

1 0086
2 Mitchell L. Posin, Esq.
3 Nevada Bar No: 002840
4 Law Offices of Mitchell Posin, Chtd.
5 850 E. Bonneville Avenue
6 Las Vegas, Nevada 89101
7 (702) 382-2222
8 mposin@gmail.com
9 Bar Number 2840
10 Attorneys for Petitioner

7 SUPREME COURT
8 STATE OF NEVADA

9 STEVEN J. BROOKS, II)
10) Case No:
11) Dept.:
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Petitioner,

vs.

LEGISLATURE OF THE
STATE OF NEVADA

Respondent.

16 VERIFIED APPLICATION
17 FOR A WRIT OF MANDATE
18 *Emergency Motion under Rule 27(e)*

19 Petitioner hereby petitions this Court for a Writ of Mandate.
20 DATED this 4 day of March, 2013.

21 LAW OFFICES OF MITCHELL POSIN, CHTD.

22
23
24 By: /s/ Mitchell Posin
25 Mitchell Posin, Esq.
26 Law Offices of Mitchell Posin, Chtd.
27 Nevada Bar No. 2840
28 850 East Bonneville Avenue
Las Vegas, Nevada 89101
Attorney for Petitioner

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 JURISDICTION

4 1. Jurisdiction is proper under Article 6, § 4 of the Nevada Constitution, which provides
5 “the Supreme Court shall . . . have power to issue writs of mandamus.” Under NRS 34.150 and
6 34.160, a Writ of Mandate “may be issued by the Supreme Court.” A writ of mandamus is available
7 to compel the performance of an act which the law requires as a duty resulting from an office, trust,
8 or station, or to control an arbitrary or capricious exercise of discretion. Brewery Arts Ctr. v. State
9 Bd. Examiners, 108 Nev. 1050, 843 P.2d 369 (Nev. 12/11/1992)

10 II.

11 PARTIES

12 2. Petitioner is a duly elected Assemblyman in the Nevada Legislature; A Certificate of
13 Election in Assemblyman Brooks’ name has been duly included among the certificates of persons
14 elected to the Office of Assemblyman, for the 77th Regular Session of the Nevada Legislature.

15 3. Respondent is the Legislature of the State of Nevada.

16 III.

17 STATEMENT OF FACTS

18 4. On or about February 11, 2013, Assemblyman William Horne caused to be sent to
19 Petitioner a letter stating that he was being on what was described therein as “administrative leave”:

20 *As Chair of the Select Committee on the Assembly, I am writing to inform you*
21 *that effective today, February 11, 2013, you are being placed on paid Administrative*
22 *Leave pending further investigation into your fitness to serve as an Assemblyman in*
23 *the Nevada Legislature. The alleged conduct which will be the subject of the*
24 *investigation includes failure to carry out certain responsibilities of an*
25 *Assemblyman, engaging in unethical conduct and engaging in certain other*
26 *deleterious conduct. All of this alleged conduct adversely affects the integrity and*
27 *credibility of the Nevada Assembly. In addition, the Nevada Legislature, as an*
28 *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

1 legislator. Any questions or concerns that you may have must be directed through my
2 office or the office of the Legislative Counsel. The Select Committee on the Assembly
3 intends to conduct hearings to investigate the specific allegations, allow you an
4 opportunity to be heard and determine the most appropriate recommendation to
5 make to the full Assembly. As you know, the Assembly has the constitutional duty to
6 judge the qualifications of its own members, determine the rules of its proceedings
7 and punish members for disorderly conduct. With the concurrence of two thirds of
8 all the members elected, the Assembly may also expel a member. The full Assembly
9 will make the final determination regarding the action to be taken upon the
10 conclusion of the hearings and receipt of the recommendation of the Select
11 Committee.”

12 IV.

13 APPLICABLE LAW

14 6. The United States Supreme Court has ruled on an almost identical issue, in Powell
15 v. Mccormack, 89 S. Ct. 1944, 395 U.S. 486 (U.S. 06/16/1969), stating:

16 *[P]etitioner . . . was duly elected . . . to serve in the United States House of*
17 *Representatives However, pursuant to a House resolution, he was not*
18 *permitted to take his seat. Powell . . . filed suit . . . claiming that the House could*
19 *exclude him only if it found he failed to meet the standing requirements of age,*
20 *citizenship, and residence contained in Art. I, § 2, of the Constitution --*
21 *requirements the House specifically found [petitioner] met -- and thus had*
22 *excluded him unconstitutionally. . . . We have determined that . . . petitioner . . . is*
23 *entitled to a declaratory judgment that he was unlawfully excluded from the 90th*
24 *Congress.*

