IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN J. BROOKS II,

Petitioner,

vs.

LEGISLATURE OF THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 62734

Original Action for Writ of Mandamus

RESPONDENT LEGISLATURE'S ANSWER

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ANSWER

Respondent Legislature of the State of Nevada (Legislature), by and through its counsel, Brenda J. Erdoes, the Legislative Counsel of the State of Nevada, pursuant to NRS 218F.720, hereby files its answer to the petition for writ of mandamus filed by the Petitioner, Assemblyman Steven J. Brooks II, on March 5, 2013. The Legislature is filing its answer in accordance with NRAP 21 and the Court's orders issued on March 6 and 15, 2013. The Legislature respectfully asks the Court to deny the petition for writ of mandamus for the reasons set forth herein.

STATEMENT OF THE ISSUES

1. Did the Assembly have the authority to take preventative and disciplinary action against the Petitioner based on its inherent power of self-protection and its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6 of the Nevada Constitution?

2. Is the Assembly's decision to take preventative and disciplinary action against the Petitioner subject to judicial review given that the power to punish its members is a function constitutionally committed to the Assembly which falls within its sole province and discretion under Article 4, §6 of the Nevada Constitution?

3. If the Assembly's decision is subject to judicial review, did the Assembly manifestly abuse its discretion or act arbitrarily or capriciously when it decided to take preventative and disciplinary action against the Petitioner?

4. Did the Petitioner sue the wrong party by suing the Legislature rather than the Assembly?

STATEMENT OF THE CASE AND FACTS

I. Parties and claims.

The Petitioner is a duly elected member of the Nevada State Assembly (Assembly). See Certificate of Election of Steven J. Brooks II (Nev. Dec. 18, 2012) (hereafter "Certificate of Election") (*RA1*).[1] On March 5, 2013, the Petitioner filed an original action with the Court petitioning for the issuance of a writ of mandamus. See Nev. Const. art. 6, §4 (providing that the Court "shall also have power to issue writs of *mandamus*."); NRS 34.160; NRAP 21. The Petitioner named the Legislature as the only respondent. (Pet. 2) ("Respondent is the Legislature of the State of Nevada.").

In his petition, the Petitioner challenges the decision of the Assembly to place him on paid administrative leave pending further investigation by the Select Committee on the Assembly (Select Committee) into his fitness to serve as a

[1] Citations to "*RA*" are to page numbers of Respondent's Appendix.

member of the Assembly. (Pet. 2-3.) The Petitioner claims that "the Legislature has imposed . . . an extra-constitutional qualification on Assemblyman Brooks' right and duty to serve his constituents, which [it] cannot do." (Pet. 3.) The Petitioner asks the Court to issue a writ of mandamus "ordering Respondent to seat Assemblyman Brooks." (Pet. 4.)

II. Petitioner's election and term of office.

At the general election held on November 6, 2012, the Petitioner was elected to office as a member of the Assembly for District No. 17 in Clark County, Nevada. See Nev. Const. art. 4, §3 (providing for the election of members of the Assembly); Certificate of Election (*RA1*). Based on the results of the election, the Governor issued the Petitioner a certificate of election on December 18, 2012, as required by NRS 218A.210 and 293.395(3). See Certificate of Election (*RA1*).

Under the Nevada Constitution, the term of office of members of the Assembly "shall be two years from the day next after their election." Nev. Const. art. 4, §3; Child v. Lomax, 124 Nev. 600, 611 (2008) ("[A]s the constitution's plain language provides, a State Assembly member-elect begins serving in office on the day after the election."). Therefore, the Petitioner's current term of office as a member of the Assembly began on November 7, 2012, the day after the 2012 general election. See Certificate of Election (certifying that the Petitioner "was duly elected a Member of the Nevada State Assembly in and for the District 17, for

a term of two years from and after the seventh day of November, two thousand twelve.") (*RA1*).

III. Proceedings in the Assembly and the Select Committee.

In its appendix, the Legislature has included public records of relevant proceedings in the Assembly as recorded in the Assembly Journal.[2] The Legislature has also included public records of relevant proceedings in the Select Committee as recorded in the committee's minutes.[3] The Legislature requests the Court to take judicial notice of these public records. See NRS 47.130, 47.150 & 47.170 (prescribing standards and procedures for taking judicial notice); Fierle v. Perez, 125 Nev. 728, 737 n.6 (2009) (stating that "courts generally may take judicial notice of legislative histories, which are public records."); French v. Senate

[2] Under Article 4, §14 of the Nevada Constitution, "[e]ach House shall keep a journal of its own proceedings which shall be published." The journals are public records that are "deposited in the Office of the Secretary of State as the official journals of both Houses." NRS 218D.930(2); see also Nev. Const. art. 5, §20 ("The Secretary of State shall keep a true record of the Official Acts of the Legislative and Executive Departments of the Government.").

[3] Under Assembly Standing Rule No. 51 and Joint Standing Rule No. 12, each committee of the Assembly must make a record of its proceedings that is preserved as the official public record of the committee's actions. See Assembly Resolution No. 1, 77th Leg. (Nev. 2013) (adopting the Assembly Standing Rules); Assembly Concurrent Resolution No. 1, 77th Leg. (Nev. 2013) (adopting the Joint Standing Rules of the Senate and Assembly).

of Cal., 80 P. 1031, 1033 (Cal. 1905) ("The courts take judicial notice of the public and private official acts of the legislative department of the state.").

