emphasis Dr. Paglini and the State placed on Dr. Paglini's work conducting ''risk assessments'' on known sex offenders. Proceeding act by act through hypothetical questions concerning the flirtations that preceded the Las Vegas assault portrayed Perez as a sex offender, on a par with the 1,000 other convicted sex offenders of risk to the community Dr. Paglini had evaluated. But Perez was not on trial for grooming over a three to four month period in California. The charges he faced involved a single incident in a Las Vegas hotel room that occurred in the space of time it took Perez's wife, the victim's aunt, to take a shower in the room's adjacent bathroom. Lastly, Perez was charged with serious sexual offenses against a minor, for which he has been sentenced to multiple life sentences, with the possibility of parole after 35 years. *See* NRS 200.366(3)(c); NRS 201.230(2).

Accordingly, I would reverse the judgment of conviction and remand for a new trial.

IN THE MATTER OF THE ESTATE OF ARLAN EDWARD BETHUREM, DECEASED.

INES CARAVEO, APPELLANT, *v.* ANITA HERRERA PEREZ; SANDRA KURTZ; AND VICKI S. PRESTON, RESPONDENTS.

No. 57749

November 27, 2013 313 P.3d 237

Appeal from a district court order invalidating a will and directing distribution of property according to a former will. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Special administrator of decedent's estate petitioned to have estate set aside without administration according to decedent's will, and decedent's stepdaughters opposed the petition, arguing will beneficiary had unduly influenced decedent. The district court affirmed probate commissioner's recommendation to invalidate will, and beneficiary appealed. The supreme court, PARRAGUIRRE, J., held that: (1) in a matter of first impression, stepdaughters, as will contestants, were required to establish the existence of undue influence by will beneficiary by a preponderance of the evidence; and (2) the district court's order confirming probate commissioner's recommendation to invalidate decedent's will based on the undue influence of will beneficiary was not supported by substantial evidence.

Reversed and remanded.

Hawkins Folsom & Muir and *Gordon R. Muir*, Reno, for Appellant.

Holland & Hart LLP and *Richard L. Elmore, Tamara Reid*, and *J. Robert Smith*, Reno, for Respondents Anita Herrera Perez and Sandra Kurtz.

John F. Kirsch, Reno, for Respondent Vicki S. Preston.

J. Douglas Clark, Reno, for Amicus Curiae State Bar of Nevada, Probate and Trust Law Section.

1. WILLS.
   In order to establish undue influence it must appear, either directly or by justifiable inference from the facts proved, that the influence destroyed the free agency of the testator.
2. WILLS.
   The influence that may arise from a family relationship is only unlawful if it overbears the will of the testator; moreover, the fact that a beneficiary merely possesses or is motivated to exercise influence is insufficient to establish undue influence.
3. WILLS.
   A will cannot be invalidated simply because it does not conform to ideas of propriety.
4. WILLS.
   Once a presumption of undue influence of a testator is raised, a will beneficiary may rebut such a presumption by clear and convincing evidence; undue influence may also be shown in the absence of a presumption.
5. WILLS.
   Testator's stepdaughters, as will contestants, were required to establish the existence of undue influence by will beneficiary by a preponderance of the evidence, and in order to meet such a standard, were required to show that the disposition of property under the will was more likely than not the result of undue influence.
6. WILLS.
   The burden of proving undue influence in a will contest is on the party contesting the will's validity.
7. WILLS.
   In the absence of a presumption, a will contestant must establish the existence of undue influence by a preponderance of the evidence; in order to meet this standard, the contestant must show that the disposition of property under the will was more likely than not the result of undue influence.
8. WILLS.
   The district court's order confirming probate commissioner's recommendation to invalidate decedent's will based on the undue influence of will beneficiary was not supported by substantial evidence; even though will beneficiary may have influenced decedent through frequent telephone

conversations, any such influence was not by itself unlawful, and there was no indication that any influence beneficiary may have exercised prevented decedent from making his own decisions regarding his will.

9. APPEAL AND ERROR.
The supreme court will not disturb a district court's findings of fact if they are supported by substantial evidence and reviews a district court's legal determinations de novo.

10. EVIDENCE.
''Substantial evidence'' is evidence that a reasonable mind might accept as adequate to support a conclusion.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, the beneficiary of a will challenges a district court order invalidating the will as the product of the beneficiary's undue influence. A rebuttable presumption of undue influence is raised if the testator and the beneficiary shared a fiduciary relationship, but undue influence may also be proved without raising this presumption. As a matter of first impression in Nevada, we hold that in the absence of a presumption, a will contestant bears the burden of proving undue influence by a preponderance of the evidence. Because we conclude that the respondent-will contestants failed to meet this burden of proof, we reverse the district court's order invalidating the will as the product of undue influence.

FACTS AND PROCEDURAL HISTORY

Arlan Bethurem died in December 2008. The special administrator of his estate petitioned to have the estate set aside without administration according to Arlan's[1] 2007 will. Arlan's stepdaughters opposed the petition, arguing that a beneficiary of the 2007 will had unduly influenced Arlan. The testimony before the probate commissioner revealed the following facts.

Arlan married his wife Bertha in 1971, and the couple resided in Reno. Bertha had three children from a prior marriage, respondents Sandra Kurtz and Anita Herrera Perez, and a son who is not a party to this action. Bertha and Arlan raised the three children together. In 2004, Arlan executed a will bequeathing his estate to Bertha. In the event that Bertha did not survive him, Arlan's will divided his estate equally between his three stepchildren and a granddaughter.

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[1]For clarity and to be consistent with the parties' briefs, we use individuals' first names throughout this opinion.

In late 2005, Bertha became ill and Arlan sought assistance with her care. Bertha's sister, appellant Ines Caraveo, traveled to Reno from her home in Texas to help care for Bertha. Upon arrival in Reno, Ines asked Sandra and Anita to assist with Bertha's care, either physically or financially. Neither was able to do so. Ines became angry with Sandra and Anita for failing to care for Bertha. Sandra and Anita both testified that Bertha said in telephone conversations that she did not like how Ines was speaking to Arlan about their inability to provide care.

Bertha died in May 2006. Ines accompanied Arlan to make funeral arrangements with a priest. The priest testified that Arlan was grief-stricken but lucid at the time of this meeting, and that Arlan expressed disappointment that Sandra and Anita had not been more supportive during Bertha's illness. Sandra and Anita attended Bertha's funeral, where they felt ostracized by family members and other funeral attendants. After Bertha's funeral, Ines returned to Texas but stayed in contact with Arlan through daily telephone conversations. Arlan did not speak to Sandra for several months or to Anita for more than a year. Although Arlan was devastated by the loss of his wife, he continued to drive, go to work, and otherwise provide for his own daily needs.

In April 2007, Arlan contacted his friend and accountant Vicki Preston to prepare a new will. Preston testified that Arlan came to her office alone and appeared in good mental condition. Preston suggested that Arlan speak with an attorney, but he declined to do so and instead provided Preston with handwritten changes to a prior will. Preston testified that these changes were made in Arlan's handwriting. These changes named Ines and Arlan's sister as beneficiaries and expressly disinherited his stepchildren. Preston further testified that she did not speak to Ines about the will and prepared the will according to Arlan's written instructions. After Preston prepared the will, Arlan picked up Preston and Preston's friend in his truck, and they drove to a bank to execute the will before a notary. Preston and her friend served as witnesses to the will. Both witnesses testified that Arlan expressed disappointment that Sandra and Anita had not helped care for Bertha and that he said he wanted to change his will because of their treatment of Bertha while she was ill. Arlan also conveyed title of his home in Reno to himself and Ines as joint tenants with right of survivorship and added Ines to some of his bank accounts.

A month later, Sandra visited Arlan. She later testified that he was very depressed during her visit. After Sandra's departure, Arlan attempted suicide. Sandra then invited Arlan to stay with her in Oregon, and he did so for over two weeks. During his time in Oregon, Arlan called Ines from Sandra's home nearly every day. After spending approximately two weeks in Oregon, Arlan returned to Reno for work.

In October 2008, Arlan lost his job. He decided to sell his home and move to Oregon to be with Sandra. Ines did not want her name removed from the property's title but was willing to sign any documents related to the sale. Around the same time, Arlan expressed regret to Sandra about changing his will. Arlan told Sandra that he changed the will because he was angry with her. Sandra testified that Arlan had a history of changing his will when he was angry with family members. Arlan named Sandra and Ines as beneficiaries to a savings account of approximately $84,000.

About two months later, Arlan committed suicide. Arlan's home was in escrow at the time of his death, and after closing, Ines received the sale proceeds. Ines and Sandra received equal shares of the $84,000 savings account. Following Arlan's death, Preston was appointed special administrator and petitioned to set aside Arlan's estate without administration to Ines and Arlan's sister as provided in the 2007 will. Sandra and Anita opposed the petition, arguing that Ines had unduly influenced Arlan.

After hearing the testimony summarized above, the probate commissioner found that (1) Preston confirmed Ines made statements to Arlan about Sandra and Anita failing to care for Bertha, (2) Ines ''enlisted'' Preston to prepare the 2007 will, (3) ''Ines mounted a campaign to turn Bertha and Arlan against Bertha's daughters . . . by telling Arlan that the children were not doing enough to help their gravely ill mother,'' and (4) ''Ines took every opportunity to remind Arlan and Bertha that Bertha's children were unwilling to help.'' The probate commissioner concluded that Ines had unduly influenced Arlan by fostering ill will between him and his stepdaughters and the 2007 will was the product of this undue influence. The probate commissioner recommended that the 2004 will be admitted to probate.

On review, the district court found that no evidence supported the probate commissioner's finding that Preston confirmed Ines made statements to Arlan about Sandra and Anita. The district court also concluded that the probate commissioner's finding that Ines enlisted Preston to prepare Arlan's 2007 will was clearly erroneous. However, the district court found these errors harmless. The district court affirmed the probate commissioner's recommendation, explaining that the evidence supported the commissioner's findings that Ines mounted a campaign to turn Arlan and Bertha against Sandra and Anita by telling Arlan that his stepdaughters were unwilling to help care for Bertha. Ines now appeals.

DISCUSSION

Below, we describe the current status of Nevada's undue influence law, discuss the appropriate burden and quantum of proof in a will contest on the grounds of undue influence, and address

whether the evidence supports a finding of undue influence in this case.[2]

Undue influence law in Nevada

[Headnotes 1-3]

In order to establish undue influence under Nevada law, ''it must appear, either directly or by justifiable inference from the facts proved, that the influence . . . destroy[ed] the free agency of the testator.'' *In re Estate of Hegarty*, 46 Nev. 321, 326, 212 P. 1040, 1042 (1923). The influence that may arise from a family relationship is only unlawful if it overbears the will of the testator. *Id*. at 328, 212 P. at 1042. Moreover, the fact a beneficiary merely possesses or is motivated to exercise influence is insufficient to establish undue influence. *Id*. at 326, 212 P. at 1042. Finally, a will cannot be invalidated simply ''because it does not conform to ideas of propriety.'' *Id*. at 327, 212 P. at 1042.

[Headnote 4]

We have held that ''[a] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction.'' *In re Jane Tiffany Living Trust 2001*, 124 Nev. 74, 78, 177 P.3d 1060, 1062 (2008) (addressing undue influence in the context of an attorney receiving an inter vivos transfer from a client). Once raised, a beneficiary may rebut such a presumption by clear and convincing evidence. *Id*. at 79, 177 P.3d at 1063. Undue influence may also be shown in the absence of a presumption. *See generally In re Estate of Hegarty*, 46 Nev. at 327, 212 P. at 1042. However, we have not previously determined the appropriate burden and quantum of proof required to establish undue influence in the absence of a presumption. Because neither the probate commissioner nor the district court found that a presumption of undue influence was raised in this case, we now discuss the burden and quantum of proof necessary to establish undue influence in the absence of a presumption.

