No. 10-568

In the Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari
to the Supreme Court of Nevada

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the State's Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a provision of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the Nevada Supreme Court erred by applying strict scrutiny to the State's content- and viewpoint-neutral recusal rule.

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OPINIONS BELOW

The en banc opinion of the Nevada Supreme Court (Pet. App. 1a-39a) is reported at 236 P.3d 616. The opinion of the First Judicial District Court of Nevada (*id.* at 40a-95a), and the opinion of the Nevada Commission on Ethics (*id.* at 96a-112a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The petition for a writ of certiorari was filed on October 27, 2010 and was granted on January 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech."

Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev. Rev. Stat.") provides, in pertinent part, that:

> 2. * * * [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
>
> (a) His acceptance of a gift or loan;
> (b) His pecuniary interest; or
> (c) His commitment in a private capacity to the interests of others.

* * * * *

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of [the public officer's] household;

(b) Who is related to [the public officer] by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs [the public officer] or a member of his household;

(d) With whom [the public officer] has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Nev. Rev. Stat. § 281A.420 (2007).

STATEMENT

The Nevada Supreme Court applied strict scrutiny to invalidate a provision of the State's Ethics in Government Law that requires public officials to refrain from casting votes on matters on which they have a conflict of interest, on the ground that it was a facially overbroad abridgement of legislators' free speech rights. That decision has no support in this Court's precedents, which stand against the claimed First Amendment right to cast a legislative vote, let alone to do so on matters where the official has a disqualifying conflict of interest. And this Court has consistently upheld reasonable, content-neutral,

nondiscriminatory laws that do not target expression, without resorting to strict or heightened scrutiny. The reasons against constitutionalizing the processes of state and local self-government apply with special force here, because recusal rules have been widely used since the earliest days of the Republic, and have long been understood to embody fundamental principles of governance wholly unrelated to the suppression of ideas or expression. Indeed, the decision below appears to be literally unprecedented: we are aware of no prior decision of any court holding that a generally applicable recusal provision is constitutionally invalid. Subjecting such basic, neutral rules to heightened scrutiny is not only contrary to centuries of practice; it would be calamitous as a practical matter, needlessly subjecting state governments to intrusive and burdensome federal litigation serving no First Amendment purpose. Reversal is warranted.

1. The Nevada Legislature enacted the Ethics in Government Law (the "Law") to ensure that the State's public offices are "held for the sole benefit of the people" and "[t]o enhance the people's faith in the integrity and impartiality of public officers and employees." Nev. Rev. Stat. § 281A.020(1)(a), (2)(b) (2009). The Law provides that a "public officer" (including local legislators[1]) "must commit himself or herself to avoid conflicts between the private interests of the public officer * * * and those of the

[1] See Nev. Rev. Stat. § 281A.160 (2009). The Law provides that the disclosure and recusal obligations of state legislators are addressed by the Standing Rules of the Legislative Department. *Id.* § 281A.420(7) (2009).

general public whom the public officer * * * serves." *Id.* § 281A.020(1)(b) (2009). To ensure that officials are aware of its requirements, the Law requires every public officer to file with the State's Commission on Ethics (the "Commission"), at the beginning of each new term of office, a form acknowledging that the officer has received a copy of the Law and has "read and understands the statutory ethical standards." *Id.* § 281A.500(1)(a), (2)-(3) (2009).

The Law creates requirements applicable to any public officer who has a private interest in a matter stemming from the officer's "acceptance of a gift or loan," "[h]is pecuniary interest," or "[h]is commitment in a private capacity to the interests of others." Nev. Rev. Stat. § 281A.420(2), (4) (2007). In many instances, the officer may take action after "disclosing sufficient information * * * to inform the public" of the circumstances. *Id.* § 281A.420(4) (2007).[2] In cases where "the independence of judgment of a reasonable person in [the officer's] situation would be *materially* affected by" his acceptance of a gift or loan, pecuniary interest, or "commitment in a private

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[2] At the time of relevant events, the disclosure and recusal provisions of the Ethics in Government Law were codified at Nev. Rev. Stat. § 281.501 (2003). The provisions were recodified without relevant change at Nev. Rev. Stat. § 281A.420 (2007). See Pet. App. 41a n.1. This brief cites the 2007 codification because that is the edition referenced by the court below. *Id.* at 2a n.2. In 2009, the provision was amended to require recusal only in "clear cases," but the Nevada Supreme Court concluded that change neither cured the perceived overbreadth of the recusal statute nor affected the applicable standard of review. See *ibid.* Both the 2007 and 2009 versions of Section 281A.420 are included in an appendix to this brief.

capacity to the interest of others," the Law provides that the officer "shall not vote upon or advocate the passage or failure of [the matter]." *Id.* § 281A.420(2) (2007) (emphasis added).

The Law defines the disqualifying "commitment[s]" as those involving: (a) "member[s] of [the public officer's] household"; (b) relatives of the officer by "blood, adoption or marriage"; (c) the employer of the officer or a member of the officer's household; (d) persons with whom the public officer "has a substantial and continuing business relationship"; or (e) "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." *Id.* § 281A.420(8)(a)-(e) (2007). The Law distinguishes between widely shared interests that the official shares with "any other member of the general business, profession, occupation or group" to which the official belongs, and specific personal interests. The former are "presumed" not to materially affect the officer's "independence of judgment." *Id.* § 281A.420(2) (2007).

The Commission administers and enforces the Ethics in Government Law. See generally *id.* § 281A.200 (2009). The Legislature structured the eight-member Commission to provide non-partisan, expert enforcement. See, *e.g.*, *id.* § 281A.200(2)-(4) (2009). The Law grants the Commission authority to "investigate and take appropriate action regarding an alleged violation" of the Ethics in Government Law, *id.* § 281A.280(1) (2009), including the imposition of civil penalties for willful violations, *id.* § 281A.480(1)-(3) (2009). The Commission is empowered to render, upon request, binding advisory opinions that

"interpret[] the statutory ethical standards and apply the standards to a given set of facts and circumstances." *Id.* § 281A.440(1)-(2) (2009).

2. Respondent Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada, an incorporated subdivision of the State. See generally Nev. Const. art. 8, § 8. In early 2005, a developer submitted an application for a hotel-casino project known as the "Lazy 8" to the Sparks City Council for required master plan and zoning changes. Pet. App. 3a. Because the Lazy 8 project was controversial citywide and was to be built in the ward Carrigan represented, it was a frequent subject of his conversations with constituents and his 2006 campaign to be reelected for a third term. J.A. 173-174.

The developer retained as a consultant Carlos Vasquez, a "longtime professional and personal friend" of Carrigan's who had served as Carrigan's campaign manager "[d]uring each of his election campaigns," including his then-current one. Pet. App. 3a. Vasquez had been Carrigan's "close personal friend[]" for years; the two "routinely discuss[ed] political matters * * * throughout [Carrigan's] terms in office, not just during political campaigns, and [Carrigan] considered Vasquez to be a trusted political advisor and confidant." *Id.* at 44a. During each of the campaigns, Vasquez and companies he owned provided services to Carrigan's campaign at cost. *Id.* at 44a, 88a, 105a. During the 2006 election, approximately 89 percent of Carrigan's campaign expenditures were made through Vasquez's advertising firm. See J.A. 120, 131, 141.

The Lazy 8 project came before the Sparks City Council for tentative approval on August 23, 2006—approximately six months after Vasquez was first engaged, Pet. App. 37a n.7, 65a, one week after Vasquez had helped Carrigan win his primary election, and eleven weeks before Carrigan's victory in the general election. *Id.* at 33a n.6. Carrigan was aware that his relationship with Vasquez was potentially disqualifying under the Ethics in Government Law. He was also aware that he could have obtained an advisory opinion from the Commission on whether abstention was required. J.A. 222-223. Carrigan instead sought the advice of the Sparks City Attorney, who told him that his obligations under the Law could be discharged by publicly disclosing the relationship before voting on the Lazy 8 matter. Pet. App. 4a.

When the Lazy 8 agenda item was called, Carrigan disclosed that Vasquez was his personal friend and campaign manager, but stated that he planned to vote because he had no personal financial interest in the matter. J.A. 20, 82. (Mayor Geno Martini, who did not have a vote on the Council, disclosed that Vasquez was also his friend and campaign manager. J.A. 20, 82.) City of Sparks Senior Planner Tim Thompson then spoke, recommending, on behalf of the City's Planning Commission, rejection of the Lazy 8 proposal. J.A. 20. Vasquez and other representatives of the developer then made a presentation advocating approval. J.A. 41-48. During the public comment period, the speakers in opposition included representatives of the Nugget hotel and casino, which would be a competitor of the proposed development. The Council asked questions throughout and debated

the measure after the close of comments. J.A. 37-78. Carrigan then moved for a vote and cast his vote to approve the Lazy 8 project. The measure failed by a single vote. J.A. 80.

3. The Commission received several complaints that Carrigan had violated the Ethics in Government Law by casting a vote on the Lazy 8 matter.[3] A panel of the Commission conducted a preliminary inquiry that found sufficient cause to inquire further. Pet. App. 4a, 96a.

In October 2007, after a hearing at which both Carrigan and Vasquez testified, *id.* at 97a, the Commission concluded that Carrigan had violated Nev. Rev. Stat. § 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." Pet. App. 112a. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his companies had provided services to Carrigan's three campaigns at cost; Carrigan had testified that Vasquez's assistance was

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[3] The complaints and the proceedings below solely addressed the August 23 City Council vote. The setback for the Lazy 8 project proved temporary. Within days, the developer of the Lazy 8 filed suit against the City, claiming it was entitled to proceed under a 1994 agreement with the City allowing construction of a hotel and casino in another section of Sparks. On September 1, 2006, the City Council voted 3-2 in a private meeting to settle the lawsuit by allowing the development to proceed. After the State Attorney General stated that the meeting violated the State's open meeting law, on September 20, the Council voted publicly to approve the settlement. Both times, Carrigan voted to approve the settlement. See Appellant's Nev. S. Ct. Br. 3-4; Ryan Randazzo, *Lazy 8 Casino Settlement Approved*, Reno Gazette-J., Sept. 21, 2006, at A1.

