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NEBRASKA DEPARTMENT OF JUSTICE

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Opinion No. 23-010 — December 15, 2023

OPINION FOR CHRISTIAN MIRCH, COMMISSIONER  
NEBRASKA PUBLIC SERVICE COMMISSION

**Authority of the Public Service Commission to  
Censure a Commissioner and Adopt a Code of  
Conduct for Commissioners**

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**Summary:** The Public Service Commission is authorized to censure a Commissioner. Censure is a form of governmental speech, and no specific constitutional or statutory authority is required for the Commission to exercise its right to speak by censuring a Commissioner. The Commission has inherent authority to adopt internal policies and practices, including adopting the Code of Conduct for Commissioners. While reprimand or censure for violating the Code is appropriate, other discipline could be actionable if found to impermissibly affect a Commissioner's ability to do their job or deny a privilege of their office. The Code is not a rule or regulation as defined in the APA. It does not establish a standard of general application and does not affect private rights, private interests, or procedures available to the public. It applies only to Commissioners and is not relied upon to bind the public. The Code is an internal procedural document excluded from the APA's definition of rule or regulation. Finally, as the Commission is a continuing body, the Code applies to new members.

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You have requested our opinion on the authority of the Nebraska Public Service Commission ("Commission") to censure an individual Public Service Commissioner. You also ask whether the Commission had authority to adopt its current Code of Conduct for Commissioners ("Code"), and, if the Commission had authority to adopt the Code, if it was required to do so under the Administrative Procedure Act's requirements for agency rulemaking.

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Finally, you ask if the Code is “binding on future members” of the Commission.

At the outset, Neb. Rev. Stat. § 75-108 (2018) provides: “The commission may consult with the Attorney General with reference to any matter upon which it may require advice, and the Attorney General shall give such advice as the commission may require and perform such other services within the line of duty as the commission may require.” Because this statute allows the Commission to consult with and seek advice from the Attorney General, we have generally declined to advise individual Commissioners on legal questions which impact the entire Commission and its policies. Separately, the Attorney General is required to provide written opinions on questions of law submitted by, among other officials and agencies, the “Public Service Commission.” Neb. Rev. Stat. § 84-205(4) (2014). As we believe it is important to provide guidance to the Commission, however, we will proceed to answer the questions presented.

We conclude that the Commission generally has the power to enact a code of conduct and needs no express statutory or constitutional authority to do so. We further conclude that, as an exercise of governmental speech, the Commission may register its disapproval of a member’s actions through the adoption of a censure motion.

However, where the Commission goes beyond mere expression of its disapproval to affirmative acts designed to punish an individual member as a result of a censure motion or violation of any code of conduct, it treads on hostile constitutional terrain. Members of the Commission are elected by the public, and the Commission may not materially restrict those members’ ability to discharge their obligations to their constituents. Sanctions such as

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restricting a member's access to office space, staff, or other resources, are very likely unconstitutional.

Finally, we understand that this request may have been made in the context of a particular censure motion made and adopted by the Commission. To be clear: nothing in this Opinion is in response to, endorses, rejects, or otherwise addresses the specific factual circumstances surrounding that motion. Our analysis addresses only the principles of law surrounding the Commission's authority generally to censure a Commissioner and to enact a code of conduct.

I.

Initially, you reference Neb. Rev. Stat. § 75-109.01 (Supp. 2023) and ask whether the Commission has authority to censure an individual Commissioner. Section 75-109.01 sets out the subjects over which the Commission "shall have jurisdiction." *Id.* It references statutes providing Commission jurisdiction over various areas, including common carriers generally, grain dealers and grain warehouses, pipeline carriers, telecommunications carriers, and jurisdictional utilities. *Id.* Section 75-109.01 addresses Commission jurisdiction over specified subject areas and has no bearing on the authority of the Commission to censure individual Commissioners.

