MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

Seventy-Ninth Session
May 2, 2017

The Committee on Legislative Operations and Elections was called to order by Chairwoman Olivia Diaz at 1:34 p.m. on Tuesday, May 2, 2017, in Room 3142 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblywoman Olivia Diaz, Chairwoman
Assemblyman Nelson Araujo, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblywoman Shannon Bilbray-Axelrod
Assemblyman Skip Daly
Assemblyman John Hambrick
Assemblyman Ira Hansen
Assemblyman Richard McArthur
Assemblywoman Daniele Monroe-Moreno
Assemblyman James Ohrenschall
Assemblyman James Oscarson

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Joyce Woodhouse, Senate District No. 5
Senator Nicole J. Cannizzaro, Senate District No. 6

STAFF MEMBERS PRESENT:

Carol Stonefield, Committee Policy Analyst
Kevin Powers, Committee Counsel
Julianne King, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Wayne Kodey, Private Citizen, Las Vegas, Nevada
Mike Cathcart, Business Operations Manager, City of Henderson
Tray Abney, Director, Government Relations, The Chamber, Reno-Sparks-Northern Nevada
Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce
Bryan Wachter, Director, Public and Government Affairs, Retail Association of Nevada
Cheryl Blomstrom, Interim President, Nevada Taxpayers Association
Jeff Clements, President, American Promise, Concord, Massachusetts
Stacey Shinn, Policy Director, Progressive Leadership Alliance of Nevada
Janine Hansen, State President, Nevada Families for Freedom
John Wagner, Carson City Vice-Chairman, Independent American Party
Yvonne M. Nevarez-Goodson, Executive Director, Commission on Ethics
Tracy L. Chase, Commission Counsel, Commission on Ethics

Chairwoman Diaz:
[Roll was taken. Committee rules were explained.] I am going to open the hearing on Senate Joint Resolution 5, which is a proposal to urge Congress to enact the Marketplace Fairness Act. This is a Senate joint resolution brought forth by Senator Woodhouse.

Senate Joint Resolution 5: Urges Congress to enact the Marketplace Fairness Act. (BDR R-890)

Senator Joyce Woodhouse, Senate District No. 5:
I am here to present Senate Joint Resolution 5, which urges Congress to enact the Marketplace Fairness Act. For those of you who are unfamiliar with this issue, the Marketplace Fairness Act is proposed federal legislation that would allow state governments to collect sales tax from sellers without a physical presence in the state. These are remote vendors, such as catalog or Internet sales. First, I will summarize the current state of the law, and then I will describe some of the problems that this situation creates for business in our state. Finally, I will explain how Congress can fix those problems through the passage of the Marketplace Fairness Act.

As explained in the "Whereas" clauses in S.J.R. 5, the U.S. Supreme Court has ruled that states cannot collect sales tax from sellers who do not have a nexus or physical presence in their state, and only Congress has the power to pass a law allowing the collection of sales tax by states from remote vendors. However, these U.S. Supreme Court decisions date back to 1967 and 1992—long before the explosion of e-commerce, Amazon, Cyber Monday, and others.

In 2013, when I sponsored an earlier version of S.J.R. 5, Internet sales in the United States amounted to $263 billion, or about 8 percent of all retail sales. By 2020, thanks to the increasing use of mobile devices for shopping, online sales are projected to reach $532 billion with an annual growth rate of over 9 percent. Because many online retailers do not have a physical presence in our state, Nevada is not collecting sales taxes on most of those sales. However, we do not know exactly how much, because there is no reporting.

Let us talk about the problems and inequities caused by the current state of the law. We have heard from many brick-and-mortar businesses in our state saying that they have become showrooms for online retailers. At the conclusion of my testimony, the Committee will hear from Geri and Wayne Kodey. They are at the Grant Sawyer Building. They are former camera store owners, and they will share their story and frustration over this issue. Electronic stores report similar situations with customers looking at computers or televisions, only to leave and never come back, because they purchased the product online to save the sales tax. I would like to give a shout-out to Amazon and other online companies that have gone ahead and paid taxes in Nevada and other states. You will hear more on this from others who support this measure.

The impact to Nevada from the loss of sales tax revenues is significant. Sales taxes make up a big part of our State General Fund revenues—accounting for over $900 million. Sales tax is the largest source of revenue for our public schools—accounting for about $1.2 billion per year. This is a critical issue in our state and in other states as well. The National Conference of State Legislatures, the National League of Cities, the National Governors Association, the U.S. Conference of Mayors, and the National Association of Counties are all working to get Congress to pass federal legislation that allows states to collect sales tax from online sales.

The Marketplace Fairness Act in Congress has had bipartisan support in 2013 and 2015 but has not made it through both houses yet. Let me repeat that this is not a partisan issue. This is about leveling the playing field for our local businesses on Main Street and about providing revenue for our state, our schools, and our local governments—revenue that is already owed but cannot be collected without federal legislation.

Nevada and the other states have worked hard as participants in the Streamlined Sales and Use Tax Agreement to simplify and standardize our taxes to make it easier for online vendors to collect state and local sales taxes. The states have done their part, and now it is time for Congress to do its part. Federal legislation is badly needed, and I urge your support of this resolution to send a message to the 115th Congress. I would love to hear from the Kodeys now.

Wayne Kodey, Private Citizen, Las Vegas, Nevada:
My name is Wayne Kodey, and this is my wife Geri. I have lived in Nevada since 1979 when I came here as a photojournalist with the *Las Vegas Review-Journal*. After 16 years on the newspaper staff, I made a slight career change and purchased my favorite camera store in Las Vegas. Casey's Cameras began in Las Vegas in 1980,

about six months after I came here, as a mom-and-pop camera store that sold professional gear across the entire price spectrum. My wife and I acquired the store in 1995 from the original owners, Dick and Cecilia Casey. We were able to expand the store and increase our employees until eventually we had between 10 and 12 people working every day. We were a thriving store until the Internet matured. Most of our business was with advanced amateurs and professionals, and we sold cameras averaging about $2,000 for a camera and lens.

Later on, customers would come into the store, and we would educate them on the merchandise. My employees were very knowledgeable about our gear, and we would take all the time we needed with the customer. We found that after spending all this time with them, they would politely thank us, go home, get online, and buy the same camera from an online merchant and save, with an 8 percent sales tax, about $160 on a $2,000 item. This is a very large gap in today's price-conscious consumer environment, and we found that we were not able to keep up and compete with that. We wound up selling the store in 2013 when this competition became too much of a disadvantage to overcome. Leveling this playing field would have made it possible for us to continue our business and save our employees' jobs and health benefits. I urge you to support local businesses by passing S.J.R. 5, the Marketplace Fairness Act.

Chairwoman Diaz:
I will open it up for questions from the Committee. I do not see any, so we will start taking testimony in support of S.J.R. 5.

Mike Cathcart, Business Operations Manager, City of Henderson:
We are in support of S.J.R. 5. We have supported similar measures for several sessions, and this type of concept is supported by several organizations that the City of Henderson is a member of, such as the National League of Cities and the Government Finance Officers Association. Retail areas are an important part of a community, and we want to make sure that there is a level playing field for all retailers, whether they are Internet-based or brick and mortar within our community.

Tray Abney, Director, Government Relations, The Chamber, Reno-Sparks-Northern Nevada:
We strongly support this resolution. We are not urging Congress to impose any kind of tax increase. We are urging Congress to treat online sellers equally to brick-and-mortar retail stores. The taxable event is when a Nevadan buys something; they are supposed to pay tax on it. All we are asking is that those online sellers be treated the same, and our brick-and-mortar folks, our Chamber of Commerce members, are not put at a disadvantage. I realize sometimes the folly of urging Congress to do anything and having them actually listen to us, but we are going to keep at this. We think it is very important.

Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce:
We have supported this for the last three or four legislative sessions. As you heard the policy arguments today, there is a really important need to level the playing field between online retailers and brick-and-mortar stores. We appreciate online retailers that are already complying with that intent in Nevada. For the Las Vegas Metro Chamber of Commerce, it is also preferable for the legislative agenda and Congress to advocate for this, so we support this at the state level and the federal level.

Chairwoman Diaz:
Do you know what the consequences have been for the brick-and-mortar establishments in Nevada versus online retailers? Do you know how often this is happening to others? Do you know how much sales tax Nevada might not be collecting?

Paul Moradkhan:
We have anecdotal stories, but I believe the Retail Association of Nevada will have specific numbers they can share with you.

Assemblyman Hansen:
We used to be able to take a catalog, and we would place an order with them. When that happened before the Internet, did they collect sales tax back then? I am trying to remember. It seems to me that they did not.

Tray Abney:
I do not want to offend you, but I am a lot younger than you are. I believe that if they had a brick-and-mortar establishment, they were supposed to calculate and pay that. I do not know for sure.

Assemblyman Hansen:
Another example comes to mind. I remember a problem Nevada had was that people were going to Oregon to buy automobiles. They would go to buy a $50,000 car with an 8 percent sales tax. They would buy a plane ticket, fly to Oregon, and drive the same car home. A law was passed, so when the person went to register the car, there was some way to collect the sales tax. There has always been that kind of give and take in the market. I understand we need to protect brick and mortar. I agree completely with that. Obviously, sales tax is a huge portion of the state's revenue. That is important too. However, there is also a trend here. More and more people are shopping online. How are you going to enforce that? You may be able to with Amazon, but I have bought stuff online from very small vendors. If this law were to pass, how would you be able to not only prove that the sale occurred, but have some mechanism to collect the tax?

Tray Abney:
I know that federal legislation has a certain exemption level for the very small vendors, so they do not have to comply with that. For the larger sellers, there is a very easy computer program. Once the vendor sells something to you, they plug in your ZIP code, and the program automatically has all the tax rates in there. It is not difficult to comply with. There is already an exception for the small folks in that federal law.

Assemblyman Hansen:
What happens in the absence of this passing? Are we facing a change in the tax structure, because the sales tax portion of our pot shrinks? Will you follow this out if Congress rejects this idea?

Paul Moradkhan:
In Las Vegas, department stores and big box stores are either shrinking their space or closing. I think that part of it is the concern about the level playing field. We are starting to see that on the east side especially. The Boulevard Mall has been a good example. Macy's and JCPenney have announced their closures, and it is all part of a competition they are having with online vendors. This is one anecdotal example we are seeing in the marketplace.

Assemblyman Daly:
Is anyone paying the tax anywhere? If there is a warehouse distribution center in Nevada, I know they are collecting it now. However, let us say they are in Ohio and do not have any agreement to do any sales tax. Do they only have to tax and can the state only regulate a sale from Ohio to someone in Ohio? Do they not collect it if they sell to someone in Florida and vice versa? How does it work now? Is anyone collecting the tax?

Bryan Wachter, Director, Public and Government Affairs, Retail Association of Nevada:
We appreciate the leadership of the 2015 Nevada Legislative Session when we passed our version of the Marketplace Fairness Act, which requires all businesses in Nevada that sell to Nevadans to collect and remit this tax. That began in January 2016. Nevada does this already. It is required. It is no longer optional. We really get into a difference between sales versus use tax. It is a subtle difference. The way it used to work was that a company was not required to collect the tax and remit it on your behalf. However, an individual was required to go to the website, download the Nevada Department of Taxation use tax form, and fill it in on an individual basis. There were four of us that did that. I just wanted to see if the system worked. I do not think the state ever cashed that check. We are happy that Nevada is going in that direction.

To answer the Chairwoman's question from earlier, this has had a huge economic impact on small retailers. The Kodeys are an excellent example of that. We thank them for their testimony, but their story is not unique. Nevada is littered with stories of small businesses that did everything they were supposed to do. They opened a Nevada business, paid property tax, and paid every other tax Nevada required. They were hiring employees and offering them health insurance. The same requirements that Nevada required from those

small businesses were not required from businesses that acted in every other way economically feasible in Nevada, except for being located here. They were sending products, mailing products, and had customer service. That was where the playing field was uneven. Nevada was requiring a subset of businesses to act one way but not requiring another subset of businesses to act in the same way or under the same rules. That is why it is called the Marketplace Fairness Act. We wanted to make sure all businesses were treated equally, so they had to survive based on their own merits. We have seen that when the playing field is not equal, brick-and-mortar businesses tended to lose.

Assemblyman Daly:
I understand the Nevada-to-Nevada sales. I am assuming that if another state had that law it would be in Ohio to Ohio. Is there no way to collect the tax on anything that is sold outside the state? I know Amazon may be doing it, which is good, but not every vendor is. Is no one collecting the tax when it is going out of state? Is it the same thing with all the other states?

Bryan Wachter:
The tax tends to be collected on delivery. If a Nevada company was delivering an item into Utah—and Utah had the same law that Nevada had—it would compel collection from that company in remission to the Utah Department of Taxation. At the moment, it really depends on this patchwork of laws. Nevada is not the only state that passed our version of it. I believe there are 32 other states that have some sort of law on the books to try to deal with this. I think it underscores the importance of the legislation, the resolution that Senator Woodhouse is bringing up, and the importance of a federal solution, so there are not 50 different solutions to a problem that should be easy to solve. It is common sense at this point.