"instrumental" to his three successful campaigns; and they had a "close personal" relationship. *Id.* at 104a-105a. The Commission unanimously concluded that a reasonable official in Carrigan's situation "would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." *Id.* at 112a. The Commission specifically concluded that the "sum total of [Carrigan and Vasquez's] commitment and relationship equates to a 'substantially similar' relationship to those enumerated under [Nev. Rev. Stat. § 281A.420](8)(a)-(d), including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" *Id.* at 105a-106a.

Because Carrigan had relied on the advice of counsel, the Commission determined that his "violation was not willful" and imposed no fine. *Id*. at 112a. The Commission concluded that inquiries under two other ethics provisions, involving whether Carrigan had "secure[d] or grante[d] unwarranted privileges" or had voted on a matter in which he had an undisclosed pecuniary interest, were not well founded. *Id.* at 106a-109a.[4]

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[4] This was not the last ethics issue arising from the Lazy 8 development. After the developer of the Lazy 8 filed a complaint against Sparks Councilman Phillip Salerno, Salerno entered into a stipulation with the Commission in October 2008 admitting he had willfully violated the Ethics in Government Law by failing to disclose at the August 23, 2006 City Council meeting that his business forms company had an ongoing relationship with the Nugget hotel and casino, an opponent of the Lazy 8, and for then failing to abstain from voting. *In re*

4. The First Judicial District Court affirmed the Commission's decision. Pet. App. 40a-95a. The court held, in relevant part, that subsections (2)(c) and (8)(e) "are facially constitutional under the *Pickering* [v. *Board of Education*, 391 U.S. 563 (1968)] balancing test" and constitutional as applied to Carrigan. *Id.* at 62a-63a. The court reasoned that "the free speech and associational rights of public officers * * * are not absolute," *id.* at 58a, and that "states may enact reasonable regulations" limiting the activities of public officials without violating the First Amendment. *Id.* at 59a. The "vital state interest in securing the efficient, effective and ethical performance of governmental functions," the court

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Salerno, No. 08-05C (Nev. Comm'n Ethics Dec. 2, 2008), Exh. A; see also Sarah Cooper, *Both Carrigan and Salerno asked to abstain from Lazy 8 vote by state commission*, Sparks Trib., May 8, 2009.

After it became clear in April 2009 that the Council would have to act on a proposed city master plan amendment for the Lazy 8 to proceed, both Salerno and Carrigan sought advisory opinions from the Commission, which advised both to abstain based on their relationships with the Nugget and Vasquez, respectively. See *In re Carrigan*, No. 09-28A (Nev. Comm'n Ethics July 15, 2009); *In re Salerno*, No. 09-21A (Nev. Comm'n Ethics May 22, 2009). On July 27, 2009, by a 2-1 vote (with both Carrigan and Salerno abstaining), the Council approved the amendment, permitting the Lazy 8 to go forward. Carrigan sought review of the Commission's advisory opinion, and in July 2010, a district court held Nev. Rev. Stat. § 291A.420(8)(e) and (d) invalid on First Amendment grounds. See *Carrigan* v. *Nevada Comm'n on Ethics*, No. CV09-02453 (Nev. D. Ct. July 2, 2010). The Commission appealed, but the Nevada Supreme Court dismissed the appeal on mootness grounds without reaching the merits. *Nevada Comm'n on Ethics* v. *Carrigan*, No. 56462 (Nev. Dec. 9, 2010); see also Resp. Supp. Br. 1-2 (filed Dec. 10, 2010).

concluded, outweighs any interest that a public officer may have "in voting upon a matter in which he has a disqualifying conflict of interest," *id.* at 61a-62a.

The court rejected Carrigan's argument that the Ethics in Government Law was unconstitutionally overbroad. It concluded the recusal provision was subject to less exacting scrutiny because it "regulate[d] in an even-handed and neutral manner" and did not suppress any particular viewpoint, and because the First Amendment interests of public officials were slight in view of the "universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest." *Id.* at 67a. The court concluded that the "substantially similar" language of Section 281A.420(8)(e) was not impermissibly vague, reasoning that because it was "expressly tied to the four types of private commitments and relationships already enumerated in the statute," it provided "four very specific and concrete examples to guide and properly channel interpretation of the statute." *Id.* at 77a.

5. A divided Nevada Supreme Court reversed, holding Nev. Rev. Stat. § 281A.420(8)(e) (2007) facially unconstitutional. Pet. App. 1a-17a. The majority reasoned that "[b]ecause voting is a core legislative function, it follows that voting serves an important role in political speech." *Id.* at 11a. The majority thus concluded that "voting by an elected public officer on public issues is protected speech under the First Amendment." *Ibid.* The majority then held that balancing of the sort employed for

employee speech under *Pickering* was inappropriate because an elected public officer's "relationship with the state differs from that of most public employees," because the officer's "'employer' is the public itself, * * * with the power to hire and fire." *Id.* at 12a (quoting *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007)) (internal quotation marks omitted). Having rejected a balancing framework, the majority concluded that "[a] strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." *Id.* at 11a (emphasis deleted).

The majority acknowledged the importance of "promoting the integrity and impartiality of public officers." Pet. App. 16a. Nonetheless, it determined that subsection 8(e), which requires recusal when a person has a "commitment or relationship that is substantially similar" to one of the four relationships enumerated in Nev. Rev. Stat. § 281A.420(8)(a)-(d), "[wa]s not narrowly tailored" (*id.* at 15a) because it lacked the "high level of clarity" (*id.* at 14a) to "sufficiently describe what relationships are included" and thus "fail[ed] to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal." *Id.* at 16a-17a. Because the majority concluded that the recusal requirement "sweeps within its control a vast amount of protected speech" and thereby has a "chilling effect on the exercise of protected speech," *id.* at 17a, it held that the "strong medicine" of overbreadth analysis was warranted (*id.* at 14a), and invalidated § 281A.420(8)(e) as "facially overbroad." *Id.* at 13a (emphasis deleted). In light of this disposition, it did "not address Carrigan's

vagueness * * * argument[]" based on the "substantially similar" language. *Id.* at 6a n.4.

6. Justice Pickering dissented. She acknowledged that "a public official's vote * * * 'arguably contains a communicative element.'" Pet. App. 22a (quoting *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting)). She observed, however, that the recusal requirement's "target is conduct—acts of governance—not personal, expressive speech." *Ibid.* Where, as here, "the purpose [of the law] is prophylactic—to avoid conflicts of interest—not retaliatory," it was appropriate to apply rational-basis review, or "at most" intermediate scrutiny. *Id.* at 26a. Justice Pickering noted that in cases arising in the election setting, the level of scrutiny "'depends upon the extent to which a challenged [action] burdens First and Fourteenth Amendment rights,'" so that strict scrutiny is appropriate only when "'such rights are subjected to severe restrictions,'" but "'if the burden imposed is less than severe and reasonably related to [an] important state interest, the Constitution is satisfied.'" *Id.* at 28a (quoting *Monserrate* v. *N.Y. State Senate*, 599 F.3d 148, 154-155 (2d Cir. 2010)). She observed that "[t]he justification for requiring recusal in matters involving conflicts of interest * * * is strong," and the recusal provision "d[id] not severely or discriminatorily burden the official or his constituents." Pet. App. 31a, 30a. In light of the "'universal and long-established tradition'" requiring legislators to recuse themselves from matters implicating private interests, *id.* at 33a (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 785 (2002)), she concluded that the Law is valid.

Justice Pickering also concluded that the "substantially similar" language of the recusal statute was not overbroad. Pet. App. 33a-39a. She emphasized that the words of the provision are "not free-standing," but are to be read in light of the statute's four enumerated covered relationships, thus inherently limiting the statute's reach. *Id.* at 37a. Finally, Justice Pickering warned that "applying First Amendment strict scrutiny * * * to invalidate state conflicts-of-interest laws that govern local governmental officials who vote * * * opens the door to much litigation and little good." *Id.* at 39a.

SUMMARY OF ARGUMENT

The Nevada Supreme Court held that a provision of the State's recusal law violated the First Amendment by restricting voting by elected officials. After noting that some federal courts of appeals have held that voting by members of public boards is "protected speech," Pet. App. 10a, the court concluded that because elected legislators are not "public employees" whose First Amendment interests are subject to balancing under the *Pickering* test, "[s]trict scrutiny is therefore the appropriate standard," *id.* at 13a. The majority then invalidated the provision as "facially overbroad." *Ibid.* That unprecedented decision rests on a series of fundamental errors.

The premise that the First Amendment entitles local legislators to cast votes on any matter, particularly one on which private interests would materially affect their independent judgment, is alien to the American constitutional tradition and to first principles of self-government. Legislative recusal rules were well established by the time of the Founding, and not only were they never thought to

implicate individual legislators' personal constitutional rights—they were understood to reflect "fundamental principles of the social compact." Thomas Jefferson, *Manual of Parliamentary Practice* 44 (New York, Clark & Maynard 1868) (1801) ("*Jefferson's Manual*"), *available at* http://www.archive.org/stream/parliamentpractic00jeffrich#page/iv/mode/2up. Such rules confirm that the delegated powers of legislative office have never been understood to include the power to act when the member has a disqualifying conflict of interest. Indeed, legislative voting is not principally expressive but is properly viewed as a governmental act, an incident of office that is a public trust held for the sole benefit of the people, whose powers must be exercised consistently with the neutral limitations under which they were granted. Neutral restrictions on a legislator's vote do not involve "loss of any private right," *Raines* v. *Byrd*, 521 U.S. 811, 821 (1997), much less loss of a free speech right. Recognition of a personal First Amendment right to vote is inconsistent with the discretion the Court traditionally has afforded States to structure their systems of government, even when their choices affect individual legislators' voting power, and inconsistent with other longstanding legislative rules.