The Commission "is a constitutionally created body." *Hergott v. Nebraska State Ry. Comm'n*, 145 Neb. 100, 104, 15 N.W.2d 418, 421 (1944). "[I]n the absence of specific legislation," the Commission's constitutional powers and duties "include the regulation of rates, service and general control of common carriers as the Legislature may provide by law." Neb. Const. art. IV, § 20. In addition to its constitutional power to regulate common carriers, subject to specific legislation, the Commission exercises

authority in certain areas granted exclusively by statute. *In re Complaint of Fecht*, 216 Neb. 535, 539-40, 344 N.W.2d 636, 639 (1984).

Generally, “[i]n the absence of constitutional authority, an administrative agency has only that power which has been granted to it by the Legislature.” *Nebraska Pub. Serv. Comm’n v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 491, 590 N.W.2d 840, 848 (1999). Not surprisingly, no constitutional provision or statute directly grants the Commission express authority to censure a Commissioner. But the absence of such express power is not controlling, as “elected bodies in this country have long exercised the power to censure their members.” *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 475 (2022) (“*Wilson*”). In *Wilson*, a unanimous Court held a community college board’s public censure of one of its trustees was not actionable under the First Amendment. The opinion relied extensively on historical practice, noting that, “[a]s early as colonial times, the power of assemblies in this country to censure their members was ‘more or less assumed.’” *Id.* (quoting M. Clarke, *Parliamentary Privilege in the American Colonies* 184 (1943)). After citing examples of the United States House and Senate exercising the power to censure members, the Court further noted that “throughout our history many state and local bodies have employed that authority to prescribe censure processes for their members.” *Wilson*, 595 U.S. at 476.

The tradition and historical practice of elected bodies exercising the power to censure their members supports concluding the Commission may censure a Commissioner. An elected body has the right to express disagreement of a member’s conduct or speech through censure. Censure in this context is itself “a form of speech by elected representatives.” *Wilson*, 595 U.S. at 479. “A government entity has the right to ‘speak for itself.’”

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*Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“*Summum*”) (quoting *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 219 (2000)). “[I]t is entitled to say what it wishes, . . . and to select the views that it wants to express[.]” *Summum*, 555 U.S. at 467-68 (citations omitted). An elected body’s censure of a member is a form of governmental speech, and no specific constitutional or statutory authority is required for the Commission to exercise its right to speak by censuring a Commissioner.

In fact, we are aware of a previous censure by the Commission of a member occurring in 2001. Nebraska Public Service Commission, Secretary’s Record, p. 4771 (Majority of Commissioners voting to censure Commissioner on May 5, 2001). This reinforces the Commission’s power to censure a Commissioner as a matter of historical practice.<sup>1</sup>

## II.

On December 6, 2022, a Commission majority voted to adopt the Code. Nebraska Public Service Commission, Secretary’s Record, Minutes of Meeting of Dec. 6, 2022, at 4. The Code includes provisions outlining Duties of Commissioners and Standards of Behavior. Code at 1-4. It also contains a Complaint Procedure for alleged violations, and a section addressing potential discipline for violations, including censure. Code at 4-5.

While no constitutional provision or statute specifically speaks to Commission authority to adopt the

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<sup>1</sup> In addition, the State Board of Education adopted a resolution in 2015 calling on a Board member to resign based on certain blog postings. [https://www.education.ne.gov/wp-content/uploads/2017/08/Pat\\_McPherson\\_Resolution.pdf](https://www.education.ne.gov/wp-content/uploads/2017/08/Pat_McPherson_Resolution.pdf)

Code, it has been recognized that the Commission “has administrative, legislative, and judicial powers.” *State ex rel. State Ry. Comm’n v. Ramsey*, 151 Neb. 333, 337, 37 N.W.2d 502, 505 (1949). “These were bestowed upon it by an independent part of the Constitution which created the [C]ommission, and not as an amendment to the executive, legislative, or judicial articles thereof.” *Id.*

