reelected to the Sparks City Council in 2006.

12. Carlos Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three of his political campaigns.

13. Councilman Carrigan moved the Council to tentatively approve the amendment to Red Hawk's planned development handbook and voted "yes" on the Lazy 8 agenda item at the August 23, 2006 Council meeting; his motion failed.

14. Prior to voting "yes," Councilman Carrigan disclosed to the Council and the public that Carlos Vasquez was his personal friend and campaign manager.

15. A majority of Councilman Carrigan's constituency favored the Lazy 8.

16. The second motion by the Council on the Lazy 8 matter on August 23, 2006 passed by a 3 to 2 vote. The motion called for denial of approval of the amendment to Red Hawk's planned development handbook. Councilman Carrigan was one of the two negative votes.

17. Prior to his August 23, 2006 vote, Councilman Carrigan requested a legal opinion from the Sparks City Attorney regarding whether a conflict existed prohibiting him from acting on the Lazy 8 matter.

18. The Sparks City Attorney advised Councilman Carrigan that unless he stood to reap either financial or personal gain or loss as a result of his official action and because the City Attorney was unaware of any facts establishing the existence of such a gain or loss, nothing prohibited Councilman

Carrigan from acting on the Lazy 8 matter at the August 23, 2006 council meeting.

19. Councilman Carrigan relied on his legal counsel's advice and he testified before the Commission that if counsel had told him to abstain on the Lazy 8 matter, he would have done so.

20. Prior to casting his votes on the Lazy 8 matter on August 23, 2006, Councilman Carrigan was aware that he could have asked the Commission for an advisory opinion, but instead he relied on his counsel's advice.

21. Should any finding of fact be better construed as a conclusion of law, it may be so deemed.

CONCLUSIONS OF LAW

1. At all relevant times, Councilman Carrigan was an elected Sparks City Councilman, and as such was a public officer as defined in NRS 281.4365.

2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465 and NRS 281.511, subsection 2, paragraph (b).

3. Councilman Carrigan has a commitment in a private capacity to the interest of Carlos Vasquez within the definition of NRS 281.501, subsection 8.

4. Councilman Carrigan did not violate NRS 281.481, subsection 2, and did not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for Carlos Vasquez.

5. Councilman Carrigan did not violate NRS 281.501, subsection 4, and he sufficiently disclosed

his relationship with Carlos Vasquez to the Council and to the public.

6. Councilman Carrigan violated NRS 281.501, subsection 2, by not abstaining from voting on the Lazy 8 matter at the August 23, 2006 Council meeting.

7. Councilman Carrigan's violation of NRS 281.501, subsection 2, was not willful under the definition of "willful" in NRS 281.4375.

8. Should any conclusion of law be better construed as a finding of fact, it may be so deemed.

WHEREFORE, based upon a preponderance of the evidence in this matter in support of the foregoing findings of fact and conclusions of law, the Commission renders the following Opinion:

OPINION

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "to 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 281.421. Therefore, charged with interpreting and enforcing the Ethics in Government Law, the Commission must hold public officers accountable when they fail to place the public

interest and public trust ahead of their private interests.

In determining whether Councilman Carrigan violated any of the provisions of the Ethics in Government Law at issue, the Commission must ascertain whether Councilman Carrigan had a "commitment in a private capacity to the interest of" Mr. Vasquez.

NRS 281.501(8) provides:

> 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.

In 1999, the Nevada State Legislature excluded mere friendships from its definition of "commitment in a private capacity to the interests of others." However, the definition contemplated close relationships which rise to such a level of commitment to another person's interests that the independence of judgment of a reasonable person in

the public officer's position would be affected. Independence of judgment means a judgment that is unaffected by that commitment or relationship. It is important to note that the test under the statute is not the independence of judgment of the public officer making the assessment whether his independence of judgment is affected. Rather, the test calls for the independence of judgment of a "reasonable person."

The legislature enumerated the commitments and relationships where the independence of judgment of a reasonable person in a given situation is sure to be affected. *See* NRS 281.501(8)(a)-(d). Additionally, the legislature contemplated commitments and relationships that, while they may not fall squarely within those enumerated in NRS 281.501 (8)(a)-(d), are substantially similar to those enumerated categories because the independence of judgment may be equally affected by the commitment or relationship. The legislature enacted NRS 281.501(8)(e) to include such cases. The commitment and relationship shared by Councilman Carrigan and Mr. Vasquez are illustrative of those contemplated by NRS 281.501(8)(e).

In a 1999 meeting of the Senate Committee on Government Affairs, Senator Dina Titus questioned Scott Scherer, Legal Counsel to Governor Guinn, regarding NRS 281.501(8)(e), as follows:

> "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 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 responded:
>
> ". . . 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.* [Emphasis added.]"
>
> Legislative Minutes re: Hearing on SB 478 before the Senate Committee on Government Affairs, 70th Leg., at 42 (Nev., March 30, 1999).

Councilman Carrigan admits that Mr. Vasquez, who is his campaign manager and political advisor, was instrumental in the success of all three of Councilman Carrigan's elections. Mr. Vasquez was Councilman Carrigan's campaign manager at the time of the August 23, 2006 Council meeting when the Lazy 8 matter was heard.