Even if generally applicable, content-neutral recusal rules were properly viewed as raising any First Amendment concern, there is no basis for applying heightened scrutiny, let alone strict scrutiny—the most demanding test known to constitutional law. Strict scrutiny is not the default mode for reviewing every law that affects expression, but is reserved for laws that regulate speech based on its content or communicative effect and pose a real

risk of suppressing expression. In a variety of contexts, this Court has upheld content- and viewpoint-neutral measures that have an incidental effect on expression where they are reasonable and serve important state interests.

The Nevada recusal statute easily satisfies that standard. It is a neutral rule that serves fundamental governmental objectives in safeguarding the integrity of decisionmaking that are unrelated to the suppression of speech and apply without regard to what viewpoint a legislator might seek to express. Because the statute governs the threshold determination of eligibility to vote, it stands a step removed from whatever expressive content a vote may have. Any burden on free speech rights is very limited in light of the fact that voting does not primarily serve an expressive function and has always been subject to recusal restrictions. The free speech rights public officials enjoy as citizens outside the legislature are entirely unaffected. And because there is no reason to believe that recusal rules will cause legislators to miss substantially more votes than they ordinarily would for any number of other reasons unrelated to recusal, there is no reason to believe their constituents will suffer any cognizable, let alone "severe," burden. Recusal rules also are valid as a traditional, viewpoint-neutral restriction preventing access to the nonpublic forum of legislative voting by those who have a disqualifying conflict of interest.

Applying heightened scrutiny would needlessly endanger a wide range of recusal provisions. The Nevada Supreme Court's rationale would mandate applying strict scrutiny to every recusal provision

governing an elected public officer's voting on matters of public interest. Indeed, because the court's reasoning did not turn on any distinctive aspect of legislative office, it would apply to executive and judicial actions with as much expressive content as voting. And its rationale would equally apply to appointed officials, whose conduct reflects on the elected officials who placed them in office. Even if most such recusal provisions are ultimately upheld, inappropriately stringent scrutiny imposes burdensome defense costs, wastes judicial resources, and unjustifiably constrains the ability of state and local governments to pursue important objectives.

The errors of the court below were enabled and compounded by its misapplication of First Amendment overbreadth doctrine. Far from being constitutionally "overbroad," the provision invalidated below only extends the recusal requirement to circumstances "substantially similar" to four familiar bases for recusal enumerated in the statute (involving members of the officer's household, relatives, employers, and substantial and continuing business relationships). The text of the statute is itself clear, and the decision below did not identify or even plausibly hypothesize instances, let alone a substantial number of them, where protected activity would be punished. Indeed, the court ignored that the core rationale for allowing "overbreadth" challenges by persons like respondent—whose conduct fell "squarely within" the statute, Pet. App. 68a—was not even present here: Those whose rights could potentially be "chilled" by supposed overbreadth have recourse to an advisory opinion mechanism to clarify whether the law applies to their conduct. Finally, to the extent the "overbreadth"

holding reflects substantive disagreement with the Nevada Legislature as to when to require recusal, such objections do not sound in the First Amendment.

ARGUMENT

THE NEVADA SUPREME COURT FUNDAMENTALLY ERRED BY APPLYING STRICT SCRUTINY TO THE STATE'S GENERALLY APPLICABLE, CONTENT-NEUTRAL RECUSAL STATUTE

As Justice Pickering noted in dissent, the Nevada Supreme Court's decision "opens the door to much litigation and little good." Pet. App. 39a. Although the majority brushed aside those concerns, the necessary implications of its holding are breathtaking. Were this Court to embrace the conclusion that elected officials' votes are protected political speech and that even content- and viewpoint-neutral regulations are subject to strict scrutiny, it would immediately render presumptively unconstitutional bedrock conflict-of-interest rules in virtually every State, including basic legislative recusal provisions that have been an accepted and necessary part of representative self-government since before the ratification of the First Amendment. Even if the vast majority of such regulations ultimately were upheld, forcing States to litigate the constitutionality of such rules under the intensely skeptical and costly strict scrutiny standard would drastically—and needlessly—constrain their ability to adopt and enforce basic rules for self-government. Nothing in the First Amendment supports that result, and much condemns it.

A. State And Local Legislators Have No Personal "Free Speech" Right To Cast Votes On Particular Matters, Much Less Ones In Which They Have A Personal Interest

The majority below cited no decision of any court that had ever invalidated a generally applicable conflict-of-interest recusal rule, nor are we aware of any prior decision of any court concluding that such laws even implicate First Amendment rights. That omission is telling. The absence of such precedent reflects the fact that the Nevada recusal provision is part of a "universal and long-established tradition" of requiring legislators to recuse themselves from matters implicating private interests, which "creates 'a strong presumption' that the [measure] is constitutional." *White*, 536 U.S. at 785 (internal quotation marks omitted).

1. It is a basic fact of legislative practice that "[d]eliberative bodies can scarcely function" without rules. David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 9 (1997). As Thomas Jefferson noted in the *Manual of Parliamentary Practice* that he compiled when serving as Vice President (and President of the Senate), such rules promote important interests of "accuracy in business, economy of time, order, uniformity, and impartiality." *Jefferson's Manual* vi. They also provide protection from the misuse of power. See *id.* at 13. It is thus unsurprising that "one of the first acts of each House [of Congress] was to adopt them," Currie, *supra,* at 9, pursuant to explicit constitutional authority providing that

"[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5.

One of the most fundamental of those rules restricts legislators from acting when they have a disqualifying private interest. Such recusal rules have been mainstays of this country's legislatures since the Founding. On April 7, 1789, within a week of first achieving a quorum, the House of Representatives adopted with its first set of rules a provision requiring that "[n]o member shall vote on any question, in the event of which, he is immediately and particularly interested." 1 Annals of Cong. 104 (1789). Although the first Senate Rules did not initially include a recusal requirement, Thomas Jefferson, as President of the Senate, adopted one based on parliamentary best practices that proved influential for decades to come: "Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division." *Jefferson's Manual* 44.

There is no indication that those serving in Congress at the time understood legislative recusal rules even to implicate the First Amendment, let alone to offend it. "Nobody" in the First Congress—which itself framed and proposed the First Amendment—"is recorded as objecting" that the House rules "unconstitutionally limited the rights of individual members." Currie, *supra*, at 10. Far from it: Jefferson described the necessity of recusal rules as inherent in the nature of public office:

> In a case so contrary not only to the laws of decency, but to the fundamental principles of the

> social compact, which denies to any man to be a judge in his own cause, it is for the honour of the House that this rule of immemorial observance should be strictly adhered to.

Jefferson's Manual 44. See generally *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (early practice in Congress "provides contemporaneous and weighty evidence of the Constitution's meaning") (internal quotation marks omitted); accord *Eldred* v. *Ashcroft*, 537 U.S. 186, 213 (2003). Indeed, the view that offices were a trust to be used for public benefit, and the need for measures to ensure that governmental power would not be exercised by individuals with distinct private interests, were recurring topics of the Constitutional Convention, which were embodied in a number of constitutional provisions. See, *e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 354-363 (2009).

The need for legislative recusal was widely accepted throughout the nineteenth century,[5] and

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[5] See, *e.g.*, Aaron Clark, *Manual, Compiled & Prepared for the Use of the Assembly* 99 (1816) ("Where the private interests of a member are concerned in a bill or question, he is to withdraw."); Luther S. Cushing, *Rules of Proceeding & Debate in Deliberative Assemblies* 30 (1848) ("No member ought to be present in the assembly, when any matter or business concerning himself is debating; nor, if present, by the indulgence of the assembly, ought he to vote on any such question."); John A. Smull, *Smull's Legislative Hand Book* 138 (1875) ("A member who has a personal or private interest in any measure or bill * * * shall disclose the fact and * * * shall not vote thereon."); George T. Fish, *American Manual of Parliamentary Law* 13 (1880) ("PRIVATE RIGHT * * * being involved, the member concerned has no right to vote."); George G. Crocker, *Principles of Procedure in Deliberative Bodies* 103 (1889) (member's "vote

such rules remain a basic part of most States' governing principles today. Virtually every State has enacted conflict-of-interest regulations for legislators.[6] The vast majority require public officials not to vote on matters presenting a conflict of interest. See Office of Legislative Research, Conn. Gen. Assembly, 2000-R-0155, *Voting Restrictions in State Ethics Codes* (Feb. 2000) (37 States), http://www.cga.ct.gov/2000/rpt/2000-R-0155.htm. While most States' bases for disqualification have evolved from common law standards focused on direct pecuniary interest at the time of the Founding through the nineteenth century to more precise codes encompassing officials' relatives and business associates,[7] there has never been an expectation that

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should not be allowed upon any question" where he has "interests distinctly from" the public); *Coles* v. *Trs. of Williamsburgh*, 10 Wend. 659, 666 (N.Y. Sup. Ct. 1833) ("Two of the [village trustees] being interested, were incompetent to act upon this question."); *In re Town of Nashua*, 12 N.H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve."); *Comm'rs Court* v. *Tarver*, 25 Ala. 480, 481 (1854) ("If any member of [the Commissioners' Court of Roads and Revenue] has a peculiar, personal interest, such member would be disqualified from taking part in the deliberations."); *Mayor of Montezuma* v. *Minor*, 73 Ga. 484, 490 (1884) ("[where an alderman] is pecuniarily or personally interested in the issue, let him retire from the [council], and let the mayor and remaining aldermen, who have no more interest in the question than that of any other good citizen of the town, proceed").