Burden and quantum of proof for establishing undue influence

[Headnotes 5, 6]

It is well-recognized that the burden of proving undue influence in a will contest is on the party contesting the will's validity. Restatement (Third) of Property: Wills & Donative Transfers § 8.3

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[2]In addition to these issues, Sandra and Anita argue we lack jurisdiction over this appeal because the district court's order only invalidated Arlan's 2007 will, rather than setting aside an estate less than $100,000 or distributing property. *See* NRS 155.190(1)(c), (*l*). However, the commissioner recommended admitting the 2004 will to probate, and the district court affirmed the commissioner's recommendation. Therefore, we have jurisdiction pursuant to NRS 155.190(1)(b).

cmt. e (2003); 79 Am. Jur. 2d Wills § 392 (2013); *Rice v. Clark*, 47 P.3d 300, 304 (Cal. 2002) (''[A] person challenging the testamentary instrument ordinarily bears the burden of proving undue influence.''); *see also In re Estate of Hegarty*, 46 Nev. at 328, 212 P. at 1042 (explaining that ''the evidence in this case fails to establish undue influence,'' suggesting the will contestant bears the burden of proof).

As to the necessary quantum of proof, Ines urges us to require a will contestant to establish undue influence by clear and convincing evidence because ''undue influence . . . is a species of fraud.'' *In re Estate of Peterson*, 77 Nev. 87, 111, 360 P.2d 259, 271 (1961) (quoting with approval a jury instruction given by the district court); *see also Heck v. Archer*, 927 P.2d 495, 499 (Kan. Ct. App. 1996) (holding that ''[u]ndue influence is a species of fraud'' and that ''[f]raud is never presumed but must be shown by clear, satisfactory, and convincing evidence,'' even in regard to testamentary transfers).

Because this is an issue of first impression, we examine other jurisdictions' treatment of this issue. It appears that the majority of other jurisdictions require undue influence be proved only by a preponderance of the evidence. *In re Estate of Todd*, 585 N.W.2d 273, 276 (Iowa 1998) (recognizing that proving undue influence by a preponderance of the evidence ''appears to be the majority rule'' and is the rule in Iowa); *see also, e.g.*, *In re Estate of Waters*, 629 P.2d 470, 472 (Wyo. 1981) (''The burden of proof on the issue of undue influence, which burden most courts say rests upon the contestant, is carried, in general, by a preponderance of the evidence.'' (internal quotation marks omitted)); *In re Estate of Garrett*, 100 S.W.3d 72, 75 (Ark. Ct. App. 2003); *In re Estate of Wiltfong*, 148 P.3d 465, 467 (Colo. App. 2006); *In re Estate of West*, 522 A.2d 1256, 1264 (Del. 1987); *Howe v. Palmer*, 956 N.E.2d 249, 254 (Mass. App. Ct. 2011); *In re Will of Elmore*, 346 N.Y.S.2d 182, 185 (App. Div. 1973); *Caranci v. Howard*, 708 A.2d 1321, 1324 (R.I. 1998); *In re Estate of Duebendorfer*, 721 N.W.2d 438, 446 (S.D. 2006); *In re Estate of Elam*, 738 S.W.2d 169, 175 (Tenn. 1987); *Cobb v. Justice*, 954 S.W.2d 162, 165 (Tex. App. 1997).

In addition, this court has previously alluded to a preponderance of the evidence standard for proving undue influence in cases involving testamentary transfers. *See, e.g.*, *In re Estate of Peterson*, 77 Nev. at 111, 360 P.2d at 271 (approving of a jury instruction stating the presumption of undue influence could be rebutted by a preponderance of the evidence); *In re Estate of Abel*, 30 Nev. 93, 103, 93 P. 227, 230 (1908) (explaining a finding of undue influence will not be overturned if supported by substantial but conflicting evidence). We have also recognized the importance of protecting an '' 'alleged donor [who] is lacking in such mental vigor

as to enable him to protect himself against imposition even though his mental weakness is not such as to justify his being regarded as totally incapacitated.' '' *Ross v. Giacomo*, 97 Nev. 550, 556, 635 P.2d 298, 302 (1981) (quoting with approval a jury instruction used by the district court), *abrogated on other grounds by Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 524, 134 P.3d 726, 731 (2006).

[Headnote 7]

We now hold that in the absence of a presumption, a will contestant must establish the existence of undue influence by a preponderance of the evidence. In order to meet this standard, the contestant must show that the disposition of property under the will was ''more likely than not'' the result of undue influence. *See Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 507 (Cal. 2001) (discussing the preponderance standard generally). This approach most closely aligns with our prior decisions alluding to but not expressly stating such a quantum of proof. *See In re Estate of Peterson*, 77 Nev. at 111, 360 P.2d at 271; *In re Estate of Abel*, 30 Nev. at 103, 93 P. at 230. This approach also provides the best protections to vulnerable alleged donors by making it easier for will contestants to establish undue influence. *See Ross*, 97 Nev. at 556, 635 P.2d at 302; *see also Caranci*, 708 A.2d at 1324 (''Because the perpetrator of such covert coercion generally applies the forbidden pressure in secret, one seeking to set aside such a will is often unable to produce direct evidence of the undue influence to the factfinder but rather must rely on circumstantial evidence.'').

Having determined that the preponderance of the evidence is the quantum of proof necessary to establish undue influence in the absence of a presumption, we now address whether substantial evidence supported the district court's finding that Sandra and Anita met this standard.

Substantial evidence did not support the district court's order

[Headnotes 8-10]

This court will not disturb a district court's findings of fact if they are supported by substantial evidence, and we review a district court's legal determinations de novo. *Clark Cnty. v. Sun State Props., Ltd.*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). ''Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.'' *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotation marks omitted).

Here, the record indicates that before Bertha's death, Ines made statements to Arlan about Sandra and Anita failing to care for Bertha, and these statements upset Bertha. While Ines and Arlan had almost daily contact by telephone after Bertha's death, Sandra

testified that Arlan made the calls at least some of the time, and there was no testimony regarding the contents of these telephone conversations. Neither the probate commissioner nor the district court indicated what evidence supported the inference that Ines ''mounted a campaign'' or ''took every opportunity to remind'' Arlan that Sandra and Anita had not helped care for Bertha, and we find none in the record.

Nevertheless, the district court affirmed the probate commissioner's recommendation, concluding there was sufficient evidence that the probate commissioner could reasonably conclude that Arlan's 2007 will was the product of undue influence exercised by Ines. The district court did not explain how the facts actually supported by the record led the court to conclude Arlan's free agency had been destroyed, despite correctly stating such a requirement for establishing undue influence. *See In re Estate of Hegarty*, 46 Nev. 321, 326, 212 P. 1040, 1042 (1923).

While Ines may have influenced Arlan through frequent telephone conversations, influence resulting merely from Ines and Arlan's family relationship is not by itself unlawful, and there is no indication in the record that any influence Ines may have exercised prevented Arlan from making his own decisions regarding his will. *See id.* at 328, 212 P. at 1042. Moreover, the fact that Ines may have possessed influence does not amount to undue influence unless her influence destroyed Arlan's free agency. *See id.* at 326, 212 P. at 1042.

The record shows Ines was angry with Sandra and Anita for failing to care for Bertha, she expressed her anger before Bertha's death, Arlan shared that sentiment, he changed his will in response, and he later regretted doing so. From these facts, no justifiable inference could be drawn that Ines destroyed Arlan's free agency as to the will. *See id.* Arlan's decision to disinherit his stepchildren may ''not conform to ideas of propriety,'' but this does not justify invalidating his will. *Id.* at 327, 212 P. at 1042.

Given ''the long-standing objective of this court to give effect to a testator's intentions to the greatest extent possible,'' *In re Estate of Melton*, 128 Nev. 34, 51, 272 P.3d 668, 679 (2012), and the complete lack of evidence indicating Arlan's decision to change his will was anything but his own, we conclude that the district court's order affirming the probate commissioner's recommendation is not supported by substantial evidence. Therefore, we reverse the district court's order and remand this matter to the district court. On remand, the district court shall order distribution of Arlan's estate according to the 2007 will.

PICKERING, C.J., and GIBBONS, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

ASPEN FINANCIAL SERVICES, INC., A NEVADA CORPORATION; ASPEN FINANCIAL SERVICES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JEFFREY B. GUINN, AN INDIVIDUAL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ALLAN R. EARL, DISTRICT JUDGE, RESPONDENTS, AND DANA GENTRY, AN INDIVIDUAL, REAL PARTY IN INTEREST.

No. 59894

November 27, 2013 313 P.3d 875

Petition for a writ of mandamus or prohibition challenging a district court order quashing a subpoena.

Investors brought action against mortgage brokerage business, loan servicing business, and majority owner of businesses alleging breach of contract and breach of fiduciary duties. Businesses and owner served subpoena upon nonparty television news reporter seeking production of certain information regarding reporter's personal relationship with investors, and investors filed motion to quash subpoena on the ground that information sought was protected by news shield statute. The district court granted motion to quash. Businesses and owner filed original petition for writ of mandamus or prohibition. The supreme court, DOUGLAS, J., held that: (1) a request for protection under news shield statute may be raised by a party's attorney in a motion to quash a subpoena, without the need to file a supporting affidavit, overruling *Las Vegas Sun, Inc. v. Eighth Judicial District Court*, 104 Nev. 508, 761 P.2d 849 (1988); and (2) statutory reporter's shield privilege applied to information sought by businesses and owner from nonparty local television news reporter regarding the nature of her relationship and contact with investors.

Petition denied.

Bailey Kennedy and *John R. Bailey, Joseph A. Liebman*, and *Brandon P. Kemble*, Las Vegas, for Petitioners.

Campbell & Williams and *Donald J. Campbell*, Las Vegas, for Real Party in Interest.

McLetchie Law and *Margaret A. McLetchie*, Las Vegas, for Amici Curiae.

1. MANDAMUS.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.

2. PROHIBITION.
   A writ of prohibition may be used to arrest the proceedings of a district court when it has exceeded its jurisdiction.
3. MANDAMUS; PROHIBITION.
   Mandamus and prohibition are extraordinary remedies, issued at the discretion of the supreme court, that are unavailable when a petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170, 34.330.
4. MANDAMUS; PROHIBITION.
   Extraordinary relief in the form of a writ of mandamus or prohibition is generally unavailable to review discovery orders because such orders may be challenged in an appeal from an adverse final judgment.
5. COURTS.
   Consideration of a petition for extraordinary relief in the form of a writ of mandamus or prohibition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction, such as when the writ petition provides the supreme court a unique opportunity to define the precise parameters of a statutory privilege that the court has not previously interpreted.
6. MANDAMUS; PROHIBITION.
   In considering a petition for a writ of mandamus or prohibition, the supreme court gives deference to a district court's factual determinations but reviews questions of law de novo.
7. APPEAL AND ERROR.
   Construction of a statute is a question of law subject to de novo review.
8. STATUTES.
   If a statute is clear and unambiguous, the supreme court will apply its plain meaning.
9. CONSTITUTIONAL LAW; PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   News shield statute confers upon journalists an absolute privilege from disclosure of their sources and information in any proceeding in order to enhance the news-gathering process and to foster the free flow of information encouraged by the First Amendment to the United States Constitution. U.S. CONST. amend. 1; NRS 49.275.
10. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
    A request for protection under news shield statute may be raised by a party's attorney in a motion to quash a subpoena, without the need to file a supporting affidavit, so long as the motion demonstrates that the information sought by the subpoena is facially protected by the news shield statute, overruling *Las Vegas Sun, Inc. v. Eighth Judicial District Court*, 104 Nev. 508, 761 P.2d 849 (1988). NRS 49.275.
11. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
    Statutory reporter's shield privilege applied to information sought by defendants from nonparty local television news reporter regarding the nature of her relationship and contact with plaintiffs, such that reporter was not required to produce information sought in defendants' subpoena in plaintiff's breach of contract and breach of fiduciary duty action against defendants; defendants alleged that plaintiffs improperly influenced reporter to produce news stories favorable to them and unfavorable to defendants, and disclosure of information sought by defendants would have required reporter to disclose information gathered in the course of devel-

oping her news stories and her motivations for producing such stories. NRS 49.275.

12. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.

News shield statute broadly protects any information that is gathered in the course of preparing a news story, as well as the sources of such information. NRS 49.275.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we address whether a district court properly quashed a subpoena based on Nevada's news shield statute, NRS 49.275, which protects journalists from being required to reveal information gathered in their professional capacities in the course of developing news stories. We conclude that a request for protection under NRS 49.275 may be raised, as it was here, by a reporter's attorney in a motion to quash a subpoena, without the need to file a supporting affidavit, so long as the motion demonstrates that the information sought by the subpoena is facially protected by the news shield statute. Here, the privilege was properly asserted, and petitioners have failed to identify any circumstances to overcome its application. Accordingly, we deny the petition for extraordinary writ relief.

FACTS AND PROCEDURAL HISTORY

Petitioners Aspen Financial Services, Inc., and Aspen Financial Services, LLC (collectively, the Aspen entities), are Nevada businesses specializing in mortgage brokerage and loan servicing, and petitioner Jeffrey Guinn is the majority owner of the Aspen entities.[2] Aspen was sued in the district court by investors alleging that Aspen had breached various statutory, contractual, and fiduciary duties.[3] Aspen denied the allegations and filed numerous counterclaims, including claims of defamation, disparagement of business, and breach of contract. As relevant here, Aspen claimed that Dana Gentry, a local television reporter who was not a party to the action below, but who is the real party in interest to the writ petition, helped the investors investigate and prepare their lawsuit in order to manufacture news stories intended to embarrass Aspen. Aspen also alleged that Gentry received personal favors from the in-

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[1]THE HONORABLE KRISTINA PICKERING, Chief Justice, voluntarily recused herself from participation in the decision of this matter.

[2]For ease of reference, the Aspen entities and Guinn will be collectively referred to throughout this opinion as Aspen.

[3]The investor plaintiffs are not a party to this writ petition.

vestors and their associates in connection with these news stories. During discovery in the investor litigation, Aspen served a subpoena on Gentry requesting information relating to alleged gifts provided to Gentry by the investors, work performed on Gentry's home by the investors, and the circumstances leading to Gentry's news station employing the son of two of the investors.

After being served with the subpoena, Gentry filed a motion in the district court to quash it. Gentry argued that the information sought was protected by Nevada's news shield statute, NRS 49.275, which protects journalists from being required to reveal certain information gathered in the course of preparing news stories. Aspen opposed the motion by making two arguments. First, as a threshold matter, Aspen argued that the district court erred in granting Gentry's motion to quash because Gentry failed to support her motion with an affidavit demonstrating the applicability of the news shield statute to the information sought. Second, Aspen asserted that Nevada's news shield statute only applies to a reporter acting in his or her professional capacity and that the subpoena did not request any information gathered by Gentry in preparation for a news story, as Gentry had never run a story regarding her personal relationship with the investors. In referring to the subpoena, however, the opposition indicated that Aspen believed that the gifts referenced in the subpoena were provided to Gentry in exchange for favorable news coverage. Gentry filed a reply to the opposition, contending that the information was within the scope of the statute.

The district court granted the motion to quash, concluding that the information at issue fell within the protection of the news shield statute. The court noted, however, that Aspen may be entitled to some of the information if it could prove in a private evidentiary hearing that such information was ''absolutely necessary'' to Aspen's case. The court further indicated that it was concerned with the potential of the subpoena to harm Gentry's credibility. Aspen now requests that this court issue a writ of mandamus or prohibition directing the district court to vacate its order quashing the subpoena.

DISCUSSION

[Headnotes 1-3]

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may be used to arrest the proceedings of a district court when it has exceeded its jurisdiction. *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). Both mandamus and prohibition are

extraordinary remedies that are unavailable when a petitioner has a ''plain, speedy, and adequate remedy in the ordinary course of law,'' and both are issued at the discretion of this court. *Id.*; *see also* NRS 34.170; NRS 34.330.

[Headnotes 4, 5]

Extraordinary relief is generally unavailable to review discovery orders because such orders may be challenged in an appeal from an adverse final judgment. *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000). But, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if ''an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction,'' such as when the petition provides ''a unique opportunity to define the precise parameters'' of a statutory privilege that this court has not previously interpreted. *Id.* (internal quotations omitted). Here, the challenged order focuses on the parameters of Nevada's news shield statute, raising issues that have not yet been addressed by this court. Accordingly, we elect to exercise our discretion to entertain the merits of this petition.

Gentry met her burden of asserting the news shield privilege

[Headnotes 6-8]

In considering a writ petition, this court gives deference to a district court's factual determinations but reviews questions of law de novo. *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010). Construction of a statute is a question of law subject to our de novo review. *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). If a statute is clear and unambiguous, we will apply its plain meaning. *Id.* at 1104, 146 P.3d at 804-05.

Nevada's news shield privilege

[Headnote 9]

The Nevada news shield statute states in pertinent part that

> [n]o reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:
>
> 1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.

NRS 49.275. As this court has previously explained, the statute ''confers upon journalists an absolute privilege from disclosure of their sources and information in any proceeding'' in order ''to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution.''[4] *Diaz*, 116 Nev. at 94, 99, 993 P.2d at 54, 57.

No affidavit requirement

As a threshold matter, Aspen argues that the district court abused its discretion in granting Gentry's motion to quash because Gentry failed to support her motion with an affidavit demonstrating that the news shield statute applied to the information sought by the subpoena. In support of its argument, Aspen primarily relies on *Las Vegas Sun, Inc. v. Eighth Judicial District Court*, 104 Nev. 508, 761 P.2d 849 (1988), *overruled on other grounds by Diaz*, 116 Nev. at 100-01, 993 P.2d at 58, in which the court noted its concern that no party claiming the privilege in that case had sworn to the facts supporting the claim in an affidavit. Stating that the privilege of nondisclosure should not be upheld in the absence of ''compliance with the statutory requisites,'' the *Las Vegas Sun* court cautioned the parties that ''[a]ny further claims [of privilege under NRS 49.275] should be supported by sworn affidavits, identifying the news gatherer and attesting that the information was obtained or produced during the news gathering process in that person's professional capacity.'' *Id.* at 515, 761 P.2d at 854.

[Headnote 10]

Regardless of the language in *Las Vegas Sun*, nothing in the text of NRS 49.275 requires a party claiming the privilege to file an affidavit in support of a request for protection under the statute. *See Kay*, 122 Nev. at 1104, 146 P.3d at 804-05 (explaining that when the language of a statute is clear, this court will not go beyond it). Nor does NRCP 45(c)(3)(A)(iii), which provides that a district court shall quash or modify a subpoena on motion if the subpoena ''requires disclosure of privileged or other protected matter,'' require an affidavit to support a claim of privilege. Thus, to the extent that *Las Vegas Sun* can be read as requiring a party to submit an affidavit in support of an assertion of the news shield statute, we overrule that case, and, instead, conclude that a request for protection under NRS 49.275 may be raised, as it was here, by a

[4]To the extent that the parties rely on cases from the federal courts of appeals in support of their respective positions, *see Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), we conclude that such cases do not apply to this analysis, as they relate to a qualified journalistic privilege developed under the federal common law, which is distinct from the state statutory privilege at issue here.

party's attorney in a motion to quash a subpoena, without the need to file a supporting affidavit, so long as the motion demonstrates that the information sought by the subpoena is facially protected by the news shield statute.

The requested information is covered by Nevada's news shield privilege

[Headnote 11]

Having determined that no affidavit was required, we now turn to whether the information sought was within the scope of the statute's protection. Aspen contends that the subpoena at issue did not seek information that was gathered in Gentry's professional capacity as a news reporter, and thus, that the information was not protected by NRS 49.275. We disagree.

[Headnote 12]

In order to determine what information falls under the news shield statute, we must look to the language of the statute itself. *See Kay*, 122 Nev. at 1104, 146 P.3d at 804-05 (explaining that when the language of a statute is clear, this court will not go beyond it); *see also Diaz*, 116 Nev. at 97, 993 P.2d at 56 (recognizing that the language of the news shield statute is plain and unambiguous). As noted above, the statute protects from disclosure ''any published or unpublished information obtained or prepared by [a reporter] in [his or her] professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by [the reporter].'' NRS 49.275. Thus, the statute broadly protects any information that is gathered in the course of preparing a news story, as well as the sources of such information. *See id.*

While Aspen asserts that it has only sought information relating to Gentry in her personal capacity, the record demonstrates that this is not accurate. In particular, Aspen's claims in the action below allege that the investors improperly influenced Gentry to produce news stories favorable to them and unfavorable to Aspen. Thus, it appears from the face of the subpoena that, when read in the context of Aspen's claims, Aspen has requested the information sought in order to affirm its suspicions about Gentry's motivation for producing those news stories. Indeed, Aspen's arguments in the opposition to the motion to quash and in its writ petition confirm that this is its reason for serving Gentry with the subpoena.[5] In other words, although Aspen claims that it is not seeking Gentry's sources because it already knows who those sources are, the cir-

[5]To the extent that this is not Aspen's purpose, Aspen has not explained how the information sought might be relevant or lead to relevant information regarding its claims or defenses in the action below.

cumstances of this case demonstrate that Aspen actually is effectively seeking to confirm the identities of Gentry's sources. As the identity of a reporter's source is information that is protected under the plain language of the news shield statute, *see* NRS 49.275 (protecting from disclosure ''the source of any information procured or obtained by'' a reporter), we conclude that the information sought was facially protected under the news shield statute.

Aspen failed to overcome the news shield privilege

Our conclusion that the information was facially protected does not necessarily end our inquiry, as we have previously recognized ''that although the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, *e.g.*, when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served.'' *Diaz*, 116 Nev. at 101, 993 P.2d at 59. We need not consider whether this case presents such a situation, as Aspen has not identified any particular circumstances that would take this case outside of the usual application of the statute. Instead, Aspen has only argued that the information was not within the statute's protection in the first place. Thus, because the information was facially protected and Aspen has not identified any circumstances to overcome the application of the news shield statute, we conclude that the district court properly quashed the subpoena duces tecum.[6]

CONCLUSION

We conclude that Gentry's motion to quash the subpoena properly asserted the news shield privilege and that Aspen failed to overcome this privilege. We, therefore, deny the petition for extraordinary relief.

GIBBONS, HARDESTY, PARRAGUIRRE, CHERRY, and SAITTA, JJ., concur.

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[6]Because we conclude that the information sought was within the statute's protection, we need not address Aspen's contention that the district court's concern for Gentry's reputation was an improper basis for quashing the subpoena.

FRANKIE ALAN WATTERS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 59703

November 27, 2013 313 P.3d 243

Appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a stolen vehicle, grand larceny of a vehicle, and failure to stop on the signal of a police officer. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Defendant was convicted in the district court of possession of stolen vehicle, grand larceny, and failure to stop on signal of police officer. Defendant appealed. The supreme court, PICKERING, C.J., held that: (1) computerized slideshow presentation used by prosecutor during opening statement, which included slide showing defendant's booking photo with ''GUILTY'' written across his battered face, was impermissible declaration of guilt that undermined presumption of innocence; and (2) error in allowing slide of booking photograph with ''GUILTY'' written across defendant's face was not harmless beyond reasonable doubt.

