

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.

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Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No. 51920

Appeal from First Judicial District Court
Case No. 07-OC-012451B

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF BY THE LEGISLATURE OF THE STATE OF NEVADA**

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REPLY

Pursuant to NRAP 27(a)(4), the Legislature of the State of Nevada (Legislature), by and through its counsel, hereby files a reply to Appellant Michael Carrigan’s opposition to the Legislature’s motion for leave to file an *amicus curiae* brief in support of Respondent Commission on Ethics of the State of Nevada (Commission). Contrary to Carrigan’s arguments in opposition to the motion, the Legislature has acted in conformity with NRAP 29, and the Legislature has presented good cause to support granting its motion.

With regard to the time for filing an *amicus* brief, NRAP 29(f) expressly provides that “[a]n *amicus curiae* must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the brief of the party being supported is filed.” However, NRAP 29(f) also contemplates a later filing by providing that “[t]he court may grant leave for later filing, specifying the time within which an opposing party may answer.” See also NRAP 26(b)(1) (“For good cause, the court may extend the time prescribed by these Rules or by its order to perform any act, or *may permit an act to be done after that time expires.*”) (emphasis added).

Based on its plain language, NRAP 29(f) does not limit its application to the original briefing schedule. See Weddell v. Stewart, 127 Nev. Adv. Op. 58, at 9 (2011) (“rules of statutory construction apply to court rules”). Therefore, unless suspended by this Court, NRAP 29(f) governed the time within which the Legislature was required to file an *amicus* brief supporting the Commission. See NRAP 1(a) & NRAP 2. When this Court entered its order on July 29, 2011, granting Carrigan’s motion for additional briefing, this Court did not suspend any provision of NRAP 29 or establish any specific requirements for the filing of *amicus* briefs. Consequently, because NRAP 29(f) controls in this case and because the Commission filed its

1 supplemental brief on September 28, 2011, the Legislature was authorized to file an *amicus* brief
2 no later than October 7, 2011. See NRAP 26(a)(2) (computing time). But the Legislature was
3 also permitted to seek “leave for later filing” under NRAP 29(f), and the Legislature’s request to
4 file an *amicus* brief 7 days after the deadline is not unreasonable or excessive, particularly in
5 comparison to the 5-day extensions that this Court has authorized the Clerk to grant routinely
6 pursuant to NRAP 26(b)(1)(B) and NRAP 31(b)(1). And given that the Legislature has
7 consistently and diligently participated in this case as an *amicus curiae* since the litigation began
8 in the district court, it would be inequitable to reject the Legislature’s participation as an *amicus*
9 *curiae* at this later stage based on a delay of 7 days.

10 The Legislature has also shown good cause for the delay. As explained in the Legislature’s
11 motion for leave, like the other branches of state government, the legislative branch has been
12 tasked with the challenge of performing its essential state duties despite significant reductions in
13 personnel and resources due to the State’s current fiscal crisis. Over the past 60 days, the
14 Legislative Counsel and her staff have been involved in the statutory duty of preparing the 2011
15 codification and reprint of Nevada Revised Statutes, which requires meeting strict deadlines to
16 ensure that the reprint is delivered to the printer under an expedited schedule. The 7-day delay in
17 this case is the result of the demands placed on the Legislative Counsel and her staff to perform
18 all their statutorily-mandated duties within the constraints of limited personnel and resources.

19 Finally, the 7-day delay will not prejudice any substantial rights. Cf. Component Sys.
20 Corp. v. Dist. Court, 101 Nev. 76, 79 n.2 (1985); Ainsworth v. Combined Ins. Co., 105 Nev.
21 237, 242 n.2 (1989). If the Court grants the Legislature leave to file its *amicus* brief, the Court’s
22 order will “specify[] the time within which an opposing party may answer.” NRAP 29(f).

1 Therefore, Carrigan will be given a reasonable opportunity to respond to the Legislature's
2 *amicus* brief, and he will not be prejudiced by the delay.

