

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PHILLIP ZARAGOZA, MICHAEL
FRANCO, and PETER KRUSE,

Plaintiffs,

v.

JUDGE KAREN P. BENNETT-HARON;
CORONER P. MICHAEL MURPHY; and
CHIEF DEPUTY DISTRICT ATTORNEY
CHRISTOPHER J. LAURENT,

Defendants.

2:11-CV-01091-PMP-GWF

ORDER

Presently before the Court is Respondents Karen P. Bennett-Haron, P. Michael Murphy, and Christopher J. Laurent's Motion to Dismiss (Doc. #11), filed on July 22, 2011. Petitioners Phillip Zaragoza, Michael Franco, and Peter Kruse filed an Opposition (Doc. #18) on August 15, 2011. Respondents filed a Reply (Doc. #19) on August 19, 2011.

Also before the Court is Petitioners' Motion to Remand for Lack of Federal Jurisdiction or Under Pullman Abstention (Doc. #12), filed on July 23, 2011. Respondents filed an Opposition (Doc. #17) on August 9, 2011. Petitioners filed a Reply (Doc. #19) on August 19, 2011.

Also before the Court is non-party American Civil Liberties Union of Nevada's ("ACLU") Motion to Intervene Pursuant to FRCP 24(a)(2) (Doc. #20), filed on August 26, 2011. Petitioners filed an Opposition (Doc. #23) on September 12, 2011. ACLU filed a Reply (Doc. #24) on September 22, 2011.

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1 This matter was reassigned to the undersigned on October 27, 2011. (Min. Order
2 (Doc. #26).) The Court held a hearing on these motions on November 30, 2011. (Mins. of
3 Proceedings (Doc. #32).)

4 **I. BACKGROUND**

5 This case presents a challenge to Clark County, Nevada's recently enacted
6 ordinance establishing new procedures in coroner's inquests involving police officer
7 involved deaths. The case originally was filed in Nevada state court by Petitioners Phillip
8 Zaragoza, Michael Franco, and Pete Kruse. (Pet. for Removal (Doc. #1), Ex. 1.)
9 Petitioners are Las Vegas Metropolitan Police Department officers who were involved in
10 the shooting death of Benjamin Bowman and are among the first officers who would be
11 subject to the new inquest procedures. (*Id.*) Petitioners brought a Petition in state court
12 seeking a writ of mandamus or a writ of prohibition against Respondents, who are the
13 presiding officer of the inquest, Justice of the Peace Karen P. Bennett-Haron; Coroner P.
14 Michael Murphy; and Chief Deputy District Attorney Christopher J. Laurent, to prohibit
15 these officials from utilizing the new inquest procedures with respect to Petitioners.
16 Petitioners contend the new inquest ordinance violates due process under the U.S. and
17 Nevada Constitutions, violates equal protection under the U.S. and Nevada Constitutions, is
18 void for vagueness under the U.S. and Nevada Constitutions, and violates the Nevada
19 Constitution's separation of powers clause. Respondents removed the action to this Court
20 based on federal question jurisdiction. (Pet. for Removal.)

21 Petitioners now move to remand, arguing this Court lacks subject matter
22 jurisdiction and, even if the Court has jurisdiction, the Court ought to abstain under
23 Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). Respondents oppose, arguing
24 the Court has subject matter jurisdiction because the Petition asserts claims arising under
25 the U.S. Constitution. Respondents also contend Pullman abstention is inappropriate
26 because the state law claims mirror their federal counterparts.

1 Respondents move to dismiss the Petition, arguing the ordinance does not violate
2 the due process or equal protection clauses of the U.S. and Nevada Constitutions, is not
3 void for vagueness, and does not violate the Nevada Constitution's separation of powers
4 clause. Petitioners oppose, arguing the ordinance deprives them of their due process rights,
5 distinguishes between police officers and citizens and imposes burdens on officers'
6 fundamental rights, provides for arbitrary enforcement, and violates the separation of
7 powers clause.

8 Finally, ACLU moves to intervene in this action. Petitioners oppose intervention.

9 **II. MOTION TO REMAND (Doc. #12)**

10 Petitioners move to remand this case to state court, arguing no federal question
11 jurisdiction exists to support removal because Petitioners seek a writ of mandamus and a
12 writ of prohibition, both creations of state law. Petitioners also argue that because they
13 assert independent state law theories to support their claims, their claims do not depend on a
14 construction of federal law. Petitioners also argue that even if federal question jurisdiction
15 exists, the Court should abstain under Pullman because this case raises substantial questions
16 of state law, the Court may avoid deciding constitutional questions because resolution of the
17 state law questions may moot the federal constitutional questions, and resolution of the state
18 law questions is uncertain.

19 Respondents oppose remand, arguing that because the Petition raises due process
20 and equal protection claims under the U.S. Constitution, federal question jurisdiction exists.
21 Respondents also contend that the Court should not abstain under Pullman for the purpose
22 of allowing the state court to interpret state constitutional provisions that parallel federal
23 constitutional provisions. Respondents contend that Nevada's due process, equal
24 protection, and separation of powers constitutional provisions mirror their federal
25 counterparts, and the Court therefore should not abstain.

