No. 10-568

In the
Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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November 29, 2010

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QUESTION PRESENTED

Whether state-imposed restrictions on the ability of local elected officials to vote on legislative matters are subject to strict scrutiny review under the First Amendment.

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The 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 (Pet. App. 40a-95a) is not reported. The administrative opinion of the Nevada Commission on Ethics (Pet. App. 96a-112a) is not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 29, 2010. The petition for writ of certiorari was filed on October 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises from a decision of the Nevada Commission on Ethics ("Commission" or "Commission on Ethics") censuring an elected city councilman for voting on a legislative measure when, in the Commission's view, he had a disqualifying "commitment in a private capacity to the interests of others" under Nevada's Ethics in Government Law.[1] Pet. App. 1a-2a. The First Judicial District Court of Nevada affirmed the administrative decision. Pet. App. 40a-95a. The Nevada Supreme Court reversed, invalidating the "catch-all" provision included in the statutory definition of "commitment in a private

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[1] Nev.Rev.Stat. § 281A.010 (2003) provides that Nev.Rev.Stat. Chapter 281A "may be cited as the Nevada Ethics in Government Law."

capacity" as unconstitutionally overbroad. Pet. App. 17a.

1. The First Amendment to the United States Constitution provides, in pertinent part, "Congress shall make no law... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is applicable to state governments through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

"The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-136 (1966). Elected representatives have an "obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; *also so they may be represented in governmental debates by the person they have elected to represent them*." *Id.* at 136-137 (emphasis added).

The Nevada statute at issue in the underlying controversy is Section 281A.420 of the 2007 Nevada Revised Statutes ("Nev.Rev.Stat."). Nev.Rev.Stat. § 281A.420(2)(c) (2007) requires that:

> 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... [his]

> commitment in a private capacity to the interest of others.[2]

Nev.Rev.Stat. § 281A.420(8) (2007) defines the term "commitment in a private capacity to the interests of others" as 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.

Restrictions on speech are unconstitutional if they vest a public official with the unbridled discretion to determine which speech is acceptable and which speech is not. Regulations that permit "arbitrary application" are "inherently inconsistent with a valid time, place and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). To

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[2] Nevada's public officials are also precluded from voting or advocating on issues where the independence of judgment of a reasonable person would be materially affected by the acceptance of a gift or loan or other personal pecuniary interests. *See* Nev.Rev.Stat. § 281A.420(2)(a)-(b) (2007).

curtail that risk, a law restricting the exercise of First Amendment freedoms must contain "narrow, objective and definite standards." *Id.* at 131. At the root of this long-standing principle is the "time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency... may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone..." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

2. Michael A. Carrigan is an elected member of the City Council of Sparks, Nevada. Pet. App. 98a. In that capacity, Carrigan represents the citizens who reside in the City's Fourth Ward. *Id.* On August 23, 2006, the City Council voted three to two to deny a land use application proposing the transfer of a tourist commercial zoning designation and a non-restricted gaming entitlement from one development project in Sparks to another project colloquially known as the "Lazy 8." *Id.* at 3a; 43a; 99a. At this meeting, the applicant was represented by a number of people, including Carlos Vasquez. *Id.* at 3a; 46a; 98a.

Vasquez has been a friend of Carrigan since 1991, and volunteered as a campaign manager for Carrigan during his initial election to the Sparks City Council in 1999, and during his subsequent campaigns for re-election in 2003 and 2006. *Id.* at 3a; 98a.

Carrigan disclosed this relationship during the August 23, 2006 public hearing, and unequivocally stated that he was not in a position to reap any type of

benefit from the project, and that he could faithfully and impartially discharge his duties as an elected official in this case. *Id.* at 4a; 46a-47a; 99a. Carrigan voted to approve the Lazy 8 application because a majority of his constituents favored the project. *Id.* at 99a.