On February 4, 2013, the Assembly convened for the 77th regular session of the Nevada Legislature. See Nev. Const. art. 4, §2; Assembly Daily Journal, 77th Reg. Sess., at 1 (Nev. Feb. 4, 2013) (*RA2*). On that first day of the session, the temporary Committee on Credentials reviewed the credentials of the members-elect of the Assembly, which included the Petitioner's credentials, and the committee reported that the Petitioner and the other members-elect "are duly elected and qualified members of the Assembly." Assembly Daily Journal, 77th Reg. Sess., at 2 (Nev. Feb. 4, 2013) (*RA3*). The Assembly adopted the committee's report. Id. at 3 (*RA4*). Thereafter, Chief Justice Pickering administered the official oath of office to the Petitioner and the other members-elect of the Assembly. Id. at 3 (*RA4*); Certificate of Election (containing the Petitioner's attestation subscribing to the official oath of office) (*RA1*); Nev. Const. art. 15, §2 (prescribing the official oath of office); NRS 218A.220 (providing that legislators must subscribe to the official oath of office and that an entry thereof must be made on the Journal of the House).

After subscribing to the official oath of office, the Petitioner took his seat with the other members of the Assembly. At the next two floor sessions of the Assembly on February 6 and 7, 2013, the roll was called, and the Petitioner was

present in his seat. Assembly Daily Journal, 77th Reg. Sess., at 1 (Nev. Feb. 6, 2013) (*RA5*); Assembly Daily Journal, 77th Reg. Sess., at 1 (Nev. Feb. 7, 2013) (*RA6*).

On February 7, 2013, the Speaker of the Assembly announced the appointment of the Select Committee on the Assembly. Assembly Daily Journal, 77th Reg. Sess., at 1 (Nev. Feb. 7, 2013) (*RA6*). The purpose of the Select Committee is to consider and investigate matters within the jurisdiction of Article 4, §6 of the Nevada Constitution. Assembly Resolution No. 5, 77th Leg. (Nev. 2013) (*RA19-20*); Assembly Daily Journal, 77th Reg. Sess., at 1-3 (Nev. Feb. 13, 2013) (*RA8-10*). That constitutional provision provides in full:

> Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), *determine the rules of its proceedings and may punish its members for disorderly conduct*, and with the concurrence of two thirds of all the members elected, expel a member.

Nev. Const. art. 4, §6 (emphasis added).

On February 11, 2013, the Select Committee held its first meeting at which it adopted the Rules of the Select Committee. Meeting of the Select Committee on the Assembly, 77th Leg., at 1-3 (Nev. Feb. 11, 2013) (*RA11-17*). The Select Committee's rules provide that the Chair of the Committee shall "[c]arry out the duties of the Chair set forth in these rules." Rule 3 of the Select Committee on the

Assembly, 77th Leg. (Nev. 2013) (*RA16*). The Select Committee's rules further provide that:

> The Chair may, if necessary to preserve order and protect the integrity and decorum of the Legislature and the legislative process, issue an order placing a member who is the subject of the Committee's investigation on administrative leave, with pay and without loss of any benefits, during the pendency of the Committee's investigation of the member. Such an order may include, without limitation, prohibiting the member from entering the legislative buildings or otherwise performing any legislative activities or acting as a legislator during the pendency of the Committee's investigation of the member.

Id.

On February 11, 2013, pursuant to his powers and duties under the Select Committee's rules, the Chair of the Select Committee, Assemblyman William C. Horne, issued an order to the Petitioner informing him that effective on that date, the Petitioner was being placed on paid administrative leave pending further investigation into his fitness to serve as an Assemblyman in the Nevada Legislature. (*RA18.*) The order provided in full:

> As Chair of the Select Committee on the Assembly, I am writing to inform you that effective today, February 11, 2013, you are being placed on paid Administrative Leave pending further investigation into your fitness to serve as an Assemblyman in the Nevada Legislature. The alleged conduct which will be the subject of the investigation includes failure to carry out certain responsibilities of an Assemblyman, engaging in unethical conduct and engaging in certain other deleterious conduct. All of this alleged conduct adversely affects the integrity and credibility of the Nevada Assembly. In addition, the Nevada Legislature, as an employer, must ensure a safe workplace for its employees. Your recent arrests, which have been well publicized by the press have caused members of the staff as well as others in the Legislative Building to fear

> that you will not be able to conduct yourself in a manner suitable to the Office of Assemblyman, and in fact, that you may present a direct threat to others in the building. Your presence has caused the need for heightened security and the commitment of additional resources to monitor your actions.
>
> During the period that you remain on Administrative Leave, you are prohibited from entering any of the legislative buildings or otherwise acting as a legislator. Any questions or concerns that you may have must be directed through my office or the office of the Legislative Counsel. The Select Committee on the Assembly intends to conduct hearings to investigate the specific allegations, allow you an opportunity to be heard and determine the most appropriate recommendation to make to the full Assembly. As you know, the Assembly has the constitutional duty to judge the qualifications of its own members, determine the rules of its proceedings and punish members for disorderly conduct. With the concurrence of two thirds of all the members elected, the Assembly may also expel a member. The full Assembly will make the final determination regarding the action to be taken upon the conclusion of the hearings and receipt of the recommendation of the Select Committee.

