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10
11

12 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

13 IN AND FOR THE COUNTY OF WASHOE

14 SCENIC NEVADA, INC.,

15 Petitioner,

Case No.

16 vs.

Dept.

17 CITY OF RENO, a political subdivision
18 of the State of Nevada, and the CITY
19 COUNCIL thereof,

20 Respondent.

/

21 **PETITION FOR WRIT OF MANDATE**

22 COMES NOW Petitioner Scenic Nevada, Inc. and by this verified Petition for
23 Writ of Mandate directed to the Respondent City of Reno and the City Council thereof,
24 petitions this Honorable Court for issuance of a writ of mandate to specially enjoin
25 Respondents from allowing the use of banked billboard permits issued during an interim
26 invalidity period (Nov. 14, 2000 to Oct. 24, 2012) from being used to construct new
27 billboards in the City of Reno.
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2 PARTIES

3 3. Petitioner Scenic Nevada, Inc. is a non-profit Nevada corporation with a
4 principal place of business at 608 Lander Street, Reno, Nevada. Its principal activity is
5 to educate the general public on the economic, social, and cultural benefits of scenic
6 preservation by means of encouraging billboard and sign control, among other issues.

7 4. Respondent City of Reno is a political subdivision of the State of Nevada
8 located in the County of Washoe and the Respondent Reno City Council is a tribunal
9 composed of elected officials.

10 FACTS

11 5. Following repeated attempts by Reno citizens to persuade the Respondents
12 to enact stronger billboard controls, a grassroots, volunteer organization called "Citizens
13 for a Scenic Reno" ("CFASR") formed on January 20, 2000.

14 6. CFASR filed nonprofit articles of incorporation with the Nevada Secretary
15 of State on March 27, 2000.

16 7. On March 29, 2000, CFASR filed an Initiative Petition with the Reno City
17 Clerk which stated: "New off-premise advertising displays/billboards in the City of Reno
18 are prohibited, and the City of Reno may not issue permits for their construction."

19 8. On June 26, 2000 opponents filed an initiative petition which stated: "Off-
20 Premise Advertising Displays (billboards) in the City of Reno shall only be permitted on
21 property zoned commercial and industrial."

22 9. By July 25, 2000, CFASR had collected 7,381 valid signatures, above the
23 required minimum of 6,790 signatures, which represented 15% of the votes cast in the
24 previous citywide election, in order to qualify its initiative for the 2000 general election
25 ballot. Ballot Question R-1 read:

26 **"The construction of new off-premises advertising displays/billboards**
27 **is prohibited, and the City of Reno may not issue permits for their**
28 **construction."**

1 10. On July 29, 2000, opponents withdrew their initiative petition from
2 circulation stating, "The dueling petition drive confused voters. The group will now
3 concentrate its efforts on defeating the referendum."

4 11. CFASR spent about \$3,000 in its successful fight for passage of Question
5 R-1. Opponents, calling themselves "Nevadans to Save Jobs and Fight Extremism" spent
6 \$226,823 in a losing effort.

7 12. On August 24, 2000, the opponents, led by Eller Media Co. as plaintiff,
8 filed a lawsuit asking the Court to remove the initiative from the ballot.

9 13. On October 14, 2000, the Hon. Jerome Polaha, District Judge, Second
10 Judicial District Court, found in favor of the City and against Eller Media. The initiative
11 remained on the ballot.

12 14. At the polls on November 7, 2000, of the 57,782 votes cast, 32,765, or
13 57%, voted in favor of Ballot Question R-1.

14 15. The results were certified by the Respondent on November 14, 2000, and
15 Ballot Question R-1 became Reno Municipal Code ("RMC") §18.16.902 (a), entitled
16 "Restrictions on Permanent Off-Premises Advertising Displays". RMC §18.16.902 (a)
17 states:

18 **"The construction of new off-premises advertising displays/billboards**
19 **is prohibited, and the City of Reno may not issue permits for their**
20 **construction."**

21 16. Notwithstanding the mandate of the voters enacted into law as RMC
22 §18.16.902 (a), on or about January 22, 2002, a majority of the Respondent City Council
23 voted to amend the municipal code to create a billboard "banking" and relocation system,
24 allowing a billboard company to remove a billboard in one location and "bank" the
25 permit for up to 10 years (later increased to 15 years) until a new permitted location could
26 be found. Using these "banked" receipts, a billboard company could construct a new
27 billboard, often in a new location, where no billboard stood before, by obtaining a new
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1 building permit for the new billboard, contrary to the plain mandate of the voters in
2 passing Ballot Question R-1.

3 17. The Respondents' adoption of the "banking" and relocation system, now
4 codified in RMC §18.16.908, unconstitutionally amended the ballot initiative barely 14
5 months after it was approved by the voters. RMC §18.16.908 gave staff of the
6 Respondent City the authority to issue permits for new billboard construction when
7 existing billboards are removed. Specifically, the ordinance provided that a billboard
8 "may be relocated to a permitted location" as long as two permits are obtained; one to
9 remove the old billboard and one to relocate the new billboard to a new location. The
10 Respondents again amended the municipal sign ordinance shortly thereafter, to formally
11 establish a billboard permit "bank" and provide city staff a mechanism for tracking
12 permits of removed billboards.

13 18. CFASR changed its name to "Citizens For A Scenic Northern Nevada" and
14 in September 2002, adopted its current name, "Scenic Nevada".

15 19. Eller Media had appealed Judge Polaha's decision to the Nevada Supreme
16 Court. On Dec. 17, 2002, the Supreme Court affirmed, in *Eller Media Co. v. City of*
17 *Reno*, 118 Nev. 767, 59 P.3d 437 (2002), holding that the billboard petition was
18 legislative in character, a proper subject for an initiative petition, and reflected a citywide
19 change in policy towards off-premise advertising. On Feb. 6, 2003, the Supreme Court
20 denied Eller Media's petition for rehearing.

