Docket No. 51920

IN THE

SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, FOURTH WARD CITY COUNCIL MEMBER FOR THE CITY OF SPARKS,

Appellant,

v.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DOCKET NO. 07-OC-012451B

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT MICHAEL A. CARRIGAN

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INTRODUCTION

The catchall disqualification provision, Nev. Rev. Stat. § 281A.420(8) (2007), is unique on its terms and, as interpreted by the Commission on Ethics, uniquely hostile to First Amendment values. Try though the Commission might to retroactively create order out of chaos, the truth is that no one knows what the law means—not this Court, not Councilmember Carrigan, not the Sparks City Attorney, not even the Commissioners who would enforce it. It was this vagueness that allowed the Commission to treat Councilmember Carrigan's perceived "loyalty" to the man who had been "instrumental in the success of all three of [his] elections" as a disqualifying conflict of interest. Political loyalties should be embraced as the fabric of our democracy, not vilified as corrupting. The plain implication of the Commission's decision in this case is that politically active citizens and candidates for office will be wary of associating with each other. Absent justification for considering the relationship between a key campaign volunteer and his chosen candidate susceptible to abuse—and the Commission has offered none—the censure cannot stand.[1]

[1] The Commission attempts to avoid some of the more troubling implications of the catchall provision, and its ruling in this case, by arguing that Councilmember Carrigan has raised only an as-applied challenge. R.S.B. 1. That is false. He has raised both a facial and an as-applied challenge. *See, e.g.*, P.O.B. 4–5 (J.A. 307–08). He has acknowledged that he is seeking only to set aside the censure and that his "claim and the relief that would follow" accordingly apply only to him. *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010); *see* Brief for Respondent at 21, *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), 2011 WL 1149041. But the *reasons* why the censure should be set aside are both facial and as-applied. Councilmember Carrigan continues to maintain that he "raised both" types of challenges and that he "should prevail regardless of the proper characterization." Brief for Respondent at 21–22, *Carrigan*, 131 S. Ct. 2343.

ARGUMENT

I. THE DISQUALIFICATION PROVISION IS UNCONSTITUTIONALLY VAGUE

A. No One Could Know What Relationships The Commission Would Deem Disqualifying Under The Catchall

This Court has stated that "[t]here is **no** definition or limitation to subsection 8(e)'s definition of any relationship 'substantially similar' to the other relationships in subsection 8" and that it accordingly "does not inform or guide public officers as to what relationships require recusal." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 623 (2010) (emphasis added). Regardless of the label the Court attached to that finding in its initial opinion, it is at a minimum highly relevant to, and arguably dispositive of, Councilmember Carrigan's vagueness challenge. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (question is whether people "of common intelligence must necessarily guess at [a law's] meaning and differ as to its application").

The Commission attempts to blunt the force of the Court's finding by arguing that it was "predicated" "on the…understanding that 'strict scrutiny' applies, 'demand[ing] a high level of clarity' and 'shift[ing] the burden of proof to the government.'" R.S.B. 9.[2] An elevated level of scrutiny is still required because of the burdens the Commission's interpretation of the catchall imposes on First Amendment associational rights. A.S.B. 14–24; *infra* at 10-13. But in any event, this Court did not find that the catchall lacked a "high level of clarity"; it found that it lacked **any** clarity. That finding is correct, both as a general matter and as applied to the relationship at issue here.

The Commissioners' disagreement about which of the four enumerated categories the Carrigan-Vasquez relationship fits confirms that the relationship is not "plainly" (R.S.B. 5) disqualifying under the statute. A.S.B. 10–11. Even now, although the Commission has narrowed the candidates down to "family member" and "business associate," it declines to pick between the two. R.S.B. 7.[3] The Commission suggests that its own internal disagreement as to exactly how the catchall applies here cannot establish the provision's lack of clarity. R.S.B. 12. The two cases it relies on, however, arise in different legal and factual contexts and are therefore inapposite. In *Reno v. Koray*, 515 U.S. 50 (1995), for example, the Supreme Court held that a "'division in judicial authority'" does not make a statute ambiguous for purposes of applying the rule of lenity. *Id*. at 65 (citation omitted). The question there is whether "'after seizing everything from which aid can be derived'" *a court* "can make 'no more than a guess as to what Congress intended.'" *Id*. (citation omitted). Where, as here, the issue is unconstitutional vagueness, the question is whether people "of common intelligence"—who do not have the legal

[2] This brief abbreviates Councilmember Carrigan's opening supplemental brief "A.S.B." and the Commission's answering supplemental brief "R.S.B."