The 1992 U.S. Supreme Court case [*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)] was on catalog sales. I am talking about the Sears, Roebuck and Co. catalog. The genesis of *Quill* was when a company gives someone a catalog, from which they purchase, the company was required to collect a remit. In 1992, the U.S. Supreme Court said that Congress needed to do that under the Commerce Clause.

In the last year, Justice Kennedy said that he believes the court was wrong in 1992, and they took a very narrow view of what nexus should have been. They took nexus to be a physical qualifier as opposed to what is now considered an economic nexus. I can, as a Nevadan, use my phone and purchase virtually any product I could want online without having to walk into a store at all. That was unheard of in 1992. There was no thought process there. Therefore, it really is just recognition of how technology has changed commerce. Because of that, our interpretation of the Commerce Clause probably needs to be updated as well.

Assemblyman Elliot T. Anderson:
I have a quick comment on the *Quill* case you mentioned. How they got there does not make any sense to me, because Sears has a physical nexus in most states. My question is about the vacancy rates of commercial real estate in general, specifically retail. Does anyone know what that number is?

Bryan Wachter:
We would be happy to get those updated vacancy numbers for you. Retail is having a hard time bouncing back from the recession. If you look at districts in North Las Vegas, there are still many strip stores or locations where the anchor tenant is gone. We are still seeing this in other parts of the city, specifically Las Vegas. An anchor store leaves, and every single small business in that location is also gone, because they count on that foot traffic from the grocery store, the department store, or the supermarket. There is a mix between folks who go out of business because of the uneven playing field and retail that is still trying to crawl its way back from the recession on the local level.

Chairwoman Diaz:
I do not see any further questions. Do you have any comments you wanted to put on the record?

Bryan Wachter:
Many of the comments have been said. We recognize Senator Woodhouse's leadership on this issue. I wanted to reiterate that Nevada is leading the nation in this regard. Nevada has done it. We saw that as an economic opportunity. Many members of this Committee voted in favor of it, and we appreciate that.

We are still looking for a court case that will allow the U.S. Supreme Court to review *Quill*. We thought we had one in Colorado. While the Supreme Court ruled in our favor, they declined to take it further. The retail community is searching for a case that will allow the U.S. Supreme Court to overturn *Quill*. In the meantime, the Marketplace Fairness Act was reintroduced to the United States Senate last week. Its companion bill was introduced into the United States House of Representatives as well. We have not had a lot of luck. The United States Senate passed a version of the bill, but that session of Congress closed before the House of Representatives could do anything about it. We are cautiously optimistic that the federal government will get around to it at some point. Both bills are still making their way through those houses. Resolutions like these, as well as stories from the Kodeys and others, are really going to push that over the finish line.

Cheryl Blomstrom, Interim President, Nevada Taxpayers Association:
My colleagues have covered the points. We reiterate our support and have supported this idea, this resolution, and the ensuing legislation for several sessions. We do so again.

[Chairwoman Diaz designated (Exhibit C) as presented but not discussed. It will be made part of the record.]

Chairwoman Diaz:
Is there any further testimony in support of S.J.R. 5? Seeing none, we will switch to testimony in opposition to S.J.R. 5. Seeing none, we will go to neutral. I do not see anyone. Does Senator Woodhouse have any closing remarks? [She did not.] With that, I will close the hearing on S.J.R. 5.

I will now open the hearing on Senate Joint Resolution 4 (1st Reprint). It is a proposal to urge Congress to propose an amendment to allow regulation of certain political contributions and expenditures. Senator Cannizzaro is here to present the resolution.

Senate Joint Resolution 4 (1st Reprint): Urges Congress to propose an amendment to the United States Constitution to allow the reasonable regulation of political contributions and expenditures by corporations, unions and individuals to protect the integrity of elections and the equal right of all Americans to effective representation. (BDR R-777)

Senator Nicole J. Cannizzaro, Senate District No. 6:
Senate Joint Resolution 4 (1st Reprint) addresses the growing and rather troubling influence of large donations by corporations and other organizations in our sacred policymaking process as a result of significant and uncontrolled political contributions. Senate Joint Resolution 4 (1st Reprint) addresses the impacts of the January 2010 U.S. Supreme Court ruling in *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010) on the increasing cost of elections in the United States.

The case struck down a critical portion of the Bipartisan Campaign Reform Act of 2002, commonly known as the McCain-Feingold Act, or BCRA, which restricted independent expenditures by corporations, thereby protecting our political process from undue influence and deep pocket donors. Specifically, the ruling struck down Section 203 of BCRA and said that the prohibition of such independent expenditures by corporations and unions violated the First Amendment's protection of free speech. The 5 to 4 decision provided that the freedom of speech prohibited the government from restricting independent political expenditures by a nonprofit corporation.

The principles articulated by the U.S. Supreme Court in the case have also been extended to for-profit corporations, labor unions, and other associations. The opinion further provided that the BCRA restrictions improperly allowed Congress to suppress political speech in newspapers, books, television, and blogs. Members of Congress on both sides of the aisle expressed grave concern with the decision. Democratic Senator Russ Feingold, a lead sponsor of BCRA, stated, "This decision was a terrible mistake . . . the U.S. Supreme Court chose to roll back laws that have limited the role of corporate money in federal elections since Teddy Roosevelt was president."

Senator John McCain, a Republican senator from Arizona and the other lead sponsor of BCRA, predicted serious future ramifications due to the decision. He noted, "I think that there is going to be, over time, a backlash . . . when you see the amounts of union and corporate money that is going to go into political campaigns." Sadly, Senator McCain's predictions came true. Since the 2010 ruling, we can all agree that political campaigns have become more contentious as more corporate money flowed into the campaigning process.

With the freedom of corporations and unions from spending limits, the cost of federal elections has more than doubled since 2000 from nearly $3.1 billion in 2000 to over $6.9 billion in 2016. The amount spent on state and local elections has increased dramatically as well. Many have suggested the corporate influence on elections is the root cause of this, and the *Citizens United* decision has certainly contributed to this as well.

For these reasons, I sponsored and requested Senate Joint Resolution 4 (1st Reprint). As the resolution notes, the growing influence of large, independent political expenditures by corporations is a great and growing concern, and the assurance of a fair and uncorrupted election process is of the utmost importance. The resolution notes that it is a legitimate and vital role of government, including that of the Nevada Legislature, to regulate independent political expenditures by corporations, unions, and other associations.

A majority of states have regulated or restricted independent political expenditures, but the *Citizens United* ruling prohibits Congress and the states from banning independent political expenditures. In my opinion, this has become a states' rights issue, as the people of Nevada and all other states should have the power to limit by law the influence of money in their political systems. For these reasons, Senate Joint Resolution 4 (1st Reprint) urges the U.S. Congress to propose an amendment to the *U.S. Constitution* to allow the government of the United States and the individual states to regulate and restrict independent political expenditures by corporations, unions, and other organizations.

One of the most interesting things while I was campaigning for this office was that, as I went door-to-door talking to the constituents of Senate District 6, I heard from Republicans, Democrats, Independents, and nonpartisans alike who were frustrated with the amount of money being spent in political contests. They wished desperately that the contests were more about the candidate and whether that candidate was going to support policies that they were appreciative of, rather than who could pay the most amount of money for the next advertisement or television commercial. I think this last presidential election illustrated that as well. It was from both presidential candidates and from a number of other candidates on both sides of the aisle, which demonstrates that this is a bipartisan issue. I think there is a serious concern over the amount of money that is spent on elections, and elected officials are becoming more subject to the whims of who can donate the most amount of money, rather than the whims of the people who they represent.

This is an effort to let Congress know that Nevadans are looking for a way to regulate their own political expenditures in a fashion that will create fair elections. The voters in our districts can really look at the individual candidates and make a decision on whether they think that candidate is the right person to represent them, rather than whoever sent them the nicest mailer. I think that is very simply what this resolution is about. I have Jeff Clements, who wanted to speak via telephone. If he is available and on the phone, I would love to have him offer some testimony as well.

Jeff Clements, President, American Promise, Concord, Massachusetts:
We are a national cross-partisan, nonprofit organization working to support Americans coming together across partisan lines to win this Twenty-Eighth Amendment to the *U.S. Constitution*. Senator Cannizzaro laid out the reasons why it is so urgent that we get back our constitutional foundation in this country that goes back in a nonpartisan and cross-partisan way for over a century. It is not to say that there is anything bad about corporations, unions, or the very wealthy. It is to say that if we allow unlimited deployment of the financial resources from those and other sources, it overwhelms the rights we have as Americans and the duties we have to participate in our self-governing republic as equal citizens with equal representation. Unlike the marketplace, where different resources will be allocated differently, we do not expect everyone to have the same resources; in the political sphere, we expect to have equal rights as Americans. It is not a marketplace to be bought and sold. We are finding that all around the country.

I wanted to bring to your attention some of the national context for this resolution. If Nevada were to join this effort and pass this resolution, it would be the nineteenth state to do so. Eighteen states have already done so. It has deep cross-partisan support across the country. Montana and Colorado have passed similar resolutions by ballot. They passed with 75 percent approval.

Other states have passed legislative resolutions with cross-partisan support in most cases. For example, in Wisconsin, 18 communities recently passed ballot initiative resolutions. Most of the communities had support of over 80 percent for these kinds of resolutions. We see all across the country that Americans get this and are willing and able to put aside partisan and policy differences to say, We really need to come together and raise this issue with Congress. Article V requires a two-thirds vote in Congress, so we need cross-partisan support. It would then go through a ratification process and back to Nevada and 38 other states to ratify the amendment. This is a process, but this resolution really moves the process forward in an important way.

Assemblyman Hansen:
Senator Cannizzaro, you struck an interesting nerve. I am a big states' rights guy. I like the whole idea, because I think we all are frustrated. How would you limit it? Let us say that we could literally, in spite of the U.S. Supreme Court decision, limit the amount of soft money. Would it be limited to $500 per individual? What is the cap in your mind as to what would be acceptable?

Senator Cannizzaro:
I think you bring up an excellent point. One of the things I would note about this resolution is that it is urging Congress to support an amendment that would allow the states the ability to make that decision. That would be something that this body would hear and then make a policy decision on. It would not be unprecedented. It is not as though Nevada does not have some limits on some types of political contributions. However, there are ways around those limits, especially for larger corporations, unions, and larger associations that have access to unfettered monies to put into political races. We can develop very similar

reasonable regulations like we currently have for the amount an individual has to donate before having to report it or the amount that any one person can donate to an individual political candidate. We have limits of $10,000. If someone contributed over $100, they have to report it. Those are policy decisions. The important part of that is that it would be for Nevada to determine. There are definitely ways for Nevada to do that in a reasonable fashion. That is what this resolution is seeking to get Congress to address.

Assemblyman Hansen:
I love Nevada history. From day one, Nevada first had the mines, then the railroads, then the mines again, then ranchers, and then the railroads. Nevada had this whole Wingfield machine. In Nevada politics, there has always been the issue of certain dominant, typically economic bodies who would control the Nevada Legislature. Even if this passes, is there a way to get truly around it? Candidates can always use political action committee (PAC) money, and there are all sorts of ways for wealthy individuals and unions to donate enormous sums of money. I heard a figure that the upcoming United States Senate race in Nevada is going to be in the neighborhood of around $200 million being spent between both parties.

That brings up another point. I think the free speech angle is very important. Does someone who is very wealthy not have a right to contribute? The second angle is the business angle. I know there are many press people out there who are probably salivating at the idea that there is going to be $200 million dumped into Nevada for one very key United States Senate seat. What about those arguments?

Senator Cannizzaro:
First, it is not unprecedented for a state or government to regulate speech. This bill is in no fashion designed to infringe upon the First Amendment or to take it away from corporations, individuals, associations, or unions. This is designed to say that there should be some reasonable limits as to what individuals can contribute. That should be a decision that is left to the states. Anywhere in law dealing with First Amendment jurisprudence, there are all kinds of laws that can regulate those in a reasonable fashion. Think of anything that has to do with a time, place, and manner restriction. This is not unprecedented in terms of how we deal with managing certain types of speech. This is not meant to be or designed to be an infringement on that. This is designed to say that individuals who want to participate in the political process should have an equal voice to those who can give unfettered amounts of money.

I can appreciate that the press and other individuals might love that there is going to be an abundance of money. There are many people who benefit from the fact that there would be a $200 million senate race in Nevada. What is important to keep in mind about this particular resolution is that the voters are more concerned with which of those candidates are going to best represent their interest in Washington, D.C., than with who is going to get the most amount of business from something, who is able to write the most articles, or which organizations are able to benefit the most from this.

This is trying to put the focus back on the voters and allow them a fair process to make the right considerations about their candidates. It is also trying to give the states the ability to say a donor can give up to a certain amount, but that is where the state will cut them off. That does not mean that we will get rid of all influence in politics. I do not know that that is a possibility, but I think it is an important step to say there should be some reasonable rules in place, so individual voters can know who it is that they are electing.

Assemblyman Hansen:
I agree. There is a big concern over the level of corruption in our system.