21 20. During the years 2000 through 2012, all billboard lighting was required to
22 be directed toward the billboard, and not toward the street. This requirement was
23 codified in RMC§18.16.905 (I), which effectively prevented digital billboards in the City
24 of Reno. In contrast to a traditional billboard where lights shine onto the display, the
25 lighting of a digital billboard shines toward the public roads. RMC §18.16.905 (I)
26 effectively made digital billboards illegal in the City of Reno by prohibiting light shining
27 toward the public roads.
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1 21. On February 13, 2008, the Respondent City Council voted to direct Reno
2 City staff to initiate a text amendment that would eliminate RMC §18.16.905 (I) and
3 allow the construction and permitting of new digital billboards.

4 22. Digital billboards are computer controlled variable message electronic signs
5 whose informational content can be changed or altered by means of computer-driven
6 electronic impulses (including “light emitting diodes” or “LED” light bulbs). LED bulbs
7 turn off and on every eight seconds to display a different advertisement in a sequence of
8 eight rotating advertisements, day and night.

9 23. Digital billboard displays are by definition a new type of billboard, using
10 new technology, and requiring mostly new construction and new building permits.

11 24. On April 25, 2008 the Community Development Department held a
12 workshop to gather suggestions, ideas and recommendations for inclusion in the proposed
13 draft digital billboard ordinance. Representatives from the billboard industry and Scenic
14 Nevada attended.

15 25. At all times since the initial draft proposed in 2008, the text amendment for
16 the proposed digital billboard ordinance was based upon, and indeed, dependent upon,
17 the Respondents’ adoption of the 2002 ordinance creating the “banking” and relocation
18 system, which purported to allow billboard companies to “bank” receipts for billboards
19 and move them to new locations within the city.

20 26. On October 13, 2009 the Community Development Department released
21 another draft ordinance that was to be reviewed at the November Planning Commission
22 meeting. At the hearing on November 5, billboard company Clear Channel Outdoor,
23 appearing by its attorney John Frankovich, requested a continuance, due to Clear
24 Channel’s objections to restrictions on digital billboards contained in the proposed draft.
25 The Planning Commission voted to continue the public hearing, but not before members
26 of Scenic Nevada were allowed to address the Commissioners and point out that the 2000
27 ballot initiative prohibited the city from allowing new billboard construction, including
28 new construction of digital billboards.

1 27. Citizen opposition to new billboards remained strong. In April, 2011,
2 Scenic Nevada commissioned a poll that asked registered voters within Reno a series of
3 questions about traditional and digital billboards. The results showed that 55% of the
4 voters were opposed to the Respondents' effort to add text changes to the sign code
5 allowing digital billboards within the Reno city limits. Further, 66% said they would not
6 want to view a digital billboard from their home or office window; 80% said that Reno
7 had enough or too many billboards; and almost 90% were concerned about distracted
8 driving.

9 28. The proposed digital billboard ordinance did not resurface until May 24,
10 2011, when city staff held another stakeholders meeting at the Community Development
11 office. Scenic Nevada attended and again spoke in opposition to the new ordinance,
12 citing the prohibition against new billboard construction and adding that the direction to
13 include digital billboards was moving the city farther away from the law contained in the
14 ballot initiative.

15 29. On September 20, 2011 the Planning Commission held a public workshop
16 on the proposed digital billboard ordinance. Scenic Nevada attended, testifying that the
17 city's banking and relocation system violated the ballot initiative and that digital
18 billboards are new construction, prohibited by city code and a further departure from the
19 voters' intent to reduce billboard blight.

20 30. At the October 2011 Planning Commission meeting, Scenic Nevada was
21 present during a discussion by commissioners who questioned whether the City should be
22 proceeding with a draft billboard ordinance in light of the 2000 ballot initiative.
23 Commissioners directed city staff to return at the next meeting with two alternative
24 recommendations: one continuing the prohibition of digital billboards and one permitting
25 digital billboards.

26 31. At the November 2, 2011 Planning Commission hearing on the draft
27 ordinance, a motion to continue prohibiting digital billboards within the city limits based
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1 on the ballot initiative failed by a 2-3 vote. City staff then was directed to return with
2 new changes to the draft ordinance.

3 32. On November 14, 2011, Scenic Nevada timely appealed the vote of the
4 Planning Commission from the November 2nd hearing.

5 33. At the December Planning Commission meeting, Scenic Nevada also
6 repeated that the banking system violated the voter initiative and should be abandoned
7 instead of expanding its use by allowing digital billboards.

8 34. Based on the presentation by Scenic Nevada, Planning Commissioners
9 postponed discussion of the ordinance and asked the city attorney for a legal opinion and
10 report.

11 35. On January 4, 2012, after a lengthy public hearing extending past 10 p.m.,
12 with few members of the public still present, by a 4-2 vote, the Planning Commission
13 recommended a draft digital billboard ordinance allowing new construction of digital
14 billboards within the city limits.

15 36. On January 9, 2012, Scenic Nevada timely appealed the January 4, 2012
16 recommendation of the Planning Commission.

17 37. At the Feb. 8, 2012 public hearing before the Respondent City Council,
18 Scenic Nevada appeared to present its appeals. Members of the City Council expressed
19 dissatisfaction with the draft ordinance recommended by the Planning Commission, and
20 postponed the public hearing as well as Scenic Nevada's appeal.