[6] See National Conference of State Legislatures, *Voting Recusal Provisions* (last updated Oct. 2009), http://www.ncsl.org/?TabId=15357.

[7] *E.g.*, Conn. Gen. Stat. § 1-85 (2010) (originally enacted as Conn. Gen. Stat. § 1-68 (1958)); N.J. Stat. Ann. § 52:13D-18 (2010) (originally enacted as L.1971, c.182, § 7 (1967)); Ariz.

legislators were entitled—let alone enjoyed a constitutionally protected right—to cast votes on matters about which they had a disqualifying conflict of interest under current law.

2. This long-held understanding that lawmakers must abstain from acting on matters in which they have an interest is inconsistent with the idea that legislators have a personal "right" derived from the Constitution to vote even when they have a conflict of interest. Rather, it attests that voting is properly viewed principally as a governmental act, an incident of an office that is itself "a public trust * * * held for the sole benefit of the people," Nev. Rev. Stat. § 281A.020(1) (2009), such that the vote must be exercised consistently with the limitations under which it was granted. "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." *City of Eastlake* v. *Forest City Enters.*, 426 U.S. 668, 672 (1976). When the people of a State authorize the creation of municipal bodies, they delegate to them the power to enact binding laws. Where, as here, elected legislators are subject to a recusal provision, it is a clear indication that the grant of government authority does not include the power to vote on matters on which the member has a conflict of interest.

Rules like this one, to maintain "integrity in the discharge of official duties" and prevent the misuse of

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Rev. Stat. Ann. § 38-503 (2011) (originally enacted Ariz. Rev. Stat. Ann. § 38-503 (1968)); Ala. Code § 36-25-1 (2011) (originally enacted Ala. Code § 36-25-1 (1973)).

office for private ends, *Ex parte Curtis*, 106 U.S. 371, 373 (1882), are fundamentally no different from familiar rules that prevent officeholders from using their government telephones or office space for personal business. *E.g.*, Nev. Rev. Stat. § 281A.400(7) (2009) (with certain exceptions, providing that "a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest"); *id.* § 281A.400(8) (2009) (same, respecting state legislators); cf. 18 U.S.C. § 607 (prohibiting solicitation of donation for elections from a person "located in a room or building occupied in the discharge of official duties by an officer or employee of the United States"); *United States* v. *Thayer*, 209 U.S. 39, 44-45 (1908) (Holmes, J.) (upholding conviction under predecessor of § 607, noting that "the [constitutional] power" to prohibit "is not in dispute"). Even if such a rule prevents an official from using government resources for "high value" political speech, neutrally restricting the use of such property to official business implicates no First Amendment right. Similarly, provisions restricting federal officials from having potentially conflicting outside business interests, which have been in force since "the first session of the first Congress," have never been thought to offend the Constitution. *Curtis*, 106 U.S. at 372-373 (discussing legislation prohibiting outside business interests enacted between 1789 and 1868 and noting "this is the first time the constitutionality of this legislation has ever been presented for judicial determination").

3. Legislators do not have an individual free speech right to vote on *any* particular matter. While "a voter's franchise is a personal right," "[t]he

procedures for voting in legislative assemblies * * * pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman* v. *Miller*, 307 U.S. 433, 469-470 (1939) (Frankfurter, J., concurring). Thus, to the extent that casting a vote in a legislative body "arguably contains a communicative element, the act is quintessentially one of governance." *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting). This Court accordingly has held in the standing context that statutes that "alter[ed] the legal and practical effect of [legislators'] votes" did not involve "loss of any private right." *Raines*, 521 U.S. at 821. As then-Judge Scalia explained, with respect to federal officials:

> no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. * * * They have a private right to the office itself, and to the emoluments of the office, but the powers of the office belong to the people and not to them.

Moore v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) (citations omitted).

The notion that legislators have an individual free speech-based right to vote is inconsistent with the broad discretion this Court traditionally has afforded each State to "structure its political system," *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 13-14 (1982), and the "substantial deference" given to

the choices States make. *Id.* at 8; see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 462-463 (1991) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders"). See generally Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 51 (2004) ("A boundary must exist between questions treated as matters of institutional design and those treated as matters of individual rights; otherwise, mechanical application of rights doctrines to democratic processes will consume institutional-design options states legitimately ought to have.").

The Court repeatedly has accorded deference even if the State's choices affect individual legislators' voting power. Thus, there is no constitutional requirement that States provide that *any* governmental decisions be made at the local level, or that such matters be decided by vote (as opposed to an administrator's decision), see, *e.g.*, *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 140 (2004); *Presley* v. *Etowah Cnty. Comm'n*, 502 U.S. 491, 507-508 (1992) (changes in "powers of some official responsible to the electorate" are "a routine part of governmental administration"). Nor is there any requirement that decisions be made by simple majority (as opposed to supermajority) vote, *Gordon* v. *Lance*, 403 U.S. 1, 6 (1971), or by a vote of the entire body (as opposed to a committee). Cf. *Davids* v. *Akers*, 549 F.2d 120, 123-124 (9th Cir. 1977) (rejecting First Amendment challenge to committee assignment practices that made it effectively impossible for legislators affiliated with minority

party to vote on, much less enact, legislation opposed by majority party).

Moreover, casting a legislative vote "does not involve any 'interactive communication,' and is 'not principally' a method of 'individual expression of political sentiment.'" *Doe* v. *Reed*, 130 S. Ct. 2811, 2830 (2010) (Stevens, J., concurring in part and in the judgment) (citation omitted) (discussing referendum petitions); cf. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression."); *Burdick* v. *Takushi*, 504 U.S. 428, 438-439 (1992) (function of elections is to select candidates, and State need not let them be used as "'a forum for continuing intraparty feuds'") (quoting *Storer* v. *Brown*, 415 U.S. 724, 735 (1974)). Indeed, what an official's legislative vote "means"—apart from that a measure is one vote closer to passage—is no simple matter: the member could personally support its aims; he could be expressing the views of his constituency or a subset of potential swing votes; he could be voting in compromise on the measure with the best chance of enactment, or voting for a measure he does not support to encumber disfavored legislation with an unpopular provision; he could be currying favor with other members or party leadership in the hope they will advance other legislative measures or his career. Frequently, "[t]he expressive component of a [legislator's vote] is not created by the conduct itself but by the speech that accompanies it." Cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47, 66 (2006).

The notion that the First Amendment affords lawmakers individual protection for their votes is inconsistent with bedrock assumptions about legislative voting that date to the Founding. If voting were speech, the requirement that individual votes be recorded would be suspect under *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995); cf. *Doe*, 130 S. Ct. at 2833-2834 (Scalia, J., concurring). State constitutional and statutory provisions requiring that all legislative meetings be public, *e.g.*, Nev. Const. art. 4, § 15, likewise would be constitutionally suspect. The same would be true of the practice, itself dating to the Founding, of assigning legislation to committees, which often denies those not on the committee any opportunity to vote on certain bills. But see *Davids*, 549 F.2d at 123 (rejecting First Amendment challenge to committee assignment practices that allegedly made it effectively impossible for minority party to enact legislation). See generally Currie, *supra*, at 9-10 (recognizing First Congress's use of committees); cf. *Jefferson's Manual* 112 (limiting power to move for reconsideration to members who voted with the prevailing side).

Of course, if *voting*, which at most has a modest "communicative element," is robustly protected "political speech," then restrictions on what legislators may say on the floor of the legislature would be immediately suspect. But legislative bodies have since the Founding employed *content-based* restrictions on speech. Thus, there have long been restrictions on "indecent language," disparaging other members, or even referencing them by name. *Jefferson's Manual* 40; see also Rule XVII, *Rules of the House of Representatives*, 112th Cong. (2011). Such restrictions, which could never be applied to the

speech of a member of the public, *Cohen* v. *California*, 403 U.S. 15 (1971), have never been thought to offend the First Amendment, Currie, *supra*, at 9-10; *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681-682 (1986) ("In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate."), underscoring that what is at issue here is not a personal right.[8]

The majority below purported to derive a broad, personal free speech right to vote from lower court cases involving claims by local legislators who alleged they were subject to retaliation because of how they had voted on certain issues. See Pet. App. 10a (citing *Colson* v. *Grohman*, 174 F.3d 498 (5th Cir. 1999), and

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[8] *Bond* v. *Floyd*, 385 U.S. 116 (1966), on which respondent relies, see Br. in Opp. 2, 8, 12-13, did not involve legislative voting—or even legislative speech. There, the Court invalidated a punishment—denial of an office—based on disapproval of the viewpoint of a legislator's speech as a citizen (opposing the Vietnam War). Cf. *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006) (noting First Amendment imposes limits on government's power to "leverage the employment relationship to restrict * * * liberties employees enjoy in their capacities as private citizens"). The Court reasoned that the First Amendment would plainly protect the statements in question had they been "made by a private citizen," *Bond*, 385 U.S. at 135, and concluded that the plaintiff's status as a legislator-critic should not alter his rights. *Ibid.* While the opinion may be read to assume that viewpoint suppression within the legislature would be suspect, it stopped far short of any suggestion that the First Amendment prevents States from enforcing general rules requiring officeholders to abstain from voting for conflict of interest or similar content-neutral reasons.

