IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, Fourth Ward City Council Member of the City of Sparks,

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

_____/

Docket No. 51920

RESPONSE TO APPELLANT'S MOTION FOR ADDITIONAL BRIEFING AND ARGUMENT

Respondent the Commission on Ethics of the State of Nevada (the "Commission") hereby submits this Response to Appellant Michael A. Carrigan's Motion for Additional Briefing and Argument ("Motion"). Because the principal focus of the original briefing to this Court was the First Amendment speech claim that the Supreme Court of the United States has now decided against Mr. Carrigan, and because additional briefing may be warranted to address the alternative vagueness claim Mr. Carrigan previously presented in this Court, the Commission does not oppose additional briefing and argument with respect to the vagueness challenge.

To the extent, however, that the Motion contemplates briefing on additional arguments not previously preserved for appeal in this Court—in particular, a claim based on a First Amendment right of association—the Commission opposes supplemental briefing because those arguments are not properly before this Court. To avoid diluting the value of supplemental briefing through the inclusion of forfeited claims, this Court should limit supplemental briefing to Mr. Carrigan's vagueness claim left undecided by the initial appeal.

I. Prior Proceedings

In October 2007, the Commission censured Mr. Carrigan under Nevada's Ethics in Government Law, NRS §§ 281A.420(2)(c) & 281A.420(8)(e),[1] for failing to abstain from voting on a matter in which his close friend, confidant and three-time campaign manager—with whom Carrigan shared a "substantial and continuing business relationship" as well as a relationship "akin to" that of a family member—had a financial interest. *In re Request for Opinion Concerning the Conduct of Michael Carrigan*, Nevada Comm'n on Ethics Nos. 06-61, 06-62, 06-66, & 06-68 (Oct. 8, 2007).

Mr. Carrigan sought review of that decision in Nevada's First Judicial District Court. In denying that petition, the District Court explained that Mr. Carrigan had raised three constitutional challenges to the relevant provisions of the Ethics in Government statute: (1) that they "impermissibly restrict protected speech in violation of the First Amendment" and were (2) "overbroad" and (3) "vague" under the First and Fourteenth Amendments. *Carrigan v. Comm'n on Ethics*, No. 07-OC-012451B ¶ 22 (Nev. D. Ct. May 28, 2008); *accord Carrigan v. Comm'n on Ethics*, 126 Nev. ___, 236 P.3d 616, 619 (2010). The District Court's opinion does not suggest that Mr. Carrigan pressed a claim based on a First Amendment right of association.

Mr. Carrigan again pressed constitutional challenges on appeal to this Court. In the Statement of the Issues required by Nevada Rule of Appellate Procedure 28(a)(4), Mr. Carrigan identified as "issues for the Court to consider": (1) whether NRS §§ 281A.420(2) & (8) were "unconstitutionally vague," (2) whether those sections "chill protected political speech in violation of the First Amendment," and (3) whether the District Court's order and Commission opinion "amount[] to a prior restraint of protected political speech." Appellant's Br. at 1, Docket No. 51920 (July 24, 2008) ("Appellant's Br."). The statement of issues made no reference to any claim based on a right of association.

In briefing his vagueness challenge to this Court, Mr. Carrigan contended that NRS §§ 281A.420(2) & (8) were "unconstitutionally vague . . . [under the] Due Process Clause of the

[1] Consistent with the parties' approach in the prior briefing and the present Motion, this Response refers to the 2007 version of the Nevada statute.

Fourteenth Amendment." *Id.* at 5-6. Mr. Carrigan urged that the vagueness inquiry required a "close[r] examin[ation] where . . . First Amendment rights are implicated," asserting that a statute "may be impermissibly vague under the First Amendment if it chills *protected speech*." *Id.* at 6 (emphasis added). Mr. Carrigan further argued that the provisions in question were sufficiently vague to contravene the First Amendment, because "the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment." *Id.* at 12; *see also id.* at 13 ("Carrigan's argument is that . . . [the provisions] extend[] to, and impermissibly chill[], otherwise protected core political speech in violation of the First Amendment.").

Mr. Carrigan separately argued that the Commission's censure, combined with the District Court's conclusion that he should have sought an advisory opinion from the Commission prior to voting, amounted to an unconstitutional "prior restraint" on "constitutionally-protected speech." *Id.* at 19-23. The prior restraint argument made no reference to any right of association.

Finally, Mr. Carrigan argued that NRS §§ 281A.420(2) & (8) were facially overbroad in light of their "chilling effect on free expression," urging the proposition subsequently rejected by the Supreme Court of the United States: that "[t]he act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment." *Id.* at 16. Although Mr. Carrigan made reference to, and cited in passing authorities that touch upon, associational rights, he did so only in the context of an overbreadth challenge that was plainly focused on speech concerns. *See id.* at 15-19 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Woodland Hills v. City Council*, 609 P.2d 1029 (Cal. 1980)).

Taking Mr. Carrigan at his word, this Court gave no indication that it understood Mr. Carrigan to have pressed or preserved a right-of-association claim. This Court explained that Carrigan had "challenge[d] the constitutionality of the Commission's censure on several grounds: overbreadth, vagueness, and unconstitutional prior restraint on speech." *Carrigan*,

236 P.3d at 619. Having sustained Mr. Carrigan's "overbreadth challenge," this Court enumerated the remaining claims which it had no occasion to reach as "Carrigan's vagueness and prior restraint arguments." *Id.* at 619 n.4. Contrary to Mr. Carrigan's suggestion (Motion at 1), this Court did not mention any "right-of-association ground[]." Indeed, the majority opinion did not once use the word "association." *Id.* at 618-24.