(*RA18.*)

On February 13, 2013, at the first scheduled floor session following the Select Committee's adoption of the rules and the Chair's issuance of the order, the Assembly adopted Assembly Resolution No. 5 (A.R. 5). Assembly Daily Journal, 77th Reg. Sess., at 1-3 (Nev. Feb. 13, 2013) (*RA8-10*). In the resolution, the Assembly "approved and ratified" the Select Committee's rules and the Chair's order. Id. at 2 (*RA9*). The Assembly determined that the rules and order were "necessary, just and appropriate to preserve order and protect the integrity and decorum of the Legislature and the legislative process and to conduct the

Committee's proceedings to consider and investigate matters within the jurisdiction of Section 6 of Article 4 of the Nevada Constitution." Id.

The Assembly also instructed the Select Committee to "continue its proceedings to consider and investigate matters within the jurisdiction of Section 6 of Article 4 of the Nevada Constitution," and the Assembly directed the Select Committee to "make reports and recommendations to the Assembly, at such times as the Committee deems advisable, regarding its proceedings." Id. Pursuant to the Assembly's instructions, the Select Committee is currently conducting its investigation into the Petitioner's fitness to serve as an Assemblyman in the Nevada Legislature to determine the most appropriate recommendations to make to the Assembly regarding the Petitioner's conduct.

SUMMARY OF THE ARGUMENT

Because the Petitioner was not excluded from his legislative seat for failing to meet the qualifications of his office, the Petitioner's reliance on Powell v. McCormack, 395 U.S. 486 (1969), is misplaced. The Assembly determined that the Petitioner was duly elected and that he met the qualifications of his office, and the Assembly seated him. After the Petitioner was seated, the Assembly denied the Petitioner access to his seat because of his alleged misconduct. As such, the action of the Assembly was not an exclusion under Powell. It was an act of institutional

self-protection and discipline, and the decision in Powell is not controlling or helpful to the Petitioner in this case.

When the Assembly adopted A.R. 5 and approved and ratified the Select Committee's rules and the Chair's order, the rules and order became the acts of the Assembly, and the Assembly's ratification dates back to the time when those actions were initially taken. Under time-honored principles of the common parliamentary law, the Assembly properly exercised its inherent power of self-protection to take preventative and disciplinary action against the Petitioner pending further investigation into his fitness to serve as a member of the Assembly. The Assembly also properly exercised its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6. Because the Assembly had the power to take preventative and disciplinary action against the Petitioner, his request for mandamus relief must be denied.

Furthermore, because the Assembly's decision to take preventative and disciplinary action against the Petitioner is a function constitutionally committed to the Assembly which falls within its sole province and discretion under Article 4, §6, the Assembly's decision is conclusive, and it is not subject to judicial review. However, even if the Assembly's decision is subject to judicial review, the

Assembly did not manifestly abuse its discretion or act arbitrarily or capriciously when it decided to take preventative and disciplinary action against the Petitioner.

Finally, because the Petitioner sued only the Legislature rather than suing the Assembly, the Petitioner sued the wrong party. The power to discipline legislators for disorderly conduct rests with each House, rather than the Legislature as a whole, and neither House may interfere with the discipline of the other's members. Therefore, the Petitioner's request for mandamus relief must be denied because the writ of mandamus will not issue to compel the Legislature as a whole to perform acts which only the Assembly has the legal authority to perform.

ARGUMENT

I. Standard of review.

In this mandamus action, the petitioner has the burden to prove that the action falls within the original jurisdiction of this Court to issue writs of mandamus and that the granting of extraordinary relief in the form of mandamus is warranted and appropriate. See Mineral County v. State, 117 Nev. 235, 243-46 (2001). Because mandamus is a drastic and extraordinary remedy, "the burden on the petitioner is a heavy one." Bottorff v. O'Donnell, 96 Nev. 606, 607-08 (1980).

Furthermore, when the petitioner challenges the validity of the acts of the legislative department, this Court presumes that the acts are constitutional, and it places the burden on the petitioner to "make a clear showing of invalidity."

Nevadans for Nev. v. Beers, 122 Nev. 930, 939 (2006). Because of this presumption of validity, "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of [the act], and courts will interfere only when the Constitution is clearly violated." List v. Whisler, 99 Nev. 133, 137 (1983). To overcome the presumption of validity, the petitioner must prove unconstitutionality "beyond a reasonable doubt." Cauble v. Beemer, 64 Nev. 77, 101 (1947); State v. Doron, 5 Nev. 399, 408 (1870).

Although the presumption of validity is ordinarily applied in challenges to the constitutionality of statutes, the presumption is not limited to that context because the presumption arises from the oath state legislators take to support, protect and defend the Federal and State Constitutions. See Illinois v. Krull, 480 U.S. 340, 351 (1987); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."); Cohen v. State, 720 N.E.2d 850, 855 (N.Y. 1999) ("all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with and fulfillment of their oaths of office.").

The presumption also arises from the institutional respect the judiciary extends to a coordinate department of state government when performing its constitutionally-assigned functions. See Rust v. Sullivan, 500 U.S. 173, 191 (1991) (explaining that the canon under which courts construe acts of Congress in

order to save them from unconstitutionality "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.").