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1 Petitioners reply that while Respondents attempt to re-cast their Petition into
2 seven claims for relief, three federal and four state, that is not how Petitioners pled their
3 Petition as masters of their pleading. Rather, Petitioners contend they pled only two state
4 law claims for a writ of prohibition and a writ of mandamus, and these claims arise only
5 under Nevada state law. Petitioners also argue that because Respondents move to dismiss
6 on the basis that Petitioners lack standing, there is no jurisdiction in this Court. Finally,
7 Petitioners argue Pullman abstention is appropriate because there is no federal counterpart
8 to Nevada's explicit constitutional provision that prohibits one branch of government from
9 impinging on the functions of another.

10 **A. Subject Matter Jurisdiction**

11 If the Court lacks subject matter jurisdiction, the Court must remand a removed
12 action to state court. 28 U.S.C. § 1447(c). The Court has original federal question
13 jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the
14 United States." 28 U.S.C. § 1331. To remove based on federal question jurisdiction, the
15 federal question must be an essential element of the plaintiff's cause of action. Gully v.
16 First Nat'l Bank, 299 U.S. 109, 112 (1936). The presence or absence of a federal question
17 is determined by the well-pleaded complaint rule. Caterpillar Inc. v. Williams, 482 U.S.
18 386, 392 (1987). Under the well-pleaded complaint rule, the plaintiff is the master of his or
19 her complaint, and a plaintiff may defeat removal by choosing not to plead independent
20 federal claims. ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality, 213
21 F.3d 1108, 1114 (9th Cir. 2000). This does not mean, however, that a plaintiff may defeat
22 removal by "omitting to plead necessary federal questions in a complaint." Id. (quotation
23 omitted). If a federal question is an essential element of the relief sought, a plaintiff may
24 not avoid federal jurisdiction by choosing to ignore the federal question in the complaint.
25 Id. A state-created cause of action arises under federal law: "(1) where federal law
26 completely preempts state law; (2) where a claim is necessarily federal in character; or (3)

1 where the right to relief depends on the resolution of a substantial, disputed federal
2 question.” Id. (internal citations omitted).

3 The Petition here seeks relief under two Nevada statutes which grant authority to
4 certain Nevada state judicial bodies and officers to issue a writ of prohibition and writ of
5 mandamus. Specifically, the mandamus statute, Nevada Revised Statutes section 34.160,
6 provides that the Supreme Court, a district court, or a district court judge may issue a writ to
7 “compel the performance of an act which the law especially enjoins as a duty resulting from
8 an office, trust or station.” The prohibition statute, section 34.330, grants the Supreme
9 Court or a district court the power to issue a writ of prohibition under section 34.320 to an
10 inferior tribunal to “arrest[] the proceedings of any tribunal . . . when such proceedings are
11 without or in excess of the jurisdiction of such tribunal”

12 Petitioners contend they assert two causes of action: one for a writ of prohibition
13 and one for a writ of mandamus. However, under Nevada law, writs of prohibition and
14 mandamus are remedies, not causes of action. See, e.g., State v. Eighth Jud. Dist. Ct., 42
15 P.3d 233, 237 (Nev. 2002) (referring to writ relief as an “extraordinary remedy”); Mineral
16 Cnty. v. State, Dep’t of Conservation & Natural Res., 20 P.3d 800, 805 (Nev. 2001) (same);
17 Scrimmer v. Eighth Jud. Dist. Ct., 998 P.2d 1190, 1193 (Nev. 2000) (same); Kussman v.
18 Eighth Jud. Dist. Ct., 612 P.2d 679, 679 (Nev. 1980) (same). Petitioners rely on cases that
19 refer to the writs as “claims” or “causes of action,” but none of those cases are Nevada
20 cases, and Nevada has stated on multiple occasions that the writs are remedies. In any
21 event, the language in the cases upon which Petitioners rely reflects how courts may refer to
22 claims for a certain remedy, like a punitive damages “claim” even though punitive damages
23 is a remedy not a claim.

24 The properly pled Petition asserts seven claims, not two, all of which seek as a
25 remedy either a writ of prohibition or mandamus. Three of those claims arise under the
26 U.S. Constitution, where Petitioners allege the inquest ordinance violates the U.S.

1 Constitution's due process and equal protection clauses. Three of the Petition's claims
2 therefore "arise under" federal law supporting removal, and the Court has remedial powers
3 comparable to Petitioners' requested relief, including declaratory and injunctive relief, to
4 effectuate any judgment it renders in this action. This Court will deny the motion to remand
5 for lack of subject matter jurisdiction.

6 **B. Standing**

7 Petitioners' argue the Court should remand because in Respondents'
8 separately-filed motion to dismiss, Respondents argue Petitioners lack standing. At the
9 hearing in this matter, Respondents withdrew their standing argument. However, the Court
10 has an independent duty to ensure its own jurisdiction, including standing. FW/PBS, Inc. v.
11 City of Dallas, 493 U.S. 215, 231 (1990).