Assemblyman Elliot T. Anderson:
I am wondering about the trend in case law as it relates to the First Amendment and political contributions. Since *Citizens United*, there has been some further narrowing of campaign protections, specifically in terms of aggregate individual contributions. The framework of these decisions is that it is core political speech and cannot be restricted, absent a compelling governmental purpose, narrowly tailored, et cetera. There has already been quite a narrowing of the existing law. Do you see the U.S. Supreme Court invalidating restrictions on limits to individual candidates continuing? Traditionally, they have kept that one limit. Instead, there is a risk of corruption for individuals, but then they have engaged in sort of a fiction where there is not that same risk when dealing with PAC contributions, et cetera.

Jeff Clements:
That is correct. *Citizens United* is the most famous of the recent U.S. Supreme Court decisions that sharply took the First Amendment, as it applies to money in politics, in a new and experimental direction. There has been a series of decisions since that 2010 case. The aggregate limits for federal campaigns were struck down in the case of *McCutcheon et al v. Federal Election Commission* [572 U.S. _ (2014)]. Regarding the states' rights issue, there is the case of *American Tradition Partnership, Inc. v. Bullock* [567 US _ (2012)]. At the time, the Attorney General of Montana struck down Montana's laws, and I believe Nevada and 20 or more other states did the same, which limited corporate and union money in elections.

Those state laws were struck down. Many of them had stood for 100 years. We are seeing a continued, what Justice John Paul Stevens called, ". . . radical departure from First Amendment jurisprudence . . ." wherein the U.S. Supreme Court is showing a markedly hostile approach to any regulation of money in politics of any kind. I think it is a grave mistake. The five members who have been in the majority in most cases view limitations on spending as limits on free speech. Most Americans disagree with that, and the experience since those cases that struck down the laws demonstrates that they have made a mistake. The free speech rights of all Americans are worthy of protection. If a very few have a very loud megaphone, and the many do not have any megaphone, we do not have the kind of free speech we need to have in a republic of governing citizens.

Regarding individual contributions to campaigns as opposed to independent expenditures, I think that is correct. Initially, in the *Citizens United* case, the U.S. Supreme Court determined that regulations on contributions to independent entities, rather than directly to campaigns, would not have a corrupting effect, because it was not directly to the campaign. I think in the experiences over the past seven years, Americans have witnessed that whether it goes into a super PAC or to a campaign, the effect is the same. The candidates tend to know and have their own super PACs, as the donors certainly know.

Now, there is a sharp distinction where there are limits still being applied. For example, there is a $2,700 limit for a federal candidate while, at the same time, you could give $27 million to a super PAC on behalf of or against that candidate. In some sense, it does not make sense. One answer we may see the U.S. Supreme Court going to is getting rid of the limit on the donations that go directly to the candidate. I think that would be a mistake. The better approach is the amendment that this resolution calls for. It would reverse the U.S. Supreme Court's experiment. There will always be a give and take and a need to address new issues as they arise.

As this country has always had before, "We the People" need to be able to adopt appropriate and reasonable limits and regulations in campaign finance to address the most egregious problems. I think Assemblyman Anderson is correct in that we may see it getting worse before it gets better, and we may see more action by the U.S. Supreme Court to allow even more money into the system. The Twenty-Eighth Amendment to the *U.S. Constitution* that this resolution calls for would be the eighth time the American people have reversed the U.S. Supreme Court when Americans decided that the U.S. Supreme Court made a mistake, and their decision does not actually support the aspirations of Americans to govern ourselves in the states. It would not be unique that this would decide to correct the course and take it a different direction.

Assemblyman Elliot T. Anderson:
It does not feel like there is any logic as a part of any of this analysis from the U.S. Supreme Court. There is nothing that drives me crazier than a lack of logic, especially coming from the U.S. Supreme Court. We live in a world where corporations and unions can contribute millions of dollars, but legislators can be arrested for getting a bottle of water from someone. This is the level of regulation that we have on ethics when our state laws and the constitutional decisions of the U.S. Supreme Court are combined. I cannot say enough about how absurd I think this is. We really need to fight back. Thank you for all your work on this project.

Assemblyman Oscarson:
If and when you do this, do you limit the funds that an individual candidate can give themselves? Where does that take out of the balance? Let us say there is a multimillionaire running for an office and you have restricted the ability for another candidate to raise funds. They can put in whatever amount of money they need, which has happened across the country, to run for an office. Does that then restrict and keep them from being able to participate in that process as well?

Senator Cannizzaro:
That is an excellent question and one of many policy questions that the state would have to answer in terms of regulation. How do we create fairer elections? Potentially, there are some good arguments about whether we should restrict an individual's ability to contribute to their own campaign, so it is fair across the board if we restrict the ability for another candidate to raise money. I think that is certainly a policy decision that would be up to this body. If the U.S. Congress were to adopt an amendment overturning *Citizens United*, how would it allow us to restrict independent expenditures or contributions to an individual campaign or an individual's own contributions? I think that is an important policy decision that we would have to make, but nothing about this particular resolution would restrict, limit, or otherwise alter that.

Assemblyman Hambrick:
Everyone on this Committee and in the audience knows what bipartisan is. You used a term I have not heard before: "cross-partisan." Could you explain your definition of cross-partisan?

Jeff Clements:
I would be happy to say bipartisan too. Frankly, I have not given it too much thought. There are Libertarians, Independents, Republicans, and Democrats. Sometimes bipartisan in the legislative context is a phrase that makes a lot of sense when there are all Republicans and Democrats working together to craft good legislation for the state or nation. Cross-partisan is when there are many states and many people; there may be more than just Republicans and Democrats, including Independents and others. This is not necessarily to compromise and meet in the middle; it is that we can come to this work as Americans with our partisan differences, not pretend those do not exist, and then say, Let us do this for the good of the country. Let us cross our partisan differences and come together to do this for the country. We will continue the debate of partisan differences. That is my best take. I would be happy to say bipartisan or cross-partisan. We try to serve all Americans and help do this big work for the future of the country.

Assemblyman Hansen:
In Nevada right now, we have seen a consistent drop-off of the number of registered voters who are members of the two major parties. Right now, Nevada is roughly 39 percent Democrat, 33 percent Republican, and then almost 30 percent others or Independents. With that sort of a trend, is it not also true that the feeling that there are corrupt elements in both parties is being reflected, and a market-driven change will occur? At some point, if that trend continues, both major parties are going to become minority parties in the political process. In order to retain election in office, candidates are going to have to appeal to those people. I assume a percentage of those people are very frustrated by the fact that soft money in both parties is very dominant in these races. What is your long-term projection in the absence of this bill passing?

Jeff Clements:
I think the trends seen in Nevada are similar in other states. They certainly are in Massachusetts and in other states I have been to. Unenrolled or Independents are the fastest-growing "parties" in many places. As you said, there is a certain frustration, an increasing loss of faith in the major parties to address the systemic corruption in our system. That is not to point fingers at any individuals or any one of the particular parties. I think the problem is when the U.S. Supreme Court in *Citizens United* said that unlimited spending by super PACs and independent entities would not cause the loss of faith in democracy from Americans. I think they were mistaken.

We are seeing a loss of faith in democracy because people do not feel that they are part of it and are not represented. They look around and see the very large donors getting so much attention, and the candidate with the most money is usually considered for that reason alone to be a frontrunner. I think people are frustrated with virtually all of the players in the system after *Citizens United*, including the two major parties. That is a symptom, but it is also an opportunity.

We can recognize that we live in times of great change, as we have before, when other amendments happened. Americans ratify amendments in times, like ours, of challenge when there is questioning of the nation's ability to deliver on the promise that we are going to be able to govern ourselves as free human beings together. Amendments happened right after the Civil War and right after the Gilded Age when there were some of the same kinds of problems we face today. Between 1961 and 1971, we ratified four amendments because of the turmoil in that era. We are in an era when there is a lot of disruption of the status quo. That is both challenge and opportunity. This resolution can help move this amendment, and this amendment can help create a stabilizing force whereby Americans can feel like they have a stake in our country once again.

The parties have an important role to play. Whether it is new parties or current parties, parties are good at organizing people. When people count as much as money, the parties will have an even more important role to play. The undermining of the parties is that if there is a super PAC or someone who can put hundreds of millions of dollars into an entity to drive a campaign, the parties are not needed as much. There is a lot of disruption happening right now. I hope very much that Nevada can help move this amendment forward and help us get Americans to believe that they have an effective democracy once again.

Chairwoman Diaz:
Are there any further questions from the Committee? Seeing none, we will open it up for testimony in support of S.J.R. 4 (R1).

Stacey Shinn, Policy Director, Progressive Leadership Alliance of Nevada:
I am here today in support of S.J.R. 4 (R1). We are really proud to be working with American Promise, Public Citizen, and Senator Cannizzaro on this initiative. I want to point out that we are a nonpartisan organization, despite what you may think. A national poll on this particular issue showed that 80 percent of Republicans and 83 percent

of Democrats nationwide support overturning *Citizens United*. Washington, D.C., 18 states, and 700 municipalities have already called for this constitutional amendment. The Progressive Leadership Alliance of Nevada (PLAN) vows to put the people and our planet over profits. We continue to put the power back into the people's hands.

Assemblyman Hansen:
A while back, Bob [Bob Fulkerson, State Director, PLAN] gave me all the financial statements from your organization. You were disproportionately financed by the very people that you are criticizing now, especially unions. Is your organization going to practice what it preaches, or is it just going to come here and insist we pass a law. Your financing is from all the people who you are criticizing.

Chairwoman Diaz:
Does that have to do with the purview of S.J.R. 4 (R1)?

Assemblyman Hansen:
Absolutely. The Progressive Leadership Alliance of Nevada is going to come here and tell everyone that it wants to eliminate money from the political process, but that is how it is financed.

Chairwoman Diaz:
I think that is crossing the line.

Assemblyman Hansen:
I still think that is something we should consider when people come testify. How many of them are guilty of what they want this bill to fix?

Chairwoman Diaz:
Is there any other testimony in support of S.J.R. 4 (R1)? Seeing none, we will go to opposition to S.J.R. 4 (R1).

Janine Hansen, State President, Nevada Families for Freedom:
I would like to point a couple of things out about this resolution. I am no big supporter of *Citizens United*; however, this resolution does not specifically address *Citizens United* in the resolved portion. On line 26 on the second page, it says, ". . . propose an amendment to the United States Constitution to allow the governments of the United States and the individual states to regulate political contributions and expenditures . . . ." This addresses all political contributions and expenditures, not just *Citizens United*, which I think is way too broad. If we want to address the contributions of unions and *Citizens United*, then that is what it ought to say in the resolved portion of it. I am very concerned about that.

One of the reasons I am concerned is that if you look at the website, www.movetoamend.org, you will find that they have a proposal for the Twenty-Eighth Amendment, House Joint Resolution 48, which was introduced January 30, 2017. It is very different from this one. If they are telling you that you are supporting this same one, it is very

different. In fact, this one says, "The judiciary shall not construe the spending of money to influence election to be speech under the First Amendment." That is preposterous. People cannot have any speech without money. I guess someone can stand on the corner and wave a flag.

Another thing that it does is that "Federal, state, and local government shall regulate, limit, or prohibit contributions, expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process . . . ." In other words, this proposed Twenty-Eighth Amendment attempting to control *Citizens United* is very different than the one here. This one is extremely broad.

Let me give the Committee a couple of personal reasons why I am so concerned about this. A couple of years ago, when I was running for the Nevada State Senate, I had many people say to me, "Oh, I would like to give you more money, Janine, but if I do, if I give you more than $100, it will show up on the Secretary of State's website, and I will get in trouble with my party." I was a member of the Independent American Party. They would say that they would love to give me $1,000, but they could not, because the state laws prohibited it. What does that do? Right now, we see that the state laws regarding contributions and expenditures are creating winners and losers. When there is someone who is not in the Republican Party or Democratic Party and is a challenger, these laws do the same things. The powers that be then find out who is giving to someone who is not the approved candidate, and they go after those contributions, so they cannot get them. Therefore, these limit the political process. They limit free speech. It is a considerable problem for those in minor parties.

In *Buckley v. Valeo* 424 U.S. 1, 67 n.80 (1976), which quoted *National Association for the Advancement of Colored People v. Alabama,* 357 US 449 (1958), it talks about the problems, especially with minority parties. It says, "The Court held that the Socialist Workers Party (SWP) need not make public financial disclosures because it had shown 'a reasonable probability that disclosure of the names of contributors and recipients will be subject to threats, harassment, or reprisals from either Government officials or private parties'" (Exhibit D).

It talks about people losing their jobs. We have had people in our party who, because they registered and ran for our party, lost their jobs. We have people in our party who lost business. They had contracts with the casinos. They lost those, because they were in our party and gave donations that were above the $99, so it was available for everyone to see. These contributions and expense limits only help the powers that be. They do not help challengers, minority parties, or people who are in major parties who are not part of the status quo. Therefore, they limit free speech. The Center for Competitive Politics has an excellent article on campaign contribution limits that are a cap on free speech.