[3] The Commission attempts to downplay the significance of the disagreement among its members by characterizing it as "initial" squabbling preceding a "unanimous[]" decision on disqualification. R.S.B. 12. The Commissioners did agree that the relationship was disqualifying; but they never agreed as to *why*. They reached no consensus on which enumerated relationship the Carrigan-Vasquez relationship was most like. Instead, they concluded that the "sum total of [Carrigan and Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated…**including** a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" J.A. 286 (emphasis added).

acumen of or resources available to a court—"must necessarily guess at its meaning and differ as to its application." *General Constr. Co.*, 269 U.S. at 391.[4]

The Commission asserts that the catchall "allows [it] to address relationships that implicate the same concerns animating the four [enumerated] categories." R.S.B. 6–7. And it has stated that for three of those categories, including business relationships, the animating concern is self-dealing. Transcript of Oral Argument at 9, *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (No. 10-568); *see* A.S.B. 9 n.5. The relationship between Councilmember Carrigan and his volunteer campaign manager did not, however, implicate any concern that he would vote for the Lazy 8 out of financial self-interest—which is precisely why the City Attorney advised him that he did not have to abstain, J.A. 282. The Commission asserts that "Vasquez's advertising firm…received 89 percent of Carrigan's 2006 campaign expenditures" and that Councilmember Carrigan "would be eager to continue receiving below-market services in his ongoing election efforts." R.S.B. 7. But Vasquez received campaign expenditures simply as a "pass through" middleman. J.A. 91, 199–200. Financially, the campaign could have carried on just as well without him. Councilmember Carrigan testified that he was not "able to get better deals on air time or radio time" because of Vasquez's involvement. J.A. 92. To the contrary, the campaign was treated "just like everybody else." *Id*.

[4] In *United States v. Jackson*, 968 F.2d 158 (2d Cir. 1992), the Second Circuit noted at the outset that the vagueness challenge to the term "cocaine base" in the federal Sentencing Guidelines did not implicate First Amendment interests. *Id*. at 161. And it found that a difference of opinion among the circuit courts on what "cocaine base" means did not matter, because "cocaine base" is a "scientific term" with an "undisputed" meaning "in the scientific community." *Id*. Here, by contrast, First Amendment interests

Lacking any plausible indication that Councilmember Carrigan had a financial interest at stake in the Lazy 8 vote based on his campaign manager's involvement, the Commission falls back on reading a general concern about closeness into the statute, given the enumeration of family relationships as disqualifying. R.S.B. 7. The Commission contends that this Court need not worry about how an official could perform the seemingly impossible task of determining whether a relationship is sufficiently "close" to be "substantially similar" to one with a family member within the third degree of consanguinity because Councilmember Carrigan "admi[tted]" that his relationship with Vasquez was "closer than that of a sibling." R.S.B. 12 n.9.[5] That is a gross misrepresentation of the record. All Councilmember Carrigan said—and all the Commission found below, J.A. 286—was that he would confide in Vasquez on matters where he would not confide in his sister. J.A. 136. Most people who have a brother or sister could say the same thing about any number of friends, regardless of how close they are with their siblings. And as the Commission well knows, Councilmember Carrigan only meant to suggest that he is not particularly close with his sister. J.A. 135–36.[6] He

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are very much in play. And *no one* is clear on what constitutes a relationship "substantially similar" to those enumerated in the disqualification provision.

[5] Justice Alito is not the only one who struggled with how an official could figure out who among his associates are like family. *See* A.S.B. 11. When this case was previously before this Court, one Justice raised the same issue. Transcript of Oral Argument at 24, *Carrigan*, 236 P.3d 616 (No. 51920) ("How do you find somebody to be like family when they're not family though? I mean, you can't inherit from the person. No laws protect the person who supposedly is [like] a family member.").