Miller v. *Town of Hull*, 878 F.2d 523 (1st Cir. 1989)).[9] The reasoning of those decisions is questionable. But even accepting them as correct, the fact that the First Amendment limits government's power to punish officials based on the way they voted does not mean that legislators have a personal Free Speech right to vote on all matters that come before the body on which they serve. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381-382 (1992) (absence of First Amendment protection for "fighting words" does not permit content-based punishment); cf. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) (freedom to make funding decisions does not

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[9] Indeed, the vast majority of cases respondent cited in his brief in opposition to establish that the Free Speech Clause protects voting likewise involved claims of retaliation, Br. in Opp. 8-9 (citing *Colson; Miller*; *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540 (9th Cir. 2010) (finding no cause of action); *Velez* v. *Levey*, 401 F.3d 75 (2d Cir. 2005); *Camacho* v. *Brandon*, 317 F.3d 153 (2d Cir. 2003); *Stella* v. *Kelley*, 63 F.3d 71 (1st Cir. 1995)), or claims of compelled speech of dubious validity in light of the small risk that local legislators required to implement federal law would be understood to endorse it. Br. in Opp. 8-9 (citing *Clarke* v. *United States*, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990)); but see *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting). The other cases cited do not assist respondent. See Br. in Opp. 17-18 (citing *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (upholding exclusion of council member from meetings on matter on which she had interest as viewpoint-neutral restriction on access to nonpublic forum that did not violate her First Amendment rights); *id.* at 19-20 (citing *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997) (involving challenge based on "First Amendment associational rights" and equal protection to application of "a [recusal] standard specific to Peeper that treats her differently than other Board members")).

extend to viewpoint suppression). The existence of a constitutional rule against viewpoint-based discrimination would not establish that the First Amendment obliges States to open legislative voting on every matter to all members, even those who have a conflicting private interest in a particular matter before the body. Recusal statutes operate "based on the *status*" of legislators "rather than their views." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

B. Neutral Recusal Provisions Are Subject To Review For Reasonableness

Not only did the decision below err in assuming that local legislators have a First Amendment right to cast votes, even in defiance of generally applicable conflict-of-interest recusal requirements, but it erred further in concluding that such laws are subject to strict scrutiny, the most demanding standard known to constitutional law.

Even if legislative voting, like much conduct, has an expressive element, it does not follow that strict scrutiny is the appropriate standard to apply to recusal rules. This Court traditionally has reserved strict scrutiny for measures that target the communicative impact of speech and expressive acts. See, *e.g.*, Laurence H. Tribe, *American Constitutional Law* 791-792 (2d ed. 1988); *McIntyre*, 514 U.S. at 345-346 (applying strict scrutiny to a "regulation of pure speech"); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying strict scrutiny to a "facially content-based restriction on political speech in a public forum"); *id.* at 217 (Stevens, J., dissenting) (same). Strict scrutiny is warranted

under such circumstances because of the inherent dangers such measures pose to the free exchange of ideas and information. Regulations that are not aimed at ideas or information, but which have an incidental effect on expression, are "of a different order altogether." Tribe, *supra*, at 791. Under such circumstances, this Court does not require a showing of a compelling governmental interest or narrow tailoring. In a variety of contexts, the Court has upheld such regulations where they are reasonable and nondiscriminatory, advance important governmental interests unrelated to expression, and do not burden substantially more speech than necessary to further the government's interests. See, *e.g.*, *Burdick* v. *Takushi*, *supra*; *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666 (1998); *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The recusal provision of the Nevada Ethics in Government Law easily satisfies that standard.[10] Only when a challenger establishes that a regulation

[10] The majority below assumed that strict scrutiny applied to this case unless it was governed by the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for employee speech. But *Pickering* is only one of many instances in which this Court has rejected the application of strict scrutiny to government action that affects expression. Indeed, *Pickering* involves a relatively demanding test, consistent with the fact that the government actions to which it applies are content- and viewpoint-based restrictions on speech as citizens on matters involving public concern. Whether or not *Pickering* is the most apt doctrinal analogy for this case, which involves no government effort to punish the content of speech, it is noteworthy that this Court rejected application of strict scrutiny, and that the two judges below who considered *Pickering* balancing concluded that the test would be readily met here.

imposes "severe" burdens does strict scrutiny apply. See *Burdick*, 504 U.S. at 434.

1. The Nevada Recusal Statute Is Content Neutral And Nondiscriminatory

Nevada's recusal statute is not a regulation of pure speech, nor is it aimed at any expressive content of voting. Rather, like other rules to maintain "integrity in the discharge of official duties" and prevent the misuse of office for private ends, see *Curtis*, 106 U.S. at 373, recusal rules promote state interests unrelated to the suppression of ideas. Recusal rules embody the principle that "no man may serve two masters," in "recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *United States* v. *Miss. Valley Generating Co.,* 364 U.S. 520, 549 (1961). Because of the difficulty of determining in any case whether private interests or public duties motivated an official's exercise of government power, the standards are ordinarily described in objective, probabilistic terms—the *risk* that a given relationship or arrangement would lead a reasonable official in the same position to decide based on private interests. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). Recusal rules promote important government objectives by reducing the influence of private interests on decisionmaking and thus help safeguard the integrity and efficiency of government. David Oretlicher, *Conflicts of Interest and the Constitution*, 59 Wash. & Lee L. Rev. 713, 720 (2002); cf. *Curtis*, 106 U.S. at 372-373 (noting long history of federal regulation of officeholders' business interests);

Rosario v. *Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.").

The interests favoring recusal rules are particularly compelling in the context of voting by members of city councils and other municipal bodies. "Unlike the [Nevada] Legislature, which performs strictly legislative functions, a local government body performs administrative functions as well." *Nevadans for Prot. of Prop. Rights, Inc.* v. *Heller*, 141 P.3d 1235, 1248 (Nev. 2006). Thus, a Nevada municipal government both acts as a legislature, "promulgating policy-type rules or standards," and applies those standards in administrative "proceedings designed to adjudicate disputed facts in particular cases." *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973); see also *Eller Media Co.* v. *City of Reno*, 59 P.3d 437, 439-440 (Nev. 2002) (per curiam). As this Court has recognized, when a local body performs an administrative function, it is subject to heightened due process standards, including the requirement of an impartial decisionmaker. In both their principles and their operation, these rules are similar to those governing judicial disqualification.[11]

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[11] See *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("'[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators'") (quoting Kenneth C. Davis, *Administrative Law Text* § 12.04, at 250 (1972)); see *Londoner* v. *City & Cnty. of Denver*, 210 U.S. 373, 385-386 (1908) (administrative action, unlike legislative action, requires individual hearings); cf. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1985) ("Congress and the states, of course, remain free to impose more rigorous standards for judicial

This Court has repeatedly upheld neutral state rules adopted to regulate the processes of self-government, emphasizing that such rules are ordinarily subject to deferential review even if they necessarily burden interests protected by the First Amendment. In *Burdick* v. *Takushi*, for example, this Court rejected application of strict scrutiny to Hawaii's prohibition on write-in voting during elections, although it acknowledged that it "ha[d] an impact on the right to vote," a right "'of the most fundamental significance,'" 504 U.S. at 433-434, and potentially burdened expression and association, *id.* at 436-437. The Court emphasized that the regulation furthered interests unrelated to the suppression of ideas by ensuring that elections are "fair and honest" and orderly. *Id.* at 433 (internal quotation marks omitted). Based on similar reasoning, this Court has repeatedly rejected strict scrutiny and upheld other restrictions on citizen voting, notwithstanding burdens on First Amendment associational rights. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 593 (2005) (upholding law limiting primary election to party members and independents because it imposes only "minor barriers between voter and party" and "advances a number of regulatory interests"); *Rosario*, 410 U.S. at 756-762 (upholding requirement that voters enroll as members of a party before voting in primary).

This Court has likewise repeatedly rejected strict scrutiny when reviewing state regulations on

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disqualification than those we find mandated [by the Due Process Clause]."); *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2268-2269 (2009) (Roberts, C.J., dissenting) (same).

candidates' access to ballots, even while recognizing that they "burden[ed] * * * First and Fourteenth Amendment associational rights," *Timmons*, 520 U.S. at 363, where they served government interests in "integrity, fairness, and efficiency" unrelated to the suppression of speech. See *id.* at 364; accord *Storer* v. *Brown*, 415 U.S. 724, 730-737 (1974). The Court also has upheld neutral laws requiring a threshold showing of public support before a candidate's name will be placed on a ballot, recognizing that First Amendment associational rights "are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986); accord *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

Thus, where a statute does not "directly and substantially burden the * * * communicative aspect" of an activity, but rather "impos[es] only indirect and less substantial burdens on communication," the provision "should be subject to review for reasonableness" under the standard of *Burdick*. *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 216 (1999) (O'Connor, J., concurring in judgment in part and dissenting in part); accord *Doe*, 130 S. Ct. at 2827-2828 (Sotomayor, J., concurring). Where, as here, the only even arguable burdens on First Amendment rights derive from "reasonable, nondiscriminatory restrictions," "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983)).

2. Heightened Scrutiny Is Neither Necessary Nor Appropriate Here

These principles cast into sharp relief the error of the decision below. Nevada's recusal statute is not a regulation of pure speech, nor is it based on or aimed at the expressive aspect of any vote to which it applies. Rather, its application turns solely on whether the public official has a private interest in a matter because of his personal financial interests or his relationships with others. Neither the provision nor the Commission's enforcement of it is concerned with the "side" of the issue the officeholder seeks to support. That is well illustrated here: the Nevada law required the recusal of both Councilman Carrigan (who had ties through Vasquez to the Lazy 8) and Councilman Salerno (who had ties through his business forms company to the Nugget).

It is likewise immaterial what "message" an official might seek to express with his vote, from outright support or opposition to the measure, to willingness to compromise, to a simple desire for reelection. The statute is solely concerned with the objective fact of the official's relationships with interested persons, and whether a private interest in the matter would affect the judgment of a reasonable person in the official's situation. Nev. Rev. Stat. § 281A.420. Because the statute is "justified without reference to" any expressive content of a vote, it is content-neutral. *Ward*, 491 U.S. at 791 (internal quotation marks omitted); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 655 (1994) (regulation was content neutral where it was "not activated by any particular message").