> Contribution limits violate the spirit of the First Amendment. Contribution limits stand in stark conflict with the First Amendment guarantee that 'Congress shall make no law . . . abridging the freedom of speech.'

> First Amendment principles reject the notion that government should decide who speaks, how much, and with whom. Yet contribution limits do just that, imposing direct restrictions on the ability of citizens to associate with each other . . .

It also talks about the fact that in states where there are independent expenditures, it penalizes candidates and political parties. If you want to limit this, make sure you are talking about the right thing, not all contributions for parties for individual candidates. You specifically mention *Citizens United* and the unions in the resolved section, so it does not cover every kind of contribution as this one does on page 2, lines 27 and 28.

Four of the ten least corrupt states—Oregon, Nebraska, Utah, and Iowa—impose no limits on individuals giving to statewide legislative candidates. They found it did not contribute to corruption. The 13 best-managed states—some of which are Utah, Virginia, Missouri, Texas, Nebraska, Indiana, and Idaho—have no limits on individual giving to candidates. The problem is that these things limit political participation. They limit free speech for candidates. Even the U.S. Supreme Court has said that especially in the case of minor parties where these things have happened, it is appropriate to exempt them from political contribution limits. If you are going to do this, be specific that it is for *Citizens United*. It has to do with corporations and unions spending money, not with individuals, so the opportunity to participate is not limited for whoever wants to run for office or have free speech in some way.

You should also check out what you are contributing to. The proposed amendment on www.movetoamend.org, which has over 490 different cities, counties, and states endorsing it, is far different than the amendment here. If they are all going to be aggregated, you need to be aware of just what that means. I think it is far more restrictive than what these other places have endorsed. However, this one is wide open and does not specifically address that. We appreciate the Committee's consideration in this matter, because we find that this is reminiscent of the Alien and Sedition Acts in some ways. People who are not on the right side of a political issue will be silenced by this.

Assemblyman Elliot T. Anderson:
I am scratching my head trying to find where you are getting this information. The measure before us is S.J.R. 4 (R1). I do not see the words "move to amend" in there. I do not see the Committee endorsing a Move to Amend initiative. All I see is that, through lines 23 through 33 of this measure, it says that we want to get the ability for individual states and the government of the United States to regulate political contributions and expenditures. Those two lines are the gravamen of the whole thing. I am wondering where you are getting all this stuff. You mentioned the Alien and Sedition Acts. We are not locking people up.

That is what it means to overrule *Citizens United*: it is to get the power of the government of the United States and the individual states to regulate political contributions. You do not write a bunch of stuff in the *U.S. Constitution*; you just get the power to do something. I am just trying to wrap my head around what part of this bill leads to what you are saying.

Janine Hansen:
First of all, my concern is for the wide-open nature of the proposal on lines 27 and 28, which do not address *Citizens United,* corporate contributions, or unions. It is completely open to regulate all political contributions and expenditures. It may be interpreted in that way. That is my expressed concern.

Second, I have worked on this issue for a long time because Move to Amend is one of the groups that is promoting an Article V constitutional convention. You can go on their website and see that they are promoting a Twenty-Eighth Amendment to the *U.S. Constitution* that deals with contributions and expenditures. It has wide support around the country. This one is also going toward the Twenty-Eighth Amendment, so I was just making the point that there may be different points of view with regard to what that Twenty-Eighth Amendment would actually say. The one from Move to Amend does not, in any way, reflect the same as the one here today.

Chairwoman Diaz:
I would like our legal counsel to weigh in on the purpose of the resolution and the language that is being used, so we have clarity as to what is being proposed in S.J.R. 4 (R1).

Kevin Powers, Committee Counsel:
The Legislative Counsel Bureau (LCB) Legal Division is a nonpartisan agency. We do not support or oppose any particular viewpoint, policy, or legislation. However, we do provide legal analysis and advice to the Legislature and its committees on issues of law.

There are two methods of amending the *U.S. Constitution* that are specified in Article V of the *U.S. Constitution*. One is where Congress drafts the text of the amendment and submits it to the states for ratification. The second is where the states come up with language and then ask Congress to call a constitutional convention, so that language is submitted eventually to the states for ratification. Senate Joint Resolution 4 (1st Reprint) is not the second method. It is not calling for a constitutional convention. It is not proposing specific language. Instead, S.J.R. 4 (R1) is the first method where this body is asking Congress to draft language for a constitutional amendment and submit that language to the states for ratification.

The reason we have a general statement in S.J.R. 4 (R1) in the resolved clause, lines 26 to 28, is that what the Legislature is asking Congress to do is to consider an amendment that allows the governments of individual states of the United States to regulate political contributions and expenditures. This is just asking Congress to draft language, and then that language would ultimately be submitted to the states for ratification. This resolution is not specific language. It does not bind Congress in any way, shape, or form. It is just a request expressing the intent of this Legislature that it wants Congress to craft language and, ultimately, submit it to the states for ratification under the first method for amending the *U.S. Constitution* in Article V.

Janine Hansen:
I completely understand that this is not calling for an Article V convention. I completely understand the difference between the two methods. I was just attempting to inform the Committee that there are many other people who are attempting to get Congress to propose an amendment in the traditional method. That is very different than this amendment. They may be considered an aggregate by Congress. The Committee might want to be aware of that. I was not saying that this was the same or that it had to be the same. I am simply trying to show the Committee that there are others who have this Twenty-Eighth Amendment in mind that is very different than what is proposed here. I am also making the point that I am very concerned about a broad, open agenda to regulate political contributions and expenditures because of our personal experience, not only in this state, but with our national political party. It has tended to suppress our free speech and opportunity to participate. I think we have made that point clearly now.

John Wagner, Carson City Vice-Chairman, Independent American Party:
Can I buy anyone a Coke? I cannot do that, because that is illegal. I think it is really foolish, because I do not see any reason why I cannot buy a legislator a Coke if they wanted to join me for one. We oppose this piece of legislation. Free speech comes in different forms. One of them is what I am doing now. The second form is printed. The third form is with money. However, to print, a person must have money. Printers do not print things for free. I know there are many ways to get around the election laws in place now. One of them is the PACs. A person gives money to a PAC, and the PAC gives money to a candidate. The first thing a person wants to know about the PAC is what it is.

When I ran for the Nevada Assembly in 2006, there was one PAC that donated to my opponent called the Red Rabbit. I still have not figured out where that came from. They were donating to my opponent in the primary. It was a Republican primary at that time. That was when I was foolish and before I changed parties. We oppose it on the speech issue alone. If I had money to donate to candidates, I would probably donate a lot more than I do now. Many people join together, form PACs, and donate that way simply because they feel like the money is a little bit more out there. They do not have to have their name necessarily associated with a candidate. Nevada has the $100 rule. Many people are afraid to give us any more than $99, which is ridiculous. Who wants to know anyway? Your opponents want to know who is giving money to you, do they not? I bet they all know. I think that is all I should say.

Chairwoman Diaz:
Is there any further testimony in opposition to S.J.R. 4 (R1)? Seeing none, we will go to neutral. Is there any testimony in the neutral position? Seeing none, are there any final remarks from Senator Cannizzaro?

Senator Cannizzaro:
I wanted to note a couple of things. This is not a specific amendment that is being proffered, which was suggested earlier. This is simply a resolution that would be sent to Congress stating that it is Nevada's intent and belief that the state should be able to determine what

regulations, if any, it should place on independent expenditures and individual, aggregate campaign contribution limits. Mr. Clements testified that this is about the decision in *Citizens United*, the progeny from that case, the direction in which the case law is going, and the restrictions it is placing upon our elections processes in terms of being able to know which candidates are running, who is backing them, and where that money is coming from.

This is about something broader than *Citizens United*, because *Citizens United* is one decision by the U.S. Supreme Court that has led to a number of other decisions. There are two additional decisions that are mentioned in this resolution that illustrate that this is an ongoing problem that puts voters in a position where it is becoming increasingly difficult to elect candidates they can believe in without being unduly influenced by massive amounts of money that voters do not know from where it came. That is what this resolution is about. I think that this is a fair and just thing to do for the voters in our districts. It is just telling Congress that we believe that we should be able to regulate that ourselves, and this body should make the decision as to what those limits should be—if any—and how they operate.

[Chairwoman Diaz designated (Exhibit E) as presented but not discussed. It will be made part of the record.]

Chairwoman Diaz:
I will close the hearing on S.J.R. 4 (R1). We will move on to our last order of business for today. I will open the hearing on Senate Bill 84 (1st Reprint), which is a proposal to make various changes to the Ethics in Government Law.

Senate Bill 84 (1st Reprint): Makes various changes relating to ethics in government. (BDR 23-250)

Yvonne M. Nevarez-Goodson, Executive Director, Commission on Ethics:
With me today is the Nevada Commission on Ethics' legal counsel, Tracy Chase. She is also here in support of the measure and is able to answer any questions that address legal issues with respect to the measure.

I wanted to take this opportunity to present the provisions of Senate Bill 84 (1st Reprint). The Committee may recall that at the beginning of this session, I provided a presentation regarding an overview of the Ethics in Government Law and the role of the Nevada Commission on Ethics, which includes a couple of things. In particular, the Nevada Ethics in Government Law is intended to govern the types of conflicts of interest that might be attributable to public officers and employees between public duties and private interests. The Legislature has seen fit to define the private interests that might be applicable to public officers to include things that relate to financial interests and matters that relate to commitments in a private capacity. Those commitments in a private capacity have to do with the interests of certain persons to whom we have close relationships. Those include our spouses and domestic partners, other close familial relationships, business associations, and employment interests.

On the other hand, the Commission on Ethics is the entity that was created by this body to enforce and interpret the provisions of the Ethics in Government Law. The Commission operates as a quasi-judicial body. It is responsible for two main functions. The first is to provide advisory opinions to public officers and public employees. The second role is to adjudicate complaints that allege violations by public officers and employees under the Ethics in Government Law.

The primary goals of S.B. 84 (R1) are intended to: (1) streamline the Commission's adjudicatory processes regarding ethics complaints; (2) establish consistency among the standards of ethical conduct that are applicable to public officers and public employees regarding the personal interests that are at stake in order to establish the conflicts of interest with public duties; (3) clarify the scope and intent of the Commission's jurisdiction; and (4) revise provisions related to annual filing requirements by public officers and disclosures of certain private representations of those public officers. We have provisions that are intended to revise what we refer to as cooling-off provisions, which are prohibited types of employment and representations in our private capacity after or during our role as public officers and employees.

There are a few housekeeping clarifications related to the Commission's processes for subpoenas and the application of the safe harbor provision for reliance on appropriate legal advice by public officers and employees in certain circumstances.

Finally, the Commission is confirming that advisory opinions that the Nevada Commission on Ethics renders include those requests for relief that the Commission is authorized to give under the provisions of certain standards of conduct. Those include primarily local legislative members who are allowed to request relief from certain application of the Ethics in Government Law under certain circumstances. Secondly, there are prohibited contracts that public officers and employees may not enter into, but the Commission may grant relief in appropriate circumstances. Finally, the Commission has been authorized to grant relief from cooling-off provisions of the Ethics in Government Law under certain circumstances. This bill makes it clear that that advisory opinion process applies to those requests.

I want to talk more specifically about the primary goal of this legislation. The first goal is to streamline the adjudicatory processes of ethics complaints. The Commission's intent, in particular in this area, is a result of looking at how it has processed ethics complaints and the types of complaints received during the last two biennium. During the last two biennium, the Commission has produced a number of ethics complaints that were derived from allegations of minor misconduct or conduct that has not yielded significant or sufficient evidence of malice, bad faith, or other reckless disregard of the Ethics in Government Law. However, these cases, which are minor in nature, have nevertheless required a significant output of resources by the Commission and its staff to investigate and adjudicate.

The Commission saw fit to confront these issues through this measure in part because it intends to measure two specific issues. The first is the Commission's mission to interpret and enforce the Ethics in Government Law as has been presented by the Nevada Legislature. That is measured against the feedback the Commission regularly gets from public officers and employees who find themselves before the Commission in the context of an ethics complaint and question why so much process needs to be undertaken and why the only opportunity for resolution is either dismissal or a finding of an ethics violation with the potential for imposition of sanctions and other reputational harms.

Public officers and employees have routinely informed us that they are reticent to admit wrongdoing at the early stages of any proceeding because the consequence of a formal finding of a violation is primarily reputational. The Commission also has the opportunity to impose monetary sanctions. The Commission has been responsive to these issues when talking about relatively minor violations of the Ethics in Government Law. These types of resolutions of minor cases, at worst, contradict the Commission's primary mission of outreach and education, at least when the Commission is addressing those minor issues that are more appropriately resolved through other manners than finding a formal violation of the Ethics in Government Law. To be clear, this bill does not affect the Commission's ability to fully investigate and evaluate the circumstances surrounding alleged violations and make appropriate findings of a violation in the right case.

