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BEFORE THE COMMISSION ON JUDICIAL DISCIPLINE

STATE OF NEVADA

IN THE MATTER OF THE HONORABLE CHARLES WELLER, District Court Judge, Second Judicial District Court, Family Division, Washoe County, State of Nevada, Respondent.	CASE NO.: 2017-025-P

RESPONDENT'S REPLY TO THE COMMISSION'S OPPOSITION TO MOTION TO DISMISS ON FIRST AMENDMENT GROUNDS

A. Respondent's Comments Involved Political Speech Addressing Matters of Public Importance and Are Protected By The First Amendment

i. Introduction

In its Opposition, the Nevada Commission on Judicial Discipline ("NCJD") goes through contortions to cobble together coherent arguments as to why the comments uttered by Respondent during the Washoe County Domestic Violence Task Force ("Task Force") meeting

on February 1, 2017, do not constitute "free speech" subject to the stringent protections of the First Amendment to the U.S. Constitution. The NCJD primarily maintains that the First Amendment does not protect the comments at issue because they were made while performing official judicial duties and may resultantly be regulated as public employee speech which does not enjoy the same degree of protection afforded to equivalent speech by private individuals. This argument is misguided from top to bottom, and relies upon erroneous presuppositions and arbitrary, unsupported legal conclusions. The NCJD also argues that the First Amendment is inapplicable to the comments at issue because they: (1) fail to implicate issues of public importance, (2) were not uttered by a candidate for judicial office, (3) are prohibited by content neutral provisions of the NCJC, and, (4) are predicated on arguments that are unsupported by legal authority cited in Respondent's Motion to Dismiss. These additional claims are not only devoid of any merit in law or logic, but they expose a disquieting misapprehension of both the Nevada Code of Judicial Conduct ("NCJC") and the principles embodied in the language of the First Amendment as applied to the comments and surrounding facts and circumstances.

ii. The NCJD Injudiciously Attempts to Discredit Respondent's Arguments by Claiming They are Unsupported by the Cited Legal Authorities

Respondent cites to Roth v. United States 354 U.S. 476 (1957), Mills v. Alabama, 384 U.S. 214 (1966) and Garrison v. Louisiana, 379 U.S. 64 (1964) for the well-established notion that "there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." Motion: p. 4, ln. 12-17. Unexpectedly, the NCJD commences it's the arguments in its Opposition by claiming these cases are "not on point" because they involve: (1) criminal cases; (2) ongoing political controversies, and, (3) final rulings by state courts. Opp: p. 4, ln. 12-15. This argument is set forth in subsection (B)(i) of its Opposition, a subsection that is approximately ¾ of a one page. At the beginning subsection

(B)(i) the NCJD cites to Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir., 2005), where the court held:

> "Political speech-speech at the core of the First Amendment-is highly protected. Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it. The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Strict scrutiny is an exacting inquiry, such that "it is the rare case in which . . . a law survives strict scrutiny."

In light of White, the NCJD was obviously aware that the First Amendment applies to any regulation that would abridge presumptively free speech irrespective of the nature or stage of proceeding. Immediately after citing to White, where the court found that pursuant to the First Amendment a judicial candidate could not be disciplined under two provisions of the Minnesota Code of Judicial Conduct for statements concerning his personal views during an election, the NCJD argued that the cases cited by Respondent for basic First Amendment principles were "not on point" because they involved criminal statutes. While the contention of the NCJD is clearly erroneous, it should be noted that this is the first of several instances where it tries to discredit an argument by distinguishing and highlighting immaterial facts, and then making a claim that is inconsistent with other arguments and legal authorities stated in its Opposition.[1]

Another dubious argument in subsection (B)(i) of the NCJD's Opposition is based on a rule derived from the U.S. Supreme Court case Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989), which states, "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." The NCJC offers an argument that because speech within the context of a political campaign arguably enjoys the

[1] This example is particularly puzzling given that it cites to White and then makes an argument inconsistent with this case only 14 lines later.

highest degree of protection under the First Amendment, any speech that is not uttered within the context of a political campaign is not free speech. In support of this argument, the NCJD alleges that "Respondent admits in his motion (at p. 7) that":

> White and Williams-Yulee dealt with the speech of judicial candidates but did not specifically address the First Amendment standard applicable to political speech by elected judges.