Reversed and remanded.

Philip J. Kohn, Public Defender, and *Audrey M. Conway*, Deputy Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   A criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions. Const. art. 1, § 8; U.S. CONST. amend. 14.
2. CRIMINAL LAW.
   The presumption of innocence, although not articulated in the federal or state constitution, is a basic component of a fair trial secured by the United States and Nevada Constitutions under the system of criminal justice. Const. art. 1, § 8; U.S. CONST. amend. 14.
3. CRIMINAL LAW.
   Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. U.S. CONST. amends. 6, 14.
4. CRIMINAL LAW.
   Computerized slideshow presentation used by prosecutor during opening statement, which included slide showing defendant's booking photo with ''GUILTY'' written across his battered face, impermissibly

declared defendant guilty of grand larceny and related charges before first witness was called, amounted to improper personal opinion on defendant's guilt, and undermined presumption of innocence.

5. CRIMINAL LAW.
   An opening statement outlines what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.
6. CRIMINAL LAW.
   In a criminal trial, the prosecutor's opening statement is not an opportunity to poison the jury's mind against the defendant or to recite items of highly questionable evidence.
7. CRIMINAL LAW.
   A prosecutor may use a computerized slideshow presentation to support his or her opening statement so long as the slides' content is consistent with the scope and purpose of opening statements and does not put inadmissible evidence or improper argument before the jury.
8. CRIMINAL LAW.
   During opening statement, a computerized slideshow presentation may not be used to make an argument visually that would be improper if made orally.
9. CRIMINAL LAW.
   The prosecution cannot orally declare the defendant guilty in opening statement; doing so would amount to improper argument and the expression of personal opinion on the defendant's guilt, which is forbidden.
10. CRIMINAL LAW.
    Courtroom practices that undermine the presumption of innocence are unconstitutional unless they serve an essential state interest.
11. CRIMINAL LAW.
    A courtroom practice ''undermines the presumption of innocence'' when an unacceptable risk is presented of impermissible factors coming into play in the jury's evaluation of the evidence.
12. CRIMINAL LAW.
    Allowing prosecutors to use booking photos with ''guilty'' written across them during opening statement does not serve an essential state interest and poses an unacceptable risk that the jury's mindset will be tainted and the fairness of its fact-finding function impaired.
13. CRIMINAL LAW.
    A presumption-of-innocence error is of constitutional dimension that is reviewed for harmless error under the *Chapman v. California*, 386 U.S. 18, 24 (1967), standard, and the appellate court will reverse if the State fails to prove, beyond a reasonable doubt, that the error did not contribute to the verdict obtained.
14. CRIMINAL LAW.
    Error in allowing prosecutor's computerized slideshow presentation during opening statement that included slide of defendant's booking photograph with ''GUILTY'' written across defendant's battered face, which diminished presumption of innocence, was not harmless beyond a reasonable doubt, in trial for grand larceny and related offenses; slide carried genuine risk of unfair bias, slide remained up and no instruction to disregard was given, and instructions on presumption of innocence had no connection to booking photograph slide sequence.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, C.J.:

We consider whether the State's use of a PowerPoint during opening statement that includes a slide of the defendant's booking photo with the word ''GUILTY'' superimposed across it constitutes improper advocacy and undermines the presumption of innocence essential to a fair trial.[1]

I.

Frankie Alan Watters was charged with and convicted of possession of a stolen vehicle, grand larceny of a vehicle, and failure to stop on the signal of a police officer. The charges grew out of a crime spree in which Watters allegedly stole a car, got in a wreck, fled, stole another car, became involved in a high-speed chase, ditched the second car, ran into a store, and was finally arrested after being knocked to the ground and bitten several times in the leg by a police dog.

At trial, the State used a PowerPoint to support its opening statement to the jury. The presentation included a slide showing Watters's booking photo with the word ''GUILTY'' written across his battered face.

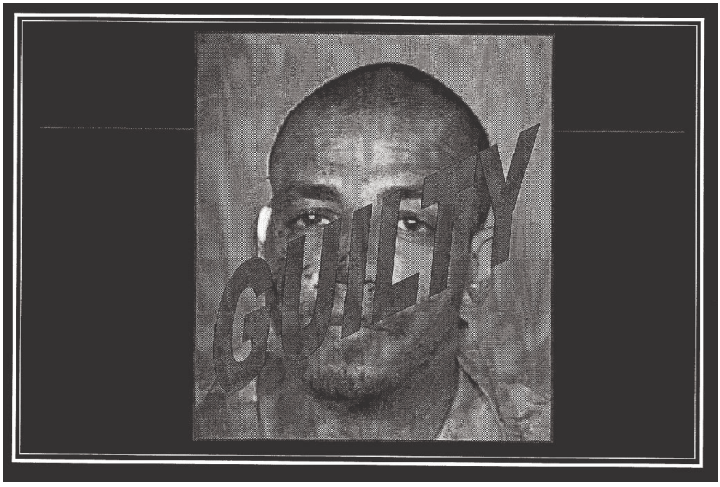

Figure 1. Prosecutor's opening statement PowerPoint slide.

[1]Watters also argues that the State presented insufficient evidence to support the jury's verdict. We conclude that the evidence when viewed in the light most favorable to the State is sufficient to establish his guilt beyond a reasonable doubt as determined by a rational trier of fact. *See* NRS 205.228(1); NRS 205.273(1)(b); NRS 484B.550(1); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We decline to consider the other issues raised on appeal.

The prosecutor used the PowerPoint first to display the booking photo, then to add the word ''GUILTY,'' while she wrapped up: ''So after hearing the evidence in the case, we're going to ask you to find the Defendant *guilty* on possession of stolen vehicle, *guilty* on grand larceny auto, and *guilty* on failure to stop on a police officer's signal.''

The defense reviewed and objected to the booking-photo slide sequence before opening statements began. The district court overruled the objection. It observed that such slides are used ''all the time. . . . They're asking based upon the evidence to find Defendant guilty and [then] they have [guilty] pop up.''[2]

Watters had not been in court when the objection was made. After opening statements, defense counsel made a record that Watters was ''very upset'' when the prosecution ''showed the picture and wrote the word[ ] guilty.'' The court assured Watters that his ''lawyer did object strongly to that [but] PowerPoints under the case[s are] allowed—both sides are allowed to express where they believe the evidence will take them and the ultimate conclusion that the jury should reach, and that's all that photograph does.''

II.

[Headnotes 1-3]

''A criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions.'' *Hightower v. State*, 123 Nev. 55, 57, 154 P.3d 639, 640 (2007) (citing U.S. Const. amend. XIV; Nev. Const. art. 1, § 8). ''The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.'' *Estelle v. Williams*, 425 U.S. 501, 503 (1976). ''Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.' '' *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)).

[Headnotes 4-6]

The booking-photo slide sequence declared Watters guilty before the first witness was called and should not have been allowed. An opening statement outlines ''what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an

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[2]The prosecution did not refer to the picture as a booking photo. *Cf. United States v. Simmons*, 581 F.3d 582, 589 (7th Cir. 2009) (''the use of mug shots is disfavored and usually impermissible'' unless specific need is shown).

occasion for argument.'' *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *see Garner v. State*, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (''The purpose of the opening statement is to acquaint the jury and the court with the nature of the case.''). In a criminal case, ''[t]he prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible.'' ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 3-5.5 (3d ed. 1993). It is not ''an opportunity to poison the jury's mind against the defendant or to recite items of highly questionable evidence.'' *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988) (internal quotation marks omitted), *abrogated on other grounds by Bailey v. United States*, 516 U.S. 137, 150 (1995), *as stated in United States v. Chen*, 131 F.3d 375, 381 (4th Cir. 1997).

The State contends that *State v. Sucharew*, 66 P.3d 59, 63-64 (Ariz. Ct. App. 2003), and *Dolphy v. State*, 707 S.E.2d 56, 58 (Ga. 2011), support its PowerPoint-supported opening statement to the jury. But in *Sucharew*, the prosecution's PowerPoint ''was essentially a slide show of photographic exhibits'' and ''was not prejudicial or inflammatory.'' 66 P.3d at 63-64. And in *Dolphy*, the trial court *sustained* the defendant's objection to the prosecution's use in opening statement of PowerPoint slides that read ''Defendant's Story Is a Lie'' and ''People Lie When They Are Guilty.'' 707 S.E.2d at 57. The question in *Dolphy* was whether the trial court's ''immediate corrective action, ordering that the slides be taken down'' and curative instructions defeated Dolphy's argument that ''the trial court . . . deprive[d him] of a fair trial by failing to declare a mistrial sua sponte.'' *Id.*

[Headnotes 7, 8]

As these cases suggest, PowerPoint, as an advocate's tool, is not inherently good or bad. Its propriety depends on content and application. A prosecutor may use PowerPoint slides to support his or her opening statement so long as the slides' content is consistent with the scope and purpose of opening statements and does not put inadmissible evidence or improper argument before the jury. *See Sucharew*, 66 P.3d at 63-64. But a PowerPoint may not be used to make an argument visually that would be improper if made orally. *See Dolphy*, 707 S.E.2d at 58. *Compare Allred v. State*, 120 Nev. 410, 419, 92 P.3d 1246, 1252-53 (2004) (upholding State's use of annotated photographs as demonstrative exhibits in closing argument where the photographs were in evidence and the district court ordered the argumentative annotations removed), *with In re Glasmann*, 286 P.3d 673, 676, 678-79 (Wash. 2012) (reversing

convictions where the State used a PowerPoint presentation in closing argument that included slides featuring the defendant's ''unkempt and bloody'' booking photo with the word ''GUILTY'' being superimposed in different directions to declare him ''GUILTY, GUILTY, GUILTY'' of the multiple crimes with which he was charged; ''the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence'' that improperly expressed the prosecutor's ''personal opinion of guilt'' and deprived Glasmann of a fair trial).

Here, the prosecutor orally declared that she would be asking the jurors to find Watters guilty. But the PowerPoint that accompanied her declaration displayed Watters's booking photograph with a pop-up that directly labeled him ''GUILTY.'' These are not just two different ways of saying the same thing, as the State suggests. While the oral statement told the jurors that they could expect the prosecutor to ask for a guilty verdict at the end of the trial, the PowerPoint slide directly declared Watters guilty.

[Headnote 9]

The prosecution could not *orally* declare the defendant guilty in opening statement. Doing so would amount to improper argument and the expression of personal opinion on the defendant's guilt, which is forbidden. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (a prosecutor should not express her personal opinion on the defendant's guilt; ''[b]y stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of . . . her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney'' (citation omitted)). Making this improper argument ''*visually* through use of slides showing [Watters's] battered face and superimposing . . . capital letters'' spelling out GUILTY ''is even more prejudicial'' than doing so orally. *Glasmann*, 286 P.3d at 680 (emphasis added). '' '[W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.' '' *Id.* (quoting Lucille A. Jewell, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)); *see* Mary Susan Weldon & Henry L. Roediger, III, *Altering Retrieval Demands Reverses the Picture Superiority Effect*, 15 Memory & Cognition 269, 269 (1987) (research shows that pictures are typically remembered better than words). We therefore conclude

that it was error, and an abuse of discretion, for the district court to allow the prosecutor's booking-photo slide sequence in opening statement.