With this background in mind, the Commission has conceived a new process in adjudicating ethics complaints whereby the Executive Director and the subject of a complaint may propose a deferral agreement to a review panel of the Commission, in which certain terms and conditions will be outlined and proposed to defer any hearing in the matter and any final determination of a violation. If the terms and conditions are satisfied by the subject, who will likely always include an educational component of the Ethics in Government Law, the complaint will be dismissed. If the terms and conditions are not agreed to or satisfied, the matter will proceed to a full adjudicatory hearing before the Commission for the Commission to determine the appropriate resolution of the case.

While this bill appears to include significant provisions of new language, the majority of those provisions are actually existing provisions of law set forth in the *Nevada Revised Statutes* (NRS) 281A.440. Those provisions are being repealed and replaced in the chapter to establish a more reader-friendly and organized chapter for the procedures undertaken by the Commission. In particular, the Commission's bill will distinguish the requirements and processes for advisory opinions versus ethics complaints. A table has been provided to the Committee that directs the Committee's attention to the provisions of the bill that replace the various subsections of NRS 281A.440 (Exhibit F) and how or whether those provisions are actually changed in this new bill.

Under existing law, NRS 281A.440 deals with both requests for advisory opinions and ethics complaints. Over the years, it has been amended on a regular basis to establish a cumbersome and sometimes confusing provision as to those distinguished processes. This bill replaces those provisions as new and separate subheadings within NRS Chapter 281A for

clarity and also clarifies the requirements for filing and other processes for both advisory opinions and ethics complaints. While the majority of the provisions set forth in NRS 281A.440 remain the same, the major addition to NRS Chapter 281A in the context of ethics complaints relates to revising the panel process and implementing an opportunity for the deferral agreements.

This bill also updates the terminology currently used in the Chapter for additional clarity, including the terminology related to requests for opinion. Under the current law, we refer to both advisory opinions and ethics complaints as this more broad term, known as a request for opinion. That is what lends itself to some of the confusion the Commission hears about from public officers, public employees, and public attorneys who are representing those interests. This bill updates some of the terminology. The Commission will be more specifically utilizing a request for an advisory opinion versus an ethics complaint as it goes forward in this measure.

I wanted to go through the new processes for clarification and to open up to any questions. To begin, the bill clarifies the timing and processes by which the Commission will determine its jurisdiction of an ethics complaint. There are no significant changes in the statutory language to this provision but, as a matter of practice, what is currently undertaken by the Commission is a review of any ethics complaint filed by the Commission staff.

That staff determination regarding jurisdiction is appealable directly to the Commission. The Commission refers to it as an internal administrative appeal directly to the Commission. The new process going forward is going to be an effort to get every filed ethics complaint put forward directly to the Commission for its initial determination of jurisdiction. The Commission will see that process streamlined in practice, but there will not be a significant change in the language of the bill to accomplish that.

Secondly, existing law provides for what is currently known as an investigatory panel. This panel is responsible for concluding an investigation and making a recommendation to the Commission of whether the case will proceed to a hearing and final opinion or be dismissed.

I wanted to offer some background about these investigatory panels. Since 2013, the Commission acquired its associate counsel position to draw firmer lines in its procedures of due process for the subject. It used to have somewhat informal processes whereby the Commission would ask questions of witnesses and the subject, render its decision, and hear evidence somewhat informally.

Since the Commission acquired the associate counsel position, it has become much more formal and operates, in many senses, as a judicial proceeding whereby the Executive Director has been turned into a party to the proceeding on behalf of the public and state. The Executive Director is charged with investigating a case and bringing a recommendation to an investigatory panel. The investigatory panel then decides whether the evidence is sufficient to move forward. The Commission has implemented internal firewalls whereby

the Executive Director is prohibited from having communications with the Commission about the ongoing scope of an investigation or any evidence that is expected to be presented to the Commission or any panel.

In implementing the process whereby the Executive Director has become a party, the Commission thinks it has streamlined the nature of any evidentiary hearings the Commission has. In fact, the Commission has resolved 100 percent of the cases that have been presented since 2013 through stipulated agreement versus a full evidentiary hearing or legal motion. If it is not a stipulated agreement, the Commission usually decides it on the legal merits. It has not had to go to a full evidentiary hearing.

Under current law, this two-member panel receives a recommendation from the Executive Director about the scope of the investigation and whether that investigation has yielded sufficient evidence to go forward. The panel then makes its determination, which is based on what is known as credible evidence. The panel determines whether just and sufficient cause is presented for the full Commission to hold a hearing and render an opinion in the matter.

As the Commission looked at this process, what the Commission has to prove on the tail end, which is before a full Commission hearing, is a preponderance of the evidence of a violation. As the Commission has looked at the way these cases flowed through its system, it realized that the panel process has become perfunctory in some respects. It has required a lot of work and staff process upfront to not only get to a panel, but to reiterate and duplicate those efforts before a Commission hearing. The Commission was hopeful to eliminate the investigatory panel and get these issues directly before the Commission in the original iteration of this bill.

The Commission received some interesting feedback on the Senate side, which has resulted in the first reprint version, regarding some concerns about an investigatory panel being eliminated altogether and what role the Commission might have in hearing an investigation's evidence upfront and then later potentially deciding the case. The Commission is confident that that would not have violated due process. Nevertheless, the Commission agreed to this new version, which will have a review panel of three members instead of an investigatory panel of two members. There will be nothing different in the process except that this review panel will have the legal authority to conclude a case through what is known as a deferral agreement. The deferral agreement will be between the Executive Director and the subject of the complaint. It is an agreement; therefore, it has to be agreed to by the parties. The review panel will have the authority to adopt and accept that deferral agreement.

If the agreement is not accepted and the panel deems there is otherwise just and sufficient cause, they will move it forward to the full Commission. If there is just and sufficient cause and the deferral agreement is approved, it will include various terms and conditions that will have to be satisfied by the subject of the complaint. If those terms and conditions are satisfied, the Commission will be responsible for dismissing the complaint. If they are not satisfied, the Commission will have the authority to vacate that deferral order and move the issue forward to a full adjudicatory hearing before the Commission.

Under the new language for the deferral agreement, there are a couple of options being provided for the Commission. One of the terms and conditions could be the imposition of various ethics education and training. The Commission could require the subject of the ethics complaint to issue a public disclosure or apology. Other corrective or remedial action is appropriate given the circumstances and is an option for the Commission. The Commission has also implemented the idea of issuing public admonishments, reprimands, or censures, depending on the context of the particular conduct and how egregious it is.

A few other parts of this new process include existing language, which includes the Nevada Commission on Ethics exemption from the Open Meeting Law. Under existing law, the Commission's proceedings or requests for advisory opinion and ethics complaint are exempt from the Open Meeting Law. This bill ensures that those exemptions remain in place for both the newly established provisions as well as by reference to NRS Chapter 241.

This bill also addresses final adjudicatory and other hearings before the full Commission upon the panel's referral or the failure of a subject to comply with a deferral agreement. All statutory time frames, notice requirements, and other standards of evidence will remain the same as they are in existing law if and when a case comes to the full Commission.

That wraps up the process in S.B. 84 (R1) with regard to the new procedures that are contemplated for these review panels and deferral agreements. This bill attempts to clarify and revise a few other provisions of law. The first is the standards of conduct that are applicable to public officers and employees. Those provisions are primarily set forth in NRS 281A.400 and govern the various prohibitions for public officers and employees in terms of conflicts of interest. Under the current law, some of those provisions are about financial interests; some talk about commitments in a private capacity; and some discuss both. This bill is intended to make that consistent through every standard of conduct, so all of those types of personal interests will be added to the standards of conduct for the purpose of consistency.

With regard to the Commission's jurisdiction, this bill imposes two new issues. The first is going to be a clarification that the Nevada Commission on Ethics jurisdiction does not include allegations that are specific solely to discrimination claims or other claims that are more appropriately addressed through the Equal Employment Opportunity Commission (EEOC) or the Nevada Equal Rights Commission. The Commission sometimes sees complaints that allege sexual discrimination or other hostile working environment issues. The Commission believes that those issues are more appropriately addressed by those agencies that are set up to address those specific issues. Nevertheless, there could be a circumstance wherein there is an allegation of discrimination in one context that has a component of ethics to it, so the Commission is reserving its jurisdiction with regard to the ethics-related matters that might occur by the same conduct.

Second, section 16 of the bill captures certain persons as public officers and employees by definition. The Commission raised a concern over the last couple of years about a number of ethics complaints and requests for advisory opinion that involved individuals who the Commission was not sure were technically within the scope and jurisdiction of the Ethics Commission because of how they were appointed or hired by the government agency. This measure captures those persons who enter into contracts with the government agency, whose compensation is paid with public money, and who serve in a position that would ordinarily be held or filled by an officer or employee as public officers and employees. For public employees, these positions are further limited to those whose performance is essentially full-time equivalent under the direction and control of a public officer or supervising public employee who holds a valid professional or occupational license issued by the government agency, and who is otherwise entrusted with public duties that would ordinarily be held by a public employee.

One example that prompted this legislation request was with regard to school districts. The Commission saw certain cases that questioned whether principals of certain rural school districts who were brought on by contract after they had retired from the public school district would be subject to the Ethics in Government Law. The Commission felt that it was appropriate that someone running a school would be subject to the Ethics in Government Law. By virtue of a technicality, the definition of a public employee or officer, they were not captured. This measure is intended to capture the types of positions that are retained by state or local government that would otherwise be filled by a public employee, but they happened to be filled by virtue of a contractual relationship or some other agreement.

A couple of other issues in the bill have to do with annual filing requirements of public officers. Two of the forms are required by public officers, one of which includes the Nevada Acknowledgement of Ethical Standards for Public Officials form that must be required by any elected or appointed public officer. There is currently a situation where many public officers may hold more than one office. Sometimes, there will be an elected official, and they will hold other publicly appointed positions to other committees or otherwise. The same goes for appointed public officers. The Commission gets questions all the time about whether those individuals must file multiple forms or if the one form is sufficient. This language models the language that is provided by the Office of the Secretary of State for financial disclosure statements, indicating that one form is sufficient as long as it indicates all of the offices held by that public officer.

Secondly, the Commission has a form that is known as an agency representation disclosure form. This form requires any public officer who, in his or her private capacity, represents or counsels private persons before Executive Branch agencies to file this disclosure with the Commission. For the most part, the individuals who are filing those types of forms happen to be professionally licensed or represent clients in a confidential capacity. For example, the Commission has seen attorney-client privilege in the certified public accountant context, medical context, and otherwise. It has prompted some level of concern by public officers

that they would be required to divulge the nature, scope, and clientele in a confidential relationship. When the Commission looked at this issue, its concern had more to do with an appropriate disclosure only if that issue happened to come before the individual in their official capacity. For that reason, the Commission sought to eliminate this disclosure form requirement and instead impose that disclosure requirement under the provisions of NRS 281A.420 if and when a public officer is asked to decide on an issue in their official capacity that affects that prior representation.

There are a couple more issues that are cleanup in some respects. The Commission is clarifying that its subpoena powers encompass the investigatory process. Second, there are changes to the safe harbor provision. *Nevada Revised Statutes* 281A.480 provides that a subject of an ethics complaint cannot be found to have willfully violated the law, subject to sanctions, if they have reasonably relied on the legal advice of their publicly appointed or elected attorney. Under the existing law, it is required that legal advice is not contrary to any published decision of the Ethics Commission. The feedback from those public attorneys is that it is virtually impossible for a couple of reasons, and from a practical perspective.

One reason is that the Commission struggles to have its opinions readily available on its website. The second reason is that the Commission is regularly coming out with new opinions. There was concern about it being as limiting as to any specific Commission opinion. Instead, the Commission will be looking at whether the legal advice rendered by the public attorney at the time the advice was given is reasonable under the circumstances, in terms of looking at not only the provisions of NRS 281A, but also the understanding of the Ethics Commission precedent that is applied thereto. The goal is not to be as limiting as saying someone cannot violate any published opinion. The Commission is going to be looking at whether that legal advice was reasonable under the circumstances at the time at which the advice was given.

My initial remarks included that the advisory opinion process is going to be specific to any request by a public officer or employee for relief from the provisions of NRS Chapters 281A.410, 281A.430, and 281A.550 that govern prohibited contracts. This includes offer requirements and other types of representations that might be authorized for local legislative members of local government.

Finally, one provision that is included with the cooling-off provisions of existing law under NRS 281A.550 is a clarification that while relief might be granted from the employment prohibitions under NRS 281A.550, it does not relieve or provide an opportunity for the Commission to grant relief from the strict prohibition of NRS 281A.410, which restricts representations or counseling of private clients within one year and if they belong to issues that were under consideration by that agency. It has offered the Commission a clarification that relief under one statute is not relief under a separate and distinct statute.

That is the general overview of a rather lengthy bill. I am available to answer any questions.

Assemblyman Elliot T. Anderson:
I think there are many things that need to have some legislative intent behind them for the record. In section 3.4, subsection 2, paragraph (c), it talks about voluntary disclosure. I want to clarify that if any part of the provisions of the advisory opinion is disclosed, that would trigger the Commission's ability to completely disclose anything. Is that correct?