21 38. Instead of hearing Scenic Nevada's appeals, the City Council scheduled
22 and held two more public workshops. Scenic Nevada attended both workshops (March 6
23 and April 25, 2012) and opposed adoption of the new ordinance on numerous grounds,
24 including the violation of the 2000 voter initiative. Scenic Nevada also asked the city
25 council to consider eliminating the billboard banking and relocation system to help
26 reduce billboard blight.

27 39. After the workshops, members of the City Council and representatives of
28 the billboard industry came to an understanding on how they wished to proceed and the

1 Respondent City Council held a public hearing on the draft ordinance on July 18, 2012,
2 when Scenic Nevada's appeal finally would be heard. Consistent with its opposition at
3 hearings for the past four years, Scenic Nevada opposed the draft and presented
4 arguments against its passage. The Respondents approved the first reading of the draft
5 ordinance over Scenic Nevada's objections.

6 40. The second reading of the ordinance was scheduled for August 22, 2012.
7 In a letter dated Aug. 16, 2012, Scenic Nevada opposed the draft, only to learn that the
8 second reading was postponed because the Respondent City Council was considering
9 substantial changes to the draft that had been made since the first reading.

10 41. Scenic Nevada opposed the substantially revised draft in a letter dated
11 September 6, 2012, but when the revised ordinance came before the Respondent City
12 Council for a "first reading" on September 12, 2012, the Respondent City Council
13 approved it over Scenic Nevada's opposition.

14 42. On October 5, 2012, city staff notified representatives of the billboard
15 industry and Scenic Nevada that there were more substantial changes to the draft and that
16 another "first reading" was scheduled for October 10, 2012.

17 43. On October 10, 2012, Scenic Nevada appeared again to challenge the
18 ordinance as violating the voter initiative, among other issues. The Respondent City
19 Council again approved the "first reading" of the ordinance and the second reading was
20 scheduled for October 24, 2012.

21 44. The agenda for the October 24 meeting included a proposed moratorium
22 and resolution to prohibit staff from issuing digital billboard building permits.
23 According to the city attorney, in the event of a lawsuit and subsequent court decision
24 invalidating the new digital billboard ordinance, a moratorium on issuing new permits for
25 billboards would avoid the expense of having to remove digital billboards that were
26 subsequently found by a court to be unlawfully constructed.

27 45. Scenic Nevada appeared at the City Council meeting on October 24, 2012,
28 to protest the adoption of the digital billboard ordinance but also to support the

1 moratorium, which obviously would be beneficial to the citizens of Reno in light of
2 Scenic Nevada's intention of filing a complaint for judicial review to challenge the new
3 digital billboard ordinance. Scenic Nevada supported its position with approximately 50
4 letters in support of the moratorium. No one in attendance at the City Council meeting
5 opposed a moratorium. Without explanation to Scenic Nevada or the public, the
6 Respondent City Council did not adopt a moratorium. Instead, the Respondent City
7 Council approved the second reading of the ordinance along with an effective date of
8 January 24, 2013.

9 46. Scenic Nevada filed a Complaint for Judicial Review on November 16,
10 2012 to invalidate the new Reno digital billboard ordinance.

11 47. The city subsequently adopted a moratorium to prohibit staff from issuing
12 digital billboard building permits, due to the Scenic Nevada lawsuit. Standard, so-called
13 "static" billboards were not affected by the moratorium on digitals. Since 2000 and to
14 this day, new static billboards continue to be erected using banked receipts.

15 SUPREME COURT DECISION

16 48. Scenic Nevada is the author and proponent of the billboard initiative
17 codified as RMC§18.16.902. From 2008 through 2012, Scenic Nevada devoted more
18 than four years to exhausting its administrative remedies by opposing the digital billboard
19 ordinance in workshops, public hearings and appeals. From 2012 through 2016, Scenic
20 Nevada litigated the unconstitutionality of the digital billboard ordinance in the Second
21 Judicial District Court and Nevada Supreme Court. Scenic Nevada is an aggrieved party
22 under NRS 278.3195.

23 49. Before the District Court and Nevada Supreme Court, Scenic Nevada
24 contended that the Nevada Constitution guarantees the right of the citizens to resort to the
25 initiative process when their elected officials have failed to act. Nevada Constitution
26 Article 19, §2(1) states:

27 Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but
28 subject to the limitations of Section 6 of this Article, the people reserve to

1 themselves the power to propose, by initiative petition, statutes and amendments
2 to statutes and amendments to this Constitution, and to enact or reject them at the
3 polls.

4 50. Scenic Nevada further maintained that once the citizens have passed an
5 initiative, the governing body of the local government is prohibited from amending,
6 annulling or repealing that initiative law for a period of not less than three (3) years.

7 Nevada Constitution Article 19, §3, states, in pertinent part:

8 If a majority of the voters voting on such question at such election votes approval
9 of such statute or amendment to a statute, it shall become law and take effect upon
10 completion of the canvass of votes by the Supreme Court. An initiative measure so
11 approved by the voters shall not be amended, annulled, repealed, set aside or
12 suspended by the Legislature within 3 years from the date it takes effect. If a
13 majority of such voters votes disapproval of such statute or amendment to a
14 statute, no further action shall be taken on such petition.

15 51. Scenic Nevada argued that the same initiative powers that the citizens
16 possess with respect to statutes and constitutional provisions also can be exercised with
17 respect to municipal ordinances. Nevada Constitution Article 19, §4 states:

18 The initiative and referendum powers provided for in this article are further
19 reserved to the registered voters of each county and each municipality as to all
20 local, special and municipal legislation of every kind in or for such county or
21 municipality. In counties and municipalities initiative petitions may be instituted
22 by a number of registered voters equal to 15 percent or more of the voters who
23 voted at the last preceding general county or municipal election. Referendum
24 petitions may be instituted by 10 percent or more of such voters.