The NCJD suggests that because Respondent was not running for office when he uttered the comments at issue the case law he cites does not support his First Amendment arguments. Opp: p. 4, ln. 3-5. Temporarily forgetting the ocean of jurisprudence concerning expressive speech, symbolic speech, commercial speech and countless other categories of protected speech outside the context of political campaigns, this argument is irreconcilable with subsequent arguments made by the NCJD. For example, in subsection (B)(iii) the NCJD argues, "[Respondent] relies on other cases[2] to support his argument that his comments were political speech subject to strict scrutiny. However, those cases dealt with a judicial officer speaking about public concerns." Id. at p. 8, ln. 1-3. So, after arguing that Respondent's First Amendment arguments are unsupported by the authorities cited given his comments were not uttered during a political campaign, it subsequently acknowledges that the First Amendment also applies to the speech of elected judges as demonstrated in Scott v. Flowers, but unlike the speech in Flowers which addressed issues of public importance, Respondent's comments did not address similar issues and was therefore unprotected.

Subsection (B)(i) of the NCJD's Opposition contains a third argument as to why the First Amendment is inapplicable to the comments made by Respondent during the Task Force meeting. The NCJD discusses a case cited in Respondent's motion, and states, "the verbal

[2] These cases include Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990), and Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007).

tumult" case cited by Respondent, Waters v. Churchill, 511 U.S. 661 (1994) ("[t]he First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as necessary side effects of… the process of open debate.") cannot be reasonably applied to government employees. Opp: p. 4, ln. 16-20. This statement is actually accurate (as it simply reiterates the language of Waters.). As discussed by the court in Waters at 672:

> [While] a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. Cf. Branti v. Finkel, 445 U. S. 507, 518 (1980). Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees. Broadrick v. Oklahoma, 413 U. S. 601 (1973); Public Workers v. Mitchell, 330 U. S. 75 (1947).

Rather than simply applying the strict scrutiny test of the First Amendment to the alleged violations of the NCJC as applied to the speech at issue, the NCJD seemingly argues that the First Amendment is inapplicable under the law and facts of every case it believes supports its position. Here, it argues that Respondent was a government employee whose First Amendment rights were properly restricted. In support of this argument, the NCJD contends that even though Respondent's participation with the Task Force was purely voluntary, because he was performing official duties of his judicial office at the time he uttered the comments at issue, he was not participating in "extrajudicial activities" and his statements where thus unprotected under the First Amendment. Opp: p. 8, ln. 21-22; p. 9, ln. 1-2; p. 15, ln. 6-7. Like all of its arguments, this one is fundamentally flawed and misapplied.

iii. Respondent Did Not Make the Statements at Issue in the Capacity of a State Employee and His Speech Was Protected By the First Amendment

NCJC, Cannon (2) states that "[a] judge shall perform the duties of judicial office impartially, competently and diligently." Unlike Cannon (1) which applies to both a judge's official duties and personal conduct, the rules enumerated under Cannon two apply only to the

duties of judicial office. NCJC § 2.1 states, "The duties of judicial office, *as prescribed by law*, shall take precedence over all of a judge's personal and extrajudicial activities." (Emphasis added by Respondent.). The language of this rule clarifies that "duties of judicial office" are prescribed by law and are separate (and of higher importance) from a judge's personal and extrajudicial activities, which unless are also prescribed by law are not official judicial duties. NCJC § 2.1, Cmt. 2, states, "although *it is not a duty of judicial office unless prescribed by law*, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system." (Emphasis added by Respondent). This comment further supports the previous point that extrajudicial activities are not official judicial duties if they are voluntary and not mandated by law. NCJC § 2.2 states, "[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially." As mentioned above, unlike Rule 1.2 which requires a judge to uphold the appearance of impartiality in both his judicial and personal activities, under Cannon (2) only a judge's official duties are relevant with respect to actual or perceived impropriety. Subsection (A) of NCJC § 3.7 states in relevant part, "[s]ubject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: … NCJC § 3.7(A). These rules demonstrate that where a judge voluntarily participates in a nonprofit organization by promoting public understanding and confidence in the judicial system his activities are encouraged by the NRJC and are not official duties of judicial office.

In this case, Respondent participated with the Task Force, a charitable, non-profit entity organized pursuant to 26 U.S.C. § 501(c)(3), and he co-chaired a subcommittee of the Task Force to discuss court procedures, promote transparency and improve services. Respondent's participation with the Task Force was an extrajudicial activity and all of his involvement was voluntary and outside the scope of his official judicial duties.