[Headnotes 10-12]

The error undermined the presumption of innocence, *see* NRS 175.191; *State v. Teeter*, 65 Nev. 584, 642, 200 P.2d 657, 685 (1948), *overruled on other grounds by In re Wheeler*, 81 Nev. 495, 499, 406 P.2d 713, 716 (1965), which is a basic component of ''[the] fair trial'' guaranteed by the Fourteenth Amendment ''under our system of criminal justice.'' *Williams*, 425 U.S. at 503. Courtroom practices that undermine the presumption of innocence are unconstitutional unless they serve an essential state interest. *Flynn*, 475 U.S. at 568. A courtroom practice undermines the presumption of innocence when ''an unacceptable risk is presented of impermissible factors coming into play'' in the jury's evaluation of the evidence. *Williams*, 425 U.S. at 505. Routinely allowing prosecutors to use booking photos with ''guilty'' written across them during opening statement does not serve an essential state interest and poses an unacceptable risk that the jury's mindset will be tainted and the fairness of its fact-finding function impaired. *See Arizona v. Washington*, 434 U.S. 497, 512 (1978) (''An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted.'' (footnote omitted)).

[Headnote 13]

A presumption-of-innocence error is of constitutional dimension, so we review for harmless error under the *Chapman v. California* standard and will reverse if the State fails to prove, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. 386 U.S. 18, 24 (1967); *see also Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008).

[Headnote 14]

Here, the State argues that the error was harmless because the PowerPoint was not admitted into evidence; the jury was instructed on the presumption of innocence at the beginning and end of trial; the slides were displayed only briefly; and the evidence of Watters's guilt was overwhelming. All this may be true. But in the presumption-of-innocence context, ''[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined,'' and the Supreme Court ''has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.'' *Williams*, 425 U.S. at 504.

Routinely allowing prosecutors to use PowerPoint slides during opening that label the defendant guilty carries a genuine risk of unfair bias, *cf. Washington*, 434 U.S. at 512, in part because ''[h]ighly prejudicial images may sway a jury in ways that words cannot.'' *Glasmann*, 286 P.3d at 679. If the district court had promptly ordered the prosecution to remove the booking-photo slide sequence and given the jury an immediate curative instruction, as in *Dolphy*, 707 S.E.2d at 57, this would be a much different case. *Cf. United States v. Dougherty*, 810 F.2d 763, 768 (8th Cir. 1987) (a curative instruction that adequately identified the prosecutor's improper comment during opening statement and instructed the jury to disregard it was sufficient to mitigate prejudice); *but see Washington*, 434 U.S. at 513 (instructing the jury to disregard an improper opening statement ''will not necessarily remove the risk of bias that may be created by improper argument''). But here, the court had already deemed the slide sequence permissible. Hence, the slides remained up and no instruction to disregard them was given. And the presumption-of-innocence instructions the jury received had no connection to the booking-photo slide sequence. Watters's principal defense was that he was not the man who stole the cars, just someone the police happened to find who matched the suspect's description whose face had been bloodied, not by an airbag deploying, but by a police dog. Whether a reasonable jury would have found in Watters's favor based on this defense is not for this court to say. But the State has not shown beyond a reasonable doubt that the booking-photo slide sequence did not affect the jury's determination of Watters's guilt. This requires that we reverse and remand this case for a new trial.

GIBBONS, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

PARRAGUIRRE, J., concurring:

I concur in the result only.

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER OF THE CITY OF SPARKS, APPELLANT, *v.* THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, RESPONDENT.

No. 51920

November 27, 2013 313 P.3d 880

On remand from the United States Supreme Court.

After Nevada Commission on Ethics censured city council member based on his failure to recuse himself, pursuant to the Nevada Ethics in Government Law, from voting on a matter due to potential conflict of interest, council member petitioned for judicial review. The district court denied the petition, and council member appealed. The Nevada Supreme Court, DOUGLAS, J., 126 Nev. 277, 236 P.3d 616 (2010), reversed. Certiorari was granted, and the United States Supreme Court, 564 U.S. 117 (2011), reversed and remanded. On remand, the Nevada Supreme Court, PICKERING, C.J., held that: (1) Ethics in Government Law's recusal provision was not void for vagueness, (2) application of ethics law's recusal provision for conflicts of interest to city council member did not violate member's due process rights, and (3) conflict-of-interest recusal provisions did not violate city council member's right of association.

Affirmed.

DOUGLAS, J., with whom CHERRY, J., agreed, dissented.

Griffin, Rowe & Nave LLP and *John W. Griffin* and *Matthew M. Griffin*, Reno; *Orrick, Herrington & Sutcliffe LLP* and *Rachel M. McKenzie* and *Mark S. Davies*, Washington, D.C., for Appellant.

Nevada Commission on Ethics and *Yvonne M. Nevarez-Goodson*, Carson City; *Vinson & Elkins, LLP*, and *Jeremy C. Marwell*, Washington, D.C., for Respondent.

1. CONSTITUTIONAL LAW; OFFICERS AND PUBLIC EMPLOYEES.

Ethics in Government Law's recusal provision was not void for vagueness; law explained when disqualification was required, then identified the types of relationships that were disqualifying, and also provided for disqualification based on any other commitment or relationship that was substantially similar to those listed, which provision closed potential loopholes in the law by giving the Ethics Commission the flexibility to address relationships that technically fell outside the four enumerated categories, yet implicated the same concerns and were substantially similar to them, such as a relationship with a domestic partner or fiancée. U.S. CONST. amend. 14; NRS 281A.420(8)(a)-(d) (2008).

2. CONSTITUTIONAL LAW.

A law may be struck down as impermissibly vague in violation of due process for either of two independent reasons: (1) if it fails to provide a

person of ordinary intelligence fair notice of what is prohibited, or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S. CONST. amend. 14.

3. CONSTITUTIONAL LAW.
   Civil laws are held to a less strict vagueness standard under due process principles than criminal laws because the consequences of imprecision are qualitatively less severe. U.S. CONST. amend. 14.
4. CONSTITUTIONAL LAW.
   When a statute interferes with the right of free speech or of association, a more stringent vagueness test applies. U.S. CONST. amends. 1, 14.
5. CONSTITUTIONAL LAW.
   When a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system. U.S. CONST. amend. 14.
6. CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS.
   Application of Ethics in Government Law's recusal provision for conflicts of interest to city council member did not violate member's due process rights; council member had notice of the statute, its potential application to his vote on the hotel project, and the Ethics Commission's willingness to provide him a definitive ruling in advance of the vote, but he declined to seek an advisory opinion and instead sought the advice of the city attorney. U.S. CONST. amend. 14; NRS 281A.420(2)(c), (8)(e), 281A.440(1) (2008).
7. ADMINISTRATIVE LAW AND PROCEDURE; APPEAL AND ERROR.
   Arguments not raised before the appropriate administrative tribunal and in district court normally cannot be raised for the first time on appeal.
8. CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS.
   Application of Ethics in Government Law's conflict-of-interest recusal provisions did not violate city council member's right of association; recusal provisions expressly renounced association as the basis for recusal. U.S. CONST. amend. 1; NRS 281A.420(2)(c), (8) (2008).

Before the Court EN BANC.[1]

OPINION

By the Court, PICKERING, C.J.:

This case returns to us from the United States Supreme Court, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011), which reversed our decision in *Carrigan v. Comm'n on Ethics*, 126 Nev. 277, 236 P.3d 616 (2010) (5-1). Where we held that Sparks City Councilman Michael Carrigan's vote on the Lazy 8 hotel/casino project constituted protected speech under the First Amendment, 126 Nev. at 284, 236 P.3d at 621, the Supreme Court held the opposite. 564 U.S. at 121. ''[T]he act of voting'' by an elected offi-

[1]After oral argument, THE HONORABLE ALLAN R. EARL, Judge of the Eighth Judicial District Court, was designated by the Governor to sit in place of THE HONORABLE RON D. PARRAGUIRRE, Justice, who voluntarily recused himself. Nev. Const. art. 6, § 4.

cial on a local land-use matter, the Supreme Court held, ''symbolizes nothing''; it is ''nonsymbolic conduct engaged in for an independent governmental purpose.'' *Id.* at 126-27. Since Carrigan's vote on the Lazy 8 project did not constitute protected speech, the Supreme Court reversed our decision that the First Amendment overbreadth doctrine invalidated the conflict-of-interest recusal provision in Nevada's Ethics in Government Law. *Id.*

On remand, Carrigan makes two additional arguments. First, he contends that the conflict-of-interest recusal provision in Nevada's Ethics in Government Law is unconstitutionally vague, violating the Due Process Clauses of the Fifth and Fourteenth Amendments; second, that it unconstitutionally burdens the First Amendment freedom-of-association rights shared by Nevada's elected officials and their supporters. Because Carrigan did not raise these arguments in his brief in opposition to the Commission's petition for a writ of certiorari, the Supreme Court did not address them. 564 U.S. at 128-29. We do so now.

I.

A.

This proceeding challenges the constitutional validity of NRS 281A.420(2)(c) and NRS 281A.420(8), the core conflict-of-interest recusal provisions in Nevada's Ethics in Government Law.[2] The lead-in section to the Ethics Law reminds us that ''[a] public office is a public trust and shall be held for the sole benefit of the people.'' NRS 281A.020(1)(a). And it emphasizes that an elected public officer ''must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.'' NRS 281A.020(1)(b).

NRS 281A.420(2)(c) prohibits public officers from voting on matters as to which they have a conflict of interest. It states that ''a public officer shall not vote upon . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by,'' *inter alia*, ''[h]is commitment in a private capacity to the interests of others.'' A disqualifying ''commitment in a private capacity to the interests of others'' means a ''commitment to a person'' who is a member of the officer's household; is related to the officer by blood, adoption, or marriage; employs the officer or a member of his household; or has a substantial and continuing business relationship with the of-

[2]To maintain consistency with prior opinions, all citations are to the 2007 version of the Nevada Ethics in Government Act. 2007 Nev. Stat., ch. 538. Although the Act was amended in 2009 and 2013, the amendments are not relevant here.

ficer. NRS 281A.420(8)(a)-(d). Paragraph (e) adds a loophole-closing catchall: ''Any other commitment or relationship that is substantially similar'' to one of those listed in the preceding paragraphs (a)-(d).

The Ethics in Government Law offers an advisory opinion option. Under NRS 281A.440(1), a public officer may request and receive an Ethics Commission opinion regarding ''the propriety of his own past, present or future conduct as an officer,'' including, specifically, whether a conflict of interest exists that requires the officer to abstain from voting on a matter, NRS 281A.460. The Ethics Commission must render an advisory opinion ''as soon as practicable or within 45 days after receiving a request, whichever is sooner.'' NRS 281A.440(1). The request is confidential, NRS 281A.440(5), and the advisory opinion final and authoritative. *See* NRS 281A.440(1).

Nevada's Ethics Law distinguishes between willful and nonwillful violations. The distinction does not affect the determination of whether a violation has occurred, only the sanction to be imposed. If the Commission deems the violation willful, it ''*may*'' but is not required to ''impose . . . civil penalties'' of up to $5,000 for a first violation, together with attorney fees and costs, NRS 281A.480(1) & (2) (emphasis added). If the Commission believes the violation may also constitute a crime, it must refer the matter to the Attorney General or the district attorney ''for a determination of whether a crime has been committed that warrants prosecution.'' NRS 281A.480(7).

NRS 281A.170 defines ''[w]illful violation'' to mean ''the public officer or employee knew or reasonably should have known that his conduct violated'' the Ethics Law. By law, the Commission cannot deem a violation willful if the public officer

> . . . establishes by sufficient evidence that he satisfied all of the following requirements:
>
> (a) He relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents . . . ;
>
> (b) He was unable, through no fault of his own, to obtain an opinion from the Commission before the action was taken; and
>
> (c) He took action that was not contrary to a prior published opinion issued by the Commission.

NRS 281A.480(5).

B.