25 52. Scenic Nevada's position is, and was, that the voter initiative of 2000,
26 codified as RMC §18.16.902, prohibited new construction of billboards and banned the
27 issuance of building permits for their construction. Since RMC §18.16.902 resulted
28 from an initiative petition, the Respondents had no authority to "amend, annul, repeal, set

1 aside or suspend” the voter initiative for a period of three years following its adoption on
2 Nov. 7, 2000. The former Reno City Council argued at trial and on appeal that the
3 Respondents have the right to immediately amend, annul, repeal, set aside or suspend a
4 law adopted by the initiative process; in other words, a city council can unwind a voter
5 initiative as soon as the initiative is passed into law.

6 53. By adopting the “banking” and relocation system in 2002, which allowed
7 billboard companies to “bank” receipts for existing billboards and obtain building permits
8 for billboards in new locations, Scenic Nevada contended that the Respondents violated
9 the rights of Scenic Nevada and the citizens of Reno under the Nevada Constitution by
10 amending, annulling, repealing and setting aside the voter initiative codified as RMC
11 §18.16.902 less than three years after the initiative had passed. The Respondents argued
12 that the ballot initiative merely “capped” the number of billboards, so the issuance of
13 permits for new billboards did not transgress against the voter initiative.

14 54. Notwithstanding Scenic Nevada’s contentions, following a one-day trial, on
15 March 27, 2014 District Court Judge Patrick Flanagan upheld the city’s digital billboard
16 ordinance against Scenic Nevada’s challenges. Scenic Nevada immediately appealed to
17 the Supreme Court on March 28, 2014.

18 55. During 2016, the Respondent City Council, at the request of Council
19 Member Jenny Brekhus, unanimously agreed to review the city’s billboard ordinance in
20 advance of the state Supreme Court’s anticipated ruling. None of the current council
21 members were elected officials when either the banking and relocation ordinances or the
22 digital billboard ordinance were adopted. The review was meant to educate the
23 Respondent City Council on the history, regulatory scheme and impacts of the ordinances
24 and to presumably make possible changes.

25 56. On June 30, 2016, in a unanimous, *en banc* opinion, the Supreme Court
26 upheld Judge Flanagan’s judgment in favor of the City, but not on the same grounds that
27 Judge Flanagan had used. The court overturned Judge Flanagan’s decision insofar as the
28 judge had declared the City of Reno could repeal a voter initiative immediately after the

1 initiative is passed. The Supreme Court ruled that the 2002 and 2003 banking and
2 relocation ordinances amended the meaning of the 2000 ballot initiative within three
3 years of the passage of the initiative, and therefore, the banking and relocation ordinances
4 were unconstitutional under the Nevada constitution, and were null and void, *ab initio*.
5 The Court then ruled, however, that the digital billboard ordinance, adopted after the
6 three-year time limit, was allowed under the Nevada constitution. The Supreme Court
7 also held that when the city enacted the digital billboard ordinance on October 24, 2012,
8 it reenacted the 2002 and 2003 banking and relocations ordinances, curing the
9 constitutional defect.

10 57. The result of the Supreme Court's decision was to place into question the
11 validity of the banked receipts issued during the period of 2000 through October 24,
12 2012, which the Court referred to as the period of "interim invalidity."

13 58. In its briefs to the trial court and Supreme Court, Scenic Nevada had
14 expressly stated that Scenic Nevada did not challenge the vested rights of the banked
15 billboard permits, only the constitutionality of the digital billboard ordinance of 2012, on
16 grounds that the digital billboard ordinance is entirely dependent upon the underpinning
17 of the unconstitutional banking and relocation system adopted by the Respondent. The
18 Supreme Court rejected Scenic Nevada's argument, and instead, on its own accord, the
19 Supreme Court determined that the banking and relocation ordinances were
20 unconstitutional, but the digital billboard ordinance was constitutional. The Supreme
21 Court's opinion thus presented the issue that is the subject of this Petition.

22 59. The Supreme Court did not rule on the validity of the banked receipts, and
23 in its opinion, the Court explained why:

24 "Here it is undisputed that the Reno City Council enacted the Conforming and
25 Banking Ordinances within the three year legislative moratorium, rendering the
26 ordinances void *ab initio*...Since Scenic Nevada limits the relief it seeks to the
27 prospective invalidation of the 2012 Digital Billboard Ordinance based on
28 antecedent infirmities in the 2002 and 2003 Conforming and Banking Ordinances,

1 which infirmities were cured when the 2012 Digital Ordinance reenacted them
2 outside the moratorium period, **no question arises in this case** as to the impact the
3 interim invalidity of the 2002 and 2003 Conforming and Banking Ordinances may
4 have on persons who relied on those ordinances.”

5 (Emphasis added).

6 60. In summary, the Court held that there exists an interim period (Nov. 14,
7 2000 to Oct. 24, 2012) during which banked receipts were unconstitutionally issued
8 pursuant to unconstitutional ordinances. But by holding that “no question arises in this
9 case”, the Supreme Court left for another day the issue of the status of the banked
10 receipts issued during the period of interim invalidity.

11 RESPONDENTS’ FEB. 8, 2017 RESOLUTION TO ALLOW USE OF BANKED
12 RECEIPTS FOR BILLBOARD PERMITS

13 61. Scenic Nevada board members are volunteers that have worked tirelessly in
14 the past year to convince the city council to enforce the people’s vote, including
15 organizing and attending group meetings with council members and other leaders in the
16 community to educate the council on the negative impacts of billboards, Scenic Nevada’s
17 lawsuit and the results and implications of the state Supreme Court case. Scenic Nevada
18 sent out email alerts to the community, contacted the media and published full-page ads
19 in the Reno Gazette Journal to alert the public on the upcoming votes.

