

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

**THE COMMISSION ON ETHICS OF
THE STATE OF NEVADA**,

Respondent.

Docket No. 51920

On Appeal from the First Judicial Court
of the State of Nevada,
Docket No. 07-OC-01491

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**APPELLANT MICHAEL A.
CARRIGAN'S OPPOSITION TO
THE NEVADA LEGISLATURE'S
MOTION FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF**

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Although the supplemental briefing ordered by this Court is now complete, the Nevada Legislature belatedly seeks leave to file an *amicus curiae* brief in support of the Respondent Commission on Ethics. The Legislature's request comes over two months after this Court set the supplemental briefing schedule, well over a month after Councilmember Carrigan filed his opening supplemental brief, two weeks after the Commission filed its supplemental brief, and one day **after** Councilmember Carrigan filed his supplemental reply brief. Not only does the request demonstrate a casual disregard for this Court's briefing schedule, the proposed brief is eleven pages over the length permitted by Rule 29(e) of the Nevada Rules of Appellate Procedure. The *amicus* brief also adds nothing of relevance to briefs already filed (on time and at length) by the Commission and Councilmember Carrigan. The motion should be summarily denied.

The Legislature's request is out of time and should be denied for that reason alone. The Legislature is on the electronic service list for this case and continues to receive electronic notices of filings from this Court. The Legislature therefore was aware that, in light of the United States Supreme Court's remand, Councilmember Carrigan moved for additional briefing and argument on both his vagueness and association claims on July 14 (Doc. No. 11-21091), and that the Court granted the motion and set forth a briefing schedule on July 29 (Doc. No. 11-22887). Pursuant to that schedule, Councilmember Carrigan's opening supplemental brief was due on August 29, the Commission's answering supplemental brief on September 28, and Councilmember Carrigan's supplemental reply brief on October 13.

Given the short time-frame for the reply set out in the Court’s order (*see* Nev. R. App. P. 31(a)(1)(C) (usual time limit for reply is 30 days)), the Legislature had no basis to assume that it would be allowed, just as a matter of course, to file an *amicus* brief seven days after the Commission filed its supplemental brief pursuant to Rule 29(f). But in any event, the Legislature failed even to do that. Instead, it waited an additional week after its brief would have been due under Rule 29(f) to state, for the first time, its intention to file a supplemental *amicus* brief.

The Legislature claims that it could not have submitted its brief any sooner because of other responsibilities. Mot. 3. But the Legislature offers no reason why, at an absolute minimum, it could not have moved for an extension before Councilmember Carrigan filed his supplemental reply brief. At no point during the request for and setting of the supplemental briefing schedule did the Legislature speak up to ask that it be permitted to file a supplemental *amicus* brief at all, let alone two weeks after the Commission filed its brief. It offers no justification for its failure to do so.

To excuse its delay, the Legislature states that “this is the first time that Carrigan’s right of association claims have been briefed and argued before this Court.” Mot. 4. That is false, as Councilmember Carrigan has explained in his supplemental briefing. *See* A.S.B. 28–30 (Doc. No. 11-26253); A.S.R.B. 14–15 (Doc. No. 11-31589). And regardless, it is undisputed that Councilmember Carrigan raised the argument before the United States Supreme Court in March of this year. *See* Brief for Respondent, *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (No. 10-568), 2011 WL 1149041. The Legislature not

only participated in that proceeding, it was aware, as of July, that Councilmember Carrigan intended to present the same argument to this Court.

Now that Councilmember Carrigan has filed his reply brief, the Legislature's failure to notify the Court and the parties of its briefing intentions has real practical consequences. Had it notified the parties and the Court of its intentions at any time prior to now, the Court might have granted Councilmember Carrigan more time to file his reply (*see* Nev. R. App. P. 31(a)(1)(C) (30-day limit)), rather than setting the limit at 15 days. The additional time would have allowed Carrigan to respond efficiently to both the Commission's and the Legislature's briefs in one filing. Instead, if the Legislature is permitted, at this late date, to file its *amicus* brief, Councilmember Carrigan and his counsel will have to commit additional time and resources to filing (and this Court will have to commit additional time and resources to reading) an additional brief.

Not only does the Legislature ignore briefing deadlines, it also pays no mind to page limits. The proposed 26-page *amicus* brief exceeds the 15-page limit by 11 pages. *See* Nev. R. App. P. 29(e). Councilmember Carrigan and the Commission were able to present their arguments within the page limits allowed by the Rules. The Legislature is not entitled to special dispensation.

The Legislature's belated and bloated filing is not a result of its having anything new to say. To the contrary, the brief it seeks leave to file sets forth arguments duplicative both of those it has made previously and of the arguments the Commission has made in its supplemental briefing. *Compare* Proposed *Amicus Curiae* Brief of the Nevada Legislature with Commission's Answering Supplemental Brief (Doc. No. 11-29664); *Amicus Curiae*

Brief of the Nevada Legislature (Doc. No. 08-21925); Brief for the Nevada Legislature as *Amicus Curiae* Supporting Petitioner, *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (No. 10-568), 2011 WL 805233. *See Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) (“The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such *amicus* briefs should not be allowed. They are an abuse.”). The only argument the Legislature makes that was not covered by the Commission is that the citizens who participated in the August 23, 2006, Sparks City Council meeting had a due process right to an impartial “administrator” that trumps Councilmember Carrigan’s First Amendment rights. *See Proposed Amicus Curiae Brief of the Nevada Legislature* 7–16. It has already presented that argument to this Court. *See Amicus Curiae Brief of the Nevada Legislature* at 6-14 (Doc. No. 08-21925). And to the extent that the argument is even relevant, *see Reno v. Koray*, 515 U.S. 50, 55 (1995) (issue “not ... argued by the interested party” is “not properly before the Court” (emphasis added)), it plainly could have been made within the 15-page limit.

The Legislature calls this case “important[],” Mot. 4, and it is. Yet the Legislature apparently did not believe it was important enough to warrant adhering to deadlines and page limits. The case may be “complex[],” Mot. 4, but the rules governing deadlines and page limits are not. The motion should be denied.

Dated: October 14, 2011

Respectfully submitted,

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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 14th day of October, 2011, a true and correct copy of Appellant Michael A. Carrigan's Opposition to the Nevada Legislature's Motion for Leave To File an Amicus Curiae Brief was served electronically on the following:

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