The NCJD apparently believed that one of the cases cited by Respondent supported its argument that his comments were not protected by the First Amendment because he was performing official duties of his office while participating with the Task Force. This case is Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990), and according to the NCJD, the court in Scott relied on the First Amendment framework in Pickering v. Board of Education, 391 U.S. 563 (1968), "which held that the validity of a regulation limiting public employee speech is to be determined by balancing the interests of the employee "as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the services it performs through its employees." Opp: p. 8, ln. 9-13. The NCJD argues that in reviewing Respondent's comments through the lens of Pickering, his remarks all outside the First Amendment protection. Id. at 13-14. It further argues that subsequent U.S. Supreme Court cases have clarified Pickering and have held that a public employee's speech warrants protection under the First Amendment only when the employee speaks as a citizen, and an employee's speech is not protected when he speaks pursuant to his official duties. Id. at 14-16.

The NCJD suggests that the court in Scott applied the test in Pickering to decide that a judge who speaks while performing his official duties of office enjoys no First Amendment protections. However, in Scott, the court recognized that the Pickering test for public employee speech is not well suited for speech by elected judges. The court in Scott held that the state's

interest in suppressing an elected judge's speech is much weaker than in the typical public employee situation, as an elected judge is not, in the typical sense, an elected employee like a teacher, assistant district attorney, or a firefighter. Scott at 211. The court recognized that an elected judge is chosen directly by the voters and at least in ordinary circumstances, is removable only by them. Id. The court then stated that elected judges are primarily accountable to their constituents, who need to be able to receive untrammeled information from and about their elected officials. Thus, it is the voters, and not the state which should ultimately supervise elected judges and are thus entitled to decide whether the judge's speech should warrant removal from office. Id. at 211-12. Contrary to the NCJD's assertion that Respondent's comments were made while performing official duties of his judicial office, as explained above, his participation with the Task Force did not involve any official duties as they were voluntary. Nonetheless, even if the speech did occur while he was performing official duties, it would still be necessary to address the propriety of subjecting him to discipline based on that speech under the proper First Amendment tests articulated by the U.S. Supreme Court. The NCJD is incorrect in its assertion that the First Amendment is entirely inapplicable to speech uttered by judge's while performing official duties of their office. As discussed by the Fifth Circuit Court of Appeals in Jenevein v. Willing, 493 F.3d 551, 558 (5th Cir. 2007), since already elected judges will usually be candidates again, their speech as a sitting judge bears on their qualifications in a future reelection campaign. For this reason, the court in Jenevein applied strict scrutiny to punishment imposed on a judge for his speech. This ruling was consistent with the U.S. Supreme Court's decision in Bond v. Floyd, 385 U.S. 116, 136 (1996) that speech by elected legislative officials is fully protected by the First Amendment.

All things considered, the NCJD is completely incorrect in arguing that Respondent was performing official duties of his judicial office at the time he uttered the comments at issue during the Task Force meeting. The NCJD argues that because Respondent admitted to acting in his official capacity while engaged in community outreach with the Task Force he was performing judicial duties and his speech was not made in his capacity as a private citizen. This contention is flawed because while it is true that Respondent was addressing the Task Force in his capacity as a family court judge who oversaw TPO applications and proceedings, he could not have participated pursuant to his official duties because his participation was not mandated by law. Provided that Respondent voluntarily engaged with the Task Force, his comments did not amount to speech by a public employee. Further, even if Respondent was performing official duties of his office while participating with the Task Force (which he clearly was not) the First Amendment would apply in precisely the same manner. Accordingly, the argument that his speech was not protected because it was uttered in his capacity as an elected district court judge is unsupported by either the express text of the NCJC or the principles intrinsic to the First Amendment.

iv. Respondent's Comments Addressed Issues of Public Importance and Enjoy Protection under the First Amendment

The NCJD argues that Respondent's citation to Reed v. Town of Gilbert, 576 U.S. _, 135 S.Ct. 2218, 2227 (2015) runs counter to his position because it provides that content-based regulations are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests. The NCJD recognizes that under Reed, a law or regulation is content based when it (i) applies to particular speech because of the topic discussed or the idea or message expressed, (ii) cannot be justified without reference to the content of the regulated speech, or (iii) was adopted by the state because of disagreement

with the message the speech conveys. Id. at 2226. The NCJD argues that based upon Reed, because the code sections allegedly violated are content neural concerning speech on their face, they are not unlawful under Reed.