Yvonne Nevarez-Goodson:
That is existing law. You are correct. If a public officer requests an advisory opinion and discloses that he or she has requested that opinion or the nature or scope of that opinion, it waives it for all purposes.

Assemblyman Elliot T. Anderson:
I know a number of these things will be existing law; however, since it is new language, I think the intent ought to be clear for the record. Section 3.9, subsection (1) is the first instance where I see the language "just and sufficient cause." Is that an existing legal standard? Can you explain to me what "just and sufficient cause" is? It is a term I am not familiar with, and I wonder if there might be something better defined in the case law of administrative law that might be useful here.

Yvonne Nevarez-Goodson:
It is not defined in statute, but the Commission has gone ahead and defined that standard through its regulations. In the *Nevada Administrative Code* (NAC) Chapter 281A, the Commission has described standard of just and sufficient cause to include what we refer to as credible evidence. It is reasonably reliable evidence to support a reasonable belief that there has been a violation of the Ethics in Government Law. When the Commission talks about presenting a recommendation to an investigatory panel, it utilizes that standard and helps navigate that for the investigatory panel members. The Commission is really getting through a threshold issue of credible evidence at this stage. If and when it gets to a full Commission proceeding, that standard changes.

Assemblyman Elliot T. Anderson:
The difficulty of having this conversation on the record is that standard is used throughout this proposed legislation, so it is going to be different in each context. In this instance, the Commission is investigating and making the decision to render a decision. I know that this is not criminal law, but might ". . . probable cause that the statute had been violated . . ." be a useful defined term here?

Yvonne Nevarez-Goodson:
We can certainly look at a standard of evidence. The only context in which the term "just and sufficient cause" is utilized in this measure is with regard to the review panel's determination going forward. If the Commission accepts jurisdiction of the issue to cause an investigation to occur, the Executive Director is responsible for presenting a recommendation to the review panel that is based upon a finding of just and sufficient cause. The just and sufficient cause standard is what the Commission has defined by regulation to include credible evidence. That is not defined specifically in statute. The Commission has looked at

that particular issue to see whether there is case law about it. The Commission has seen case law less in the context of anything regarding ethics and more in the context of human resources employment, law-related types of standards that did not apply to the Commission. I do not have the history of when the Commission adopted this regulation. It was certainly before my time, but the standard of credible evidence to support a violation that is set forth in the regulations is what the Commission has used during my tenure.

Kevin Powers, Committee Counsel:
I believe the term "just and sufficient cause" is to be used as a civil equivalent to probable cause in the criminal setting. When the Ethics in Government Law was fashioned in the 1970s and amended throughout the 1980s and 1990s, the idea was that this was not a criminal process. It was a civil process, so the Legislature did not want to use terms such as "probable cause" that are associated with the criminal process. Instead, they are using the term "just and sufficient cause." However, both just and sufficient cause and probable cause serve the same purpose. It is a threshold determination of whether there is sufficient credible evidence to go to the next step, the adjudicatory step. In the criminal context, it would be like a preliminary hearing. At the preliminary hearing, the court determines whether there is probable cause to go forward to a full trial. In this context, the review panel is going to determine whether there is just and sufficient cause to go to the next step, an adjudicatory hearing. As the Executive Director mentioned, the bill provides for the deferral agreement process, but that would be similar to any sort of agreement on the criminal side, such as a plea bargain.

Assemblyman Elliot T. Anderson:
I think this exchange is quite helpful, and there is a good record on what that is. Subsection 3 of section 3.9 talks about "any information relevant." Is that just as the Commission understands relevancy? It is not exactly evidence, is it? Can you help me with the term "relevant"? Maybe that is focusing on relevancy in the evidentiary context.

Yvonne Nevarez-Goodson:
That language is in response to the subject's ability to provide a response to the Executive Director during the course and scope of the investigation. The language makes very clear that through the investigatory stage of proceedings, a subject is not required to file a response to the allegations that are presented. The subject does not waive his or her rights, defenses, or anything of that nature by failing to file a response. When the Commission is at the investigatory stage of the proceedings, often it is not acquiring evidence at that point; the Commission is sometimes trying to acquire a context and information relevant to why the complaint was filed and what the knowledge is about it. I think the language was put in there to be broad for that purpose at that stage in the proceedings.

Assemblyman Elliot T. Anderson:
I will move on to section 4, subsection 2, paragraph (c). There is some language that gives the Executive Director some discretion. It uses the phrase "appropriate under the facts and circumstances." Can you give me an idea of what, generally, would be appropriate under the facts and circumstances, so there is some idea of when discretion has been abused or not?

Yvonne Nevarez-Goodson:
At this point in the proceedings, because the investigation is conducted by the Executive Director, the investigation results in a recommendation to the review panel. That recommendation is twofold under current law. Either there is not sufficient evidence to warrant a hearing, so it should be dismissed, or there is credible evidence in support of the alleged violations to warrant a hearing. Because the Commission is implementing these deferral agreements and indicating that an issue alleging a minor violation of the Ethics in Government Law in the appropriate type of circumstances, the Executive Director might be able to make a recommendation to a review panel. It would say that based on the circumstances and the evidence that was revealed during the course and scope of an investigation, it is the Executive Director's recommendation that this case could be resolved through a deferral agreement. The intent of that language is for the Executive Director to be able to describe to the review panel that the nature and circumstances of a particular case warrant a deferral agreement versus a full finding in that recommendation. The Executive Director does not make that final decision. That is subject to the review panel about whether the recommendation will be accepted first. Secondly, if it is not going forward to a hearing, then it is waiting for the terms and conditions of that deferral agreement.

Assemblyman Elliot T. Anderson:
The more I think about it, that was not a good question. I do not think that that would be a reviewable determination anyway. Maybe that was an unnecessary question. Whenever I see phrases like that, I want to know what it means. Thank you for explaining what that is. It seems like more of a charging decision, which would be an executive function. It is pretty much absolute discretion. I would not want to say that if the Executive Director does not feel that there is a case, they have to file something. It seems to be more along the lines of prosecutorial discretion.

I will move on to section 5, subsection 4. It talks about "with or without prejudice." If there is a determination that there is not just and sufficient cause, why would we ever do it without prejudice if there was a finding that there was not just and sufficient cause?

Yvonne Nevarez-Goodson:
The goal with this language was because we are in an administrative context. Frequently, what the Commission will see is that a particular investigation of a particular issue did not yield sufficient evidence to warrant a violation or finding in this particular case. However, sometimes additional information will be acquired by a requestor or a complainant, come forward, and the Commission will have to look at additional issues.

What the Commission was looking at with this particular language was if a circumstance in which an investigation based on alleged facts and circumstances did not yield sufficient evidence to warrant a hearing, it is not with prejudice against the complainant from filing again. If a complaint was filed, and it was identical to the original one, the Commission

would weigh in and say that it has already decided this particular issue. However, if certain facts and circumstances were presented that warranted another look at the issue, that would provide the flexibility and discretion of the Commission to impose another investigation on that.

Assemblyman Elliot T. Anderson:
I will go on to section 6.5, subsection 4. It talks about "For good cause shown, the Commission may take testimony from a person by telephone or video conference . . . ." I think this is one that needs a record, because we are talking about a right to respond. Due process is important. As for "good cause shown," would that be close to a matter of right? Would it be something that they had to be a certain distance away? What are you envisioning good cause shown would be?

Yvonne Nevarez-Goodson:
The Commission requires, in fact, a good cause. This is another one of those provisions that is existing law. Because of the nature of the Commission's proceedings, sometimes it is very difficult due to timing purposes, and the fact that the Commission does not pay witnesses under subpoena to appear and testify. As long as there is no objection, the parties usually agree. As long as there is not a credibility issue at stake for a particular witness, the Commission will evaluate whether it is appropriate for a person to testify by telephone or video conference. That is true in both the complaint context and advisory context. In an advisory context, in particular, the Commission is trying to save money in terms of having these individuals testify in person. In a complaint process, it is a case-by-case basis. The parties have the option to file motions if they dispute a determination that someone will testify by telephone or video conference. The Commission has not seen any objections to that issue where it has been permitted, as a practical matter. However, in terms of all of the process before the Commission, everything is subject to motions.

Assemblyman Elliot T. Anderson:
Before I move on to my next question, I would just encourage you to require as much in-person as possible. I feel like it is easier to get a better read of witness credibility in person. Considering how big of a thing ethics proceedings can turn into for people's professional reputations, they are certainly something to be used judiciously.

Yvonne Nevarez-Goodson:
The Commission's budget contemplates in-person hearings for that very purpose. All of the Commissioners are funded to travel to be in one location as opposed to video conference. To the extent that the Commission holds evidentiary hearings or hearings that involve parties and attorneys, it is regularly all in person. It is the exception, rather than the rule, that the Commission would utilize telephonic testimony.

Assemblyman Elliot T. Anderson:
My next question is in regard to section 9, subsection 2. It talks about the ability to request written discovery as to proposed witnesses and a copy of a portion of the investigative file that the Commission would appear to use in your case in chief, to borrow a criminal term.

Borrowing from that analogy some more, the Executive Director would be the prosecutor in that context. In the criminal context, there is the ability to get information in some cases that is not going to be used in the case in chief. If you had a witness who was favorable to the person who is being accused, you are not necessarily going to put them up as your number one star when a hearing is being held.

As I read that language in that context, you would not have to provide written discovery as to people who are not being used by you, but they provided information that would nonetheless be beneficial to the person who is being accused. Would you be open to making it more of an open file, but minus when there are confidentiality concerns for whatever reason? There are confidentiality provisions. In one part of the bill, you said that you can keep a person's identity secret who complained as long as there is plenty of other evidence to support it? Would you be willing to broaden the right to discovery closer to an open file?

Yvonne Nevarez-Goodson:
It might be helpful to provide a little bit of context to this particular provision. This is carried over from existing law into the new procedures. Historically, what the Commission looked at before this language was provided to the Legislature had to do with the Commission's feeling of uncooperative witnesses during the course of an investigation. The majority of witnesses that the Commission will talk to in the course and scope of an investigation of an ethics violation are employees who work in the same governmental agencies. The majority of witnesses that tend to have information relevant to alleged misconduct are those who work within the same agency. Historically, the Commission had difficulty getting cooperation by witnesses in those agencies for fear of retribution, retaliation, and things of that nature.

Second, investigations were also cut short because the Commission might not get the full scope of information if that witness had an understanding that the investigatory file would be eventually turned over to the subject of the complaint. What will hopefully curb some concern is that although the Executive Director is a party and postured in some respects as the prosecutor of an ethics complaint, there is a distinction in an administrative context versus a criminal context. It is that the Executive Director has an obligation to ensure the public's trust in the process and transparency. The Executive Director is responsible for presenting evidence, both good and bad. If there was favorable evidence that went against a perceived violation, the Executive Director would have the responsibility to present that information to the Commission. If that information came to the attention of the Commission, and the Executive Director knew about it and did not provide it, there would be some concern by the Commission that the Executive Director was not being objective in the presentation of that type of evidence.

I just wanted to offer that context. This particular provision was intended to protect the scope and nature of the investigatory file. However, to the extent the Commission was going to utilize any information learned during the course and scope of that investigation in a hearing or as evidence in a stipulated agreement or against a public officer or employee who is subject to an ethics complaint, the Commission would have a responsibility to turn over that evidence. This includes any witnesses the Commission calls, any exculpatory

evidence, and any documentary evidence it might be presenting at a hearing. I have not discussed that particular issue with the Commission because it is existing law, and the hope would be to stay as current with the Commission's processes as possible. I can certainly bring something back to the Commission.

Chairwoman Diaz:
I believe Mr. Powers also wanted to address Assemblyman Anderson's concern.

Kevin Powers:
I agree with the Executive Director that as a matter of due process, the Executive Director would have an obligation to disclose exculpatory evidence. If the Executive Director did not, there is the potential that the proceeding would be found invalid for failing to disclose that exculpatory evidence. However, with regard to Assemblyman Anderson's concern, I think we could put language in this provision of the statute that would make it clear that the Executive Director had to disclose not only the portion of the investigative file, but also any exculpatory evidence that was obtained during the investigation. You could put that standard in the statute, and then it would be clear that the Executive Director would have that duty in addition to the due process requirement.

Assemblyman Elliot T. Anderson:
I think it would be helpful to require that disclosure to ensure that the public and policymakers feel confident in the procedures that the Committee would be asked to approve. I had read something about sufficient evidence as to determining jurisdiction. That got me thinking about, generally, the standard of proof. I am not sure that this bill affects it. I am not sure that I found any new language in regard to the standard of evidence or the preponderance of evidence. Is there any standard of evidence for these proceedings or is it just at the discretion of the Commission?

Yvonne Nevarez-Goodson:
To the extent that an ethics complaint gets to a Commission proceeding whereby it is determining whether there has been a violation, the Commission is subject to a standard of a preponderance of evidence. That is set forth in NRS 281A.480. At that juncture, the preponderance of evidence standard would apply to any finding of a violation.

Assemblyman Elliot T. Anderson:
Thank you for your indulgence, Madam Chairwoman. Thank you, ladies, for being well prepared and creating a really good record.