Although there is little case law from other jurisdictions discussing the source of power for a governmental body to adopt a code of conduct, it has been recognized that “[t]he authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government.” *In re The Florida Bar*, 316 So.2d 45, 47 (Fla. 1975). In Nebraska, at least two constitutionally created bodies (the State Board of Education and the University of Nebraska Board of Regents) have adopted ethical codes for their elected members.<sup>2</sup> The State Board of Education (“State Board”), created by Neb. Const. art. VII, § 3, consists of eight elected members. The powers and duties provided to the State Board in Neb. Rev. Stat. § 79-318 (Cum. Supp. 2022), while broad, include no specific authority for adoption of the State Board’s Code of Conduct. The general governance of the University of Nebraska is vested in the Board of Regents, including “not less than six nor more than eight” elected members. Neb. Const. art. VII, § 10. The Legislature has granted the Board of Regents general powers and duties (Neb. Rev. Stat. § 85-106 (2014), but no

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<sup>2</sup> Nebraska State Board of Education, Board Operating Policies (“BOP”) 1.02 State Member Code of Conduct (Dec. 2, 2022) (<https://www.education.ne.gov/wp-content/uploads/2022/12/BOP-Final-Documents-1.pdf>); Bylaws of the Board of Regents of the University of Nebraska, Chapter I, 1.10, Code of Ethics (2023) (<https://nebraska.edu/-/media/unca/docs/offices-and-policies/policies/board-governing-documents/bor.pdf>).

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specific authority to adopt its Code of Ethics. The Commission, like the State Board and Board of Regents, is created by the Constitution and its members are elected. While no constitutional provision or statute specifically grants the State Board or Board of Regents authority to adopt a member code of conduct or ethics, their power to do so has not been challenged. We see no reason why the Commission may not also adopt a code of conduct for Commissioners.

The Code establishes operating procedures for the Commission, including matters such as selection and duties of the Chair and Vice-Chair, and assignment and duties of Hearing Officers. Code at 1-2. The Standards of Behavior section addresses actions already prohibited by law, such as provisions relating to acceptance of gifts and conflicts of interest governed by the Nebraska Political Accountability and Disclosure Act, violence and harassment in the workplace, and retaliation. Code at 2-4. The Code creates an internal procedure for reporting complaints of Code violations and outlines the range of discipline for violations. Code at 4-5. The Commission has adopted similar operating policies and procedures for its employees. Nebraska Public Service Commission Employee Manual (Adopted January 9, 2018) (“Manual”) at 4 (Code of Conduct), 5-6 (Conflict of Interest), 7 (Gifts), 8 (Use of State Resources), 36, 40-44 (Violence and Harassment in the Workplace), and 43 (Retaliation Prohibited). There is no question that the Commission may create these practices for its employees, and we see no bar to the Commission adopting similar policies for Commissioners.

Because Commissioners are elected or appointed to an office created by the Constitution, however, the permissible discipline under the Code differs from that which may be imposed on employees. For employees,

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discipline may “range from a written warning to termination.” Manual at 47. Commissioners, however, may only be removed from office by impeachment. *See Laverty v. Cochran*, 132 Neb. 118, 123, 271 N.W. 354, 357 (1937) (“A constitutional officer can only be removed by impeachment as provided in the Constitution.”); Neb. Const. art III, § 17 (Procedure for Legislature to impeach officers). Thus, the Code includes potential discipline by informal or formal reprimand and censure. Code at 5. Censure may be accompanied by further sanction, such as: (1) Loss of privileges that “may include, but are not limited to, eligibility to serve as Chair [or] Vice-Chair, hearing officer assignments, ability to represent the Commission on committees or advisory boards, access to office space or equipment, and/or direct access to staff”; (2) Loss of position as Chair or Vice-Chair; (3) Request to resign from office; or (4) Recommendation for impeachment. *Id.*