The same reasons that justify the presumption of validity when the Legislature performs its constitutionally-assigned function to enact legislation are also present when one of the Houses performs its constitutionally-assigned function to discipline its members and to protect the order, dignity, integrity and safety of its proceedings. When one of the Houses is performing that function, its members should be entitled to the same presumption that they act only in accordance with and fulfillment of their oaths of office, and the judiciary should extend the same respect to this function and presume that the House has acted in the light of constitutional limitations.

Therefore, in reviewing the Petitioner's claims in this case, the Court should presume that the acts of the Assembly are constitutional, and it should place the entire burden on the Petitioner to make a clear showing of invalidity. And in case of doubt, every possible presumption should be made in favor of the validity of the acts of the Assembly, and the Court should not interfere with those acts unless the Petitioner can meet his heavy burden to prove beyond a reasonable doubt that the Constitution is clearly violated.

II. Because the Assembly seated the Petitioner and did not exclude him from his legislative seat for failing to meet the qualifications of his office, the decision in Powell v. McCormack, 395 U.S. 486 (1969), is not controlling or helpful to the Petitioner in this case.

In his petition, the Petitioner asks the Court to issue a writ of mandamus ordering the Legislature "to seat Assemblyman Brooks." (Pet. 4.) However, the Petitioner also states in his petition that "Assemblyman Brooks has already been seated as a member of the 77th Regular Session of the Nevada Legislature." (Pet. 3.) This latter statement is accurate because the record clearly reflects that the Petitioner has already been seated as a member of the Assembly. Assembly Daily Journal, 77th Reg. Sess., at 2-3 (Nev. Feb. 4, 2013) (*RA3-4*). On February 4, 2013, the Assembly determined that the Petitioner was duly elected and that he met the qualifications of his office. Id. Based on this determination, the Assembly permitted the Petitioner to take and subscribe to the official oath of office before the Chief Justice, and the Assembly seated the Petitioner as a member of the Assembly. Id. Therefore, it is undisputed that the Petitioner has already been seated as a member of the Assembly.

What is disputed is the nature of the Assembly's action after the Petitioner was seated by the Assembly. Even though the Assembly determined that the Petitioner met the qualifications to be seated as a member of the Assembly and the Petitioner was, in fact, seated, the Petitioner claims that "the Legislature has imposed . . . an extra-constitutional qualification on Assemblyman Brooks' right

and duty to serve his constituents, which [it] cannot do." (Pet. 3.) In support of his claim, the Petitioner cites Powell v. McCormack, 395 U.S. 486 (1969). It appears the Petitioner is claiming that by being placed on paid administrative leave, he has been wrongfully excluded from his legislative seat similar to the wrongful exclusion that occurred in Powell.

The fatal flaw in the Petitioner's claim is that under Powell, a wrongful exclusion can occur only if the House refuses to seat the legislator and the legislator is not allowed to subscribe to the oath of office even though the legislator meets all the qualifications of office. Powell, 395 U.S. at 506-12. However, if a legislator has already taken his legislative seat and subscribed to the oath of office and thereafter the House denies the legislator access to his seat because of his alleged misconduct, the action of the House is not an act of exclusion. Id. It is an act of institutional self-protection and discipline.

As stated by the Supreme Court repeatedly in Powell, its holding was limited to the situation where the legislator "had not been seated." Id. at 508. The Supreme Court emphasized that "we express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated." Id. at 507 n.27. Based on the Supreme Court's statements, several state courts have recognized that the decision in Powell is limited to cases involving exclusion where the legislator is never seated, and that the decision in Powell is not

controlling where the House has exercised its power to discipline or expel a legislator after he has been seated. See, e.g., Gray v. Gienapp, 727 N.W.2d 808, 813-15 (S.D. 2007); Sweeney v. Tucker, 375 A.2d 698, 706-07 (Pa. 1977).

As the record clearly indicates in this case, the Petitioner was not excluded from his legislative seat for failing to meet the qualifications of his office. To the contrary, the Assembly determined that the Petitioner was duly elected and that he met the qualifications of his office, and the Assembly seated him. Assembly Daily Journal, 77th Reg. Sess., at 2-3 (Nev. Feb. 4, 2013) (*RA3-4*). After the Petitioner was seated, the Assembly denied the Petitioner access to his seat because of his alleged misconduct. As such, the action of the Assembly was not an exclusion under Powell. It was an act of institutional self-protection and discipline. Therefore, because the Assembly seated the Petitioner and did not exclude him from his legislative seat for failing to meet the qualifications of his office, the decision in Powell is not controlling or helpful to the Petitioner in this case.

Thus, the legal issue in this case does not involve exclusion. It involves institutional self-protection and discipline. When properly framed, the legal issue is whether the Assembly had the authority to take preventative and disciplinary action against the Petitioner based on its inherent power of self-protection and its express power to determine the rules of its proceedings and punish its members for

disorderly conduct under Article 4, §6. Because the Assembly had such authority, the Petitioner's request for mandamus relief must be denied.

III. When the Assembly adopted A.R. 5 and approved and ratified the Select Committee's rules and the Chair's order, the rules and order became the actions of the Assembly, and the Assembly's ratification dates back to the time when those actions were initially taken.