Councilman Carrigan argues that his relationship with Mr. Vasquez is not a business relationship. Under Councilman Carrigan's view, a "business relationship" is where money changes hands or a situation where money is made. The Commission rejects such a narrow interpretation of "business relationship."

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. Notwithstanding this at-cost or pass-through arrangement, Mr. Vasquez and his companies provided public relations and advertising services to Councilman Carrigan during all three political campaigns. Councilman Carrigan believes that Mr. Vasquez was instrumental in getting Councilman Carrigan elected in all three of his elections.

Mr. Vasquez has been a close personal friend, confidant and political advisor to Councilman Carrigan throughout the years. Councilman Carrigan confides in Mr. Vasquez on matters where he would not confide in his own sibling. Therefore, The sum total of their commitment and relationship equates to a "substantially similar" relationship to those enumerated under NRS 281.501(8)(a)-(d), including a

close personal friendship, akin to a relationship to a family member, and a "substantial and continuing business relationship." The independence of judgment of a reasonable person in Councilman Carrigan's position would be affected by the commitment and relationship Councilman Carrigan shares with Mr. Vasquez.

Therefore, during the August 23, 2006 Council meeting when the Lazy 8 matter was heard, Councilman Carrigan had a "commitment in a private capacity to the interest of" Mr. Vasquez.

1. NRS 281.481(2).

NRS 281.481(2) provides:

> A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:
>
> > (a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.
> >
> > (b) "Unwarranted" means without justification or adequate reason.

The Commission finds that a preponderance of the evidence does not exist to conclude that Councilman Carrigan used his position as Sparks City

Councilman to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or Mr. Vasquez, a person to whose interests he has a commitment in a private capacity. Councilman Carrigan testified that a majority of constituents in his Ward favored the project. No evidence or testimony was presented in this matter to conclude otherwise. Therefore the Commission finds that Councilman Carrigan did not violate NRS 281.481(2).[3]

2. NRS 281.501(4).

NRS 281.501(4) provides:

> A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:
>
> (a) Regarding which he has accepted a gift or loan;
>
> (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
>
> (c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest.

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[3]Commissioners Capurro, Cashman, Hsu, Hutchison and Jenkins voted to approve the motion, while Commissioner Flangas voted nay.

Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.l20 or 294A.125 in a timely manner.

In the *Woodbury* opinion, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he serves: first, disclosure is required whenever a public officer's actions would "***reasonably*** be affected by his private commitment"; and second, before abstention is also required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. *In re Woodbury,* CEO 99-56.

The facts presented at the hearing established that prior to the August 23, 2006 Council meeting, Councilman Carrigan requested a legal opinion from the Sparks City Attorney as to whether or not he had a conflict that prohibited him from acting on the Lazy 8 matter. The Sparks City Attorney advised Councilman Carrigan through a legal memorandum that stated in part: "The only type of bias which may lead to disqualification of a public official must be grounded in facts demonstrating that the public

official stands to reap either financial or personal gain or loss as a result of official action…if you anticipate that certain positions you may have previously taken or personal relationships in which you are involved may give rise to allegations of bias against you, you should simply err on the side of caution and disclose sufficient information concerning the positions or relationships before you consider and vote on the issue." The Sparks City Attorney also prepared a disclosure for Councilman Carrigan to make before voting. Relying on this advice, Councilman Carrigan disclosed the following: ". . . I have to disclose for the record something . . . I'd like to disclose that Carlos Vasquez, a consultant for Red Hawk…Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. Therefore, according to NRS 281.501, I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue . . ."[4]

3. NRS 281.501(2).

NRS 281.501(2) provides:

> Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but

[4]Commissioners Capurro, Cashman, Hsu and Jenkins voted for the motion, while Commissioners Flangas and Hutchison voted Nay.

may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

In Woodbury the Commission opined:

. . . [T]he public (and an elected official's constituents) have an interest in matters which come before such officers and employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and

> employees should have the opportunity to perform the duties for which they were elected or appointed, *except where private commitments would materially affect one's independence of judgment.* Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore, is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a *reasonable person's* independence of judgment would be *materially* affected by those private commitments. *In re Woodbury,* CEO 99-56. [Emphasis added.]

Under the *Woodbury* analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reasonable person's independence of judgment would be materially affected by his private commitment.

A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such

circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

Therefore, the Commission unanimously finds that Councilman Carrigan violated NRS 281.501(2) by not abstaining from voting on the Lazy 8 matter on August 23, 2006. However, because the Commission also finds that Councilman Carrigan's violation was not willful, as he reasonably relied on his counsel's advice, and because he did not consider his relationship with Mr. Vasquez a relationship that falls under the statute, it imposes no civil penalty.

CONCLUSION

Based on the foregoing, the Commission finds that Councilman Carrigan's actions did not violate NRS 281.481(2) or NRS 281.501(4). The Commission finds one violation by Councilman Carrigan of NRS 281.501(2). However, because the Commission finds that Councilman Carrigan's violation is not willful, it imposes no civil penalty.

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.

DATED: October 8, 2007.

NEVADA COMMISSION ON ETHICS

By: /s/
MARK HUTCHISON, Vice Chairman