[6] To the extent the Commission is suggesting that the determination of whether a relationship is "substantially similar" to a family tie within the third degree of consanguinity turns on the strength of an official's relationships with his *actual* family members, such a test not only exacerbates the vagueness problem, it "doesn't make sense," as one member of this Court has already noted. Transcript of Oral Argument at 25, *Carrigan*, 236 P.3d 616 (No. 51920).

stated explicitly that he did *not* consider Vasquez to be "like a brother" to him. *Id*. There was no reason for Councilmember Carrigan to know that their relationship would be deemed "substantially similar" to a familial bond.

It may well be that in *other* contexts, as the Commission contends (at 7–8), use of the phrase "substantially similar" poses no vagueness concerns. In some contexts, unlike here, it may have a "settled usage or tradition of interpretation in law," *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991), or be tied to criteria that make its scope more readily ascertainable. The Commission faults Councilmember Carrigan for not citing a decision invalidating the term "substantially similar" on vagueness grounds. R.S.B. 8. But *United States v. Turcotte*, 405 F.3d 515 (7th Cir. 2005), the only decision it cites to show the phrase has been upheld in other contexts, is so easily distinguishable as to prove our point regarding the catchall's vagueness. In *Turcotte*, the Seventh Circuit addressed whether a person of ordinary intelligence could figure out whether the chemical structure of GBL is substantially similar to that of GHB, a scheduled controlled substance. The court stated that the defendant's argument that there is no "established scientific definition of the term 'substantially similar' as applied to questions of molecular chemistry" was "well-taken." *Id*. at 531. It nevertheless determined that ordinary people were up to the particular task at hand, in part because GBL turns into GHB when ingested (their chemical structures differ by only three atoms), but most notably because "'GBL is one of the substances that the **statute actually identifies** as a potential controlled substance analogue.'" *Id*. at 532 (citation omitted) (emphasis added).

If the ethics statute actually identified an official's relationship with his volunteer campaign manager as substantially similar to the enumerated disqualifying relationships, Councilmember Carrigan's vagueness challenge would fail. But it does no such thing. Similarly, if the strengths of the bonds between human beings, and the effect those bonds have on one's independence of judgment, were objectively quantifiable and comparable, then "closeness" might be a more workable standard. But in reality, there is no way for any official to assess which of his many ties the Commission would deem so close as to be substantially similar to a family relationship within the third degree of consanguinity.

The Commission asserts (at 8–9) that other state and local ethics provisions "require disqualification based on language significantly more general" than Nevada's. The Commission cites no cases upholding the provisions it cites. It is possible that some or all of them have been interpreted in a way that makes their scope clear; that is not the case with the provision actually before this Court. In any event, most laws do not include such general language and the possibility that a handful of laws may be even vaguer than this state's does not mean that the catchall can survive constitutional scrutiny.

B. The Commission's Remaining Attempts To Save The Disqualification Provision Are Unpersuasive

Where, as here, the question is whether a statute puts ordinary people on notice as to what is prohibited, resort to legislative history—inaccessible to a large portion of the public—is improper. *See Fleuti v. Rosenberg*, 302 F.2d 652, 654–55 & n.5 (9th Cir. 1962); *Schwegmann Bros. v. Calvert Distillers Corp*., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring); *cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528

(1989) (Scalia, J., concurring) ("The meaning of the terms on the statute books ought to be determined…on the basis of which meaning is…most in accord with context and ordinary usage and thus most likely to have been understood by the whole [legislature] which voted on the words of the statute (not to mention the citizens subject to it)….."). That is especially true where the Commission would use witness testimony (*see* A.S.B. 12 n.6) to ascribe an entirely unexpected meaning to the catchall, rather than simply confirm what it makes clear on its face.[7]