After the Petitioner was seated, the Assembly established the Select Committee to consider and investigate matters within the jurisdiction of Article 4, §6, which expressly authorizes the Assembly to determine the rules of its proceedings and punish its members for disorderly conduct. Assembly Daily Journal, 77th Reg. Sess., at 1 (Nev. Feb. 7, 2013) (*RA6*); Assembly Daily Journal, 77th Reg. Sess., at 1-3 (Nev. Feb. 13, 2013) (*RA8-10*). The Select Committee adopted rules which authorize its Chair to issue orders necessary to preserve order and protect the integrity and decorum of the Legislature and the legislative process. Rule 3 of the Select Committee on the Assembly, 77th Leg. (Nev. 2013) (*RA16*). The Select Committee's rules also provide that during the pendency of the Select Committee's investigation of a member, the member could be placed on paid administrative leave and prohibited from entering any of the legislative buildings or otherwise acting as a legislator. Id.

Under the authority of the rules, the Chair of the Select Committee issued an order to the Petitioner on February 11, 2013, which informed the Petitioner that preventative and disciplinary action was being taken against the Petitioner because

of his alleged deleterious conduct. In particular, the order informed the Petitioner that he was "being placed on paid Administrative Leave pending further investigation into your fitness to serve as an Assemblyman in the Nevada Legislature." (*RA18.*) The order stated that the Petitioner was being investigated for alleged deleterious conduct which "adversely affects the integrity and credibility of the Nevada Assembly." Id. The order also informed the Petitioner that the events involved in his highly publicized arrests "have caused members of the staff as well as others in the Legislative Building to fear that you will not be able to conduct yourself in a manner suitable to the Office of Assemblyman, and in fact, that you may present a direct threat to others in the building." Id. The order stated that the Petitioner's presence in and around the legislative buildings "has caused the need for heightened security and the commitment of additional resources to monitor your actions." Id. Accordingly, to promote and carry out institutional self-protection and discipline, the order instructed the Petitioner that he was "prohibited from entering any of the legislative buildings or otherwise acting as a legislator." Id.

On February 13, 2013, at the first scheduled floor session following the Committee's adoption of the rules and the Chair's issuance of the order, the Assembly "approved and ratified" the rules and order when the Assembly adopted A.R. 5. Assembly Daily Journal, 77th Reg. Sess., at 1-3 (Nev. Feb. 13, 2013)

(*RA8-10*). The Assembly determined that the rules and order were "necessary, just and appropriate to preserve order and protect the integrity and decorum of the Legislature and the legislative process and to conduct the Committee's proceedings to consider and investigate matters within the jurisdiction of Section 6 of Article 4 of the Nevada Constitution." Id.

It is a well-established rule of parliamentary law that "[a] legislative body may ratify any action that it had the power to authorize in advance and the ratification dates back to the action that was ratified." Mason's Manual of Legislative Procedure §146(6) (2010) (hereafter "Mason's Manual").[4] This rule applies to ratification by a legislative body of the actions of its committees, officers and delegates. Mason's Manual §443(2) ("A legislative body can ratify only such actions of its officers, committees or delegates as it had the right to authorize in advance."); Mason's Manual §615(2) ("A legislative body cannot delegate its powers to a committee, but when it ratifies the act of a committee in due form, the act of the committee becomes the act of the body.").

[4] Under Assembly Standing Rule No. 100, the Assembly has adopted Mason's Manual as "parliamentary authority in the Assembly." See also Gray v. Gienapp, 727 N.W.2d 808, 811 (S.D. 2007) ("Mason's Manual is a widely recognized authority on state legislative and parliamentary procedures.").

As will be discussed in extensive detail next, the Assembly had the authority to take preventative and disciplinary action against the Petitioner based on its inherent power of self-protection and its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6. Therefore, when the Assembly adopted A.R. 5 and approved and ratified the Select Committee's rules and the Chair's order, the rules and order became the acts of the Assembly, and the Assembly's ratification dates back to the time when those actions were initially taken.

A. The Assembly had the authority to take preventative and disciplinary action against the Petitioner based on its inherent power of self-protection.

When the framers of the Nevada Constitution drafted the provisions governing legislative procedure, they were influenced by the customs and practices of the British Parliament and the United States Congress. See State ex rel. Davis v. Eggers, 29 Nev. 469, 473-75 (1907). Therefore, to determine the extent of the Assembly's power over its internal affairs and management, the Nevada Constitution "should be construed with reference to existing customs in legislative and parliamentary bodies." State ex rel. Cardwell v. Glenn, 18 Nev. 34, 40 (1883).

It is well established that every legislative body possesses inherent powers that are essential to its self-preservation and protection. Luther S. Cushing, Elements of the Law & Practice of Legislative Assemblies §533 (1856) (hereafter

"Cushing"). These inherent powers originated centuries ago in the British Parliament, and they are considered "so essential to the authority of a legislative assembly, that it cannot well exist without them; and they are consequently entitled to be regarded as belonging to every such assembly as a necessary incident." Id. As explained by the California Supreme Court:

> A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self-preservation.

Ex parte McCarthy, 29 Cal. 395, 403 (1866).

Thus, it is a well-settled rule of parliamentary law that every legislative body "necessarily possesses the inherent power of self-protection." In re Chapman, 166 U.S. 661, 668 (1897); Mason's Manual §561(2) ("A state legislative body possesses inherent powers of self-protection."). A legislative body's inherent power of self-protection authorizes it to take all protective actions that are "recognized by the common parliamentary law." Cushing §684.