20 62. As with the digital billboard hearings from 2008-2012, Scenic Nevada
21 participated at all subsequent city council hearings requested by Council Member
22 Brekhus, submitting letters, emails and a petition signed by approximately 400 people,
23 with their comments, asking the city council to stop allowing new billboard construction
24 and to enforce the ballot initiative of 2000.

25 63. On December 14, 2016 the Respondent City Council voted unanimously,
26 with one abstention, to instruct city staff to draft a new billboard moratorium that would
27 (1) prohibit the city staff from accepting applications for both standard and digital
28 billboards; (2) close the billboard bank, (3) not accept any new banked permits; and (4)

1 provide more information on the existing 82 banked permits. The motion maker, Council
2 Member Paul McKenzie, added that the purpose of the moratorium was to stop new
3 billboard construction while giving the City of Reno time to rewrite the city's billboard
4 ordinance to reflect the will of the people, banning the new construction of all billboards.
5 This purpose was stated in proposed moratorium resolutions presented on January 11 and
6 February 8 that would amend the sign ordinance to prohibit ANY billboard construction.

7 64. On January 11, 2017 the Respondent City Council voted unanimously, with
8 one abstention, to adopt a 30-day moratorium on both standard and digital billboards.
9 The January 11th resolution reflected the Respondents' previous direction, with one
10 exception: the time period left on the expiration of the banked receipts would remain
11 frozen, until the moratorium expired. *See Staff Report, Ex. 1, attached.*

12 65. According to the adopted 30-day moratorium resolution, the purpose of the
13 moratorium is "to provide the City an opportunity to implement a policy and plan to
14 address existing receipts in the bank **and amend RMC 18.16 (Off-premises advertising**
15 **displays) to prohibit any construction of off-premises advertising displays". *See*
16 *Resolution No.8280, Exhibit 2, attached, emphasis added.***

17 66. The moratorium procedure is a two-stage process, requiring the adoption of
18 a pending moratorium resolution and a final moratorium resolution. It was agreed that
19 the final moratorium language and the fate of the 82 banked permits would be decided at
20 the next meeting, after the Respondent City Council received a legal briefing from the
21 City Attorney's Office.

22 67. At the February 8, 2017 public hearing on the proposed final one-year
23 moratorium, speakers included Scenic Nevada, billboard industry representatives and
24 members of the public. Planning staff and legal staff made presentations. *See Staff*
25 *Report, Ex. 3, attached.* Planning staff presented a draft of a one-year moratorium, as
26 requested by Respondent, with the same wording as the 30-day moratorium. During the
27 moratorium, the draft provided that Respondents would not accept standard and digital
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1 billboard applications, would halt the banking of billboards and would not create new
2 banked receipts.

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4 68. During the February 8 hearing, the issue of whether the ballot initiative was
5 a cap or a ban was revisited. See Feb. 8, 2017 Hearing DVD, Ex. 6, attached. Upon
6 questioning from a city council member, the City Attorney's Office said that the Supreme
7 Court case validated the 2012 digital billboard ordinance and validated banking. The
8 City Attorney's Office said that the City's position had been that the ballot initiative
9 "functioned as a cap", rather than a ban on new construction. The City Attorney's Office
10 avoided any explanation of the true implications of the Supreme Court's decision: that
11 the city had unconstitutionally amended the ballot initiative, that the banking and
12 relocation ordinances should not have been adopted within the three-year period after the
13 vote; and continuing with the status quo (banking and relocation) would not be a faithful
14 interpretation of the people's will.⁶⁹ The City Attorney's Office had also been asked
15 to prepare a report that shows the liability to taxpayers, if the banked permits were
16 voided. At the Feb. 8 hearing, the City Attorney's Office presented a small chart
17 purporting to assess the costs to taxpayers, if the sign owners sued the city and won a
18 judgment for not being able to erect new billboards with the invalid banked receipts. *See*
19 *"Banked Receipts – Potential Legal Exposure," Ex. 4, attached.* The chart was presented
20 at the meeting and not submitted with the staff report in advance, allowing no time for
21 public scrutiny. The chart showed there are 10 banked receipts issued after Oct. 12, 2012
22 and are not invalid. The other 72 permits were issued during the interim invalidity
23 period. According to the City Attorney Office's chart, the estimated costs of revoking the
24 banked receipts was anywhere from \$0 to \$36 million.

25 70. It was revealed that the chart was the result of information gleaned from the
26 website of Lamar Advertising, which owns about two thirds of the Respondents' banked
27 receipts.
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1 71. The chart by the City Attorney's Office gave no breakdown as to which of
2 the banked receipts represented brand new billboards and which were not. Each banked
3 receipt was treated like a brand new billboard that had a life of 15 years. The City
4 Attorney's Office admitted at the hearing that the range of possible exposure was so
5 broad because the numbers depend on "what factual scenarios" are present for each
6 banked receipt.

7 72. During the hearing on February 8, the City Attorney's Office erroneously
8 represented to the Respondent City Council that the Supreme Court had decided that
9 banked permits handed out during the interim invalidity period were legally issued; in
10 short, the City Attorney's Office took the position that the banked receipts became
11 retroactively validated:

12 "The city attorney's opinion is that there is no such thing as interim
13 invalidity of the banked permits. Everything in that period because of the action in
14 2012 and the reenactment of the digital ordinance validated those permits."

15 73. The City Attorney's Office also incorrectly led the Respondent City
16 Council to believe that it was too late to get a ruling on whether the permits are valid:

17 "That's the Court telling Scenic Nevada, politely, look you didn't raise that
18 argument. Now you're not going to be able to raise that argument because this was
19 the forum in which you should have raised that argument."