In addition to relying on legislative history, the Commission continues to argue that its advisory opinion process cures any concerns about the catchall's vagueness. R.S.B. 10–11. Yet it points to no case in which the ability to seek an advisory opinion saved a statute that a court deemed to be otherwise impermissibly vague. In both *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court found that the relevant statute was sufficiently clear and referenced the availability of an advisory opinion only as an afterthought. "[I]f states were able to address a statute's breadth and lack of clarity simply by adding another layer to their regulatory apparatus, the

[7] The Commission cites *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991), for the proposition that "the Ninth Circuit no longer follows the rule articulated" in *Fleuti*. R.S.B. 13 n.10. But the court in *Information Providers* looked to legislative history only to confirm that "the term 'indecent' has a judicially recognized meaning." *Id*. at 874. It gave no indication that legislative history can be used to establish a meaning that is not otherwise evident from the terms of the statute, based on either common understanding or "settled usage or tradition of interpretation in law," *Gentile*, 501 U.S. at 1049. The same is true of the Supreme Court's decision in *United States v. Harriss*, 347 U.S. 612, 618, 620–22 (1954), this Court's decision in *Gallegos v. State*, 163 P.3d 456, 459 (Nev. 2007), and the Second Circuit's decision in *United States v. Rybicki*, 354 F.3d 124, 137–38 (2d Cir. 2003) (en banc).

overbreadth and void for vagueness doctrines would be a dead letter." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 299 (4th Cir. 2008). Notably, this Court previously struck down a financial disclosure requirement as vague despite the presence of the advisory opinion process. *Dunphy v. Sheehan*, 549 P.2d 332, 336 (Nev. 1976).

The Commission claims that if this Court finds the catchall unconstitutionally vague, either on its face or only as applied to Councilmember Carrigan, then the "venerable…standard for judicial recusal" is "doom[ed]." R.S.B. 9. But judicial ethics provisions are different. They are often left to the judge's own discretion to implement. *See, e.g.*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 56 (2000). And the state has a far more fundamental—indeed, constitutionally imposed—imperative to safeguard against any possibility of judicial favoritism based on political support. *See Carrigan*, 131 S. Ct. at 2353 (Kennedy, J., concurring); *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993).

The Commission also contends that its sanctioning of Councilmember Salerno, an opponent of the Lazy 8, indicates that it regulates evenhandedly. R.S.B. 14. No such comfort can be taken from Councilmember Salerno's case because it did not involve an application of the catchall. Nor did his case involve facts remotely similar to Councilmember Carrigan's. Councilmember Salerno was sanctioned for failing to disclose, prior to voting on the Lazy 8, sufficient information about the financial relationship between *a company he owns* and the Nugget. *In re Salerno*, Nev. Comm'n

on Ethics Op. No. 08-05C, Ex. A (Dec. 2, 2008). That company receives 10 to 12% of its yearly business from the Nugget. *In re Salerno*, Nev. Comm'n on Ethics Op. No. 09-21A (May 22, 2009). Councilmember Salerno's case thus involved only a straightforward application of one of the enumerated disqualifying "commitments in a private capacity": "a substantial and continuing business relationship."

II. THE DISQUALIFICATION PROVISION UNCONSTITUTIONALLY INFRINGES ON ASSOCIATIONAL RIGHTS

A. The Disqualification Provision Burdens Associational Rights

The disqualification was based on a political relationship. The basis for the censure was Councilmember Carrigan's relationship with Vasquez. J.A. 290. And what troubled the Commission about that relationship was the "loyalty" Councilmember Carrigan would feel towards the man who helped get him elected. J.A. 285–86, 290.

The Commission stated in its opinion that "mere friendships" are not disqualifying. J.A. 284. The distinguishing feature of *this* friendship was the fact that Vasquez was Councilmember Carrigan's "confidant and political advisor." J.A. 286; *see* J.A. 255, 257. And although the Commission found that "Vasquez and his companies provided public relations and advertising services…during all three [of Councilmember Carrigan's] political campaigns," it cited that fact only in support of the conclusion that "Councilman Carrigan believes that Mr. Vasquez was instrumental in getting [him] elected in all three of his elections," J.A. 286; *see* J.A. 253.[8]