Assemblyman Daly:
My first question is on section 3.3 where people are asking about an advisory opinion. That language says that a person can go to judicial review under NRS 233B.130. The language under NRS 233B.130 says that a person can file a judicial review. If they are a party, the low standard of it is if they are aggrieved. They say, "I think they made the wrong decision. Courts, you decide. You go over the evidence." None of the Commission's discretion is going to be used; the court is going to go over that. The problem is that I am not clear,

and I do not know if someone could argue that an advisory opinion is not a contested case. That is the specific language used in NRS 233B. I think we need to add language that says, "For the purposes of judicial review, this advisory opinion is a contested case." I think that would clear up my issue on that.

Yvonne Nevarez-Goodson:
My position would be that stating affirmatively that the advisory opinion context is, in fact, subject to judicial review makes it a contested case for purposes of definition. With regard to cases that involve both present and future conduct, there is a distinction in the law between advice about present and future conduct versus past conduct.

Kevin Powers:
I would agree with the Executive Director. In section 3.3, subsection 2, paragraph (b), it specifically says that an advisory opinion is "A final decision that is subject to judicial review pursuant to NRS 233B.130." Through this language, the Legislature defines it as a final decision in the contested case and provides for judicial review under the Nevada Administrative Procedure Act (APA). The Legislature deems it to be a final decision for purposes of the APA.

Assemblyman Daly:
It is the final decision of an advisory opinion, but not necessarily a contested case. If I was accused of some deal, and the Commission did not have the whole process, and it was a deferral, then that would be a contested case to me. I am not sure that an advisory opinion is. If the Commission gives me the opinion, it is still just an opinion. The Commission is telling me I have to abide by it. Maybe the contested case is there. It seems to me that it should be clearer.

Yvonne Nevarez-Goodson:
The Commission has looked at this issue in a couple of contexts. I suppose that the reason, policywise, that an advisory opinion could be potentially subject to judicial review is that there is a potential that the Commission could commit a legal error in rendering its advice and interpreting the provisions of NRS 281A into a particular context. It is a remedy available to the person who is subject to that advice on the potential that it could be binding as to future conduct. From a policy perspective, that is why the judicial review process is in place under an advisory opinion context.

There are many avenues for the Commission to look at whether a particular advisory opinion has aggrieved a party. There is a lot of case law about whether a person is aggrieved by a particular decision. The Commission would be looking at whether the particular advice was binding in a particular circumstance. The Commission has those avenues of redress in terms of concern about being subject to judicial review in an advisory context. I am not sure if that helps your review of that issue. Ultimately, it is a policy decision by the Legislature about whether advice rendered by the Commission should be subject to a judicial review proceeding.

Kevin Powers:
In section 3.3, subsection 2, paragraph (b), we can provide that the advisory opinion is a final decision ". . . in a contested case that is subject to judicial review." We could list it as a contested case, and that should address Assemblyman Daly's concerns.

Assemblyman Daly:
I would agree. I have been in too many cases. Standing is routinely challenged by the opposing counsel on whatever issue it may be.

In section 20, subsections 1, 2, 3, and 4, you said you wanted to try to make the language consistent. I read it around 25 times, and every time I scratch my head and say, "What does it mean?" I see in subsection 2, where the existing language that you added into the other sections, it says ". . . or any person to whom the public officer or employee has a commitment in a private capacity." You strike out "to the interests of that person." You had a choice to make that consistent in two different directions, or maybe it was only in section 2 because it only needed to be in section 2. That is the direction I am leaning.

In subsection 1, it talks about a public officer or employee getting a ". . . gift, service, favor, employment, engagement . . . ." It then opens up to ". . . any other person to whom the public officer or employee has a commitment in a private capacity . . . ." I do not know if we have defined "commitment in a private capacity." It is fairly broad. It is then "any other person." Most of the time, when a person sees that, they are saying it is the person's wife, spouse, kids, and various things such as in other provisions.

In subsection 2, the public officer or employee may be using their position to ". . . secure or grant unwarranted privileges." They would say, My friend, I can get you in to see someone at the Department of Motor Vehicles (DMV) quicker than someone else because of your position. We might use that for a friend. There are two ways to make that consistent, or maybe look at and say that subsection 2 has that language for a specific reason, and the others do not.

Yvonne Nevarez-Goodson:
The terminology "commitment in a private capacity to the interests of another person" is defined in NRS 281A.065. It is defined to include relationships with spouses or registered domestic partner, persons with whom the public officer or employee shares substantial and continuing business relationships, persons to whom they are related within the third degree of consanguinity, persons who employee them, and other substantially similar relationships. The goal the Legislature has defined for purposes of the Ethics in Government Law is that there are two types of personal interests that could be in conflict with public duties. The first is the more tangible interest, a financial interest. The Legislature has said the second one is the interests of a person to whom a public officer or employee has one of these relationships and are reasonably or materially affected, those interests are imputed to the public officer for purposes of conflict of interest.

In NRS 281A.400, each of those subsections set forth a separate standard of conduct or a prohibition of a public officer's conduct. Some of the provisions talk about financial interests; some of them talk about these commitments; and some of them refer to both. What the Commission was trying to establish for purposes of consistency was that all of the standards of conduct should apply equally, whether it is a financial interest or one of these relationships that is already defined in the law. That was the intent of that provision. That terminology is not as broad as a friend, for example, or these other types of relationships. It is defined in the NRS 281A.065.

Kevin Powers:
As a drafting matter, in subsection 2, the bracketed red language, ". . . to the interests of the other person . . ." is to ensure that only the defined term is used throughout the section. They could have gone either way. They could have added the phrase "to the interests of that person" in every other subsection. As a drafting matter, that is unnecessary, because the term is defined in NRS 281A.065. Everywhere it says "a commitment in a private capacity," it means what it is defined as, which is essentially a commitment in a private capacity to the persons listed in NRS 281A.065.

Assemblyman Daly:
I can follow up with them on that. I appreciate that. The next question I had was in section 20.3. You delete the language that used to be subsection 5, line 41, that says "Not later than January 15 of each year, if any State legislator, member of a local legislative body . . . ." The subsection 1 of section 20.3 says, "If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city . . . ." When you eliminate that part, do you just eliminate the report for legislators, city councilmen, or county commissioners? Would they not have to report that report at all? Is that what you are intending to do?

Yvonne Nevarez-Goodson:
In part, that is correct. The Commission is, in fact, eliminating the requirement for any public officer who is subject to the requirements to file the form if they have represented or counseled a private person. As otherwise permitted by this section, they are required to file the form. The Commission is eliminating the requirement to file the form. Instead, in the provisions of NRS 281A.420, it is now required that any individual who is otherwise permitted to represent or counsel a person under NRS 281A.410 would be required to disclose the nature and scope of that representation if, in fact, the matter before them involves or is reasonably related to the nature of the representation of that private client. Therefore, as a practical matter, the Commission maybe receives anywhere from 5 to 15 of these forms per year. It is one of those issues that is difficult to enforce, because the Commission does not know which public officers are actually doing those representations of private clients. The Commission will be responsive if it receives a complaint that someone failed to file the form.

When the Commission looked at this issue, its intent was to require disclosure when there is an official matter before the individual that involves that representation. The purpose of transparency in government and informing the public of the nature and scope of the representation is only if someone is being confronted with it in their official capacity. The Commission thought it would be more appropriate for the public officer to disclose that as otherwise required to disclose other conflicts, if and when there is an official issue before them that is reasonably related to that private representation.

The other concern that the Commission has with this particular form is that the majority of individuals filing these forms happen to be individuals in certain professional industries. They are attorney clients, have medical professions, and things of that nature, wherein they are concerned about having to disclose the nature and scope of the confidential representation. We receive feedback from other public attorneys, particularly with the Office of the Attorney General, who are representing clients before boards if they have to disclose these confidential relationships. The Commission says, "Well, if it involves an issue before their board, certainly." However, they should already be disclosing that under the current provisions of the law. The Commission is doing a trade. It is getting rid of the annual filing requirement, but it is requiring that disclosure if and when the nature of that representation is before them in their official capacity. Would an example help?

Assemblyman Daly:
An example might help. I am familiar with the way it is now. A person has to put in the report and form. Any Executive Branch agency that they interacted with is necessarily a subject, and the person may or may not be confronted by it, but they cannot put someone in a private capacity, an unemployment claim, or whatever it might be that was in front of the labor commissioner, et cetera. When the person is making legislative stuff that is outside of their purview, the legislator has to make a determination of whether or not there is a conflict. I am not really worried so much about the Legislature, county commissioner, or city councilperson who may have had that position.

You add that language, which was my next question in section 20.5. It says, "Which would reasonably be related to the nature of any representation or counseling . . . ." I need an example. When I read it, I am thinking people will be spending a lot of time just to turn in a form making "gotcha" disclosures. They never know if they needed to or not. Most of the time, they probably did not need to, but they are going to say that it is out of an abundance of caution. People are used to the way it is. I do not think this change is useful to anyone. If there were many issues and complaints, then investigate them. Convoluting it more is not helpful.

Yvonne Nevarez-Goodson:
Maybe I can provide an example wherein, from the Commission's perspective, it streamlines the issue. First, the Commission receives many problems with the form. Secondly, the Commission rarely, if ever, received a public records request for who in Nevada has filed this form. The original goal was to have transparency about which public officers existed in the state that were representing private clients before Executive Branch agencies.

As the Commission took a look at this issue, it was only relevant when a public officer or employee was representing a private client before an Executive Branch agency, if permitted, and if an issue involving that client or the nature of that representation was in conflict with their public duties. The filing of the form is just an outright disclosure of whether it is in conflict with a public officer or employee's public duties. What the Commission is trying to do by this measure is to say that only if the nature of that representation or the affiliation with the client is in conflict with the public officer or employee's official duties, they should have to disclose that issue.

An example might be a member of a planning commission who is an attorney in his or her private capacity who represents private clients before the Ethics Commission as an Executive Branch agency. In a circumstance like that, if the client who the attorney represented before the Ethics Commission suddenly appeared before the Planning Commission on a development project, that planning commissioner would have an obligation to inform the public that he or she represented a private client before an Executive Branch agency. He or she has to disclose the nature and scope of that relationship. The world may not care that in his or her private capacity he or she represented that individual before the Ethics Commission unless and until that issue came before him or her in his or her official capacity. The Commission is worried about when there is an actual conflict between the private representation and the official public duties. That is why the Commission is trying to change course in terms of eliminating the automatic filing requirement and only imposing the disclosure requirement when it is conflict with official duties. That was the goal.

Assemblyman Daly:
I understand the disclosure. That is a situation I would not be familiar with. Thanks for the example. The person has to make the disclosure, but what is the next step? Does the person have to say, "Now that I made this disclosure, I could have just put it on my form?" People could have made their information requests. They might say, "Now that I made the disclosure, people are going to say that I cannot vote on that now." They have to make the second step of determining if there really is a conflict. I understand that we want to have some of those things open, but at the same time, no matter what a person does at that point, it is a "gotcha" disclosure.

Yvonne Nevarez-Goodson:
The Commission looked at this issue. Under current law, it is only a disclosure requirement by virtue of filing the form. The Commission did not impose the secondary abstention analysis on an individual for that prior representation. It is a strict disclosure requirement if and when that issue comes before the public officer in his or her official capacity. The current law does not impose abstention obligations against the public officer for that prior representation. If the client happened to be a continuous client of the individual, that would impose abstention requirements under a separate analysis. If it was a business relationship that the individual maintained, and it was not within the past one year,

there would be separate requirements for that sort of abstention analysis. This would simply acknowledge that there was a prior representation within the immediately preceding year of a particular client involving the nature and scope of representation that is now before the individual in their official capacity. There is an automatic requirement to disclose that.

Assemblyman Daly:
I am familiar with what the Legislature has to do. I know that if a legislator is doing their legislative duties—it is not subject to the Executive Branch. Where is the disclosure part of it for city council or county commissioners? They would have to then make a similar analysis on whether they have a conflict that could stop them from voting. I am not familiar with that.

Yvonne Nevarez-Goodson:
The provisions for all other state public officers and local government public employees regarding disclosure and abstention are set forth in NRS 281A.420, which is where this language is included for the purposes of the representation. Under current law, all public officers and employees are required to disclose either to the public, if they serve on a governing body, or to the supervisory head of their organization, if they serve as a public employee. They are required to make a disclosure of the full nature and scope of any financial interests or interests of persons to whom they have these commitments that is reasonably affected by the matter before them in their official capacity.

The abstention analysis goes a step forward. Where that relationship is material, instead of just reasonable, they are required to abstain from acting. Under those disclosure provisions, public officers are required to abstain from voting and public employees are required to abstain from acting or making any decision in one's official capacity.

Assemblyman Daly:
The Commission is switching it from a form. The person has to make an analysis on whether they have to abstain. If they have to abstain, they should make that announcement. This is versus putting in a form, making an analysis, and not having to say anything. The person could then vote. That is the change the Commission is making.

Yvonne Nevarez-Goodman:
That is essentially correct.