The Ethics Commission censured Sparks City Councilman Michael Carrigan for voting to approve the Lazy 8 hotel/casino

project despite a disqualifying conflict of interest. The conflict of interest grew out of Carrigan's relationship with Carlos Vasquez, Carrigan's longtime friend and campaign manager. For the six months leading up to the Lazy 8 vote, Vasquez was managing Carrigan's reelection campaign free of charge—the third such campaign Vasquez had managed for Carrigan—and placing Carrigan's campaign ads at cost. At the same time, Vasquez was receiving a $10,000-a-month retainer from the Lazy 8's principals, Red Hawk Land Company and/or Harvey Whittemore. Vasquez openly lobbied the Sparks City Council to approve the Lazy 8 project and testified before the body as a paid consultant.

Several citizens complained to the Commission that Carrigan should not have voted on the Lazy 8 project because of a conflict of interest. An evidentiary hearing followed, at which both Carrigan and Vasquez testified. After deliberation, the Commission issued a written opinion, which included findings of fact and conclusions of law. The Commission's findings of fact included findings that Vasquez ''has been a close personal friend, confidant and political advisor'' to Carrigan ''throughout the years''; that Carrigan ''confides in Mr. Vasquez on matters where he would not confide in his own sibling''; and that ''[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated under NRS [281A.420(8)(a)-(d)], including a close personal friendship, akin to a . . . family member, and a 'substantial and continuing business relationship.' '' *See* NRS 281A.420(8)(e).

In its conclusions of law, the Commission opined that ''commitment in a private capacity to the interests of others,'' NRS 281A.420(2)(c), includes ''close relationships which rise to such a level of commitment to another person's interest that the independence of judgment of a reasonable person in the public officer's position would be affected.'' In the Commission's view, ''[i]ndependence of judgment means a judgment that is unaffected by that commitment or relationship.'' NRS 281A.420(2)(c)'s recusal requirement, the Commission emphasized, is an objective, ''reasonable person'' standard. Regardless of Carrigan's subjective belief that he was unbiased, ''[a] reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times.'' ''[U]nder such circumstances,'' the Commission wrote, ''a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment'' on the Lazy 8 hotel/casino project.

Carrigan attempted to raise an ''advice of counsel'' defense before the Commission. Thus, he testified that the Sparks City Attorney advised him that his relationship with Vasquez did not create a disqualifying conflict of interest because he, Carrigan, did not personally stand to reap financial gain or loss from the Lazy 8 project. Carrigan admitted that, before he voted on the Lazy 8 project, he knew he could have asked the Commission for an advisory opinion—and that he had ample time to do so—but chose not to.

The Commission unanimously found that Carrigan violated NRS 281A.420(2)(c) by not abstaining from voting on the Lazy 8 matter. While it publicly censured him, it imposed no civil penalty or fine because it deemed his violation not willful.

II.

A.

[Headnote 1]

We first consider—and reject—Carrigan's contention that NRS 281A.420(2)(c)'s recusal provision is void for vagueness where, as in his case, the disqualifying ''commitment in a private capacity to the interests of others'' is based on NRS 281A.420(8)(e)'s ''substantially similar'' provision, rather than one of the four relationships specified in NRS 281A.420(8)(a)-(d).

[Headnotes 2-4]

The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010). A law may be struck down as impermissibly vague for either of two independent reasons: ''(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.' '' *Id.* at 481-82, 245 P.3d at 553 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). ''The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.'' *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Civil laws are held to a less strict vagueness standard than criminal laws ''because the consequences of imprecision are qualitatively less severe.'' *Id.* at 498-99. Even so, when a statute ''interferes with the right of free speech or of association, a more stringent vagueness test'' applies. *Id.* at 499.

Carrigan's vagueness challenge focuses on language culled from this court's prior opinion, rather than statutory text as applied to

the facts of his case. This leads his analysis astray. In the first place, our prior opinion rested on the First Amendment overbreadth doctrine. Unlike overbreadth challenges, ''a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression.'' *Humanitarian Law Project*, 561 U.S. at 20. Second, our prior opinion held that Carrigan's vote on the Lazy 8 project constituted protected speech under the First Amendment—a proposition the Supreme Court unanimously rejected. *Carrigan*, 564 U.S. at 121. While laws that ''touch upon 'sensitive areas of basic First Amendment freedoms' '' may raise '' 'special' '' vagueness concerns because of their '' 'obvious chilling effect,' '' *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, ___, 132 S. Ct. 2307, 2318 (2012) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-71 (1997)), the Supreme Court's conclusion that Carrigan's vote on the Lazy 8 did not constitute protected speech dispels such ''special'' vagueness concerns. Thus, we analyze Carrigan's vagueness challenge under the relaxed standards appropriate to a due process challenge to a civil statute not affecting the challenger's First Amendment freedoms.[3]

Carrigan acknowledges that the four enumerated bases for recusal in NRS 281A.420(8)(a)-(d) are clear. His claim is that NRS 281A.420(8)(e), which requires recusal for relationships ''substantially similar'' to the four enumerated ones, is ''hopelessly vague.'' But he incorrectly reads NRS 281A.420(8)(e) in isolation from the rest of NRS 281A.420. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011) (''Terms claimed to be vague must be interpreted in light of their precise statutory context.''); *Comm'n on Ethics v. Ballard*, 120 Nev. 862, 866, 102 P.3d 544, 546 (2004) (this court interprets the ethics laws ''in the context of the entire statutory scheme'').

NRS 281A.420(8)(e) is not free-standing. It draws meaning from the rest of NRS 281A.420, which first explains when disqualification is required (situations in which ''the independence of judgment of a reasonable person in [the public officer's] situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others,'' NRS 281A.420(2)(c)); then identifies the types of relationships that are disqualifying (household, family, employment, or business, NRS 281A.420(8)(a)-(d)); and finally, under those headings, provides for disqualification based on ''[a]ny other commitment or relationship that is substantially similar'' to those listed, NRS 281A.420(8)(e).

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[3]We reject Carrigan's First Amendment right of association argument *infra* in section II.B.

''Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.'' Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). Thus, paragraph 8(e) does not sweep in entirely new types of relationships. Rather, it closes potential loopholes in the Ethics Law by giving the Commission the flexibility to address relationships that technically fall outside the four categories enumerated in paragraphs 8(a)-(d) yet implicate the same concerns and are substantially similar to them, such as a relationship with a domestic partner or fiancée.

The legislative history of NRS 281A.420(8)(e) confirms that it encompasses the relationship between Carrigan and Vasquez. This is evidenced by the testimony given by Scott Scherer, General Counsel to Governor Guinn, during the 1999 legislative session. To fall within NRS 281A.420(8)(e), Scherer testified, ''it has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship.'' Hearing on S.B. 478 Before the Senate Governmental Affairs Comm., 70th Leg. (Nev., April 7, 1999). When asked by Senator Titus how campaign managers fit into the statute, Scherer stated that if ''the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.'' Hearing on S.B. 540 Before the Senate Governmental Affairs Comm., 70th Leg. (Nev., March 30, 1999) (discussing S.B. 478).

''[T]here are limitations in the English language with respect to being both specific and manageably brief.'' *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973). The Supreme Court's opinion in this case examines the history of recusal rules, dating back to 1791, and gives example after example of provisions considerably less definite than NRS 281A.420(2)(c) and NRS 281.420(8) that nonetheless have withstood the test of time. *Carrigan*, 564 U.S. at 120-23. Given the long common-law history of disqualifying local officials from voting on matters when they have conflicts of interest—a history that offers no satisfactory, one-size-fits-all definition of ''conflict of interest''—the statute could have ended with the general proscription in NRS 281A.420(2)(c) and been unexceptionable. *Id*. at 122 (''The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest rule—and such rules have been commonplace for over 200 years.''); *see* 4 Patricia E. Salkin, *American Law of Zoning*

§ 38:2, at 38-5 (5th ed. 2013) (while ''[s]ome state statutes provide specific guidance as to what constitutes a conflict of interest in the land use context . . . most states are silent on this issue [while still others] simply provide a catch-all phrase stating that even if the complained of conduct does not violate another specific section of the law, where the conduct gives an 'appearance of impropriety' it may be prohibited''); 2 Sandra M. Stevenson, *Antieau on Local Government* § 25.08[1], at 25-43 (2d ed. 2012) (''The decision as to whether a particular interest is sufficient to disqualify [a public official] is necessarily a factual one and depends on the circumstances of the particular case. *No definitive test has been devised*.'' (emphasis added)). We are disinclined to invalidate a civil statute addressing conflicts of interest by public officials on the grounds that, in some cases, it poses problems of application that require case-by-case elaboration, in common law fashion. *See Vrljicak v. Holder*, 700 F.3d 1060, 1063 (7th Cir. 2012).

[Headnote 5]

Carrigan's claim that he did not have fair notice that he risked censure under NRS 281A.420(2)(c) if he voted on the Lazy 8 project, despite Vasquez's dual role as paid lobbyist and campaign manager and close friend, ignores the Ethics Law's advisory opinion option. ''When a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system.'' *Bauer v. Shepard*, 620 F.3d 704, 716 (7th Cir. 2010). In rejecting a vagueness challenge to parts of the Hatch Act in *Letter Carriers*, 413 U.S. at 580, for example, the Supreme Court deemed it ''important . . . that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.'' *See Vill. of Hoffman Estates*, 455 U.S. at 498 (vagueness concerns diminish when the regulated person has ''the ability to clarify the meaning of the regulation . . . by resort to an administrative process''); *Groener v. Or. Gov't Ethics Comm'n*, 651 P.2d 736, 742-43 (Or. Ct. App. 1982) (upholding Oregon's Ethics Law against vagueness challenge and noting that the ''fair warning'' test was satisfied by the statutory procedure ''by which a public official in doubt about the propriety of proposed conduct may petition for and obtain the Commission's opinion, which is binding on the Commission as to that petitioner'' (citing *Letter Carriers*, 413 U.S. at 580)).

[Headnote 6]

Vasquez was receiving a $10,000-a-month retainer from the Lazy 8 project proponents. While lobbying for the project before

the Sparks City Council, Vasquez was simultaneously serving as Carrigan's campaign manager free of charge and placing media ads for Carrigan at cost. Carrigan recognized the problem his relationship with Vasquez posed, and he testified that he knew that he could ask the Ethics Commission for an advisory opinion on whether it required him to abstain on the Lazy 8 project vote. And as the district court expressly found, Carrigan had ''ample time and opportunity'' to request an opinion from the Ethics Commission: NRS 281A.440(1) provides for the Commission to issue its opinion as soon as practicable or within 45 days after receiving a request; Vasquez ''became . . . Carrigan's [reelection] campaign manager 6 months or more before the City Council meeting'' at which the Lazy 8 matter came to a vote.