[8] Contrary to the Commission's assertion (at 22 n.16), it alone deems political loyalties a basis for recusal. The court in *Ward v. Zoning Bd. of Adjustment*, No. BER-L5354-08, 2009 WL 1498705 (N.J. Super. Ct. Law Div. May 15, 2009), for example, mentioned the "shared political allegiance" between the official and his friend only in passing, focusing

The disqualification provision burdens a protected relationship. The Commission argues that its application of the catchall in this case places no burden on the right to petition the government because "Vasquez could still appear." R.S.B. 25. But by doing so, he put a critical vote at risk. The rule, based on the Commission's decision, is that a legislator's relationship with someone who has given material support to his campaigns creates a disqualifying conflict of interest. That rule would make any political activist shy away from participating in campaigns.

The Commission also assigns significance to the fact that Vasquez was lobbying on behalf of a paying client, rather than a personal cause, at the relevant meeting. R.S.B. 25. The Supreme Court, however, has long recognized that "[s]ome of our most valued forms of fully protected speech are uttered for profit." *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *see* A.S.B. 18 n.10.

According to the Commission (at 23–24), only those volunteers who could be deemed instrumental to a candidate's success and maintain an ongoing political relationship with him need worry about disqualification. That is cold comfort to prospective volunteers left to wonder at what point their level of involvement with a candidate might be deemed sufficiently instrumental and ongoing to result in

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instead on the closeness of the friendship, including the fact that the official and his friend vacationed together. It was not a case where the political allegiance was predominant, and unlike here, the friend was not credited with helping the official win an election. The same is true of both Rhode Island Ethics Commission decisions cited by the Commission. *See In re Giorgio*, R.I. Ethics Comm'n Advisory Op. No. 2004-1 (2004); *In re Perez*, R.I. Ethics Comm'n Advisory Op. No. 2001-64 (2001).

disqualification. Even if minimal volunteering would not count, the only certain way to preserve the right to engage in future political advocacy would be to sit out the election.

The Commission also argues that "recusal would [not] be triggered when a person in a covered relationship supports official action for policy reasons" because, it claims, the provision applies only where an official is committed to the "(typically pecuniary) private interests" of others. R.S.B. 24. Even if the statute were limited in the way the Commission currently advocates—and there is nothing stopping the Commission from changing its mind later—it still would place severe burdens on the exercise of associational rights. Regardless of why Vasquez supported the Lazy 8, by requiring recusal based on Vasquez's campaign efforts in support of Councilmember Carrigan, the Commission forces a candidate and a would-be volunteer to calculate up front whether the benefits of associating in common cause during the election are worth the later potential costs of not voting or not lobbying on "any…cause supported by" the volunteer, *Carrigan*, 131 S. Ct. at 2353 (Kennedy, J., concurring). Putting candidates and their prospective volunteers to that choice burdens the right to associate.

B. The Burdens Imposed By The Disqualification Provision Are Severe

The Commission questions the severity of the burdens imposed by the catchall based on a lack of "evidence" that the provision has triggered a "string of recusals." R.S.B. 23, 25–26. There is no way to "know that would-be speakers have been chilled and have not spoken." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 497 n.5 (2007) (Scalia, J., concurring); *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011). For that reason, the "normal practice is to access

ex ante the risk that a standard will have an impermissible chilling effect" on speech or association. *Wisconsin Right to Life, Inc.*, 551 U.S. at 497 n.5 (Scalia, J., concurring).

The Commission also contends that the burden imposed by the disqualification provision is "negligible" compared to the prohibition on federal executive branch employees' participation in political campaigns upheld in *Letter Carriers*, 413 U.S. 548. R.S.B. 25. But as the Commission previously has suggested, the regulation of government employees is not "the most apt doctrinal analogy for this case." Brief for Petitioner 32 n.10, *Carrigan*, 131 S. Ct. 2343, 2011 WL 661711; *see Carrigan*, 236 P.3d 621–22 (finding *Pickering* scrutiny inapposite).