3 With regard to the extra length of the Legislature's *amicus* brief, NRAP 29(e) expressly
4 authorizes an *amicus curiae* to ask the Court for permission to exceed the page limit. Because of
5 the magnitude, complexity and importance of the numerous constitutional issues in this case, the
6 extra pages were needed to provide the Court with the benefit of extensive research and
7 comprehensive analysis regarding Carrigan's constitutional claims, especially since this time
8 around Carrigan significantly modified his arguments concerning those claims. For example,
9 even if Carrigan properly preserved his right-of-association claims, Carrigan's supplemental
10 brief contains 14 pages of newly-minted arguments concerning those claims that he did not
11 include in his prior briefs in the district court or this Court. Thus, because this is the first time
12 that Carrigan has presented these particular arguments to this Court, the Legislature needed extra
13 pages to discuss the arguments properly and thoroughly in its *amicus* brief.

14 Furthermore, the primary function of an *amicus* brief is to assist the Court in a case of
15 general public interest by supplementing the efforts of counsel and drawing the Court's attention
16 to law that might otherwise escape consideration. See Funbus Sys., Inc. v. Cal. Pub. Utils.
17 Comm'n, 801 F.2d 1120, 1125 (9th Cir. 1986); Neonatology Assocs. v. Comm'r of Internal
18 Revenue, 293 F.3d 128, 130-34 (3d Cir. 2002). During prior stages of this litigation, the
19 Legislature's other *amicus* briefs have consistently met this standard, and the Legislature's latest
20 *amicus* brief is no different in that it draws the Court's attention to law that might otherwise
21 escape consideration. For example, in the latest *amicus* brief, the Legislature explains how the
22 recusal statute is constitutional on its face because it codifies long-standing legislative procedure

1 in which recusal does not apply when legislators are voting on general legislation that is
2 advanced by or associated with a political supporter since such legislation enacts policy of
3 general applicability which applies across-the-board to every person who comes within its
4 scope. The Legislature also explains that the recusal statute is constitutional as applied because
5 Carrigan could not vote based on political loyalty in the Lazy 8 administrative proceeding
6 without violating the Due Process Clause, and his conduct was not protected in such a
7 proceeding by any right of political and expressive association that may have existed between
8 him and Vasquez. The Legislature also notes that it amended the recusal statute in 2009 to
9 further guide and properly channel the Commission’s discretion by enacting a statutory rule of
10 lenity which requires abstention only in “clear cases.” This statutory rule of lenity reduces any
11 potential for discriminatory enforcement because in cases where application of the recusal
12 statute is *unclear*, those cases must be resolved by the Commission in favor of the public officer
13 and against abstention.

14 To properly present these complex constitutional arguments in its *amicus* brief, the
15 Legislature needed extra pages to meet the Court’s high standards of appellate practice in which
16 this Court “expects all appeals to be pursued with high standards of diligence, professionalism,
17 and competence.” Barry v. Lindner, 119 Nev. 661, 671 (2003); Polk v. State, 126 Nev. ---, 233
18 P.3d 357, 359 (2010). This duty requires counsel to avoid lackadaisical appellate practices, such
19 as discussing issues without including “cogent argument and citation to relevant authority.”
20 Berkson v. Lepome, 126 Nev. ---, 245 P.3d 560, 566 (2010). Therefore, the extra pages in the
21 Legislature’s *amicus* brief are the direct result of discussing the numerous constitutional issues
22 in a cogent manner that includes “adequate supporting law.” Barry, 119 Nev. at 672.

1 Finally, although the purpose of an *amicus curiae* is to act as a “friend of the court,” there
2 is no rule that an *amicus curiae* must be totally disinterested in the outcome of the case.
3 Neonatology Assocs., 293 F.3d at 130-32; Funbus Sys., 801 F.2d at 1125. Instead, “an *amicus*
4 who makes a strong but responsible presentation in support of a party can truly serve as the
5 court’s friend.” Neonatology Assocs., 293 F.3d at 131. Throughout the many stages of this case,
6 the Legislature has endeavored to meet the highest standards of appellate practice, and it has
7 provided each of the courts with a strong but responsible presentation which is based on cogent
8 argument and citation to relevant authority. Because the Legislature believes that its latest
9 *amicus* brief will assist the Court as it considers this case on remand from the U.S. Supreme
10 Court, the Legislature asks the Court to grant its motion for leave to file its *amicus* brief in
11 support of the Commission on Ethics.

12 DATED: This 18th day of October, 2011.

13 Respectfully submitted,

14 **BRENDA J. ERDOES**
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