20 74. In fact, the Supreme Court had expressly reserved ruling on the effect of the
21 interim invalidity issue. 75. Members of the Respondent City Council were led to
22 believe incorrectly that their only alternative was to allow the billboard industry to use
23 the banked permits for the construction of new static billboards, or else face costly
24 lawsuits from the sign industry. This erroneous understanding was based on the incorrect
25 insistence that the banked receipts are retroactively valid and can no longer be
26 challenged, on the unsubstantiated dollar figures in the chart created from Lamar
27 Advertising's website, and by clouding the issue concerning the false premise that that
28 the ballot initiative is only a cap, not a ban.

76. On February 8 three city council members reversed their previous votes and the one-year moratorium on both standard and digital billboards failed in a tie vote, 3-3. A second motion to temporarily prohibit digital billboard applications passed unanimously.

77. The February 8 moratorium temporarily prohibits digital billboard applications and closes the billboard bank to new permits. *See Resolution No. 8293, Ex. 5, attached.*

78. The “purpose” section of the resolution adopted February 8th was amended from language that would have prohibited ANY billboard construction to language LIMITING construction of off-premise advertising displays (billboards), to allow for construction of new static billboards using the void banked receipts. The February 8 resolution of the Respondent City Council also allows for billboard demolition permits.

79. Once the temporary moratorium on construction of digital billboards expires, and if there are no further changes to the billboard ordinance, digital billboards will be allowed to be constructed using the null and void banked receipts, too.

POINTS AND AUTHORITIES

The issue is, are the banked receipts that were issued in the 12-year period between the date of enactment of the citizens' initiative banning new billboards (Nov. 14, 2000) and the date of the Council's adoption of the digital billboard ordinance (Oct. 24, 2012), null and void and therefore unable to be used by billboard companies to construct new billboards?

Respectfully, the correct answer to this question is yes, the receipts are null and void, and the Respondents should be specially enjoined from attempting to use the banked receipts for allowing the construction of new billboards, either static or digital.

In *Scenic Nevada v. City of Reno*, 373 P.3d 873 (2016), the Supreme Court referred to the issue of the “interim invalidity” of the banking and relocation ordinance. And the court explained exactly why it was not deciding the issue of the “interim invalidity” of the banking and relocation ordinances:

1 Since Scenic Nevada limits the relief it seeks to the prospective invalidation
2 of the 2012 Digital Ordinance based on antecedent infirmities in the 2002 and
3 2003 Conforming and Banking Ordinances, which infirmities were cured when the
4 2012 Digital Ordinance reenacted them outside the moratorium period, no
5 question arises in this case as to the impact the interim invalidity of the 2002 and
6 2003 Conforming and Banking Ordinances may have on persons who relied on
7 those Ordinances.

8 Id. at 877-878.

9 Thus, because the issue was not raised in *Scenic Nevada*, the Supreme Court did
10 not address the impact of the “interim invalidity” of the banking and relocation
11 ordinances. On the other hand, by referring to an “interim invalidity,” the Supreme Court
12 recognized that there exists this interim period (Nov. 14, 2000 to Oct. 24, 2012) during
13 which banked receipts were invalid because they were issued pursuant to unconstitutional
14 ordinances.

15 If the court in *Scenic Nevada* intended to hold that the adoption of the Oct. 24,
16 2012 digital billboard ordinance retroactively validated the banking and relocation
17 ordinances, all the way back to 2002 and 2003, there would be no reason for the Supreme
18 Court even to refer to the impact of “interim invalidity.” The reference to “interim
19 invalidity” can only mean that despite the curing of the constitutional defects of the
20 banking and relocation ordinances by their reenactment in October 2012, the validity of
21 these ordinances was *prospective* only.

22 Unless it is clear that the drafters intended for a statute to apply retroactively, the
23 statute is presumed to be prospective only. *Sandpointe Apts., LLC v. Eighth Judicial*
24 *Dist. Court of State*, 313 P.3d 849, 853-54 (Nev. 2013), citing *Landgraf v. USI Film*
25 *Prods.*, 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Here there is no
26 evidence that the Supreme Court intended the banking and relocation ordinances
27 validated retroactively. Furthermore, the Reno City Council could not retroactively cure
28 the constitutional violations inherent in the banking and relocation ordinances, without

1 recreating the same constitutional violation that the Supreme Court condemned in *Scenic*
2 *Nevada*, namely, the adoption of an ordinance that amends the meaning of a ballot
3 initiative within three years of its passage.

4 In *Scenic Nevada*, the court cited to its prior precedent, including *Nev. Power Co.*
5 *v. Metro. Dev. Corp.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163-64 (1988), as follows:

6 "When a statute is held to be unconstitutional, it is null and void ab initio; it is of no
7 effect, affords no protection, and confers no rights." *Scenic Nevada*, at 877. As a matter
8 of law, therefore, a billboard company could have obtained no rights under banking and
9 relocation ordinances that were null and void ab initio, because it is as if the laws never
10 existed. Here, the Nevada Supreme Court has held that the banking and relocation
11 ordinances did not legally exist until they were reenacted Oct. 24, 2012 as part of the
12 digital billboard ordinance. One cannot sue for alleged rights afforded by ordinances that
13 did not exist at the time the rights supposedly were bestowed.