12 Petitioners are making a facial attack on the ordinance and the new inquest
13 procedures already have begun or are threatening to begin against them. The inquest
14 hearing was scheduled for July 2011, but was halted pending resolution of this federal case.
15 Petitioners already have been subjected to the new procedures because an ombudsman for
16 the deceased's family has been appointed and the ombudsman has participated in
17 pre-hearing conferences and motion practice. Petitioners' injury in the context of a facial
18 attack on the ordinance therefore is not speculative, hypothetical, or unripe; is fairly
19 traceable to Respondents' conduct given Respondents' role in the inquest process; and is
20 redressable by this Court through declaratory and injunctive relief. See Friends of the
21 Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Petitioners
22 therefore have standing.

23 **C. Pullman Abstention**

24 Petitioners argue that even if this Court has jurisdiction, it should abstain under
25 Pullman and either dismiss entirely, or sever and remand the state law claims and stay the
26 federal claims pending resolution by the state court. Petitioners argue that given the local

1 importance and novelty of the issues and a means to avoid deciding federal constitutional
2 questions which may be unnecessary, the Court should abstain. Respondents argue that
3 Pullman abstention is inappropriate because Pullman abstention should apply only where
4 the state will interpret a provision of its own constitution which has no federal counterpart.
5 Respondents argue Petitioners' due process, equal protection, and separation of powers
6 state law claims are based on state constitutional provisions which have federal
7 counterparts.

8 Pullman abstention "is a narrow exception to the district court's duty to decide
9 cases properly before it." Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791,
10 801 (9th Cir. 2001) (quotation omitted). A district court may abstain "when difficult and
11 unsettled questions of state law must be resolved before a substantial federal constitutional
12 question can be decided." Id. (quotation omitted). The policy considerations behind
13 Pullman abstention are avoiding unnecessary adjudication of federal constitutional
14 questions and serving state comity considerations. Id. at 801-02. Pullman thus reflects "an
15 equitable doctrine that allows federal courts to refrain from deciding sensitive federal
16 constitutional questions when state law issues may moot or narrow the constitutional
17 questions." Spoklie v. Montana, 411 F.3d 1051, 1055 (9th Cir. 2005) (quotation omitted).

18 The Court applies a three-part test to determine whether to abstain under
19 Pullman. "First, the case must touch on a sensitive area of social policy upon which federal
20 courts ought not to enter unless no alternative to its adjudication is open." Columbia Basin,
21 268 F.3d at 802. "Second, it must be plain that the constitutional adjudication can be
22 avoided if a definite ruling on the state issue would terminate the controversy." Id.
23 "Finally, the possible determinative issue of state law must be uncertain." Id.

24 Pullman abstention is "particularly appropriate" when the state law question at
25 issue "implicates a state constitutional provision that differs significantly" from its federal
26 counterpart. Id. at 806; see also Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 237 n.4 (1984)

1 (“The Court has previously determined that abstention is not required for interpretation of
2 parallel state constitutional provisions.”). However, the Court need not remand if doing so
3 “would simply impose expense and long delay upon the litigants without hope of its bearing
4 fruit.” Potrero Hills Landfill, Inc. v. Cty. of Solano, 657 F.3d 876, 889-90 (9th Cir. 2011)
5 (quotation omitted).

6 Pullman abstention is not a jurisdictional question; rather, whether to abstain lies
7 within the district court’s discretion. Smelt v. Cnty. of Orange, 447 F.3d 673, 679 (9th Cir.
8 2006). If the Court abstains under Pullman, the proper course is to retain jurisdiction but
9 stay the action pending resolution of the state law questions in state court, rather than
10 dismissing the case entirely. Columbia Basin, 268 F.3d at 802, 807.

11 Here, the first Pullman factor favors abstention. A community’s relationship with
12 its police force and its determination of how unnatural deaths ought to be investigated are
13 matters of local concern. The subject of officer involved deaths in Las Vegas and the
14 subsequent coroner’s inquests have been the subject of significant controversy in the local
15 community, and how to respond to that controversy is an area of sensitive local social
16 policy.

17 The second factor also favors abstention because the Court can avoid deciding
18 the federal constitutional questions by obtaining a definitive ruling on the state issues. If
19 the Nevada courts strike the ordinance on any of the state constitutional grounds, the Court
20 will not have to address the federal constitutional claims.

21 The third factor also supports abstention, as the possible determinative issue of
22 state law is uncertain. Because the inquest ordinance is newly enacted, the Nevada state
23 courts have had little opportunity to construe it first. There is currently one state court
24 ruling addressing the ordinance, but it is unclear how the Nevada Supreme Court would
25 resolve the challenges to the ordinance which Petitioners raise in this action.

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1 However, Pullman abstention generally is not appropriate if the state
 2 constitutional provision is a mirror image of a federal constitutional provision. Nevada's
 3 equal protection and due process clauses mirror their federal counterparts, and Nevada
 4 looks to federal authority for guidance on these provisions. In re Candelaria, 245 P.3d 518,
 5 523 (Nev. 2010) ("The standard for testing the validity of legislation under the equal
 6 protection clause of the state constitution is the same as the federal standard." (quotation
 7 omitted)); Reinkemeyer v. Safeco Ins. Co. of Am., 16 P.3d 1069, 1072 (Nev. 2001) (stating
 8 the Nevada Constitution's due process clause uses "virtually mirror" language to the U.S.
 9 Constitution and Nevada therefore "look[s] to federal caselaw for guidance"). However,
 10 the U.S. Constitution does not contain an explicit separation of powers clause. Rather, the
 11 federal separation of powers doctrine is based on the structure of the three branches of
 12 government within Articles I, II, and III. Crater v. Galaza, 508 F.3d 1261, 1263 (9th Cir.
 13 2007). The Nevada Constitution contains the same structural separation of powers in
 14 Articles 4, 5, and 6. Comm'n on Ethics v. Hardy, 212 P.3d 1098, 1103 (Nev. 2009). But
 15 the Nevada Constitution goes further and contains an explicit separation of powers clause:

16 The powers of the Government of the State of Nevada shall be divided
 17 into three separate departments,--the Legislative,--the Executive and
 18 the Judicial; and no persons charged with the exercise of powers
 properly belonging to one of these departments shall exercise any
 functions, appertaining to either of the others, except in the cases
 expressly directed or permitted in this constitution.

19 Nev. Const. art. 3, § 1. The Nevada Supreme Court has characterized its constitutional
 20 separation of powers as "probably the most important single principle of government."
 21 Comm'n on Ethics, 212 P.3d at 1108 (quotation omitted).

22 Nevada's separation of powers clause has no federal counterpart. While the U.S.
 23 Constitution structurally incorporates separation of powers, it has no explicit textual
 24 provision like the Nevada Constitution which directs that persons in one branch may not
 25 exercise the powers belonging to another branch. Nevada has not indicated that its
 26

1 separation of powers clause is the mirror image of the U.S. Constitution's separation of
 2 powers achieved only through structure. Nevada also has not stated it will look to federal
 3 law for guidance on separation of powers questions. Nor has it done so regularly in
 4 practice. See, e.g., Stromberg v. Second Jud. Dist. Ct., 200 P.3d 509, 512-13 (Nev. 2009)
 5 (looking to California law); Blackjack Bonding v. City of Las Vegas Mun. Ct., 14 P.3d
 6 1275, 1279-80 (Nev. 2000) (citing Nevada and other state law); City of N. Las Vegas v.
 7 Daines, 550 P.2d 399, 400 (Nev. 1976) (same); Galloway v. Truesdell, 422 P.2d 237, 242-
 8 47 (Nev. 1967) (same); but see Comm'n on Ethics, 212 P.3d at 1103-09 (relying on both
 9 state and federal law); Guinn v. Legislature of State of Nev., 76 P.3d 22, 30 (Nev. 2003)
 10 (citing federal law). Consequently, Pullman abstention is particularly appropriate with
 11 respect to the separation of powers claim.

12 While Pullman abstention is particularly appropriate with respect to the
 13 separation of powers claim, it is not favored for the due process and equal protection
 14 claims. Therefore, the Court, in its discretion, will keep and decide the equal protection and
 15 due process claims under both the U.S. and Nevada Constitutions. Because, as discussed
 16 below, the Court will grant Respondents' motion to dismiss those claims, the Court will
 17 sever and remand the separation of powers claim and decline to exercise supplemental
 18 authority over that remaining state law claim. See 28 U.S.C. § 1367(c)(1), (c)(3). The
 19 Court rejects Respondents' implication at the hearing that the state court is not suited to
 20 hear this case. The Nevada state courts are entirely capable of fairly resolving Nevada
 21 constitutional questions, and indeed, those courts are especially suited to do so. The Court
 22 therefore will sever and remand the separation of powers claim.

23 **III. MOTION TO DISMISS (Doc. #11)**

24 Respondents move to dismiss, arguing that as a matter of law, the ordinance
 25 survives facial attacks under the due process and equal protection clauses of the U.S. and
 26 Nevada Constitutions, and under the separation of powers clause of the Nevada

1 Constitution. Petitioners oppose dismissal.

2 Petitioners' attack on the ordinance is a facial attack which seeks to declare the
3 entire ordinance unconstitutional.¹ The Court starts with the presumption that the ordinance
4 is constitutional. SeaRiver Maritime Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 669 (9th
5 Cir. 2002). A party making a facial challenge to an ordinance must meet a "high burden of
6 proof." S.D. Myers, Inc. v. City & Cnty. of S.F., 253 F.3d 461, 467 (9th Cir. 2001). The
7 party must establish there is "no set of circumstances" under which the ordinance would be
8 valid. Id. (quotation omitted). The ordinance is not wholly invalid even if it "might operate
9 unconstitutionally under some conceivable set of circumstances." Id. (quotation omitted).
10 Should such circumstances arise, the aggrieved party then could mount an as-applied
11 challenge to the ordinance. Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998).
12 "Facial invalidation is, manifestly, strong medicine that has been employed by the Court
13 sparingly and only as a last resort." Gospel Missions of Am. v. City of L.A., 419 F.3d
14 1042, 1047 (9th Cir. 2005) (quotation omitted).

15 **A. Due Process**

16 Respondents argue the Court should dismiss the due process claims because the
17 due process clause is not implicated by the inquest ordinance. Respondents contend that
18 because the inquest ordinance does not make any ultimate finding of guilt or impose any
19 penalty, it does not deprive anyone of life, liberty, or property to trigger application of the
20 due process clause. Respondents also argue that hypothetical harm to Petitioners'
21 reputation does not amount to a due process violation, both because it is hypothetical and
22 because reputation is not life, liberty, or property protected by the due process clause.