This straightforward reading of the briefs in this Court stands in sharp contrast to the arguments Carrigan debuted before the Supreme Court of the United States. Even then, however, Mr. Carrigan's Brief in Opposition to certiorari made no mention of an associational claim, despite his evident incentive to identify alternate bases for sustaining this Court's favorable judgment. *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011). Indeed, in reciting the claims that he had made before this Court, Mr. Carrigan *plainly omitted* any reference to a "right of association" claim. The Brief in Opposition states that Mr. Carrigan "raised *three* distinct constitutional challenges to the Nevada Ethics in Government law," the Free Speech Claim that this Court addressed, and two claims "which were not reached in the decision below: (1) that Nev. Rev. Stat. § 281A.420(8) (2007) is unconstitutionally vague; and (2) that the binding advisory opinion process established in Nev. Rev. Stat. § 281A.440 (2007) is an unconstitutional prior restraint." Brief in Opposition at 24-25, *Nevada Comm'n on Ethics v. Carrigan*, No. 10-568 (Nov. 29, 2010) ("Br. in Opp."). The failure to mention any "right of association" claim is telling.

Only at the eleventh hour did Mr. Carrigan develop a right-of-association claim, which appeared for the first time in his brief on the merits before the Supreme Court of the United States. Mr. Carrigan's extensive treatment of the right of association in his merits brief there, *see* Brief for Respondent at 29-36, *Nevada Comm'n on Ethics v. Carrigan*, No. 10-568 (Mar. 24, 2011), underscores that any passing references to the right in briefing in District Court and before this Court were not part of any independent constitutional claim. The Supreme Court properly declined to reach the newly raised association claim, observing that "[t]he Nevada

Supreme Court made no mention of [an association] argument." *See Carrigan*, 131 S. Ct. at 2351.

II. While the Commission Does Not Oppose Supplemental Briefing on Vagueness, an Association Claim Is Not Properly Before this Court.

Under Nevada Rule of Appellate Procedure 28(a)(4), Mr. Carrigan was required to include in his appellant's brief "a statement of the issues presented for review." Rule 28(a)(8)(A) further required Mr. Carrigan to set forth "[his] contentions and the reasons for them, with citations to the authorities and parts of the record on which [he] relie[d]." This Court has long deemed waived—and thus declined to consider—arguments which an appellant has failed to "cogently argue" in its brief, with appropriate reference to "relevant authority." *See, e.g., Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Maresca v. State*, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987).

As described above, Mr. Carrigan did not properly present or preserve for consideration by this Court a claim based on a right of association. His briefs to this Court raised vagueness, overbreadth, and prior restraint theories predicated on a (subsequently repudiated) claim to speech rights in voting. Mr. Carrigan mentioned a right of association only in passing, in portions of his brief devoted to other topics. Mr. Carrigan's *own brief* in the Supreme Court of the United States plainly reflects his admission that he raised no right of association claim before this Court. Br. in Opp. 24-25.

The Motion focuses heavily on a concurring opinion in *Carrigan*, joined by Justice Anthony M. Kennedy alone, which discusses *potential* burdens on "speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote," as well as *possible* burdens on association. The Motion, however, glosses over the crucial predicate for Justice Kennedy's analysis: the acknowledgment that although such issues might be important "were [they] to have been a proper part of the case, . . . the question whether Nevada's recusal statute was applied in a manner that burdens [] First Amendment freedoms is *not presented in this case*." *Carrigan*, 131 S. Ct. at 2352, 2354 (Kennedy, J., concurring) (emphasis added).

The Commission respectfully submits that a remand to this Court following full briefing and argument and plenary review by the Supreme Court of the United States is not the appropriate time for Mr. Carrigan to present novel claims that have not been passed upon by any court in these proceedings and were not properly preserved for appeal. As this Court observed in applying claim preclusion principles to foreclose claims that "could have been asserted" at an earlier stage in an action, "'fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end,' . . . 'even though the substantive issues have not been [adjudicated], especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding.'" *Five Star Capital Corp. v. Ruby*, 124 Nev. ___, 194 P.3d 709, 715 (2008) (quoting *Restatement (Second) of Judgments* § 19, cmt. a (1982)); *cf. Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 171, 400 P.2d 621, 625 (1965) ("There must be some end to the litigation, and appellant may not proceed to advance one theory after another . . . ."). Thus, while the Commission does not oppose supplemental briefing on Mr. Carrigan's vagueness argument, no right-of-association claim is properly before this Court on remand.

Dated: July 19, 2011

Respectfully submitted,

/s/ Yvonne M. Nevarez-Goodson

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Nevada Rules of Appellate Procedure, I hereby certify that on this 19th day of July, 2011, a true and correct copy of the foregoing Response was electronically served pursuant to Rule 9 of the Nevada Electronic Filing Rules on the following:

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And a true and correct copy of the foregoing Response was served by overnight mail, prepaid, on the following:

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Dated: July 19, 2011
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