There is no risk that application of the recusal provision will result in a "severe" restriction of free speech. Because such a provision simply helps make the threshold determination whether a legislator is *eligible* to vote, without regard to how he might cast his vote if permitted, it "'stand[s] a step removed from the communicative aspect of [voting].'" See *Doe*, 130 S. Ct. at 2828 (Sotomayor, J., concurring) (quoting *Buckley*, 525 U.S. at 215 (O'Connor, J., concurring in judgment in part and dissenting in part)). Any impact on expression it may have is thus merely "incidental," *FAIR*, 547 U.S. at 62.

The interests advanced by recusal provisions are important ones. See pp. 33-34, *supra*. Indeed, recusal rules have long been recognized as among the "fundamental principles of the social compact." *Jefferson's Manual* 44. By contrast, any burden imposed by the Nevada recusal rule is "a very limited one." *Burdick*, 504 U.S. at 437. It cannot credibly be maintained in the face of a widespread, centuries-old prohibition that there is a right to vote in matters on which a member has a conflict of interest; indeed, respondent conceded as much below. Appellant's Nev. S. Ct. Br. 13. Moreover, while legislative voting may, like most conduct, have an expressive character, expression is not its primary purpose. As noted above, see p. 27, *supra*, voting "serve[s] primarily" to determine which measures will be adopted, "not as [a] forum[] for political expression." *Timmons*, 520 U.S. at 363 (discussing election ballots). Because voting does not primarily serve an expressive function, the State may validly adopt measures to safeguard the integrity of lawmaking, even if doing so may impose incidental burdens on officials' use of voting for personal expression. Cf. *Burdick*, 504 U.S.

at 438 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.").

Moreover, it bears emphasis that the legislative recusal provision in no way burdens the First Amendment rights respondent enjoys outside the City Council as a citizen. He remains free to communicate his views to his constituents and the public through public speaking, television appearances, newsletters, pamphlets, advertisements, telephone calls, personal visits, and emails. The rule's lack of impact on these traditional channels of communication underscores that the recusal rule is not aimed at suppressing information or disfavored ideas. Cf. *Ward*, 491 U.S. at 802 (noting requirement of "ample alternative channels of communication" in time, place, or manner restriction case). Nevada's recusal statute is concerned with officials' exercise of official powers, not the exercise of their freedom of speech. Cf. note 8, *supra*.

Nor does Nevada's recusal statute unconstitutionally burden the rights of respondent's constituents (who are, in any event, not parties to this case). See Br. in Opp. 19. This Court has never intimated that citizens have a broad constitutional right to have their representatives vote on matters in which they have a disqualifying private interest. The fact that citizens may find themselves without a voting representative for many reasons besides disqualification—death, resignation, illness, scheduling conflicts, or simple failure to vote—suggests that recusal provisions will not cause citizens to suffer an unusual deprivation of voting representation. Moreover, this Court has said that

States are to be afforded "substantial deference" in determining how to fill vacancies, *Rodriguez*, 457 U.S. at 8, suggesting that the Constitution would tolerate a reasonable delay in appointing or electing a successor—during which time, constituents would be without representation for a far greater number of votes than would reasonably be at issue under the recusal statute. This Court saw no issue with constituents being without a representative *they had elected* for substantial periods, *id.* at 11 & n.11 (29 months), or with having the interim official appointed by a party rather than a politically accountable elected official. *Id.* at 12. No serious challenge has been mounted against the common practice of a State's governor making interim appointments, even though it sometimes results in an interim officeholder of a different political party than the one voters elected.

Finally, there is no indication that Nevada's recusal statute is framed so broadly as to require constant recusals that might deny representation in a large number of matters. See J.A. 196 (Councilman Carrigan testifying that he has recused himself only once). Rather, the effect of the recusal provision is "minimal," and there is no reason to believe that the effect of recusal would fall disproportionately on any set of constituents. *Rodriguez*, 457 U.S. at 12; *Doe*, 130 S. Ct. at 2830 (Stevens, J., concurring in part and concurring in the judgment) (in upholding statute, noting "the amount of speech covered is small") (internal quotation marks omitted).

While respondent argues that the Lazy 8 project was "of the utmost importance" to respondent's constituents, Br. in Opp. 18, it is to be expected that

elected representatives may occasionally miss even important votes for a variety of reasons—including a feeling that recusal is necessary under the circumstances. Indeed, respondent testified that he would have felt a need to abstain "[i]f it would have been a relative" representing the Lazy 8. J.A. 214. In any event, the importance of this particular vote is not relevant in considering the propriety of the *facial* invalidation of the recusal statute. Accordingly, the effect of the recusal statute on respondent's constituents raises no constitutional concern.

C. The Nevada Recusal Statute Is A Reasonable Regulation Of The Forum Of Legislative Voting

In addition, the Nevada Recusal Statute can be sustained as a reasonable regulation of the forum of legislative voting. "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799 (1985). "'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Greer* v. *Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderly* v. *Florida*, 385 U.S. 39, 47 (1966)). Thus, "[t]he government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Forbes*, 523 U.S. at 677-678 (quoting *Cornelius*, 473 U.S. at 800). A nonpublic forum is created by permitting "selective access, unsupported by evidence of a purposeful designation for public use." *Id.* at 680 (quoting *Cornelius*, 473 U.S. at 805). In nonpublic forums, the government

retains the choice of whether to reserve the forum "for specified classes of speakers." *Ibid.*

Nevada municipal council voting is appropriately considered a nonpublic forum. Access to it is selective—it is traditionally restricted to legislators (and non-recused legislators at that). It is immaterial that restrictions on access to legislative voting are not property-based; this Court repeatedly has applied forum analysis to "access to a particular means of communication." *Cornelius*, 473 U.S. at 788 (holding that the Combined Federal Campaign, a charity drive for federal employees, was a nonpublic forum) (collecting authorities); cf. *Burdick*, 504 U.S. at 439 (State may determine that "'[t]he general election ballot . . . [is] not a forum for continuing intraparty feuds'") (quoting *Storer*, 415 U.S. at 735); *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."); *Doe*, 130 S. Ct. at 2830 n.1 (Stevens, J., concurring in part and concurring in the judgment) (referendum petition "is a state-created forum with a particular function"). Indeed, the Agenda for the Sparks City Council meeting on the night of the Lazy 8 vote noted that "[t]he meetings conducted by the Sparks City Council * * * are not public forums." J.A. 10. That conclusion would apply a fortiori to the voting that occurs there.

There can be little question that the Nevada Recusal Statute is "reasonable in light of the purpose of the [forum]." *Forbes*, 523 U.S. at 682. Over two centuries of practice attest to the reasonableness of such restrictions, which, as noted above, serve legitimate viewpoint-neutral purpose of limiting the exercise of governmental lawmaking power to

officials who have no conflicting interests with respect to the matter at hand. That is a valid reason for restricting access to nonpublic forums. Cf. *Greer*, 424 U.S. at 839 (prohibition on political rallies at military base served valid purpose of insulating the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates"); *Cornelius*, 473 U.S. at 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (restriction on access to advertising space on city transit serves "reasonable legislative objective[]" of preventing "the appearance of [political] favoritism"). Thus, legislators who have a conflict of interest are properly excluded from legislative voting; exclusion is "based on the[ir] *status* * * * rather than their views." *Perry Educ. Ass'n*, 460 U.S. at 49. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811.

D. Applying Heightened Scrutiny Would Needlessly Burden Neutral Ground Rules For The Operation of Government

Ostensibly, the Nevada Supreme Court's decision addressed only subsection 8(e) of the recusal provision of the Ethics in Government Law, Nev. Rev. Stat. § 281A.420, in the context of elected legislators. But its rationale, if accepted, would have broad ramifications for recusal provisions applicable to officials in all branches of government nationwide. Even if the vast majority of such rules ultimately are

upheld, forcing States to litigate the constitutionality of such rules under heightened scrutiny would drastically—and needlessly—constrain their ability to adopt and enforce basic rules for self-government.

1. The Nevada Supreme Court's Rule Endangers A Wide Range Of Recusal Provisions

At a minimum, the Nevada Supreme Court's rationale would mandate applying strict scrutiny to *every* conflict-of-interest provision of § 281A.420, including those applicable when a public official has received a gift or loan from an interested party or has a direct pecuniary interest in the matter. Nev. Rev. Stat. § 281A.420(2)(a), (b) (2009). Moreover, its logic would require applying strict scrutiny to *every* "statute regulating an elected public officer's protected political speech of voting on public issues." Pet. App. 11a (emphasis omitted). Although the language of recusal statutes may differ across jurisdictions, the purpose and effect of such provisions is the same everywhere: to disqualify legislators from voting on matters in which a conflict is present, thus regulating what the Nevada Supreme Court called the "protected political speech of voting." *Ibid.* Thus, the sort of legislative conflict-of-interest laws that have been commonplace in this country since the Founding would immediately become "presumptively invalid," *R.A.V.*, 505 U.S. at 382, subject to a standard designed to ensure such statutes would only "rarely" survive constitutional review. *Burson*, 504 U.S. at 199-200 (plurality opinion).