Instead of requesting an opinion from the Commission, Carrigan sought private advice from the Sparks City Attorney, who told him he did not need to abstain. That Carrigan received mistaken legal advice led the Commission to deem his violation nonwillful, justifying censure with no penalty or fine. But on this record, Carrigan cannot claim that he lacked fair notice that NRS 281A.420(2)(c) and NRS 281A.420(8)(e) could require his recusal on the Lazy 8 matter.[4] While Carrigan may disagree with the Commission's interpretation of NRS 281A.420(2)(c)—preferring the private legal advice he obtained—he in fact had notice of the

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[4]The dissent argues that the Commission's finding that Carrigan should not be assessed a civil penalty because it deemed his violation ''not willful'' somehow establishes that, as to him, the Ethics Law is unconstitutionally vague. Of note, after years of briefing before the Commission, the district court, this court, the Supreme Court, and again this court, Carrigan has *never* advanced this argument. *Cf. City of Las Vegas v. Cliff Shadows Prof'l Plaza, L.L.C.*, 129 Nev. 1, 7 n.2, 293 P.3d 860, 864 n.2 (2013) (issue preclusion claim waived if not timely raised). And with good reason: The Commission found that, viewed objectively, Carrigan violated the Ethics Law. Thus, the Commission stated that it declined to find a willful violation because Carrigan ''reasonably relied on his counsel's advice, and because he did not consider his relationship with Mr. Vasquez a relationship that falls under the statute.'' Carrigan did not subjectively mean to violate the law; he just relied on faulty legal advice from the Sparks City Attorney. *See also* NRS 281A.170(5), *reprinted supra* section I.A (the Commission may not deem a violation ''willful'' if the officer meets three requirements, the first of which is that he ''relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents''). However, the fact the Commission absolved Carrigan of willfulness even though NRS 281A.170(5) did not require it to do so does not excuse the violation itself, much less constitute an admission by the Commission that the conflict-of-interest recusal provision is unconstitutionally vague as to Carrigan. *See United States v. Nasir*, No. 5:12-CR-102-JMH, 2013 WL 5373625, at *5 (E.D. Ky. Sept. 25, 2013) (rejecting vagueness challenge to the federal Controlled Substance Analogue Enforcement Act and noting that a defendant who by his inquiries acknowledged that his activities fell ''within a gray area of legality'' is hard-pressed to claim an unconstitutional lack of fair notice).

statute, its potential application to his vote on the Lazy 8 project, and the Ethics Commission's willingness to provide him a definitive ruling in advance of the vote. *Cf. United States v. Zhen Zhou Wu*, 711 F.3d 1, 14-15 (1st Cir. 2013) (rejecting claimed lack of fair notice by challengers who had concerns about the law's application to them yet failed to pursue an available, official answer on the matter).

Analyzed on an as-applied basis, *see United States v. Jones*, 689 F.3d 696, 702 (7th Cir. 2012) (''Vagueness challenges are normally evaluated in light of the particular facts of the case, not in general.''),[5] Carrigan's claim that NRS 281A.420(2)(c) and NRS 281A.420(8)(e) are so lacking in standards as to authorize or encourage '' 'seriously discriminatory enforcement,' '' *Humanitarian Law Project*, 561 U.S. at 18 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)), also fails. Nothing in the record suggests that the bipartisan Commission harbored an improper motive or failed to sanction other similarly situated persons. On the contrary, the Commission evenhandedly sanctioned another council member for his vote *against* the Lazy 8 project because of an undisclosed business relationship with the Nugget, a competing casino that opposed the Lazy 8. *See In re Salerno*, No. 08-05C (Nev. Comm'n on Ethics, Dec. 2, 2008). And, as the Supreme Court noted, the recusal statute Carrigan challenges is ''content-neutral and applies equally to all legislators regardless of party or position.'' *Carrigan*, 564 U.S. at 125.

The recusal provisions in NRS 281A.420(2)(c) and NRS 281A.420(8)(e) use qualitative terms such as ''reasonable'' and ''substantially similar.'' Although terms of degree, these terms are objective and do not require the kind of ''untethered subjective judgments''—such as whether a defendant's conduct was ''annoying'' or ''indecent''—that the Supreme Court has invalidated as unconstitutionally vague. *Humanitarian Law Project*, 561 U.S. at 20-21; *Williams*, 553 U.S. at 306. ''[P]rotean words such as 'reasonable' are ubiquitous in law. Think of the reasonable-person standard in tort law'' or ''the phrase 'good cause' that peppers'' the rules of civil procedure. *Vrljicak*, 700 F.3d at 1062. Objective standards such as these may require case-by-case evaluation, but they do not call for the wholly subjective, unreviewable judgments that invite seriously discriminatory enforcement, in violation of the due process clause. *Id.*

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[5]Although Carrigan insists that he ''has raised both a facial and an as-applied challenge,'' he acknowledges that ''he is seeking only to set aside the censure and that his claim and the relief that would follow accordingly apply only to him.'' (internal quotation marks omitted).

B.

[Headnotes 7, 8]

On remand from the Supreme Court, Carrigan now argues, for the first time,[6] that the Commission's censure of him under NRS 281A.420(2)(c) and NRS 281A.420(8)(e) violates the First Amendment right of association that Carrigan and his political supporters share. This afterthought argument does not fit either the facts or the statutory text. As a paid lobbyist, Vasquez had a private, pecuniary interest in the Lazy 8 project, and Carrigan, the Commission found, had a commitment in a private capacity to Vasquez's interests. If Carrigan's wife were a lawyer whom the Lazy 8 hired for $10,000 per month to advocate for it before the Sparks City Council, Carrigan would have had to recuse. His ''commitment in a private capacity'' to her private, pecuniary interests would be disqualifying. From a right-of-association perspective, Carrigan's disqualification based on Vasquez's retention is no different.

The recusal provisions expressly renounce association as the basis for recusal. Thus, NRS 281A.420(2)(c) states the general rule that a public officer shall not vote on ''a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.'' But the statute follows that rule with an exception: It *presumes* that ''the independence of judgment of a reasonable person would not be materially affected by . . . his commitment in a private capacity to the interest of others *where the resulting benefit or detriment* accruing to him *or to the other persons whose interests to which the member is committed in a private capacity* is not greater than that accruing to any other member of the general business, profession, occupation or group'' concerned. *Id.* (emphases added). This presumption did not save Carrigan's relationship with Vasquez from requiring Carrigan's recusal precisely because ''the resulting benefit or detriment accruing'' to Vasquez from the vote on the Lazy 8 project was greater than that accruing to other concerned citizens, given the pecuniary benefit to Vasquez of his employment by the Lazy 8 developers. The statute as applied to this case thus

[6]Arguments not raised before the appropriate administrative tribunal and in district court normally cannot be raised for the first time on appeal. *See Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 679 (2011); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). We have, on occasion, departed from this rule where, as here, the issue presents a constitutional question that can be resolved as a matter of law. *See Levingston v. Washoe Cnty.*, 112 Nev. 479, 482-83, 916 P.2d 163, 166 (1996).

does not penalize ''simple association or assembly,'' and the right-of-association cases on which Carrigan relies are inapposite. *Humanitarian Law Project*, 561 U.S. at 39.

NRS 281A.420 serves to ensure that its public officers ''avoid conflicts between [their] private interests and those of the general public whom [they] serve[ ].'' NRS 281A.020(1)(b). Even accepting arguendo that the recusal provision somehow burdens Carrigan's associational rights, the burden is scant when compared to the state's important interest in avoiding conflicts of interest and self-dealing by public officials entrusted with making decisions affecting our citizens. *See Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005) (a reasonable, nondiscriminatory regulation that imposes an incidental burden on associational rights is acceptable when justified by a state's important regulatory concerns).

We therefore affirm.

GIBBONS, HARDESTY, and SAITTA, JJ., and EARL, D.J., concur.

DOUGLAS, J., with whom CHERRY, J., agrees, dissenting:

While I agree with parts of the majority's opinion, I disagree with their conclusion upholding the Commission's censure of Carrigan for violating NRS 281A.420(2)(c) (2007) (amended 2009), in light of the Commission's additional finding that the violation was not willful under NRS 281A.170 (2007) (amended 2009).

NRS 281A.420(2)(c) states that ''. . . a public officer shall not vote upon . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.'' In its decision, the Commission explained that '' 'commitment in a private capacity to the interest of others' . . . contemplated close relationships which rise to such a level of commitment to another person's interests that the independence of judgment of a reasonable person in the public officer's position would be affected.'' Ultimately, the Commission found that Carrigan had a commitment in a private capacity to the interests of Vasquez. Then, as the majority notes, in applying its interpretation of NRS 281A.420(2)(c) to Carrigan, the Commission found that ''[a] reasonable person in Councilman Carrigan's position would not be able to remain objective'' under the circumstances. Based on this reasoning, the Commission determined that Carrigan violated NRS 281A.420(2)(c) by voting on the Lazy 8 matter.

The Ethics in Government statutory scheme also contains provisions for the imposition of civil penalties based on willful violations of its provisions. *See* NRS 281A.480 (2007) (amended 2009). In finding that Carrigan violated NRS 281A.420(2)(c), the Com-

mission determined that no civil penalty would apply because Carrigan's violation was not willful. Under the statute, the Commission could determine a violation was not willful based on two provisions. First, an action by a public officer would not be a willful violation if, *inter alia*, ''[h]e was unable, through no fault of his own, to obtain an opinion from the Commission before the action was taken.'' NRS 281A.480(5)(b) (2007). Here, as the majority points out, and supported by the Commission's decision, Carrigan was aware that he could have sought an advisory opinion,[1] and he had ample time to do so. Accordingly, the Commission's determination that Carrigan's violation was not willful could not be based on NRS 281A.480(5).

The second potential statutory basis for determining Carrigan's violation was not willful is found in NRS 281A.170 (2007) (amended 2009), which provides that '' '[w]illful violation' means the public officer or employee knew or reasonably should have known that his conduct violated this chapter.'' Because NRS 281A.480(5) is precluded, the Commission's determination must arise from NRS 281A.170. Thus, the Commission made two relevant conclusions: Carrigan violated NRS 281A.420(2)(c), and that violation was not willful (knowingly) under NRS 281A.170.

As the majority indicates, a law is impermissibly vague ''if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.' '' *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010). Here, in determining that Carrigan's violation was not willful, the Commission inescapably concluded that he did not know and should not have reasonably known that his conduct would violate NRS 281A.420(2)(c). In this lies the dispositive contradiction: the Constitution requires that laws be of a nature that a person reasonably should know what is prohibited; yet, here, the Commission concluded that Carrigan should not have reasonably known that his conduct was prohibited. Thus, the Commission's determination that Carrigan did not willfully violate the statute equates to a legal conclusion that NRS 281A.420(2)(c) is vague as applied to Carrigan. Accordingly, this court should vacate the Commission's censure of Carrigan.[2]

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[1]It should be noted that, although Carrigan did not obtain an advisory opinion from the Commission, he did obtain one from the Sparks City Attorney.

[2]Note that the provision defining ''willful violation'' was amended in 2009, presumably to avoid this inherent contradiction—a problem that would necessarily arise in each Commission decision finding a nonwillful violation under the 2007 language of the statute. The fact that the Commission was forced to work with imperfect language is of no importance. However, it is of great importance that this court considers Carrigan's as-applied challenge with the utmost fidelity to the statute's plain language, even when its natural import is problematic under the circumstances.

The majority opinion does not directly address the ''fair notice'' test for vagueness as it relates to the aforementioned contradiction and Carrigan's as-applied challenge. While acknowledging that the U.S. Supreme Court has suggested that an advisory opinion option diminishes vagueness concerns, here, the majority treats it as though it disposes of them entirely.[3] This eager embrace of a new idea seems premature given the unique context here and should be tempered to a salutatory handshake. However, the majority concludes that, under the circumstances, any vagueness problems are cured by the statute's advisory opinion option found in NRS 281A.440(1) (2007) (amended 2009).

While the advisory opinion option might lend support to the majority's conclusion that the challenged statutory provisions are not facially vague, it is clearly insufficient to quell Carrigan's as-applied challenge. Here, the Commission made a finding that Carrigan knew about the advisory opinion option. Despite this, the Commission still found that Carrigan's violation was not willful and that he did not know and should not have reasonably known that his conduct would violate NRS 281A.420(2)(c). The majority reasons that, because Carrigan had notice of the statute, of its potential application, and of the ability to obtain an advisory opinion, he had fair notice of what was prohibited at law. This determination runs directly against the Commission's conclusion that Carrigan's violation was not willful. The anomaly recognized in this opinion cannot justifiably be ignored or overcome. For these reasons, I dissent in part and believe that the Commission's censure of Carrigan should be vacated.

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[3]The U.S. Supreme Court opinion referenced only peripherally addresses the impact of an advisory opinion option and does so only in the context of economic regulation. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The impact of adopting a similar conclusion in the political context might merit an independent analysis considering the potential restraint it imposes on elected officials in their representative capacity.