In September 2006, several nearly identical ethics complaints were filed against Carrigan with the Nevada Commission on Ethics. *Id.* at 4a; 48a.The complaints alleged that Carrigan used his position as a Sparks City Councilman to secure unwarranted benefits for himself from Vasquez and that Vasquez had an "undue influence" over Carrigan. *Id.* The Commission ultimately charged Carrigan with (1) using his position in government to secure an unwarranted benefit for Vasquez; (2) failing to make an adequate disclosure of his relationship with Vasquez; and (3) failing to abstain from voting on the Lazy 8 application on August 23, 2006. *Id.* at 96a-97a.

3. On August 29, 2007, the Commission on Ethics employed the "catch-all" provision included in the statutory definition of "commitment in a private capacity to the interests of others," Nev.Rev.Stat. § 281A.420(8)(e) (2007), to conclude that the relationship shared by Carrigan and Vasquez was "substantially similar" to a familial relationship within the third degree of consanguinity and a "substantial and continuing business relationship." Pet. App. at 5a; 50a; 105a-106a. On that basis, the Commission determined that Carrigan's relationship with Vasquez obligated Carrigan to abstain from voting in favor of the Lazy 8 application at the August 23, 2006 meeting of the Sparks City Council despite the fact that a

majority of Carrigan's constituency favored the Lazy 8 project. *Id.* at 5a; 51a; 111a.

4. The First Judicial District Court of Nevada affirmed the administrative decision of the Commission on Ethics, holding that Nev.Rev.Stat. §§ 281A.420(2) (2007) and (8)(e) (2007) were not unconstitutionally vague and overbroad, and that the state's interest in securing the ethical performance of governmental functions outweighed Carrigan's rights to free speech and political association under the *Pickering* balancing test. Pet. App. 81a; 70a; 63a.

5. In a 5-1 decision, the Nevada Supreme Court reversed, invalidating Nev.Rev.Stat. § 281A.420(8)(e) (2007) as unconstitutionally overbroad.[3] Pet. App. 1a-17a. Noting that the "dissent misunderstands the pertinent issue raised in this appeal," the majority explained that it had not found that the Legislature "can never require recusal," but that the statute in question failed to provide "sufficient limitations and explanations concerning when recusal is required." *Id.* at 7a-8a. Because the majority determined that voting by elected officials is a "core legislative function" that "serves an important role in political speech," it concluded that voting by elected official "on public issues is protected speech under the First Amendment." *Id.* at 11a.

The court rejected the application of the *Pickering* balancing test to the rights of elected officials, holding instead that "[a] strict scrutiny standard applies to a

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[3] Chief Justice Parraguirre voluntarily recused himself from participation in the decision. Pet. App. 1a.

statute regulating an elected public officer's protected political speech of voting on public issues." *Id.* Finding that Nev.Rev.Stat. § 281A.420(8)(e) (2007) "does not inform or guide public officers as to what relationships require recusal," the Nevada Supreme Court concluded that the "catch-all" provision "is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. The Nevada Supreme Court Correctly Applied Strict Scrutiny to an Unconstitutionally Overbroad State Statute That Impermissibly Restricts Protected Political Speech

A vote cast by an elected representative on a legislative measure exists at the confluence of all other types of political speech. The decision to run for elected office, the expression of policy choices that form a candidate's political platform, monetary contributions given in support of the candidate, political association and volunteerism, independent expenditures made to promote a particular viewpoint and individual citizens ultimately choosing one candidate over the others on election day finally culminate in a singular moment - thousands of citizens speaking in unison through their popularly elected representative as he votes "yea" or "nay" on a matter of legislative policy. Legislative voting by an elected official is the essence of self-government and the foundation of the American Republic; it is the pinnacle of political speech. *See* The Federalist No. 10 (Madison) (discussing the advantages of a republic over a pure democracy in protecting individual liberty from majority rule).