Although the Nevada Supreme Court addressed its holding to elected public officers who vote on public issues, its direct effect extends beyond legislative conflict-of-interest provisions. Indeed, the provision invalidated as facially overbroad, subsection 8(e)'s definition of the 2(c) standard, applies to all public officers, not just elected legislators. Nev. Rev. Stat. § 281A.160 (2009). The court's rationale focused on the general nature of elective office (for which, unlike civil service positions, the power to "hire [or] fire" resides with the electorate) rather than any unique characteristics of the legislative role. Pet. App. 12a (internal quotation marks omitted). Nothing in the logic of the decision suggests a basis for distinguishing elected legislators from other elected public officials. *Ibid.* Under the Nevada Supreme Court's rationale, recusal requirements governing elected judges are vulnerable because they limit the protected voting of public officers and their ability to communicate, through their votes, with the public. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 395-396 (1991) (holding, under the Voting Rights Act, that elected justices are "representatives" elected as part of the political process); *White*, 536 U.S. at 784 (suggesting that the elected judiciary is part of "the enterprise of 'representative government'"). Indeed, the principal decision on which the majority relied (Pet. App. 12a), *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007), involved an elected *judge*. And the same rationale would apply equally to other elected officials who, while they do not vote, engage in governmental conduct with as much expressive content as voting—such as executive officials who must sign or veto

legislation. See *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting).

Indeed, the rationale of the court below could easily be applied to politically accountable *appointed* officials, whose conduct, after all, reflects on the elected officials who appointed them. Officials at a range of federal agencies—the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board—routinely act on, and even vote on, matters of significant public interest. The First Circuit (while applying the *Pickering* balancing test) has explicitly rejected the suggestion that the First Amendment permits greater restrictions on the voting of appointed officials than elected ones, calling it "a distinction without a difference," and "a wholly artificial dichotomy." *Stella* v. *Kelley*, 63 F.3d 71, 76 (1st Cir. 1995). Thus, regulations affecting the conduct of agency officials—and particularly their voting—could come within the sweep of the rule below.[12]

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[12] See, *e.g.*, 5 C.F.R. § 2635.502 (2010) (requiring employees of the Executive Branch to receive authorization before participating in matters involving a "financial interest" or "covered relationship" where the officer's impartiality could reasonably be questioned); 17 C.F.R. § 200.735-2(b) (2010) (applying Section 2635.502 to the Securities and Exchange Commission); 5 C.F.R. § 3301.101(a) (2010) (applying it to the Department of Energy).

2. Applying Strict Scrutiny To Neutral State Recusal Rules Imposes Severe Costs Even When They Are Upheld

Whatever the ultimate scope of its application, the rule below clearly subjects a broad range of neutral state rules of self-government to the most rigorous form of First Amendment review. Applying strict scrutiny to these regulations imposes a "strong presumption of invalidity," *Vieth* v. *Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion), and will "readily, and almost always, result[] in invalidation." *Ibid.* But application of that standard imposes grave burdens on state and local governments even when the rules are ultimately upheld. As Justice Pickering noted in dissent below, applying strict scrutiny to such rules "opens the door to much litigation and little good." Pet. App. 39a. It is inevitable that sanctioned officials will go to court, particularly in light of existing incentives to litigate. See, *e.g.*, 42 U.S.C. § 1988; *NASA* v. *Nelson*, No. 09-530, slip op. 11 (U.S. 2011) (Scalia, J., concurring in the judgment) (noting that liability for damages and attorney's fees "will greatly encourage lawyers to sue, and defendants * * * to settle.").

Even unsuccessful challenges under that standard impose substantial burdens on state and local governments. First, governments bear the burden of "'show[ing] the existence of [a compelling] interest,'" *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976)), and that the rule is narrowly tailored. That necessarily requires the state or local governments to compile an evidentiary record that clearly demonstrates the necessity of their regulation,

without the benefit of deference that is usually afforded legislative fact determinations. See *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818-819 (2000). Moreover, governments will be required to demonstrate that their rules address existing, not anticipated harms, and that the rules are not prophylactic in nature. See *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). In addition to the "heavy litigation burden" that strict scrutiny imposes on state and local governments, *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), such exacting scrutiny represents a "considerable * * * intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Ibid.*; *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting) ("Claims that have little chance of success are nonetheless frequently filed."). See generally Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 495 (1996) ("The need to address the constitutionality of all such laws [that incidentally restrict speech] would impose significant costs. If, as seems likely, most of the laws would pass constitutional muster, incurring these costs does not seem worthwhile."). That is to say nothing of the judicial resources that such challenges will needlessly consume.

The rule adopted below may have the perverse effect of making States less likely to entrust such decisions to democratically elected local bodies, if they are unable to obtain the beneficial effects of local control without the risks of private influence. Cf. *Forbes*, 523 U.S. at 681-682 (noting prospect of First Amendment liability had caused organizer to cancel debates). If it would be ironic to eliminate local

control to further the public interest, it would also be unnecessary, in view of the absence of any danger that recusal rules could be used to "suppress unpopular ideas." *Turner Broad.*, 512 U.S. at 641.

E. Nevada's Recusal Requirement For Relationships "Substantially Similar" To Four Enumerated Relationships Is Not Overbroad

The court below found no infirmity in requiring recusal based on a legislator's "commitment[s] in a private capacity," nor did it conclude that Nevada's recusal statute was unconstitutional as applied to Carrigan. Pet. App. 13a n.8. Rather, the court concluded that the clause applying the recusal provision to relationships "substantially similar" to the four statutory categories (members of the official's household, relatives, employers, and business relationships, see Nev. Rev. Stat. § 281A.420(8)), was *facially* invalid because it lacked the "high level of clarity" (Pet. App. 14a) necessary to "describe what relationships are included" and thereby "adequately limit the statute's potential reach and * * * inform or guide public officers as to what relationships require recusal." *Id.* at 16a-17a. Describing § 281A.420(8)(e) as "sweep[ing] within its control a vast amount of protected speech" and producing an intolerably large "chilling effect on the exercise of protected speech," *ibid.*, the majority held that Carrigan was entitled to have the Commission's censure of him overturned, regardless of whether (as the district court found) his relationship fell "squarely within the intended scope of the statute." *Id.* at 68a. See generally *Broadrick* v. *Oklahoma*, 413 U.S 600, 610 (1975) (First Amendment overbreadth is an exception to

"traditional rule[] * * * that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others").

That conclusion reflects an untenable understanding of this Court's precedents. Facial First Amendment invalidation is "strong medicine," *Broadrick*, 413 U.S. at 613, a "last resort," *ibid.*, to be reserved for laws that, absent immediate judicial disapproval, pose a genuine threat of chilling a "substantial" quantity of constitutionally protected activity. *Id.* at 615. The opinion below disregarded those key limitations and failed even to consider the well established rule that statutes that "seek[] to regulate political activity in an even-handed and neutral manner" are "subject to a less exacting overbreadth scrutiny." *Id.* at 616. But even considered on its own terms, the decision below cannot stand.

1. The Recusal Provision Is Not Especially Broad, Let Alone Unconstitutionally *Over*broad

The court below erred from the outset because, before pronouncing subsection 8(e) facially invalid, it failed to carefully assess the challenged statute, to determine whether it in fact "chill[s] protected speech" in so "'substantial'" a number of situations that an immediate categorical prohibition against enforcement is warranted. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). It did not identify a single instance where the provision has impermissibly punished protected activity, let alone a significant

number of such instances. *Id.* at 122 ("The overbreadth claimant bears the burden of demonstrating 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." (quoting *New York State Club Ass'n, Inc.* v. *City of New York,* 487 U.S. 1, 14 (1988)). Nor did it offer any basis for concluding that the provision's "very existence" has or would induce officials to refrain from protected activity. See *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). Rather, its "casual[]" (*Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.,* 528 U.S. 32, 39 (1999)) conclusion that the statute prohibited a "vast amount of protected speech" focused solely on the provision's purported "*potential* reach," Pet. App. 17a (emphasis added), and allegedly deficient "level of clarity." *Id.* at 14a. But "that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, 466 U.S. at 800.[13]

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[13] The Nevada Supreme Court expressly declined to consider Carrigan's vagueness challenge. Pet. App. 6a n.4. Because this Court is one "of review, not of first view," it ordinarily would not resolve such an argument. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see also *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002). Even if Carrigan's vagueness challenge were properly before this Court, it is meritless. Unlike with overbreadth, "a plaintiff whose speech is clearly proscribed" simply "cannot raise a successful vagueness claim * * * for lack of notice." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). Carrigan's longstanding professional association with Vasquez, Vasquez's ongoing service as campaign manager for Carrigan's 2006 ongoing reelection effort (whose two elections straddled the City Council's meeting on the Lazy 8), and the campaign's extensive business ties with

Even considering its "potential reach," neither the text nor experience supports the conclusion that the "substantially similar" language of subsection 8(e) is especially "sweeping." The provision has been referenced only a handful of times in Commission opinions, and the Commission is not aware of a large number of officials citing the provision in recusing themselves, effectively answering any claim that there is widespread "self-censorship" at work. And despite his claims of overbreadth, Councilman Carrigan testified that he had recused himself only once. J.A. 196.

As this Court's precedents consistently emphasize, because "[w]ords inevitably contain germs of uncertainty," *Broadrick*, 413 U.S. at 608, and "there are limitations in the English language with respect to being both specific and manageably brief," *U.S. Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-579 (1973), it is wrong to "insist[] upon a degree of rigidity that is found in few legal arrangements." *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002). Indeed, the Court's cases dealing with regulation of official conflicts of interest make exactly this point: "disqualifying criteria 'cannot be defined with precision. Circumstances and relationships must be considered.'" *Caperton*, 129 S. Ct. at 2261 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Vasquez's advertising firm, at a minimum made the relationship "substantially similar" to a "substantial and continuing business relationship" that triggers the recusal requirement under subsection 8(d).