Initially, in response to this argument, the provisions of the NCJC allegedly violated by Respondent are unquestionably facially neutral with respect to the content/message of speech because they were not intended to apply to speech in the first instance and are misapplied in this case. The NCJD argues that NCJC § 2.2 states: "a judge should uphold and apply the law and shall perform all duties of judicial office fairly and impartially." NCJC § 2.3(B) states:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

NCJC § 2.8 states:

> (A) A judge shall require order and decorum in proceedings before the court.
>
> (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.
>
> (C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

The NCJD argues that each of these content neutral rules apply generally to the speech uttered by Respondent during the Task Force meeting. This argument is flawed given that each of these rules apply only to a judge's official duties. It is not even subject to reasonable dispute that these rules only apply to conduct by a judge who is performing official duties of his office. These rules cannot apply to extrajudicial activities, and for this reason it is irrelevant whether or not these rules are content neutral on their face. Somewhat oddly, the NCJD argues that the

Nevada Supreme Court has adopted the objective reasonable person standard in interpreting the NCJC. Opp: p. 5, ln. 21-22. It argues that Respondent's comments that women belong back "in the kitchen and in the bedroom" indicate to a reasonable person that he lacks judicial impartiality towards women. By relying on the reasonable person standard to address whether the speech demonstrates an appearance of impropriety, the NCJD acknowledges that the rules in question cannot be justified without reference to the content of the speech at issue. This suggests that the rules are either content based or are misapplied.

NCJC § 2.10 is not alleged to have been violated by Respondent in this case. It is nonetheless relevant to the instant argument as it provides that "judges shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing." NCJC § 2.10(a). Subsection (b) states: "a judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." NCJC § 2.10(b). Under subsection (a) a judge's comments do not violate the rule unless they might reasonably be expected to affect pending or impending matter, or otherwise interfere with a trial or hearing. Subsection (b) is broader in that it applies to issues that are likely to come before the court, which goes beyond pending and impending matters. However, speech can only violate this rule if it constitutes a pledge, promise or commitment that is inconsistent with impartiality. The reason for this rule is fairly obvious; if a judge pledges or commits to decide an issue in a particular case he cannot possibly be deemed open-minded with respect to that issue.

Extrajudicial statements by judges that do not involve pending or impending matters, and do not amount to a pledge, commitment or promise to decide a particular issue one way or the other can never constitute a violation of the NCJC. Why? Because extrajudicial statements that do not violate NCJC § 2.10 cannot be punished under any of the rules under Cannon (2) of the NCJC. While they could potentially be punished under NCJC §1.2, Cmt. (5) to this rule states:

> Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. *Ordinarily, judicial discipline will not be premised upon appearance of impropriety alone, but must also involve the violation of another portion of the Code as well*.

As in this case, where no Rule under Cannon (2) is applicable to the speech at issue, the only potential violation is NCJC §1.2 for failing to avoid the appearance of impropriety. However, absent violation of another rule, there can be no violation under NCJC §1.2 for apparent impropriety.

The NCJD argues that Respondent's comments did not address matters of public concern. It states that the public concern was the potential funding cuts to VAWA and how it would impact the Court or CAAW, not where women allegedly belong. Opp: p. 9, ln. 3-6. It should be recognized that the statements were uttered during a meeting of the Task Force whose members included CAAW employees in addition to employees of the police department, the court, medical services providers, domestic violence survivors and various other interested parties. Defunding the VAWA would have affected each of the organizations involved in the Task Force negatively, and the consequence thereof would be diminished services, programs and assistance to the domestic violence victims these organizations sought to assist. While certain individuals present during the meeting may have been offended by the manner in which Respondent

expressed his opinions about the proposed defunding and its potential consequences, these comments addressed possible impacts of the proposed defunding at the local level and on women in the society and community effected. The proposed defunding of the VAWA was published shortly after President Trump took office and while recent stories about his previous mistreatment of women were still circulating through the news cycle. To suggest that those persons present during the Task Force meeting should be concerned about potential defunding of domestic violence programs because said budget cuts could cause women to be put back in their place – the kitchen and the bedroom – was actually consistent with the realities of the situation. It would be very difficult to argue that these statements did not address matters of public concern when there were news article expressing similar statements, such as the one published on January 19, 2017 by The XX Factor – (a publication addressing "What Women Actually Think") entitled *Trump's Planned Elimination of Violence Against Women Grants is Pure Cruelty*. (See Article, attached hereto as Exhibit 1.) In this article, it states:

> The proposed elimination of these grants is cruel, and it neatly sums up Trump and his cohorts dismissive view of women who come forward with sexual and domestic violence allegations. "A man with a well-documented history of sexually assaulting women is about to take over the federal government so it is sadly not surprising that he is gutting programs vital to protecting women from violence. With these cuts Trump is making it harder for law enforcement to protect women from predators like himself and members of his staff.

A quick search of the internet for "Trump cuts to the Violence Against Women Act" returns dozens of similar articles where statements very similar to the one uttered by Trump are made. How can it be reasonably argued that these are not statements of public concern?

The NCJD argues that the test for determining whether speech addresses matters of public concern was discussed by the Ninth Circuit Court of Appeals in Turner v. City & Cty. of San Francisco, 788 F.3d 1206, 1210 (9th Cir. 2015) where it held:

> If employee expression relates to an issue of political, social, or other concern to the community, it may fairly be said to be of public concern. However, an employee's motivation is relevant to the public-concern inquiry. We have framed that inquiry with two questions: Why did the employee speak? Does the speech seek to bring light to actual or potential wrongdoing or breach of public trust?

Reliance on this case is misplaced to the extent that it involved whether a public employees' speech was protected by the First Amendment. As addressed above, Respondent did was not performing official duties when he made the statements at issue and this analysis is thus inapplicable. However, this case is relevant to the extent that it provides a speaker's motivation is relevant to determining whether the speech addresses matters of public concern. The NCJD asserts that the comments violated rules of judicial conduct because they were offensive to certain individuals who heard them during the meeting. What the NCJD should have focused on was the reasons why Respondent made the statements in the first instance, and the message he was intending to convey. Furthermore, it should not be overlooked that a statement that women would be put back into their place – within the bedroom and the kitchen, as a result of federal defunding of VAWA obviously relates to social and community concerns.

The NCJD ends its Conclusion the same way it began, by arguing that well-settled principles of First Amendment jurisprudence are inapplicable for completely arbitrary reasons. According to the NCJD, cases involving "verbal tumult" such as Terminiello, Cohen, and Churchill are inapplicable to this case because they involve criminal cases and deal with punishment for speech. It argues that Respondent may be potentially disciplined for failing to maintain the impartiality of the judiciary under the NCJC, not for a free speech issue. *If Respondent is disciplined for failure to maintain the impartiality of his office without concern with his speech, how can he possibly be disciplined?* This argument is essentially an assertion that Respondent should be disciplined because it says that he should be disciplined despite

whatever that facts and relevant laws actually are. Its seems that the NCJD is arguing that it believes Respondent needs to be disciplined and it does not matter whether there is even an underlying basis for the discipline.

Likewise, it argues that principles of Stanley v. Georgia and Martin v. City of Struthers, Ohio are inapplicable because the speech in this case involves offensive, derogatory opinions about women and their place. According to the NCJD while well-settled First Amendment principles are applicable to speech involving pornography and the distribution of religious pamphlets, it does not apply to this case because the speech at issue involves derogatory and offensive statements about women and their place. Hence, in the end, it appears as if the NCJD's argument is that this Commission should carve out and exception to the First Amendment for statements involving political issues that negatively affect women which specific women find offensive.

CONCLUSION

Based on the foregoing, the Formal Statement of Charges ("Complaint") should be dismissed.

Respectfully Submitted this 8th day of August 2018.

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 8rd day of August 2018.

/s/ Crystal Guardino
Crystal Guardino;
an Employee of David R. Houston, Esq.

CERTIFICATE OF SERVICE

I certify that I am an employee of David R. Houston, Esq. and that on the 8th day of August 2018, I caused to be served via electronic mail and first class mail a true and correct copy of the foregoing **Respondent's Reply to the Commission's Opposition to Motion to Dismiss on the First Amendment Grounds** with postage fully prepaid thereon, by depositing the same with the U.S. Postal Service to the following:

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DATED this 8th day of August 2018.

/s/ Crystal Guardino
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