A. Legislative Voting by Elected Representatives is Widely Recognized as Protected Political Speech

Voting on legislative measures has been recognized by this Court as "the individual and collective expressions of opinion within the legislative process." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). Legislators are given the widest latitude to express their views on issues of policy, *Bond*, 385 U.S. at 135-136, because an elected representative's vote not only mechanically disposes of proposed legislation, but registers "the 'will, preference, or choice' of an individual legislator on an issue of concern to the political community." *Clarke v. United States*, 886 F.2d 404, 411 (D.C. Cir.1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir.1990) (quoting *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir.1988), *cert. denied*, 492 U.S. 921 (1989)). In fact, "[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir.1989). That Carrigan's vote occurred in the heat of a controversial land use decision only strengthens the protection afforded to Carrigan's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.[4] *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

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[4] The First Judicial District Court of Nevada recognized that during Carrigan's campaign for reelection in 2006, "the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project." Pet. App. 45a.

This Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), and legislative voting by an elected representative is unquestionably protected conduct under the First Amendment. See, e.g., *Blair v. Bethel School District*, 608 F.3d 540, 545 (9th Cir.2010) (quoting *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir.1995)) ("the status of public officials' votes as constitutionally protected speech is established beyond peradventure of doubt"); *Velez v. Levy*, 401 F.3d 75, 97-98 (2d Cir.2005) (explaining that publicly elected school board member's votes and positions are clearly protected speech); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir.1999) ("[t]here is no question that political expression such as a [city council member's] positions and votes on City matters is protected speech under the First Amendment"); *Miller v. Town of Hull*, 878 F.2d at 532 ("we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment"); *Clarke*, 886 F.2d at 412 ("there is no question that the votes of Council members qualify as speech").

B. Nev.Rev.Stat. § 281A.420(2)(c) is a Content-Based Restriction on Political Speech

The government may not regulate speech based on its substantive content or the message it conveys, and may not preclude speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819,

828 (1995). Nev.Rev.Stat. § 281A.420(2)(c) (2007) is a content-based restriction on protected speech because it is based on relationships or circumstances that, in the Commission's view, influence or motivate elected officials to vote *in a particular way*. In other words, the practical concern and justification for the abstention requirement is the content of the message conveyed if elected officials were allowed to cast votes that the Commission deemed to be improperly based on particular motivating ideologies or perspectives created by certain relationships. A content-based restriction on protected speech is subject to strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

Moreover, Nev.Rev.Stat. § 281A.420(2) (2007) explicitly bars elected officials in Nevada from advocating for or against legislative measures that they are precluded from voting on. This blanket restriction on protected speech is analogous to the "announce clause" contained in the State of Minnesota's Code of Judicial Conduct[5] which was struck down by this Court as an impermissible content-based regulation that burdened a category of speech "at the core of our First Amendment freedoms." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002). "[T]he proper test to be applied to determine the constitutionality of such a restriction is... strict scrutiny." *Id.*

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[5] In *Republican Party of Minnesota*, the Court considered the constitutionality of Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000) which precluded candidates for judicial office in Minnesota from "announcing his or her views on disputed legal or political issues." 536 U.S. at 768.

C. The *Pickering* Balancing Test is an Inapposite Tool for the Constitutional Evaluation of State-Imposed Restrictions on the Political Speech of Elected Representatives

Contrary to the reasoning of the Commission on Ethics, there is a very real and meaningful difference between the limited protection the First Amendment provides to the speech of ordinary employees of the government and the nearly absolute protection the First Amendment provides to the speech of elected officials. Job-related speech by public employees is less protected than other types of speech because the employee's speech rights must be balanced with the government's need, *as an employer*, to supervise and discipline employees in order to ensure efficient operation of government.[6] *See Pickering v. Board of*

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[6] In *Pickering,* the Court held that the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern, and established a balancing test to determine whether restrictions imposed on the speech and associational freedoms of government employees by the government as an employer are constitutional. 391 U.S. at 568. However, the *Pickering* test is an inapposite tool in the case at hand - not only is Carrigan not an "employee" of the State of Nevada or the Nevada Commission on Ethics, but when Carrigan casts a vote on a matter before the Sparks City Council, he is not speaking as a private citizen or an employee of a governmental entity, but as the elected and representative voice of the citizens residing in the Fourth Ward of the City of Sparks. *See Clarke*, 886 F.2d at 416 (use of *Pickering* balancing test is "obviously wrong" when applied to votes of elected legislators rather than governmental employees); *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir.2000) (rejecting application of *Pickering* to an elected member of school board of trustees).