25 The provision of the Nevada Constitution mirrors the provision from the United States
26 Constitution ruled upon in Powell, and the Nevada Supreme Court has invoked Powell with
27 specific reference to the Nevada State legislature, in Heller v. Legislature of the State of Nevada,
28 93 P.3d 746, 120 Nev. 456, 120 Nev. 51 (Nev. 07/14/2004), holding that this Court “*may act*
with respect to the ‘qualifications, elections and returns’ of legislators . . . where the legislature
has . . . imposed extra-constitutional qualifications” for a legislator’s being seated and allowed
to pursue his obligations to his constituents.

Assemblyman Brooks has already been seated as a member of the 77th Regular Session of
the Nevada Legislature. Here, the Legislature has imposed an imposed an extra-constitutional
qualification on Assemblyman Brooks’ right and duty to serve his constituents, which they
cannot do. The matter is therefore suitable for judicial consideration under established case law,
the requested relief should be granted, and Assemblyman Brooks should be allowed to continue
his service to the voters of his district and the people of the State of Nevada.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.
CLAIMS FOR RELIEF
(Writ of Mandate)

13. There is not a plain, speedy and adequate remedy in the ordinary course of law ,
and Petitioner should therefore be granted a Writ of Mandate ordering Respondent to seat
Assemblyman Brooks.

WHEREFORE, Petitioner respectfully prays for the following relief, pursuant to NRS
34.190:

1. That the Court command that Respondent immediately seat Assemblyman
Brooks;

2. In the Alternative, that the Court order that Respondent show cause before the
Court, at a specified time and place, why Respondent has not done so;

3. For such other and further relief as this Court deems to be just, equitable and
proper.

AFFIRMATION

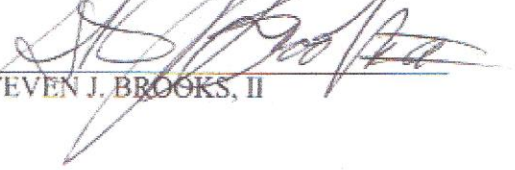
Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain
the social security number of any person.

DATED this 4 day of March, 2013.

LAW OFFICES OF MITCHELL POSIN, CHTD.

By: /s/ Mitchell Posin
Mitchell Posin, Esq.
Law Offices of Mitchell Posin, Chtd.
Nevada Bar No. 2840
601 South Tenth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

1 I hereby affirm under penalty of perjury that I am the Petitioner herein, that I have read the
2 foregoing, that I have personal knowledge of all facts stated therein, and that it is true and correct
3 to the best of my knowledge.

4 
5 STEVEN J. BROOKS, II

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 NRAP 27(E) CERTIFICATE

2 (A) The telephone numbers and office addresses of the attorneys for the parties:

3 For Movant:

4 Mitchell Posin, Esq.
5 Law Offices of Mitchell Posin, Chtd.
6 850 E. Bonneville Ave.
7 Las Vegas, NV 89101
8 702-382-2222

9 For Respondent:

10 Brenda J. Erdoes, Esq.
11 Legislative Counsel
12 401 S. Carson Street
13 Carson City, NV 89701-4747
14 (775) 684-6833

15 (B) Facts showing the existence and nature of the claimed emergency:

16 The Nevada Legislature is currently in session. As long as he is on “administrative
17 leave,” Assemblyman Brooks cannot perform his functions.

18 (C) When and how counsel for the other parties were notified and whether they have
19 been served with the motion; or, if not notified and served, why that was not done:

20 Counsel for Respondent has been previously notified that the instant pleading was
21 imminent, has graciously agreed to accept service on behalf of the Respondent, and has been
22 provided by email with a copy of this pleading.

23 LAW OFFICES OF MITCHELL POSIN, CHTD.

24 By: /s/ Mitchell Posin
25 Mitchell Posin, Esq.
26 Law Offices of Mitchell Posin, Chtd.
27 Nevada Bar No. 2840
28 601 South Tenth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of March, 2013, I sent a true and correct copy of the foregoing to:

Brenda J. Erdoes, Esq.
Legislative Counsel
401 S. Carson Street
Carson City, NV 89701-4747
(775) 684-6833

LAW OFFICES OF MITCHELL POSIN, CHTD.

By: /s/ Mitchell Posin
Mitchell Posin, Esq.
Law Offices of Mitchell Posin, Chtd.
Nevada Bar No. 2840
601 South Tenth Street
Las Vegas, Nevada 89101
Attorney for Petitioner