The Commission complains (at 27–28) about the difficulties a government faces in meeting its burden under strict or intermediate scrutiny, implying that the application of either level of scrutiny in this case will render ethics laws across the country vulnerable to constitutional attack. That fear is unfounded. Shorn of its unique and problematic catchall—the only aspect of the statute this Court previously struck down, *Carrigan*, 236 P.3d at 624 n.10—Nevada's statute would be just like the standard statutes adopted by most state and local jurisdictions. Such a provision would certainly not be subject to strict scrutiny because it does not impose the same severe burdens on associational rights—a candidate and his prospective spouse, for example, are unlikely to call off the nuptials for fear of disqualification. And it would easily survive any level of scrutiny.

C. The Disqualification Provision Fails Under Either Strict Or Intermediate Scrutiny

As Councilmember Carrigan has explained, the state has no legitimate interest, much less an important or compelling one, in treating political loyalties as disqualifying conflicts of interest. A.S.B. 24–26. The Commission does not disagree; it only falls back on the argument that "that was not the basis for the Commission's action." R.S.B. 28. The record proves otherwise. *See* A.S.B. 15–16; *supra* at 10.

D. Councilmember Carrigan Preserved His Right-Of-Association Challenge

The district court and this Court had sufficient notice of the substance of Councilmember Carrigan's claim to have ruled on whether the Commission's decision in this case "eviscerate[s] a constitutionally protected political relationship," A.O.B. 9. *See* A.S.B. 28–30 (describing prior briefing). The claim was not waived.[9]

The Commission's suggestion (at 15 n.12) that Councilmember Carrigan's association claim "may" not be justiciable because he did not raise it in proceedings before the Commission is wrong. He did raise it in reference to a different provision. R.S.B., Add. 15. Moreover, any "factual evaluation," *Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 59 P.3d 474, 477 (Nev. 2002), necessary to resolve his association

[9] In one of the waiver-related cases cited by the Commission, the party did not even "address" the issue deemed waived. *Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280, 1288 n.38 (Nev. 2006). That plainly is not true here. In the other, the court stated that an issue "ha[d] not been adequately briefed," without describing the extent of the briefing. *Maresca v. State*, 748 P.2d 3, 6 (Nev. 1987). Moreover, even if this Court finds Councilmember Carrigan's prior briefing insufficient, it can and should address the claim. "[W]aiver is a discretionary, not jurisdictional, determination." *In re Mercury Interactive Securities Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). Courts often will address an otherwise waived issue where, as here, "'the issue presented is purely one of law, and either does not depend on the factual record developed below, or the pertinent record has been fully developed.'" *Id*. (citation omitted).

claim has already been performed by the Commission. In any event, if the Court agrees that he raised his association claim in prior briefing, then the Commission's justiciability argument, which it raised for the first time in its supplemental brief, is itself waived.

Finally, judicial economy favors this Court's resolution of Councilmember Carrigan's association challenge. Confusion about the meaning and permissible scope of the disqualification provision persists in the wake of the United States Supreme Court's decision in this case. The state Attorney General has stated that "she and other officials would just have to wait and see" how this Court resolves the remaining issues in this case "before her office will be able to advise state officials on the matter."[10] And the Commission's counsel has stated that Justice Kennedy's concurrence "'all but invited a challenge' [to the provision] on freedom of association grounds."[11] There is no reason for this Court to wait for an inevitable challenge by another public official to percolate through the courts rather than resolving this obviously important issue now.

CONCLUSION

This Court should set aside the Commission's censure.

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[10] Geoff Dornan, *Sandoval Abstains in Wake of Supreme Court Case*, Nevada Appeal, June 15, 2011, *available at* http://www.nevadaappeal.com/article/20110615/NEWS/110619828/0/FRONTPAGE).

[11] Tony Mauro, *High Court Upholds Nevada Recusal Law Invoked Against Legislator*, The National Law Journal (Online), June 13, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Supplemental Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with the Court's July 29 and August 8, 2011 Orders and all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 13, 2011

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Nevada Rules of Appellate Procedure, Rule 9 of the Nevada Electronic Filing Rules, and the consent of the parties, I hereby certify that on this 13th day of October, 2011, a true and correct copy of the Supplemental Reply Brief of Appellant Michael A. Carrigan was served electronically on the following:

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