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25 ¹ At the hearing, Petitioners argued they are mounting an as applied challenge, but Petitioners
26 have not identified anything that has happened in the proceedings so far that has denied them of any
due process or equal protection rights beyond the asserted facial deficiencies in the ordinance.

1 Petitioners respond that because the inquest process is akin to a criminal
2 adjudication and has the power to brand Petitioners as criminals, the due process clause is
3 implicated. Petitioners argue that through the interrogatories presented to the inquest jury,
4 the inquest will find the factual predicate for a criminal adjudication.

5 The Fourteenth Amendment's procedural due process clause applies only when a
6 constitutionally protected liberty or property interest is imperiled. Bd. of Regents v. Roth,
7 408 U.S. 564, 569 (1972). Consequently, a plaintiff must show deprivation of a liberty or
8 property interest protected by the Constitution to state a due process claim. Wedges/Ledges
9 of Cal., Inc. v. City of Phoenix, Ariz., 24 F.3d 56, 62 (9th Cir. 1994).

10 The parties dispute which of two U.S. Supreme Court cases govern this dispute,
11 Hannah v. Larche, 363 U.S. 420 (1960) or Jenkins v. McKeithen, 395 U.S. 411 (1969). In
12 Hannah, certain individuals involved in running local elections challenged subpoenas to
13 appear at a hearing before the Commission on Civil Rights regarding alleged voting rights
14 violations. 363 U.S. at 421-22. The Commission was acting pursuant to a "statutory
15 mandate to investigate allegations in writing under oath or affirmation that certain citizens
16 of the United States are being deprived of their right to vote and have that vote counted by
17 reason of their color, race, religion, or national origin." Id. at 423 (quotation omitted). The
18 Supreme Court concluded that no due process rights were implicated because the
19 Commission's--

20 function is purely investigative and fact-finding. It does not
21 adjudicate. It does not hold trials or determine anyone's civil or
22 criminal liability. It does not issue orders. Nor does it indict, punish,
23 or impose any legal sanctions. It does not make determinations
24 depriving anyone of his life, liberty, or property. In short, the
Commission does not and cannot take any affirmative action which
will affect an individual's legal rights. The only purpose of its
existence is to find facts which may subsequently be used as the basis
for legislative or executive action.

25 Id. at 441. Hannah set forth the general principles that "when governmental agencies
26 adjudicate or make binding determinations which directly affect the legal rights of

1 individuals, it is imperative that those agencies use the procedures which have traditionally
2 been associated with the judicial process.” Id. at 442. However, “when governmental
3 action does not partake of an adjudication, as for example, when a general fact-finding
4 investigation is being conducted, it is not necessary that the full panoply of judicial
5 procedures be used.” Id. The Supreme Court specifically rejected the proposition that
6 collateral consequences, such as the objects of the investigation being subjected to “public
7 opprobrium and scorn,” or the possibility they might lose their jobs or face criminal
8 prosecution, would trigger procedural due process protections. Id. at 442-43. Rather, those
9 individuals would be entitled to the full panoply of procedural protections if and when any
10 adjudicatory proceeding was initiated. Id. at 446.

11 Several years later, the Supreme Court addressed whether subjects of an
12 investigation by a special body created by Louisiana statute, the Labor-Management
13 Commission of Inquiry, were entitled to procedural due process protections. In Jenkins, the
14 Commission was created by Louisiana statute with the specific purpose of investigating and
15 finding facts “relating to violations or possible violations of criminal laws of the state of
16 Louisiana or of the United States arising out of or in connection with matters in the field of
17 labor-management relations.” 395 U.S. at 414 (quotation omitted). The Commission could
18 act only upon referral from the Governor when, in his opinion, there was or could be
19 criminal law violations affecting labor-management relations. Id. at 415. The Commission
20 then would hold public hearings to determine the facts relating to the alleged criminal
21 violations. Id. The Commission had to make public findings regarding whether probable
22 cause existed to believe criminal violations occurred. Id. at 416. It had no power to
23 adjudicate criminal violations, but it could make findings with respect to specific
24 individuals and make recommendations to the Governor. Id. at 416-17. The Commission
25 was required to refer the matter to state or federal authorities if it found probable cause a
26 criminal violation had occurred. Id.

1 The Supreme Court concluded that under these circumstances, Hannah did not
2 control. Id. at 425. The Supreme Court acknowledged that the Commission did not, strictly
3 speaking, adjudicate rights, but “the Commission exercises a function very much akin to
4 making an official adjudication of criminal culpability.” Id. at 427. Specifically, the
5 Supreme Court noted that the Commission was limited to investigating criminal law
6 violations, it was required to make specific findings of guilt, it was not an independent body
7 of citizens, and it could not act without a referral from the Governor. Id. at 428, 431. The
8 Supreme Court concluded the Commission therefore exercised “an accusatory function; it is
9 empowered to be used and allegedly is used to find named individuals guilty of violating
10 the criminal laws of Louisiana and the United States and to brand them as criminals in
11 public.” Id. at 427-28. The Supreme Court thus held that “where the Commission allegedly
12 makes an actual finding that a specific individual is guilty of a crime, . . . due process
13 requires the Commission to afford a person being investigated the right to confront and
14 cross-examine the witnesses against him, subject only to traditional limitations on those
15 rights.” Id. at 429.