As explained above, *Wilson* confirms that a verbal censure is protected speech which does not qualify as a “materially adverse action” under the First Amendment. 595 U.S. at 478-79. The case was “a narrow one” which did “not involve expulsion, exclusion, or any other form of punishment.” *Id.* at 482. “[T]he censure did not prevent” the individual “from doing his job” and “did not deny him any privilege of office . . . .” *Id.* at 479. In addition to censure, Wilson was made ineligible for election to board officer positions for one year. *Id.* at 472. He was also not allowed to receive reimbursement for college-related travel and his future requests for access to funds in his board account were subject to board approval. *Id.* The Fifth Circuit affirmed the district court’s findings that these additional actions taken against Wilson did not violate his First Amendment rights. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 499 n.55 (2020). While Wilson requested the Supreme Court to find the Fifth Circuit erred in affirming these nonverbal punishments, he failed



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to properly preserve that question for review. 595 U.S. at 473-74.

Thus, *Wilson* left unresolved the constitutionality of censures accompanied by punishments. Whether any punishment accompanying a censure may constitute impermissible retaliation turns on whether the punishment is a “materially adverse action” because it prevents the member from doing their job or denies them a privilege of office. Ineligibility or removal from leadership positions within the body has been held not to rise to the level of a materially adverse action. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d at 499 n.55; *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9<sup>th</sup> Cir. 2010) (School board’s removal of member from “a titular position” as vice-president not a materially adverse action because “his authority as a member of the Board was unaffected” and “he retained the full range of rights and prerogatives that came with having been publicly elected.”). Other sanctions, however, may be actionable. For example, requiring a state senator to provide 12 hours advance notice prior to entering the state capitol based on statements made by the senator was held to state a claim of materially adverse action as “a form of punishment which deprive[d] [the senator] of ‘authority he enjoyed by virtue of his popular election,’ . . . and ‘prevent[ed] [him] from doing his job[.]’” *Boquist v. Courtney*, 32 F.4<sup>th</sup> 764, 783 (9<sup>th</sup> Cir. 2022) (internal citations omitted). Also, a recently filed federal district court case in Nebraska alleges that a resolution imposing sanctions against a natural resources district board member beyond censure, consisting of removal from subcommittees and eliminating reimbursement for out-of-district travel expenses, constituted materially adverse action which violated the member’s First Amendment rights. *Temple v. Lower Elkhorn Nat. Res. Dist.*, No. 4:23-cv-03198 (D. Neb. 2023) (Complaint for Preliminary and

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Permanent Injunction, Damages, and Declaratory Relief at 14 ¶¶ 81-86).

It is thus an open question whether certain discipline imposed under the Code—beyond reprimand or censure—could be actionable as materially adverse actions which impermissibly affect a Commissioner’s ability to do their job or deny a privilege of their office. Ineligibility to serve as Chair or Vice-Chair, or removal from these positions, is likely not a materially adverse action. It is unclear if other sanctions, such as restricting access to office space or equipment and direct access to staff, are permissible. Sanctions of this nature could be found to impede a Commissioner’s ability to function and deny them privileges of their office.

In sum, we conclude that the Commission has the authority to adopt a code of conduct; we do not endorse the imposition of certain sanctions in addition to censure, some of which may be an unconstitutional restriction on the privileges of a popularly elected constitutional office.

### III.

The Commission is an “agency” under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (2014 and Cum. Supp. 2022) (“APA”). *Application of Yellow Cab Co.*, 175 Neb. 150, 156-57, 120 N.W.2d 922, 927 (1963). You ask whether, if the Commission had authority to adopt the Code, it was required to do so under the procedure for promulgating a rule or regulation under the APA.

“Rule or regulation shall mean any standard of general application adopted by an agency in accordance with authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or

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regulation.” Neb. Rev. Stat. § 84-901(2) (Cum. Supp. 2022). “Rule or regulation shall not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public.” *Id.* “[E]very standard which prescribes a penalty shall be presumed to have general applicability and any standard affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public.” *Id.*

“Statutory interpretation begins with the text, and the text is to be given its plain and ordinary meaning.” *State v. Godek*, 312 Neb. 1004, 1011, 981 N.W.2d 810, 816 (2022). “[A]n appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Adams Land & Cattle, LLC v. Widdowson*, 314 Neb. 358, 365, 990 N.W.2d 542, 548 (2023). “It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.” *Stewart v. Nebraska Dep’t of Revenue*, 294 Neb. 1010, 1016, 885 N.W.2d 723, 728 (2016). “If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.” *Cty. of Lancaster v. Cty. of Custer*, 313 Neb. 622, 632, 985 N.W.2d 612, 621 (2023).