Under the common parliamentary law, a legislative body has the power to "preserve its own honor, dignity, purity, and efficiency," and the power to "protect itself and its members from personal violence." Cushing §611. It also has the power "to punish offenders, to impose disciplinary regulations upon its members, [and] to enforce obedience to its commands." Cushing §533; Mason's Manual

§561(1) ("A legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate . . ."). It also has the power to regulate its buildings and grounds. Mason's Manual §805(5) ("A legislative body has the right to regulate its own halls.").

A legislative body may exercise its inherent power of self-protection to remedy or sanction a wide array of misconduct by its members. Cushing §653. For example, Cushing broadly defines misconduct by members as follows:

> Members may be guilty of misconduct, either towards the assembly itself, towards one another, or towards strangers. Misconduct of members towards the assembly, besides being the same in general as may be committed by other persons, consists of any breaches of decorum or order, or of any disorderly conduct, disobedience to the rules of proceeding, neglect of attendance, etc.; or of any crime, misdemeanor, or misconduct, either civil, moral, or official, which, though not strictly an attack upon the house itself, is of such a nature as to render the individual a disgrace to the body of which he is a member. Misconduct of members towards one another consists of insulting remarks in debate, personal assaults, threats, challenges, etc., in reference to which, besides the ordinary remedies at law or otherwise, the assembly interferes to protect the member, who is injured, insulted, or threatened.

Id.

Cushing also explains that some of the most severe acts of misconduct include "[a]ll attacks upon the persons of the members, or officers, of a legislative assembly, or others attending and privileged, as witnesses and parties, whether by actual violence, or by threats." Cushing §628. Such severe acts of misconduct

"have been always deemed high breaches of privilege and punishable accordingly." Id.

When disciplining or punishing members for acts of misconduct, the legislative body may, among other things, reprimand, censure, fine, imprison, suspend or expel a member. Cushing §§280, 627 & 675; Mason's Manual §561(1). For example, throughout its long history, the British Parliament has disciplined some of its members for disorderly conduct by imprisonment in the Tower. Cushing §§677 & 681; Hiss v. Bartlett, 69 Mass. 468, 473-75 (1855).

In addition, although the suspension of a legislator may deprive the electors of their representative for the duration of the suspension, its use as a form of discipline is still a common and valid practice. Cushing §280 ("Members may also be suspended by way of punishment from their functions as such, either in whole or in part, for a limited time."); Cushing §627 ("during the suspension, the electors are deprived of the services of their representative, without power to supply his place; but the rights of the electors are no more infringed by this proceeding, than by an exercise of the power to imprison."). As further explained by the United States Supreme Court in another context:

> The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

Barry v. United States, 279 U.S. 597, 616 (1929).

Accordingly, based on the time-honored principles of the common parliamentary law, the Assembly has the inherent power of self-protection, and it was authorized to exercise that power of self-protection to take preventative and disciplinary action against the Petitioner pending further investigation into his fitness to serve as a member of the Assembly. Therefore, the Assembly had the inherent authority to suspend the Petitioner by placing him on paid administrative leave pending further investigation by the Select Committee into his fitness to serve as a member of the Assembly. It also had the inherent authority to prohibit the Petitioner from entering any of the legislative buildings or otherwise acting as a legislator while he is suspended on paid administrative leave.

B. The Assembly had the authority to take preventative and disciplinary action against the Petitioner based on its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6.

Under Article 4, §6, each House is given the exclusive power to determine the rules of its legislative proceedings and to punish its members for disorderly conduct. When interpreting similar grants of power, courts from other jurisdictions have found that the power to punish for "disorderly conduct" is a broad grant of power which covers more than simply maintaining etiquette and decorum in debate and suppressing unruly behavior in the orderly conduct of business. Rather, the

power to punish for "disorderly conduct" extends to punishing members for "[a]ny conduct which is contrary to law" or "any gross violation of official duty on the part of a member." State ex rel. Tyrrell v. Common Council, 25 N.J.L. 536, 541 (N.J. 1856); Etzler v. Brown, 50 So. 416, 417-18 (Fla. 1909).

Thus, the power to punish for "disorderly conduct" is a broad grant of power that is at least as extensive as the power to expel, which the Supreme Court has stated "extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." In re Chapman, 166 U.S. 661, 669 (1897); 1 Joseph Story, Commentaries on the Constitution of the United States §838 (5th ed. 1905); 1 Westel W. Willoughby, Constitutional Law of the United States §§341 & 343 (1929); 1 Thomas M. Cooley, Treatise on Constitutional Limitations at 271 (8th ed. 1927) ("Each house has also the power to punish members for disorderly behavior, and other contempts of its authority, as well as to expel a member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats.").

Given the breadth of its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6, the Assembly had the authority to take preventative and disciplinary action against the Petitioner pending further investigation into his fitness to serve as a member of the Assembly. Therefore, the Assembly had the authority under Article 4, §6 to

suspend the Petitioner by placing him on paid administrative leave pending further investigation by the Select Committee into his fitness to serve as a member of the Assembly. It also had the authority to prohibit the Petitioner from entering any of the legislative buildings or otherwise acting as a legislator while he is suspended on paid administrative leave.

IV. Because the Assembly's decision to take preventative and disciplinary action against the Petitioner is a function constitutionally committed to the Assembly which falls within its sole province and discretion under Article 4, §6, the Assembly's decision is conclusive, and it presents a nonjusticiable political question that should not be subject to judicial review.