Assemblyman Elliot T. Anderson:
Before I go into my specific questions, I need to ask the committee counsel something. When you started mentioning the public attorneys who practice this sort of law, it made me think a bit broader. I know there are a few different attorneys who practice this sort of law. Have you engaged in discussions with them? It sounds like you have discussed this with the public attorneys. Do you have any sense of how they feel about these changes?

Yvonne Nevarez-Goodson:
The original iteration of the bill, before the first reprint in the Senate, invited several working groups with those parties from local government that were interested or concerned about various provisions of the bill. I feel fairly confident that local government has been represented in terms of articulating their concerns. The Commission has corrected them in the first reprint version of the bill. Those primary concerns revolved around the deferral agreement process, and the investigatory panel versus review panel process distinction. The Commission was able to work that out. There were concerns about the scope of jurisdiction of public employees not to encompass the rank and file employees or other ministerial contracts that a local government might enter into. If the Commission wanted to hire out a service for mosquito abatement, those contracted individuals are not going to be deemed the public employees subject to the Ethics in Government Law. Those were the types of concerns that local government interests presented. I believe that we worked all of those out for purposes of this version of the bill.

Assemblyman Elliot T. Anderson:
At some level, we need to be able to trust that the folks who will be most affected by this bill were able to comment.

Yvonne Nevarez-Goodson:
I want to be fair on the record. One of the concerns in the existing reiteration of the bill has to do with the safe harbor provision that subjects public attorneys to the type of advice that they are giving. I hope I fairly reflected that the goal is to look at whether the advice presented by the public attorneys is reasonable under the circumstances. The Commission is not trying to be as limited as a single-published opinion. I know that was of concern to some local government representatives in the current version of the bill.

Kevin Powers:
For the moment, I will take off my LCB nonpartisan hat as committee counsel. I will put on my hat as a public attorney who represents clients before the Ethics Commission. Aside from the substantive changes of the bill, which I am not commenting on, the changes in the procedure and the reenactment and restructure of the Ethics in Government Law will be very helpful to public attorneys. It will make the chapter easier to use and follow. The options that are now available through the deferral agreement and some of the other progressive stages of discipline will be a benefit to both the clients of the public attorneys and the public attorneys themselves when dealing with ethics complaints. That is my viewpoint as a public attorney. I am now putting my nonpartisan hat back on.

Assemblyman Elliot T. Anderson:
I have one technical question for Mr. Powers. We are glad Mr. Powers is on our side, and not against us. I wanted to get into section 20.5, subsection 4(a). Line 4 on page 30 says, ". . . duty of the public officer to make a proper disclosure . . ." pursuant to subsection 1, which is the duty to disclose a conflict. I wanted to clarify that. Is it already considered a legal duty or would section 20.5, subsection 4 make it substantively a duty? Would you already consider the fact that it is in law? Does that make it a duty?

Kevin Powers:
It is already a duty in law under subsection 1. There is a two-step process. First, there is a duty to disclose any of those potentially conflicting interests. That is under section 20.5, subsection 1. Subsections 2 through 4 describe when there is a duty to abstain. There is an existing duty to disclose. The change on page 30 is simply condensing the language, and not listing all of the interests that are set forth in subsection 1. It refers back to subsection 1 to make it more readable.

Assemblyman Ohrenschall:
My question has to do with the section of the bill that deals with anonymous complaints and how it proposes to change the existing law?

Yvonne Nevarez-Goodson:
I will provide a little context. As Assemblyman Ohrenschall is familiar with, last session when we passed Assembly Bill 60 of the 78th Session, the Commission made an effort to determine whether the Legislature had an appetite for allowing anonymous complaints to be filed with the Ethics Commission. The feedback at the time was that there was a real whistleblower issue. There was a fear of retribution and retaliation by public employees or other people within the same agencies who might have had a concern about bringing forward an ethics issue because of their involvement in the process.

The compromise that was reached in 2015 was that the Commission would not allow outright anonymous complaints, but it would keep the name of a person who filed an ethics complaint confidential if they worked in the same governmental agency as the person against whom they were complaining. This bill clarifies that if and when the Commission is proceeding to a hearing in the case, and it has to turn over information about the case, the Commission does not have to turn over the individual's name as the requestor. However, the Commission would turn over their name as a potential witness if, in fact, they were deemed to be a witness.

The existing law provides that the Executive Director would not be able to go forward with a full hearing if the requestor was a witness and the Executive Director did not turn over their name. It is a due process ability to cross-examine a witness that is going to be presented. The Commission's only hope was to clarify the fact that if it were going to utilize that person as a witness in a proceeding before the Ethics Commission, it would turn over their name as a witness to be cross-examined by the subject. The Commission would not have to turn over the fact that they were the original requestor of the complaint.

Assemblyman Ohrenschall:
The anonymous complaints would still be limited to that whistleblower-type situation wherein someone might work at an agency and there is a bona fide fear of retribution. We would not be expanding it to someone who does not know or work with the alleged person they are complaining about. That area changes the mechanics of it in terms of if they are a witness.

Yvonne Nevarez-Goodson:
That is correct. That is existing law. This does not expand the scope of anonymous complaints to any other individuals. The only other thing that is existing law that protects the identity of the requestor is if there is a fear of physical threat or harm. As a practical matter, if someone feared physical harm to themselves or their property, they could keep their name confidential. The Commission has not seen that in practice, but it exists in the law. This bill does not do anything to change that. It is to clarify that when the Commission turns over the name of a requestor, it would only be turning over their name as a witness. It does not otherwise expand the scope of anonymity with regards to an ethics complaint.

Assemblyman Daly:
The last bit of discussion caused me to ask this question. I am one of the five people who turn in this disclosure form. Let us say that we interact during the course of the year with the Nevada State Contractors Board. We represent a member if there is a complaint. Right now, I turn in my form. I have disclosed my thing. Now I have to do my analysis on whether any piece of legislation that might involve the Contractors Board is going to affect me or anyone else any more or less than someone else. In this scenario, I am not doing that disclosure anymore. Every time there is a bill that comes up, I have to say I represented someone from the Contractors Board. I can sit back and say that I do not have to tell the Commission anything else, because it is not going to affect me. Do I have to make that disclosure every time? Would that not be the case under this? It is a lot easier just to do the form.

Kevin Powers:
I want to clarify the record on one thing before I go forward, so it is consistent. An anonymous complaint is when the identity of a requestor is known by no one, including the Commission. That is still prohibited by this bill. The provisions that Assemblyman Ohrenschall and the Executive Director were talking about were confidential requestors. The identity of the requestor is known by the Commission; it is not released to anyone else. There are no anonymous complaints allowed. An anonymous complaint is when the identity of the requestor is known by no one.

I will go back to Assemblyman Daly's question. I am not going to answer the question in the context of the Legislature, because NRS 281A.420 does not apply to members of the Legislature. The duty in section 25 of the bill with regard to disclosing the nature of representation will not apply to the Legislature through NRS 281A.420. That is controlled by the rules of each house, Assembly Standing Rules, Rule No. 23.

When applying the question in the context of local government, my answer would be that Assemblyman Daly's description is correct. Anytime a matter comes before a local public officer that is related to their representation, the public officer will have to go through the process and determine if it is connected enough to disclose it on the record. However, the way the bill is structured, that disclosure would never result in abstention with regard to the new provision that is being added to the bill. It could result in abstention under one of the other existing provisions. It is a slightly nuanced distinction, but the bill adds an extra disclosure requirement. It does not add an extra abstention requirement.

Assemblyman Daly:
I was just using myself as an example. I know there are other people in nonlegislative positions who have similar issues. I just wanted that answered.

Kevin Powers:
As the Executive Director and the Commission counsel know, I am obsessive about this issue, and I will always clarify that statute does not apply to legislators.

Yvonne Nevarez-Goodson:
I wanted to respond to a couple of questions that came up. Assemblyman Daly had a question with regard to the advisory opinion process and whether it constituted a contested case. I want to refer to Commission counsel. She has some concerns about calling it a contested case, at least under the definition in NRS Chapter 233B. I believe it is because a contested case, by definition, includes a requirement that there was a hearing. In the Commission's world, a hearing is not always required in an advisory context.

Tracy L. Chase, Commission Counsel, Commission on Ethics:
The concern is under NRS 233B.032. It defines "contested case" in a very particular manner. There is a whole body of case law that is in that interpretation of a contested case. My concern is that the advisory opinion process before the Commission that the Legislature now deems appropriate to send to judicial review may not fit squarely within the contested case definition. That being said, I would be happy to work with legal counsel, and we can determine what avenues are available. I believe that the Legislature can determine whether a matter should go under judicial review by separate statute, as it has already done in the Ethics in Government Law. I do not think that those matters would discontinue going under judicial review as they do today.

I just wanted to place that concern on the record. The first party advisory process does not have attributes of calling witnesses, cross-examination, or any of the attributes that would be involved in a contested case. It is the public officer or employee coming to the Commission to ask advice about what they should do under their specific circumstances. They are in control of the facts and circumstances presented to the Commission. It is not an adjudicatory process that would traditionally be a contested case. Nonetheless, those matters can go up on judicial review. They have since the statute has been in place. I have a concern with it neatly fitting into the definition set forth in NRS 233B.032.

Kevin Powers:
I do not necessarily disagree with the Commission counsel. However, section 3.3 is a deeming statute. It is deeming something to be something, even if it does not fall within that definition. That is why if you added the term, "It is a final decision in a contested case," that would become a contested case, regardless of if it met the definition in the APA. However, we choose to use the language to deem it subject to judicial review. It will be that, even if it does not meet the definition of a contested case.

Assemblyman Daly:
I appreciate the deeming part. If there is a contested case, there is a final decision. What I am trying to get away from is that body making the decision in a normal deal wherein the hearing is held. They have made that based on their evidence, and they have certain discretion. The court is not allowed to overturn or supplant their determination; whereas, the contested case in NRS Chapter 233B is when a public officer or employee is aggrieved. They do not have to come up with all of these other, "You made an error in law," and all the other things they would have to then put in their brief when it is put through judicial review. The public officer and employee will get their judicial review. They review the facts and make a decision. I was trying to have that not be taken away in this advisory opinion situation.

Kevin Powers:
I think some quick drafting on the fly will remedy everyones' concerns. In section 3.3, subsection 2, paragraph (b), it could say, "The advisory opinion is a final decision that is subject to judicial review pursuant to NRS 233B.130, even if it would not otherwise be considered a contested case under that section." That would make it clear that it is deemed to be a contested case. A public officer or employee could go through the normal judicial review process, and their rights would not be denied, even though they do not have that traditional adjudicatory setting.

Yvonne Nevarez-Goodson:
For purposes of the record, I would like to clarify that it would only be with respect to an advisory opinion on present or future conduct, not with respect to past conduct as is existing in the law.

Kevin Powers:
It would be the same right of judicial review that already exists under NRS 281A.440 that is being redrafted in section 3.3. The other idea is to convey what Assemblyman Daly wants to convey. There is no impediment to this judicial review since it is not a traditional contested case. A public officer or employee is still entitled to judicial review for the advisory opinion.

Yvonne Nevarez-Goodson:
I concur with the Committee counsel's remarks about the anonymity. I use the term "anonymity" a little too casually. He is correct. It is not fully anonymous; it is that the requestor's name remains confidential. The Commission would know who the requestor is and have the ability to interact with the requestor. I apologize for that. That is the last clarification.

Chairwoman Diaz:
I do not see any further questions.

Yvonne Nevarez-Goodson:
I wanted to offer my availability to answer questions off the record from members of the Committee. I know it is somewhat lengthy, and I did not have an opportunity to reach each of the members prior to the bill being scheduled for the Committee hearing.

Chairwoman Diaz:
Is there any testimony in support? [There was none.] Is there any testimony in opposition? [There was none.] We will go to neutral. [There was none.] I will now close the hearing on S.B. 84 (R1). I will open it up for public comment. Seeing no public comment, I want to tell the Committee members that we will start Committee earlier on Thursday. We are looking to start at 12:45 to hear about four to five bills. This meeting is adjourned [at 4:33 p.m.].

RESPECTFULLY SUBMITTED:

_____
Julianne King
Committee Secretary

APPROVED BY:

_____
Assemblywoman Olivia Diaz, Chairwoman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is written testimony submitted by Wes Henderson, Executive Director, Nevada League of Cities and Municipalities in support of Senate Joint Resolution 5.

Exhibit D is a copy of an email dated May 2, 2017, from Ryan Tipton to the members of the Assembly Committee on Legislative Operations and Elections in support of Senate Joint Resolution 4 (1st Reprint).

Exhibit E is a letter dated May 1, 2017, from Jonah Minkoff-Zern, Director, Public Citizen's Democracy Is for People Campaign to the Assembled Legislature, in support of Senate Joint Resolution 4 (1st Reprint).

Exhibit F is a document titled "Nevada Commission on Ethics Senate Bill 84 (R1) (Advisory/Complaint Process – NRS 281A.440)," presented and submitted by Yvonne M. Nevarez-Goodson, Executive Director, Commission on Ethics.