14 The inability to obtain rights under an unconstitutional law, particularly a law
15 related to zoning and land use, is a universal principle found in the jurisprudence of many
16 jurisdictions besides Nevada. The reasoning was perfectly explained by the court in
17 *Pettit v. City of Fresno*, 34 Cal. App. 3d 813 (1973), a case in which the court concluded
18 that the landowners had not obtained a vested right to use their property as a beauty salon
19 in violation of an express provision in a zoning ordinance, despite having obtained a
20 building permit allowing such use and having expended substantial sums in reliance on
21 the permit. (Id. at pp. 816-817, 824). The court explained: "The public and community
22 interest in preserving the community patterns established by zoning laws outweighs the
23 injustice that may be incurred by the individual in relying upon an invalid permit to build
24 issued in violation of zoning laws." (Id. at p. 820.) "To hold that the City can be estopped
25 would not punish the City but it would assuredly injure the area residents, who in no way
26 can be held responsible for the City's mistake. Thus, permitting the violation to continue
27 gives no consideration to the interest of the public in the area nor to the strong public
28

1 policy in favor of eliminating nonconforming uses and against expansion of such uses.”
2 Id. at 823.

3 Here, even though the citizens passed a law that banned new billboard
4 construction -- a law which expressly prohibits the issuance of permits for their
5 construction -- the citizens would be punished by having new billboards constructed due
6 to the City’s constitutional errors and mistakes, for which the citizens are in no way
7 responsible. As the court pointed out in *Pettit*, such an unjust result “gives no
8 consideration to the interest of the public in the area nor to the strong public policy in
9 favor of eliminating nonconforming uses and against expansion of such uses.” *Pettit*
10 continues: “[t]he public and community interest in preserving the community patterns
11 established by zoning laws outweighs the injustice that may be incurred by the individual
12 in relying upon an *invalid* permit to build issued in violation of zoning laws.” *Pettit*,
13 *supra*.

14 Billboards are, after all, treated as public nuisances under state statutes. See NRS
15 405.020 and NRS 410.360. The notion that the citizens of Reno would be unable to rid
16 their community of public nuisances like billboards because the City betrayed the
17 citizens’ vote by unconstitutionally issuing banked receipts for new billboard
18 construction is fundamentally wrong under Art. 19, §§ 2 and 4 of the Nevada
19 Constitution and wrong because it violates strong public policy.

20 These vital constitutional and public policy principles were fought for – and won –
21 in two significant Nevada Supreme Court cases involving Scenic Nevada. In the original
22 case, the court in *Eller Media v. City of Reno*, 118 Nev. 767 (2002) upheld the right of
23 Reno citizens to ban billboards. The court held:

24 The billboard petition did not merely apply previously declared policies or
25 laws; rather, it articulated an entirely new policy-it prohibited construction of new
26 off-premise billboards throughout the City of Reno. Although the City of Reno
27 had regulated off-premise advertising, prohibiting such advertising was a complete
28 change in policy. Additionally, unlike the situations in *Citizens for Train Trench*

1 Vote v. Reno and Glover v. Concerned Citizens for Fuji Park, the billboard
2 initiative does not concern a specific project, but enacts a city-wide change in
3 policy towards off-premise advertising. As a result, we conclude that the billboard
4 petition was legislative in character and a proper subject for an initiative petition.

5 In *Scenic Nevada v. City of Reno*, 373 P.3d 873 (Nev. 2016), the court held that
6 the citizens' power to enact the ballot initiative of 2000 could not be undermined by the
7 unconstitutional banking and relocation ordinances passed in 2002 and 2003 by the
8 former Reno City Council:

9 Here, the City Council enacted both the Conforming Ordinance and the
10 Banking Ordinance within the three-year moratorium. The Initiative Ordinance
11 banning new billboards went into effect on November 14, 2000, creating a three-
12 year legislative moratorium until November 14, 2003. The Conforming and
13 Banking Ordinances were enacted on January 22, 2002, and June 11, 2003,
14 respectively. Because the City enacted the Conforming and Banking Ordinances
15 within three years of the Initiative Ordinance's effective date, and the ordinances
16 amended the meaning of the Initiative Ordinance, the Conforming and Banking
17 Ordinances are unconstitutional, and therefore void. See *Nev. Power Co. v. Metro.*
18 *Dev. Corp.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163-64 (1988) ("When a statute
19 is held to be unconstitutional, it is null and void ab initio; it is of no effect, affords
20 no protection, and confers no rights.").

21 *Scenic Nevada*, at 877.

22 A host of jurisdictions have confronted the same or very similar issues with
23 respect to alleged reliance on invalidly issued permits. Here are excerpts of the holdings
24 from several cases:

25 -- It is well settled that vested rights are not acquired where there is reliance
26 upon an invalid permit. *Perrotta v. New York*, 107 A.D.2d 320, 325, 486 N.Y.S.2d 941,
27 945 (App. Div. 1985), citing *Matter of Natchev v. Klein*, 41 NY2d 833; *Matter of Jayne*
28 *Estates v. Raynor*, 22 NY2d 417; *Matter of Albert v Board of Stds. & Appeals*, 89 AD2d

1 960. Even where an agency erroneously issues a permit due to its own initial failure to
2 notice that a builder's plans do not comply with code provisions, no vested rights are
3 acquired, since the permit could not have been validly granted in the first place. *Id.*

4 -- Where each building permit was invalid and violated the clear and express
5 terms and conditions of the ordinance, and the fact that a ministerial employee
6 erroneously issued an illegal building permit upon which the appellant relied cannot vest
7 any rights; the invalid and illegal building permit was void when issued, and could vest
8 no property rights, with or without reliance. *Corey Outdoor Advert., Inc. v. Bd. of Zoning*
9 *Adjustments*, 254 Ga. 221, 227-28, 327 S.E.2d 178, 184-85 (1985). “The expenditure of
10 even substantial sums in reliance upon a permit found to be void is generally held not to
11 raise an estoppel against its revocation or against enforcement of the ordinance found to
12 be violated by the use or structures maintained pursuant to the permit.” *Id.* at 226.