As a fundamental rule of the separation of powers, this Court generally will not issue a writ of mandamus to compel either House of the Legislature to perform an act which would be in conflict with the exclusive powers conferred upon the House by the Nevada Constitution. Heller v. Legislature, 120 Nev. 456, 458-59 (2004); Comm'n on Ethics v. Hardy, 125 Nev. 285, 291-97 (2009).[5] Thus, when the Nevada Constitution expressly grants an exclusive power to each House, the other departments of state government may not usurp, exercise or infringe upon

[5] See also State ex rel. Grendell v. Davidson, 716 N.E.2d 704, 709 (Ohio 1999) ("A writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.").

that exclusive power out of respect for an equal and coordinate branch of government. Heller, 120 Nev. at 462-63, 466-69; Hardy, 125 Nev. at 291-97.

In Heller v. Legislature, the Secretary of State tried to interfere with the exclusive power of each House to judge the qualifications of its members under Article 4, §6. 120 Nev. at 462-63, 466-69. The Court rejected the Secretary of State's unfounded interference as a violation of separation of powers because "[t]he Nevada Constitution expressly reserves to the Senate and Assembly the authority to judge their members' qualifications." Id. at 458-59. In rejecting the Secretary of State's improper attempt to intrude into the legislative sphere, the Court emphasized that "[s]eparation of powers is particularly applicable when a constitution expressly grants authority to one branch of government, as the Nevada Constitution does in Article 4, Section 6." Id. at 466. In addition, because Article 4, §6 creates an exclusive power in each House, the Court observed that neither the Legislature nor one of the Houses may delegate that exclusive power to another branch of government. Id. at 462-63, 472 & n.65 (citing In re McGee, 226 P.2d 1, 5 (Cal. 1951)).

Similarly, in Commission on Ethics v. Hardy, the Nevada Commission on Ethics attempted to interfere with the exclusive power of each House to discipline its members for disorderly conduct. 125 Nev. at 291-97. The Court found that Article 4, §6 "expressly grants the authority to discipline legislators for disorderly

conduct to the individual houses of the Legislature, thus the power to discipline legislators for disorderly conduct is a function constitutionally committed to each house of the Legislature." Id. at 293. Because the power to discipline legislators for disorderly conduct is a function constitutionally committed to each House, the Court held that any delegation of that power to another branch of government would be an unconstitutional delegation of power in violation of the separation of powers provision of the Nevada Constitution. Id. at 291-300.

The Court's reasoning in Heller and Hardy is consistent with decisions from other jurisdictions. In interpreting provisions similar to Article 4, §6, courts from other jurisdictions have found that the power of each House to punish or expel its own members is plenary and exclusive. French v. Senate of Cal., 80 P. 1031, 1032-33 (Cal. 1905); Gerald v. La. State Senate, 408 So. 2d 426, 428-29 (La. Ct. App. 1981); Hiss v. Bartlett, 69 Mass. 468, 473 (1855); Reaves v. Jones, 515 S.W.2d 201, 202-04 (Ark. 1974). As explained by one court, "[t]he overwhelming weight of opinion as expressed by not only the courts of this State, but the opinion of the courts of our sister states is that the discipline and removal of a legislator is within the sole province of the body in which he serves as a member." Gerald, 408 So. 2d at 429; see also 1 Thomas M. Cooley, Treatise on Constitutional Limitations at 270 (8th ed. 1927) ("There are certain matters which each house determines for itself, and in respect to which its decision is conclusive.").

Because the decision to take preventative or disciplinary action against a legislator is a matter that falls within the sole province and discretion of the legislator's House under Article 4, §6, the House's decision is conclusive, and it presents a nonjusticiable political question that should not be subject to judicial review. See Heller, 120 Nev. at 466-69 (holding that under Article 4, §6, "a legislative body's decision to admit or expel a member is almost unreviewable in the courts."); see also State ex rel. White v. Dickerson, 33 Nev. 540, 562 (1910) ("In the exercise of the powers conferred upon [the Governor] by the constitution which carry or imply any discretion, such as those relating to the approval or vetoing of bills or certain appointments of persons to office, his will is absolute and his action beyond the control of the courts.").

In this case, the Assembly's decision to take preventative and disciplinary action against the Petitioner is a function constitutionally committed to the Assembly which falls within its sole province and discretion under Article 4, §6. As such, the Assembly's decision is conclusive, and it presents a nonjusticiable political question that should not be subject to judicial review. Therefore, the Petitioner's request for mandamus relief must be denied.

V. Even if the Assembly's decision is subject to judicial review, the Assembly did not manifestly abuse its discretion or act arbitrarily or capriciously when it decided to take preventative and disciplinary action against the Petitioner.

A writ of mandamus is available to compel a public body to perform an act that the law requires as a duty resulting from an office, trust or station. Brewery Arts Ctr. v. State Bd. of Exam'rs, 108 Nev. 1050, 1053 (1992). Generally speaking, a writ of mandamus will issue only when the public body has a clear, present legal duty to act. Round Hill Gen. Impr. Dist. v. Newman, 97 Nev. 601, 603 (1981). A writ of mandamus will not issue to control a public body's discretionary action, unless the discretion is manifestly abused or is exercised arbitrarily or capriciously. Id. at 603-04.