16 Following Jenkins, the Courts of Appeals have reaffirmed the principle in
17 Hannah that where a governmental body performs investigatory, rather than adjudicatory,
18 functions, the procedural due process clause is not triggered. See Trentadue v. Integrity
19 Comm., 501 F.3d 1215, 1237 (10th Cir. 2007) (stating that “[w]hen agencies conduct
20 ‘nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation, and
21 cross-examination generally do not obtain.’” (quoting Hannah, 363 U.S. at 446)); Aponte v.
22 Calderon, 284 F.3d 184, 193 (1st Cir. 2002) (“[I]t is clear that investigations conducted by
23 administrative agencies, even when they may lead to criminal prosecutions, do not trigger
24 due process rights.”).

25 Here, the coroner’s inquest is more like Hannah than Jenkins. The inquest
26 performs an investigatory function to inquire into the cause of death where a person has

1 died by unnatural means. Clark County, Nev., Code § 2.12.080(a). Although a prosecutor
2 is assigned to the inquest, his or her duty is to “serve as a neutral presenter of facts. In this
3 role, the prosecutor shall not act as advocate for any of the interested parties.” Id.
4 § 2.12.080(g). The presiding officer “shall insure that the inquest is conducted as an
5 investigatory and fact finding proceeding and not an adversarial proceeding.” Id.
6 § 2.12.080(m). The interrogatories presented to the inquest jury “shall deal only with
7 questions of fact and shall not deal with questions of fault or guilt.” Id. §§ 2.12.080(m)(7),
8 2.12.140(a). The panel’s findings are not binding on the district attorney’s office and they
9 have no “preclusive effect on any future civil or criminal proceedings.” Id. § 2.12.140(a).

10 The inquest is designed to be an investigatory body, not an adjudicatory or
11 accusatory body. It does not adjudicate any legal rights. It does not recommend any
12 particular action to any other entity, including the district attorney’s office. Whether to
13 initiate criminal charges following an inquest remains solely within the discretion of the
14 prosecuting authorities. The fact that officers may face reputational harms, may suffer
15 adverse employment actions, or may become the subject of a future civil or criminal
16 proceeding are speculative collateral consequences that do not trigger due process
17 guarantees. Any officers who face criminal prosecution or a civil suit will be entitled to the
18 full panoply of due process protections in those proceedings, including any challenge that
19 they cannot obtain a fair trial due to pre-trial publicity occasioned by the fact that the
20 inquest is aired on television. See id. § 2.12.080(k) (requiring officer involved inquests to
21 be aired on the county’s government access television channel). Because the inquest does
22 not adjudicate any legal rights, the due process clause is not triggered, and Petitioners fail to
23 state a due process claim under either the U.S. or Nevada Constitutions.

24 Moreover, the harms Petitioners identify are purely speculative. Petitioners
25 contend the inquest will result in factual interrogatories laying the predicate for criminal
26 charges, such as second degree murder. However, the interrogatories Petitioners present are

1 hypothetical interrogatories and thus it is speculation whether any inquest proceeding will
2 ask the questions in the manner Petitioners present. Petitioners also contend they will suffer
3 harm to their reputations and suffer collateral consequences such as adverse employment
4 actions, but that assumes the inquest process will result in a suggestion that they may have
5 engaged in wrongdoing. Even if that is true for some officers, it surely is not the case in all
6 circumstances, and therefore the ordinance survives a facial attack. And because
7 Petitioners do not allege they in fact have suffered any such harms, an as applied challenge
8 is not ripe.

9 The officers also speculate that they may be held in contempt if they invoke their
10 Fifth Amendment right not to testify at the inquest, but that has not happened nor is it
11 certain to occur. The officers contend that they may be limited to a single attorney
12 representing them at the inquest even if there are multiple officers involved and sometimes
13 the officers will have competing interests. The ordinance provides that the officers be
14 represented by one attorney “unless the presiding officer determines otherwise.” Id.
15 § 2.12.080(h)(2). Thus, if such a situation arose, the presiding officer could determine that
16 a single attorney representative would be inadequate. The fact that in some circumstances a
17 single attorney representative would be inadequate does not support facial invalidity, and
18 the ordinance permits the presiding officer discretion to address this scenario. Petitioners
19 also do not have an as applied challenge on this basis. They have not alleged that they
20 requested separate representation and were denied, and they admit that their interests
21 currently are aligned such that a single attorney adequately may represent their interests.
22 (Pet’rs’ Mot. to Remand (Doc. #12), Ex. 1 at 23-24.) The Court therefore will dismiss the
23 due process claims under the U.S. and Nevada Constitutions.

24 **B. Equal Protection**

25 Pursuant to the equal protection clause, the government must treat all similarly
26 situated persons alike. Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1047 (9th Cir.

1 2002). The initial step in evaluating an equal protection claim is to identify the asserted
2 classification of groups. Thornton v. City of St. Helens, 425 F.3d 1158, 1166-67 (9th Cir.
3 2005). “The groups must be comprised of similarly situated persons so that the factor
4 motivating the alleged discrimination can be identified.” Id. “[T]he Constitution does not
5 require things which are different in fact or opinion to be treated in law as though they were
6 the same.” Plyler v. Doe, 457 U.S. 202, 216 (1982) (quotation omitted).