The Code does not establish a “standard of general application” and does not “affect[ ] private rights, private interests, or procedures available to the public ...” § 84-901(2). It applies only to Commissioners and is not “relied upon to bind the public.” *Id.* The Code thus does not fit within the plain meaning of the APA’s definition of “rule or regulation.”

Further, “internal procedural documents which provide guidance to staff on agency organization and

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agency operations, lacking the force of law, and not relied upon to bind the public,” are excluded from the definition of “rule or regulation.” § 84-901(2). *See also Heist v. Nebraska Dep’t of Corr. Servs.*, 312 Neb. 480, 979 N.W.2d 772 (2022) (Discussing internal procedural documents exception); *Gray v. Nebraska Dep’t of Corr. Servs.*, 26 Neb. App. 660, 922 N.W.2d 234 (2018) (same). The Code provides guidance on Commission operations relating to the duties and conduct of Commissioners, lacks the force of law, and does not bind the public. As an internal procedural document, the Code falls outside the APA definition of “rule or regulation.”

The “internal procedural document” exclusion from the definition of “rule or regulation” was added to § 84-901 by 2016 Neb. Laws LB 867, § 2 (codified at Neb. Rev. Stat. § 84-901(2) (Cum. Supp. 2016)). The previous definition excluded “rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . .” Neb. Rev. Stat. § 84-901(2) (2014). In *McAllister v. Nebraska Dep’t of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998) (“*McAllister*”), an employee contended he was wrongfully terminated for violating a Department of Correctional Services (“DCS”) administrative rule that was not adopted as a rule or regulation under the APA. DCS argued the rule fell within the internal management exception. *Id.* at 914, 573 N.W.2d at 147. The Court disagreed, relying on the portion of the definition of “rule or regulation” providing that “every rule or regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests....” *Id.* at 914-16, 573 N.W.2d at 147-48. Noting the APA did not define “penalty,” the Court cited a dictionary definition noting “its meaning is generally confined to pecuniary punishment.” *Id.* at 916, 573 N.W.2d at 147 (quoting *Black’s Law Dictionary* 1133 (6<sup>th</sup> ed. 1990)).

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While not deciding if “the definition of ‘penalty’ is limited to pecuniary punishment,” the Court found the disciplinary rule prescribed a penalty because violation of the rule could “result in suspension without pay, demotion, or reduction in salary within a salary grade, all pecuniary punishments.” *Id.* Because the rule imposed a penalty under this definition, it was presumed to affect private rights and interests. *Id.* at 916, 573 N.W.2d at 148.

Section 84-901(2) currently provides “every standard which prescribes a penalty shall be presumed to have general applicability ...” While this differs from the penalty language formerly contained in the definition of “rule or regulation” construed in *McAllister*, if the definition of “penalty” employed in that case is applied, the Code imposes no penalty. None of the Code’s discipline provisions assess a pecuniary punishment of the type contemplated in *McAllister*. While the *McAllister* Court did not foreclose broadening the meaning of penalty beyond pecuniary punishment, there is no reason to expand that term beyond its ordinary meaning. A Commission reprimand or censure is an expression of disapproval, not a punishment or penalty. See *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1246-47 (10<sup>th</sup> Cir. 2000) (Censure of board member for violating ethics policy “did not penalize” or “punish” member for exercising her First Amendment rights.); *Zilich v. Longo*, 34 F.3d 359, 363-64 (6<sup>th</sup> Cir. 1994) (City council resolution and ordinance expressing disapproval of former member did “not have the effect of a ‘law’” and “contain[ed] no punishment or penalty.”). Moreover, even if a standard prescribes a penalty, the consequence is that it “shall be presumed to have general applicability.” Any such presumption is negated because the Code is not generally applicable, but applies solely to Commissioners.<sup>3</sup>

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<sup>3</sup> In *Hauser v. Nebraska Police Stds. Advisory Council*, 269 Neb. 541, 694 N.W.2d 171 (2005), a state trooper whose law enforcement

IV.