A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule. State v. Dist. Ct., 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011). An arbitrary or capricious exercise of discretion is one which is founded on prejudice or preference rather than on reason or which is contrary to the evidence or established rules of law. Id.

The Assembly's decision to take preventative and disciplinary action against the Petitioner was a discretionary decision and, based on the foregoing standards, the Assembly did not manifestly abuse its discretion or act arbitrarily or capriciously.

First, the Assembly did not take its action based on a clearly erroneous interpretation of the law or a clearly erroneous application of the law. Rather, as discussed previously, the Assembly correctly interpreted and applied both common parliamentary law and state constitutional law to determine that it had the authority to take preventative and disciplinary action against the Petitioner based on its inherent power of self-protection and its express power to determine the rules of its proceedings and punish its members for disorderly conduct under Article 4, §6.

Second, the Assembly's action was founded on reason because it was "determined to be necessary, just and appropriate to preserve order and protect the integrity and decorum of the Legislature and the legislative process." Assembly Daily Journal, 77th Reg. Sess., at 2 (Nev. Feb. 13, 2013) (*RA9*).

Finally, the Assembly's action was not contrary to the evidence. The action was based on the fact that the Petitioner was being investigated for alleged deleterious conduct which "adversely affects the integrity and credibility of the Nevada Assembly." (*RA18.*) The action was also based on the fact that the Legislature, as an employer, must ensure a safe workplace for its employees and the events involved in the Petitioner's highly publicized arrests "have caused members of the staff as well as others in the Legislative Building to fear that you will not be able to conduct yourself in a manner suitable to the Office of Assemblyman, and in fact, that you may present a direct threat to others in the

building." Id. The action was also based on the fact that the Petitioner's presence in and around the legislative buildings "has caused the need for heightened security and the commitment of additional resources to monitor your actions." Id.

In light of this evidence, the Assembly's action was based on the urgent and compelling need to protect the order, dignity, integrity and safety of the legislative process. Because the Assembly's action was founded on legitimate and rational reasons and was consistent with well-established rules of parliamentary and constitutional law, the Assembly did not manifestly abuse its discretion or act arbitrarily or capriciously when it took preventative and disciplinary action against the Petitioner pending further investigation into his fitness to serve as a member of the Assembly. Therefore, the Petitioner's request for mandamus relief must be denied.

VI. Because the Petitioner sued only the Legislature rather than suing the Assembly, the Petitioner sued the wrong party.

In his petition, the Petitioner named the Legislature as the only respondent. (Pet. 2) ("Respondent is the Legislature of the State of Nevada."). The Petitioner did not name the Assembly as a respondent. As a result, the Petitioner sued the wrong party because the power to discipline legislators for disorderly conduct rests with each House, rather than the Legislature as a whole, and neither House may interfere with the discipline of the other's members. Therefore, the Legislature as a whole cannot provide the Petitioner with any relief because the Legislature

cannot be compelled to perform acts which only the Assembly has the legal authority to perform.

The writ of mandamus will not issue to compel a public body to perform an act which the public body has no legal authority to perform. Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 536 (2001); State ex rel. Conklin v. Buckingham, 58 Nev. 450, 453-54 (1938). Additionally, the writ of mandamus will not issue "to compel one official [body] to discharge a duty devolving upon another official body." Elliott Addressing Mach. Co. v. Jarman, 135 So. 166, 167 (Ala. 1931). Thus, if a public body does not have the legal authority to perform the acts requested in the petition because those acts fall within the exclusive province of another public body, the courts will deny mandamus relief. See Wenzler v. Mun. Ct., 45 Cal. Rptr. 54, 57 (Cal. Dist. Ct. App. 1965).

For example, in Heller v. Legislature, 120 Nev. 456, 458-60 (2004), the Secretary of State asked this Court to issue a writ of mandamus directing the Legislature to oust or exclude state employees from serving as members of the Legislature. Based on the plain language of Article 4, §6, the Court determined that "the authority to determine members' qualifications rests with each House, rather than the Legislature as a whole, and neither House may interfere with seating the other's members." Id. at 462. The Court concluded, therefore, that

"the Secretary has sued the wrong party, as he seeks to compel an act that the Legislature as a whole has no legal authority to perform." Id.

Like the Secretary of State in Heller, the Petitioner in this case sued the wrong party because the power to discipline legislators for disorderly conduct rests with each House, rather than the Legislature as a whole, and neither House may interfere with the discipline of the other's members. See Hardy, 125 Nev. at 291-97. Therefore, the Petitioner's request for mandamus relief must be denied because the writ of mandamus will not issue to compel the Legislature as a whole to perform acts which only the Assembly has the legal authority to perform.

CONCLUSION

Based on the foregoing, the Legislature respectfully asks the Court to deny the petition for writ of mandamus.

DATED: This **20th** day of March, 2013.

Respectfully submitted,

By: /s/ Brenda J. Erdoes

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that the foregoing answer complies with the formatting requirements of NRAP 21(d), NRAP 32(c)(2) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font and Times New Roman type.

2. We hereby certify that we have read the foregoing answer, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that the answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **20th** day of March, 2013.

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Respectfully submitted,

By: /s/ Brenda J. Erdoes

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **20th** day of March, 2013, pursuant to the Court's orders on March 6 and 15, 2013, and the Nevada Electronic Filing Rules, I served a true and correct copy of the Legislature's Answer and Appendix, by means of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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