7 Once the classification is identified, the Court then determines the proper level of
8 scrutiny to apply. Honolulu Weekly, Inc., 298 F.3d at 1047. The Court applies strict
9 scrutiny if the classification at issue “targets a suspect class or burdens the exercise of a
10 fundamental right.” Id. (quotation omitted). If the distinction is based on a semi-suspect
11 classification, such as gender, the Court applies intermediate scrutiny. Green v. City of
12 Tucson, 340 F.3d 891, 896 (9th Cir. 2003). If neither strict nor intermediate scrutiny
13 applies, the Court reviews for a rational basis. Id.

14 Petitioners’ equal protection claim fails at the first step. The classification at
15 issue is between a death being investigated through the inquest process where a police
16 officer is involved and where no officer is involved. In this context, police officers and
17 private citizens are not similarly situated. Police officers are given extraordinary powers on
18 behalf of the citizenry that private citizens do not have, particularly in the use of force. As
19 stated by the Supreme Court, police officers “are clothed with authority to exercise an
20 almost infinite variety of discretionary powers. The execution of the broad powers vested
21 in them affects members of the public significantly and often in the most sensitive areas of
22 daily life.” Foley v. Connelie, 435 U.S. 291, 297 (1978) (footnote omitted). The public has
23 special interests in ensuring police officer accountability, fostering a trust relationship
24 between police officers and the community they serve, and providing a balanced and
25 transparent investigative process in situations where the police department is called upon to
26 investigate its own officers. These concerns do not arise with respect to the average citizen.

1 Even if police officers and private citizens were similarly situated such that equal
2 protection is triggered, only rational basis review applies. Petitioners argue strict scrutiny
3 applies because the ordinance burdens fundamental rights. However, as discussed above,
4 the ordinance does not burden due process rights. Petitioners argue the ordinance burdens
5 the fundamental rights “to cross examine witnesses, to present evidence, to be represented
6 by counsel, to exercise the privilege against self-incrimination, and to be free from
7 unwarranted prosecution.” (Opp’n to Mot. to Dismiss (Doc. #18) at 18.) However, these
8 rights apply only in the context of criminal proceedings. U.S. Const. amend. V, VI. The
9 inquest process is not a criminal proceeding. Consequently, these rights are not implicated
10 by the inquest ordinance.

11 To the extent those rights are implicated, the ordinance does not burden those
12 rights. With respect to the rights to cross examine witnesses, present evidence, and be
13 represented by counsel, the ordinance provides for the participation of the officers’ counsel
14 in the pre-hearing conferences to discuss the evidence and witness list, provides for
15 compulsory process by the presiding officer, and provides that the officers’ counsel may
16 question witnesses at the hearing. Clark County, Nev., Code § 2.12.080(h), (j), (m)(2). As
17 to the right against self-incrimination, as discussed above, it is not clear from the face of the
18 ordinance that a Fifth Amendment challenge to a contempt ruling would not prevail.
19 Finally, with respect to the right to be free from unwarranted prosecution, the inquest is not
20 a prosecution and does not necessarily compel a prosecution. The inquest does not refer
21 matters for prosecution and has no binding effect on any future proceeding. Whether to
22 prosecute remains solely within the discretion of prosecuting authorities. Because the
23 ordinance does not burden a fundamental right, rational basis review applies.

24 Under rational basis review, the county commission rationally could have
25 concluded that because the citizenry vests substantial authority in its police officers, an
26 open, transparent, and balanced inquest process would facilitate public confidence both in

1 the police and in the inquest process itself. Moreover, the county commission rationally
2 could have concluded that because police officers in essence investigate themselves in an
3 officer involved death, and because the district attorney's office has either a real or
4 perceived relationship with police officers that it does not have with the average citizen,
5 different procedures are required to ensure both actual meaningful review of police conduct
6 and to preserve the appearance of balanced, meaningful review. The Court therefore will
7 grant the motion to dismiss the equal protection claims under both the U.S. and Nevada
8 Constitutions.

9 **C. Void for Vagueness (Due Process)**

10 Petitioners argue the ordinance is unconstitutionally vague because the presiding
11 officer has unfettered discretion over various aspects of the proceeding, including the
12 burden of proof and the number of votes required for valid findings. Respondents argue
13 that because the hearing does not result in the adjudication of any legal right, the due
14 process clause does not apply.

15 "A law is unconstitutionally vague if it fails to provide a reasonable opportunity
16 to know what conduct is prohibited, or is so indefinite as to allow arbitrary and
17 discriminatory enforcement." Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1019
18 (9th Cir. 2010) (quotation omitted). However, the law does not require "perfect clarity."
19 Id. (quotation omitted). "[S]peculation about possible vagueness in hypothetical situations
20 not before the Court will not support a facial attack on a statute when it is surely valid in the
21 vast majority of its intended applications." Id. at 1021 (quotations omitted).