13 -- “Where a permit is issued by a governing body in violation of an ordinance,
14 even under a mistake of fact, it is void, and its holder does not acquire any rights; even a
15 substantial expenditure in reliance on a void permit does not raise an estoppel.” *Hampton*
16 *v. Briscoe*, 207 Ga. App. 501, 504, 428 S.E.2d 411, 412 (1993).

17 Respondents have violated, and in their Resolution No. 8293, of February 8, 2017,
18 Respondents continue to violate, the voters’ initiative and the rights of Scenic Nevada
19 and the citizens of Reno by allowing the use of unconstitutionally-issued banked permits
20 to construct new billboards. This Petition for Writ of Mandate seeks to redress this
21 violation of the people’s rights.

22 “The writ of mandamus may be denominated the writ of mandate.” NRS 34.150.

23 The writ may be issued by a district court, “to compel the performance of an act
24 which the law especially enjoins as a duty resulting from an office, trust or station. . .”
25 NRS 34.160. This Petition shows that as their duty resulting from office, Respondents
26 should be compelled to act by not allowing the use of banked permits for construction of
27 new billboards in Reno.
28

1 A writ shall be issued in all cases where there is not a plain, speedy and adequate
2 remedy in the ordinary course of law. NRS 34,170. Scenic Nevada has no right to
3 appeal the Respondents' February 8, 2017 resolution, and thus there is not a plain, speedy
4 and adequate remedy in the ordinary course of law.

5 In the first instance, Scenic Nevada seeks an alternative writ of mandate. Under
6 NRS 34.190(2), "[t]he alternative writ shall state generally the allegation against the party
7 to whom it is directed, and command such party, immediately after the receipt of the writ,
8 or at some other specified time, to do the act required to be performed, or to show cause
9 before the court, at a specified time and place, why the party has not done so." When a
10 petition is filed without notice to the adverse party, and the writ is allowed, an alternative
11 writ must issue first. NRS 34.200. On the return day of the alternative writ, Respondents
12 may show cause by answer under oath, made in the same manner as an answer to a
13 complaint in a civil action. NRS 34.210. Any questions of fact essential to the
14 determination of the action and affecting the substantial rights of the parties may be
15 submitted to a jury for decision. NRS 34.220.

16 Following the issuance of the alternative writ and the presentation of any evidence
17 and arguments in writing or at a hearing, Scenic Nevada seeks the issuance of a
18 peremptory writ, similar in form to the alternative writ, except that the words requiring
19 Respondents to show cause why the party has not done as commanded shall be omitted,
20 and a return day shall be inserted. NRS 34.190(3).

21 Although Scenic Nevada has no speedy or adequate legal remedy, even if a speedy
22 and adequate legal remedy existed, courts will consider a writ petition if an important
23 issue of law needs clarification or if review would serve a public policy or judicial
24 economy interest. *See Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50,
25 54 (2000). Each case will be examined on its own merits, and extraordinary relief will be
26 granted if the "circumstances reveal urgency or strong necessity." *Mona v. Eighth*
27 *Judicial Dist. Court*, 380 P.3d 836, 840 (Nev. 2016), citing *Jeep Corp. v. Second Judicial*
28 *Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

1 Issuance of the alternative and peremptory writs in this case is appropriate
2 regardless of the availability of a legal remedy because this Petition presents an important
3 issue of law that needs clarification; namely, the interim invalidity of the banked permits.
4 Additionally, review would serve a public policy interest, in that the citizens of Reno by
5 initiative petition have adopted a law expressly prohibiting construction of new billboards
6 and also prohibiting the issuance of permits for their construction.

7 Furthermore, this case involves urgency and strong necessity, in that the resolution
8 adopted February 8, 2017 allows sign companies to file applications to construct new
9 billboards using the banked receipts. The need for action is immediate. To prevent new
10 billboards from being constructed, using unconstitutionally-issued banked receipts, the
11 alternative writ and peremptory writ should be granted.

12 Scenic Nevada has lodged with this Petition a proposed Alternative Writ of
13 Mandate pursuant to NRS 34.190(2) to be considered by this Honorable Court.

14
15 WHEREFORE, Petitioner Scenic Nevada, Inc. respectfully prays for:

16 1. An Order directing the Clerk of the Court to issue an alternative writ of
17 mandate stating that Petitioner Scenic Nevada, Inc. has filed a Petition for Writ of
18 Mandate seeking to compel the Respondents to cease and desist from using
19 unconstitutionally-issued banked receipts to permit the construction of new billboards, as
20 proposed by Reno City Council Resolution No. 8293 dated February 8, 2017, and
21 commanding Respondents, immediately after service of the alternative writ, to cease and
22 desist from allowing the construction of billboards in the City of Reno that are based on
23 permits obtained from any and all banked receipts issued prior to October 24, 2012, or to
24 show cause before the court, at a specified time and place, why Respondents have not
25 done so;

26 2. The issuance of a peremptory writ of mandate specially enjoining
27 Respondents to cease and desist from any and all use of banked receipts issued prior to
28 October 24, 2012 for the construction of billboards in the City of Reno;


- 1 3. Costs of suit;
2 4. Reasonable attorney's fees; and
3 5. All other relief which the court deems just and proper.

4 AFFIRMATION

5 The undersigned certifies that the foregoing document does not contain the Social
6 Security number of any person.

7 Dated this 21st day of February, 2017.

8 LAW OFFICES OF MARK WRAY

9
10 By 
11 MARK WRAY
12 Attorney for Petitioner
13 SCENIC NEVADA, INC.

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Mark Wray
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