Finally, you ask if the Code is “binding on future members” of the Commission. In *State ex rel. Peterson v Ebke*, 303 Neb. 637, 659, 930 N.W.2d 551, 566 (2019), the Court held the Nebraska Legislature is “not a ‘continuing body.’” In reaching this conclusion, the Court noted “[t]he constitutional provisions restricting the power of the legislature describe 2-year biennium terms that begin with odd-numbered years and end with the following even-numbered year.” *Id.* at 657-58, 930 N.W.2d at 566. It also noted that “all procedural rules of the Nebraska Unicameral Legislature are adopted by majority vote at the ‘commencement of each regular session in odd-numbered years,’ and the adopted rules ‘govern the Legislature for a period of two years.’” *Id.* at 658, 930 N.W.2d at 566. This practice “demonstrates the Legislature’s collective understanding that it is not a ‘continuing body,’ but, rather, is a new Legislature established at the regular legislative session commencing in each odd-numbered year.” *Id.* at 658-59, 930 N.W.2d at 566. *See also State ex rel. Stenberg v. Moore*, 249 Neb. 589, 594, 544 N.W.2d 344, 348 (1996) (“The authority of a legislature is limited to the period of its own existence. One general assembly cannot bind a future one.” (quoting *Frost v. State*, 172 N.W.2d 575, 583 (Iowa 1969))).

The Commission, unlike the Legislature, is not limited to act within a particular term. While the terms of

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certification was revoked argued the Council improperly considered violations of the State Patrol’s codes of conduct and ethics in making its decision because the policies were not adopted as rules or regulations pursuant to the APA. The Court rejected Hauser’s claim, finding the codes were used only as evidence to show violation of the statutory grounds for revocation. *Id.* at 545-46, 694 N.W.2d at 175-76. *Hauser* thus did not address whether the codes prescribed penalties making them rules or regulations under the APA.

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office of Commissioners are staggered and expire at different times, the Commission is a “continuing body.” See Neb. Const. art. IV, § 20; Neb. Rev. Stat. § 32-509(2) (2016); Neb. Rev. Stat § 75-101(1) (2018); *King City Union High School Dist. v. Waibel*, 2 Cal. App. 2d 65, 68, 37 P.2d 861, 862 (Cal. Ct. App. 1934) (School board not “a different board simply because some of its personnel has been changed at an election” as “[s]uch a board is a continuing body[.]”); *Daly v. Stokell*, 63 So. 2d 644, 645 (Fla. 1953) (City Commission with staggered terms for Commissioners expiring at different times a “continuing body[.]”) As a continuing body, the Commission’s practices and procedures, including the Code, remain in effect and binding on new members. Nothing prevents a Commissioner from seeking a vote to change or eliminate the Code or other previously adopted Commission policies.

### V.

The Commission is authorized to censure a Commissioner. Censure is a form of governmental speech, and no specific constitutional or statutory authority is required for the Commission to exercise its right to speak by censuring a Commissioner. The Commission has inherent authority to adopt internal policies and practices, including adopting the Code of Conduct for Commissioners. While reprimand or censure for violating the Code is appropriate, other discipline could be actionable if found to impermissibly affect a Commissioner’s ability to do their job or deny a privilege of their office. The Code is not a rule or regulation as defined in the APA. It does not establish a standard of general application and does not affect private rights, private interests, or procedures available to the public. It applies only to Commissioners and is not relied upon to bind the public. The Code is an internal procedural document excluded from the APA’s definition of rule or

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regulation. Finally, as the Commission is a continuing body, the Code applies to new members.

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