22 The ordinance is not unconstitutionally vague on its face. First, the ordinance
23 does not prohibit any conduct and therefore it is not unconstitutionally vague for failing to
24 provide a reasonable opportunity to know what conduct is prohibited. Further, while the
25 ordinance leaves some matters to the discretion of the presiding officer, it is not so
26 indefinite as to allow arbitrary and discriminatory enforcement in all of its applications.

1 Because the inquest process does not adjudicate any legal rights as discussed above, it is
2 doubtful the ordinance allows for any “enforcement” at all, much less arbitrary or
3 discriminatory enforcement. But to the extent that conducting the proceeding itself
4 constitutes “enforcement,” the ordinance is not so vague and indefinite as to be
5 unconstitutional on a facial attack. The presiding officer is commanded to conduct the
6 proceedings as a fact finding proceeding not as an adversarial proceeding, to limit collateral
7 evidence, to present interrogatories that deal only with questions of fact not questions of
8 fault or guilt, and to conduct a fair and just hearing.

9 Petitioners argue there are no limits on the presiding officer’s selection of an
10 ombudsman for the family of the deceased, and there are no standards on the burden of
11 proof or how many votes constitute valid findings. However, neither of these challenges
12 support a void for vagueness challenge. As to the identity of the appointed ombudsman,
13 Petitioners fail to identify how that has any constitutional significance. Moreover, the
14 ordinance provides that the presiding officer may appoint an ombudsman only from an
15 ombudsperson group established by the board of county commissioners. Clark County,
16 Nev. Code § 2.12.075(b). Consequently, it is not completely at the presiding officer’s whim
17 whom to appoint as ombudsperson. As to the standard of proof or voting protocols,
18 because the inquest does not adjudicate any rights, Petitioners do not show how the burden
19 of proof or voting has constitutional significance.

20 Petitioners rely on Fitzgerald v. Jordan to argue that where an enactment provides
21 for arbitrary enforcement, it is unconstitutionally vague. In Fitzgerald, an Illinois statute
22 permitted a court to deny bail to a criminal defendant for “compelling reasons” pending
23 resolution of the State’s appeal. 747 F.2d 1120, 1129 (7th Cir. 1984). The United States
24 Court of Appeals for the Seventh Circuit upheld the statute against a void for vagueness
25 facial attack, concluding that the statute provided for internal protections through the
26 possibility of appeal and offered some guidance through use of a presumption against

1 denying bail. Id. at 1129-31. The Seventh Circuit also rejected the petitioner's as applied
2 challenge, finding that compelling reasons existed to deny bail pending the State's appeal.
3 Id. at 1132-33.

4 Fitzgerald does not alter the Court's analysis. Unlike the inquest ordinance at
5 issue here, the bail statute in Fitzgerald implicated a due process right—the right to liberty.
6 Moreover, the ordinance, like the bail statute in Fitzgerald, provides some guidance to
7 presiding officers on how to conduct the proceedings such that the ordinance is not vague in
8 all its applications. Finally, because Petitioners can identify no constitutionally significant
9 harm that they actually have suffered as yet, there is no basis to find the ordinance
10 unconstitutionally vague as applied. The Court will deny the void for vagueness challenge
11 under both the U.S. and Nevada Constitutions.

12 **IV. ACLU's MOTION TO INTERVENE (Doc. #20)**

13 Because the Court is dismissing the due process and equal protection claims and
14 remanding the separation of powers claim, there is nothing left in this Court in which the
15 ACLU can intervene. Accordingly, the Court will deny the ACLU's motion to intervene as
16 moot, without prejudice to seek intervention in the remanded proceedings in state court.

17 **V. CONCLUSION**

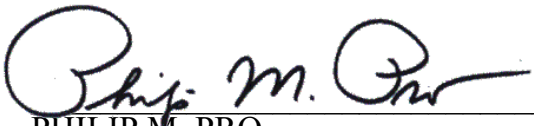
18 IT IS THEREFORE ORDERED that Respondents Karen P. Bennett-Haron, P.
19 Michael Murphy, and Christopher J. Laurent's Motion to Dismiss (Doc. #11) is hereby
20 GRANTED in part and DENIED in part. The motion is granted as to the Petition's claims
21 for due process, equal protection, and void for vagueness under the U.S. and Nevada
22 Constitutions. The motion is denied with respect to the separation of powers claim under
23 the Nevada Constitution, without prejudice to renew in the remanded state court
24 proceedings.

25 IT IS FURTHER ORDERED that Petitioners' Motion to Remand for Lack of
26 Federal Jurisdiction or Under Pullman Abstention (Doc. #12) is hereby GRANTED to the

1 extent that Petitioners' separation of powers claim under the Nevada Constitution is hereby
2 SEVERED and REMANDED to the Eighth Judicial District Court in and for the County of
3 Clark, State of Nevada in Case No. A-11-643622-W. Petitioners' Motion (Doc. #12) is
4 hereby DENIED in all other respects.

5 IT IS FURTHER ORDERED that American Civil Liberties Union of Nevada's
6 Motion to Intervene Pursuant to FRCP 24(a)(2) (Doc. #20) is hereby DENIED as moot,
7 without prejudice to renew in the remanded state court proceedings.

8
9 DATED: December 5, 2011

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11 PHILIP M. PRO
12 United States District Judge
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