Indeed, subsection 2(c)'s basic prohibition against wielding governmental authority where private commitments would materially affect a reasonable officer's independent judgment, even without subsection 8's additional elaboration on its meaning, is no more open-ended than many provisions that this Court has sustained against First Amendment challenge. See, *e.g.*, *Hicks*, 539 U.S. at 116 (upholding regulation requiring "a legitimate business or social purpose for being on the premises") (emphasis omitted); *Arnett* v. *Kennedy,* 416 U.S. 134, 158-159 (1974) (plurality opinion) ("such cause as will promote the efficiency of the service"); *Broadrick*, 413 U.S. at 606 ("tak[ing] part in the management or affairs of any political party or in any political campaign"). Nor is that standard less precise than many other laws—including criminal laws—that govern public officials' ethical obligations, including conflicts of interest in particular. *Arnett*, 416 U.S. at 161 ("[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation.") (plurality opinion); *id.* at 164 (Powell, J., concurring in part and concurring in the result) (agreeing statute was not unconstitutionally vague or overbroad).

But the Nevada legislature created clarity far exceeding the constitutional minimum by anchoring the recusal provision involving private interests to relationships "substantially similar" to the four familiar statutory categories explicitly set forth in the statute. See Nev. Rev. Stat. § 281A.420(8). And the Commission carefully heeded that requirement in this case. See Pet. App. 102a-106a. Indeed, courts troubled by broad or vague general terms often have eliminated constitutional concerns by imposing the

very limitation the Legislature codified here. See, *e.g.*, *Norfolk & Western Ry.* v. *Am. Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."). Moreover, the phrase "substantially similar" is a familiar statutory term that has frequently been used in other statutes without causing undue difficulty.[14] Nevada's recusal statute "may not satisfy those intent on finding fault at any cost," *Letter Carriers*, 413 U.S at 578-579, but the language is plainly clear enough.

Public officials in Nevada are required to familiarize themselves with the Ethics in Government Law at the outset of each term and certify that they have "read and understand[]" its standards. Nev. Rev. Stat. § 281A.500(1)(a), (2)-(3) (2009). A public officer looking for further guidance as to the reach of subsection (e) would not be confined to the statute's bare words. As respondent was aware, J.A. 222, the Ethics in Government Law provides that officials may seek confidential guidance from the Commission as to "the propriety of [their] * * * future conduct," Nev. Rev. Stat. § 281A.440(1) (2009), and about whether a particular relationship requires recusal. *Id.* § 281A.460 (2009). Because "the underlying justification for the overbreadth exception" is "the interest in preventing an invalid statute from inhibiting the speech of third parties," *Vincent*, 466 U.S. at 800, the ability of those

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[14] *E.g.*, 11 U.S.C. § 1122(a) (involving bankruptcy plans); 15 U.S.C. § 78*l*(g)(5) (securities); 30 U.S.C. § 921(c)(4) (miners' benefits).

"need[ing] further guidance * * * to seek advisory opinions for clarification * * * and thereby 'remove any doubt there may be as to the meaning of the law,'" typically disposes of "chilling" claims. *McConnell* v. *FEC*, 540 U.S. 93, 170 n.64 (2003) (quoting *Letter Carriers*, 413 U.S. at 580). And the legislative history of the Law provides additional guidance about its application. As both the Commission and the trial court emphasized, the Legislature specifically discussed what relationships subsection 8(e) would cover during the debate that preceded the Law's enactment, and the discussion indicated that ordinary campaign work by another person would not trigger the recusal obligation, but that recusal *would* be in order "'where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship.'" Pet. App. 69a (quoting Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999)).

Finally, respondent's claim that the Commission "arbitrarily determines whether a public officer's relationships are 'substantially similar' to the other relationships listed in subsection 8," Pet. App. 15a, does not affect this analysis. Neither the court below nor respondent offered any evidence of discriminatory enforcement, and "speculation" is insufficient to establish overbreadth. *Ashcroft* v. *ACLU*, 535 U.S. 564, 584 n.16 (2002). As the district court noted, "the Legislature has given the Commission and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission." Pet. App. 77a. Officials dissatisfied with an advisory opinion are

entitled to petition for judicial review. Nev. Rev. Stat. § 281A.440(1)(b) (2009).

Nevada's Ethics in Government Law speaks in clear terms and offers agency and judicial guidance for individuals who seek advice on its operation. It therefore affects protected speech, if at all, only in a "tiny fraction" of cases and cannot be facially overbroad. *New York* v. *Ferber*, 458 U.S. 747, 771, 773 (1982). "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-616.

2. The Nevada Recusal Law Is Narrowly Tailored

The requirement of narrow tailoring is satisfied if a neutral regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests," and the "'regulation promotes a substantial government interest that would be achieved less effectively'" without it. *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). That requirement is amply satisfied here. Because "[t]he alternative regulatory method[] [the court below] hypothesized"—disclosure alone—would serve Nevada's interest "less well," the State need not adopt it. The supposed alternative "reflect[s] nothing more than a disagreement with" the Nevada legislature over "how much" corruption to target and "how that level of control is to be achieved." *Id.* at 800.

The assumption that disclosure alone would serve Nevada's interest is surely incorrect. The multiyear

tenure of many offices makes the distant prospect of standing for reelection an uncertain deterrent, particularly because some officials voluntarily forego reelection. Moreover, the constituents' decision to return a legislator to office is not the equivalent of an acquittal of betraying the public trust. Reelection could just as easily result from running against an unpopular or unknown opponent or from constituents' belief that seniority or ideology outweigh the conflict of interest. In some cases, as was maintained here, voters may agree with their representative's vote, whatever the reason for casting it. And more fundamentally, the interest in the integrity of the office does not belong solely to a representative's own constituents; it belongs to *all* the people of the State. Cf. Nev. Const. art 15, § 2 (prescribing oath to "support, protect and defend * * * the constitution and government of the State of Nevada, * * * [and] bear true faith, allegiance and loyalty to the same"); *id.* § 3 (qualifications for local offices). And even popular politicians are appropriately subject to investigation and prosecution for corruption. Significantly, the Constitution has never treated the ballot box as the sole means of keeping elected officials within ethical bounds. See, *e.g.*, U.S. Const. art. I, § 5 (providing for expulsion of legislators and punishment for "disorderly Behaviour"); U.S. Const. art. II, § 4 (providing for impeachment of civil officers).

Disclosure fails to fully advance Nevada's interest in preventing biased decisions. Disclosure brings potential personal interest to light but does nothing to stop lawmakers from misusing their state-granted powers to decide matters in which their judgment "would be materially affected by * * * [their]

commitment in a private capacity to the interests of others." Nev. Rev. Stat. § 281A.420(2)(c) (2007). Without a recusal obligation, the most brazen forms of self-dealing could persist. For instance, a council member could disclose that he was married to a permit applicant and then cast the deciding vote to issue the permit. Such open self-dealing strikes a harder blow to public confidence than hidden motives do, but disclosure targets only the latter. As a result, Nevada reasonably concluded that a "complete prohibition" on voting by officials with private commitments is necessary to advance its interest in ensuring that public offices are "held for the sole benefit of the people." Nev. Rev. Stat. § 281A.020(1) (2009). The statute is therefore not "substantially broader than necessary," *Ward*, 491 U.S. at 800.

Respondent's testimony suggests that he does not dispute the need for recusal statutes, but only disagrees with the Nevada Legislature's judgment that the statute should cover "substantially similar" private commitments in addition to the four enumerated categories. See J.A. 214 (stating that he would have felt a need to abstain "[i]f it would have been a relative" representing the Lazy 8 because "any reasonable person" would have thought that fact "would sway you"). The decision below may reflect similar disagreement. But such line-drawing decisions have long been a matter of "legislative discretion." *Tumey*, 273 U.S. at 523. And treating relationships that implicate the same governmental interests to the same degree as the four categories is a "virtue, not a vice," because it suggests an absence of "a discriminatory governmental motive." *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

Nev. Rev. Stat. 281A.420 (2007)

Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions

1. Except as otherwise provided in subsection 2, 3 or 4, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his

commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

3. In a county whose population is 400,000 or more, a member of a county or city planning commission shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His direct pecuniary interest; or

(c) His commitment to a member of his household or a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his direct pecuniary interest or his commitment described in paragraph (c) where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed is not greater than that

accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the direct pecuniary interest or commitment.

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public

officer reported pursuant to NRS 294A.120 or 294A.125 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294.286 of this act in a timely manner.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. After a member of the Legislature makes a disclosure pursuant to subsection 4, he may file with the Director of the Legislative Counsel Bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a Legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the Legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the Legislative Counsel Bureau.

7. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of the Legislative Branch from requesting or introducing a legislative measure; or

(b) Require a member of the Legislative Branch to take any particular action before or while requesting or introducing a legislative measure.

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

Nev. Rev. Stat. § 281A.420 (2009)

Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

2. The provisions of subsection 1 do not require a public officer to disclose:

(a) Any campaign contributions that the public officer reported in a timely manner pursuant to NRS 294A.120 or 294A.125; or

(b) Any contributions to a legal defense fund that the public officer reported in a timely manner pursuant to NRS 294A.286.

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of others, accruing to the other persons, is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth

in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which he was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of a local legislative body from requesting or introducing a legislative measure; or

(b) Require a member of a local legislative body to take any particular action before or while requesting or introducing a legislative measure.

7. The provisions of this section do not, under any circumstances, apply to State Legislators or allow the Commission to exercise jurisdiction or authority over State Legislators. The responsibility of a State Legislator to make disclosures concerning gifts, loans, interests or commitments and the responsibility of a State Legislator to abstain from voting upon or advocating the passage or failure of a matter are governed by the Standing Rules of the Legislative Department of State Government which are adopted, administered and enforced exclusively by the appropriate bodies of the Legislative Department of State Government pursuant to Section 6 of Article 4 of the Nevada Constitution.

8. As used in this section:

(a) "Commitment in a private capacity to the interests of others" means a commitment to a person:

(1) Who is a member of the public officer's or employee's household;

(2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;

(3) Who employs the public officer or employee or a member of the public officer's or employee's household;

(4) With whom the public officer or employee has a substantial and continuing business relationship; or

(5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

(b) "Public officer" and "public employee" do not include a State Legislator.