COUNTY OF CLARK, NEVADA, AND MARK SCHOFIELD, IN HIS OFFICIAL CAPACITY AS CLARK COUNTY ASSESSOR, APPELLANTS, *v.* LB PROPERTIES, INC., AN ILLINOIS CORPORATION, RESPONDENT.

No. 57082

December 12, 2013 315 P.3d 294

Appeal from a district court order setting aside the Nevada Tax Commission's decision upholding the County Assessor's assessment of a remainder parcel for tax abatement purposes. First Judicial District Court, Carson City; Robert E. Rose, Senior Judge.

Property owner sought judicial review of Tax Commission's decision upholding the County Assessor's assessment of a remainder parcel for tax abatement purposes. The district court reversed. County and Assessor appealed. The supreme court, PICKERING, C.J., held that: (1) Tax Commission regulation to value remainder parcels was legislative regulation that applied prospectively only, and (2) valuation method used by County Assessor was not impermissible ''ad hoc standard.''

Reversed.

Steven B. Wolfson, District Attorney, and *Paul D. Johnson*, Deputy District Attorney, Clark County, for Appellants.

Lionel Sawyer & Collins and *William J. McKean*, Reno; *Frazer Ryan Goldberg & Arnold LLP* and *Douglas S. John*, Phoenix, Arizona, for Respondent.

1. TAXATION.
   Regulation promulgated by the Tax Commission to value remainder parcels of real property for tax abatement purposes constituted a ''legislative regulation,'' rather than an ''interpretive regulation,'' and therefore regulation did not apply retroactively, where regulation established a substantive rule for assessing and valuing remainder properties, it did not merely construe the meaning of the statute, and regulation's apportionment formula for valuing remainder parcels represented an explicit break from the approach taken by the Assessor, which, in the absence of the regulation, considered generally applicable factors such as land size and shape and looked at the separate value of the individual piece. NAC 361.61038.
2. STATUTES.
   Retroactivity is not favored in the law.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   Regulations generally only operate prospectively unless an intent to apply them retroactively is clearly manifested.
4. ADMINISTRATIVE LAW AND PROCEDURE.
   ''Interpretive regulations'' construe, but do not expand upon, the terms of a statute.

5. ADMINISTRATIVE LAW AND PROCEDURE.
''Legislative regulations'' are adopted under power delegated by the Legislature to an agency and establish substantive rules that create standards of conduct and impose new rights or duties.
6. ADMINISTRATIVE LAW AND PROCEDURE.
Despite the general rule against retroactivity, if a regulation is a first-time interpretive regulation, application to preexisting issues may be permissible.
7. TAXATION.
County Assessor's method used in determining valuation of remainder parcel for tax abatement purposes did not constitute an impermissible ''ad hoc standard,'' where, in the absence of an applicable regulatory method of assessment, the Assessor determined taxable value by calculating what the property would have been worth had it existed as a separate piece of land during the relevant tax year and included consideration of factors such as size, shape, topography, and the value of comparable parcels.

Before the Court EN BANC.

OPINION[1]

By the Court, PICKERING, C.J.:

In this appeal we consider whether a regulation promulgated by the Nevada Tax Commission to value remainder parcels of real property for tax abatement purposes applies retroactively.

I.

In 2005, the Legislature enacted NRS 361.4722, which caps real property taxes by providing partial tax abatements calculated with reference to assessed valuations for the preceding fiscal year on, as relevant here, remainder parcels of real property.[2] The abatement statute generally requires a remainder parcel's prior-year assessed valuation to be determined as if it ''had been separately established for that property for that prior fiscal year based upon all the assumptions, costs, values, calculations and other factors and considerations that would have been used for the valuation of that property for that prior fiscal year.'' NRS 361.4722(2)(a)(1). The Legislature did not provide additional specifics. Instead, it delegated authority to the Nevada Tax Commission (NTC) to adopt

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[1]We originally resolved this appeal in a nonprecedential order of reversal. Appellant filed a motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f).

[2]'' '[R]emainder parcel of real property' means a parcel of real property which remains after the creation of new parcels of real property for development from one or more existing parcels of real property, if the use of that remaining parcel has not changed from the immediately preceding fiscal year.'' NRS 361.4722(6).

implementing regulations. *See* NRS 361.4722(5) (''The Nevada Tax Commission shall adopt such regulations as it deems appropriate to ensure that this section is carried out in a uniform and equal manner.'').

Exercising its delegated authority, the NTC promulgated NAC 361.61038, effective March 23, 2007, which sets forth an apportionment formula for calculating remainder-parcel property values for purposes of NRS 361.4722. Both the regulation's valuation method and the assessor's prior approach are complex, but they can be summarized as follows: The regulation adopts an apportionment formula and calculates taxable value by determining the percent of value the smaller parcel contributed to the larger parcel during the fiscal year, thus assigning a pro-rata share to the remainder parcel. The assessor's prior approach had been to determine taxable value by calculating what the property would have been worth had it existed as a separate piece of land during the relevant tax year, and included consideration of factors such as size, shape, topography, and the value of comparable parcels.

The parcel at issue is owned by respondent LB Properties, Inc. It was divided from a larger piece of land before the regulation's enactment and, the parties concede, is properly characterized as a ''remainder parcel'' under NRS 361.4722(6), *reprinted supra* note 2. Appellant, the Clark County Assessor, valued the land under the multifactored approach he used before NAC 361.61038 was enacted. Seeking application of the new regulation's apportionment formula, LB Properties appealed to the NTC. The NTC assigned an administrative law judge to the case, who determined that NAC 361.61038 should apply. The NTC disagreed. It upheld the Assessor's valuation and declined to apply its new regulation retroactively. LB Properties petitioned for judicial review. The district court reversed the NTC and directed it to apply NAC 361.61038 to LB Properties' remainder parcel.

II.

[Headnote 1]

The parties primarily dispute whether NAC 361.61038 applies retroactively and, if so, whether it conflicts with the Nevada Constitution, Article 10, Section 1, and is void as a result.[3] Because the regulation does not apply retroactively, this court need not reach the Assessor's challenge to its constitutionality. We also reject LB Properties' constitutional challenge to the Assessor's preregulation, multifactor approach.

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[3]Article 10, Section 1 of the Nevada Constitution declares that ''[t]he Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory.''

A.

[Headnotes 2, 3]

''Retroactivity is not favored in the law.'' *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Thus, regulations generally only operate prospectively ''unless an intent to apply them retroactively is clearly manifested.'' *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092, 1099 (2008); *accord Bowen*, 488 U.S. at 208 (statutory ''enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result'').

[Headnotes 4, 5]

There are two types of regulations: legislative and interpretive. *Fmali Herb, Inc. v. Heckler*, 715 F.2d 1385, 1387 (9th Cir. 1983). Interpretive regulations construe, but do not expand upon, the terms of a statute. Legislative regulations, by contrast, are adopted under power delegated by the Legislature to an agency and establish substantive rules that create standards of conduct and impose new rights or duties. *See, e.g.*, *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989) (''[A] substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights or duties.''); *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1236 (Pa. 2009) (''[A] legislative regulation establishes 'a substantive rule creating a controlling standard of conduct.' '' (quoting *Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741, 743 (Pa. 1998))).

[Headnote 6]

Despite the general rule against retroactivity, if a regulation is a first-time interpretive regulation, application to preexisting issues may be permissible. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 n.3 (1996). Thus, in *Smiley*, the Supreme Court approved application of an interpretive regulation that clarified an ambiguity the Legislature left for the agency to resolve, namely the definition of ''interest.'' *Id.* at 740-41. *Compare Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1152 (9th Cir. 2003) (holding that first-time interpretive regulations are not generally retroactive and where the new regulation is an explicit break from prior practice or the agency has expressly stated application would be impermissibly retroactive, it may not be retroactively applied), *with Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (holding that an agency pronouncement that ''simply clarif[ies] an unsettled or confusing area of the law . . . does not change the law'' and hence may be applied without having impermissible retroactive effect), *overruled on other grounds by Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999).

LB Properties argues that NAC 361.61038 constitutes an interpretive regulation that should be accorded retroactive effect. We cannot agree. NAC 361.61038 was promulgated by the NTC at the express direction of the Legislature in NRS 361.4722(5). It establishes a substantive rule for assessing and valuing remainder properties; it does not merely construe the meaning of the statute. Thus, NAC 361.61038 is legislative, not interpretive. NAC 361.61038's apportionment formula for valuing remainder parcels represents an explicit break from the approach taken by the Assessor, which, in the absence of the regulation, considered generally applicable factors such as land size and shape and looked at the separate value of the individual piece. Finally, NRS 361.4722(5) does not authorize, and NAC 361.61038 does not provide for, retroactive application. Indeed, the NTC ruled *against* LB Properties' contention that NAC 361.61038—a regulation that the NTC itself promulgated—applies to this matter.

Because NAC 361.61038 was not enacted until 2007 and the valuation at issue occurred prior to that time, application of the regulation would be impermissibly retroactive. The district court therefore erred by ordering the NTC to follow the administrative law judge's initial recommendation and value the land according to the apportionment formula set forth in the regulation.

B.

[Headnote 7]

In the absence of an applicable regulatory method of assessment, the question becomes whether the method the Assessor used was proper or whether it was itself in violation of Nevada law.

LB Properties argues that the Assessor's valuation method violated the holdings in *Barta* and *State ex rel. State Board of Equalization v. Bakst*, 122 Nev. 1403, 148 P.3d 717 (2006), because it was an ''ad hoc standard'' rather than a method formally promulgated by the agency. The district court determined, without analysis, that the Assessor's method of calculation was in violation of *Bakst*. We disagree, because the pre-2007 method does not inherently lend itself to inconsistent application.

Bakst and *Barta* dealt with a county assessor's authority under NRS 361.260 to substantially deviate from statutorily mandated methods of assessing land. *See Bakst*, 122 Nev. at 1414-15, 148 P.3d at 725; *Barta*, 124 Nev. at 620-21, 188 P.3d at 1098. In *Bakst*, the assessor used a unique method to adjust property values—one not consistent with others used throughout the state. 122 Nev. at 1406, 1411, 1414, 1416, 148 P.3d at 719, 722-23, 725-26. In deeming the assessor's methods unconstitutional, this court held that our Constitution requires ''that the methods used for assessing taxes throughout the state must be uniform.'' *Id.* at 1413,

148 P.3d at 724 (internal quotations omitted); *see also Barta*, 124 Nev. at 624, 188 P.3d at 1100 (citing *Bakst* and stating that ''methods used to value taxpayers' properties play a material role in ensuring that the constitutional guarantee of a uniform and equal rate of assessment'' exist in property valuations).

But *Bakst* and *Barta* also recognize that the wide and varied differences in each property make it impossible to devise an absolute formula to determine value. *Bakst*, 122 Nev. at 1412, 148 P.3d at 723; *see also Barta*, 124 Nev. at 622, 188 P.3d at 1099 (upholding *Bakst* generally). Moreover, NRS 361.228(3) encourages consideration of property attributes ''such as zoning, location, water rights, view and geographic features'' in valuing a property, suggesting that valuations should account for all relevant attributes—perhaps even where consideration of a particular attribute is not codified by statute or regulation.

In contrast to *Bakst* and *Barta*, the record here supports the conclusion that the Assessor's method did not lead to unequal taxation—to the contrary, both the administrative law judge and the NTC recognized that it likely led to more equitable taxation than did the method set forth in NAC 361.61038. Indeed, the Assessor's method appears to be the one generally used prior to the regulation's enactment and appears in harmony with NRS 361.4722(2)(a)(1). Neither *Bakst* nor *Barta* states that *only* formal regulations may establish methods for assessing value. Since the Assessor's approach did not conflict with existing statute or practice, we conclude that the Assessor's methods did not violate the Constitution.

We therefore reverse.

GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.