Education, 391 U.S. 563 (1968) (emphasis added). But when the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated. *See Waters v. Churchill*, 511 U.S. 661, 671-672 (1994) ("[t]he government as employer indeed has far broader powers than does the government as sovereign."). A state's interest in regulating speech as a sovereign is "relatively subordinate... [as] [t]he government cannot restrict the speech of the public at large just in the name of efficiency." *Id.* at 675. No previous decision of this Court regarding the level of constitutional protection afforded to the speech activities of public employees qualifies or limits the First Amendment's protection of elected government officials' speech.[7]

In fact, this Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. For example, in *Bond,* 385 U.S. 116 (1966), the Court held that state action excluding a state representative from membership in the legislature because of his statements criticizing the policy of the federal

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[7] In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) the Court declined to rule on the constitutionality of restrictions on the First Amendment rights of elected officials. Citing its policy of "avoiding unnecessary constitutional issues," the Court limited its holding to the litigants - lower level employees of the executive branch - suggesting that the government "conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question" than the one decided by the Court in *National Treasury Employees Union*. *Id.* at 478.

government in Vietnam and the operation of the selective service laws violated his right of free expression under the First Amendment. In *Wood v. Georgia*, 370 U.S. 375 (1962), the Court held that out-of-court statements by a sheriff questioning the advisability of a grand jury investigation into block voting by black citizens did not present a clear and present danger to the administration of justice, and, therefore, the use of the contempt power to punish the sheriff for the statements abridged his right of free speech. The Court emphasized that "[t]he role elected officials play in our society makes it all the more imperative that they be allowed to freely express themselves on matters of current public importance." *Id.* at 395.

Elected officials are obligated to take positions on public issues in order to guarantee meaningful representation in governmental debates for the electorate at large. *See Bond,* 385 U.S. at 136-137. As such, restrictions on an elected official's ability to perform his duties implicate the interests of two distinct parties: the individual legislator's First Amendment rights; and the voters' right to be meaningfully represented by their elected officials. *See Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619, 623 (8th Cir.1997). Where state-imposed restrictions prevent an elected official from meaningfully representing the voters who elected the official, the restrictions are subject to strict scrutiny. *Id.* at n.5.

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Voting on legislative measures by elected representatives is the ultimate form of political speech.

As such, the protection afforded to the legislator by the First Amendment is at its zenith. Content-based restrictions that preclude elected officials from voting on legislative measures thereby silencing the electorate are subject to strict scrutiny under the First Amendment. The Nevada Supreme Court properly struck down Nev.Rev.Stat. § 281A.420(8)(e) (2007) as unconstitutionally overbroad.

II. There is No Genuine Split of Authority over Whether and How the First Amendment Applies to Regulation of Legislative Voting by Elected Public Officials

The decision below does not conflict with the rulings of the First, Second, Seventh, Eighth or Ninth Circuit Courts of Appeal. The Commission's effort to manufacture an inter-circuit disagreement is unpersuasive; the holdings of the courts below, and the distinctions drawn therein, are entirely consistent with the conclusion of the Nevada Supreme Court that state-imposed restrictions on legislative voting by elected representatives are subject to strict scrutiny under the First Amendment.

In *Mullin v. Town of Fairhaven*, 284 F.3d 31, 41 (1st Cir.2002), the First Circuit rejected the argument that *appointed* members of a town conservation commission were entitled to First Amendment protection when the commissioners unlawfully voted to reorganize the leadership positions of the commission. The First Circuit employed the *Pickering* balancing test but explicitly limited its decision to appointed, rather than elected, public officials: "[i]n their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment

protection 'so long as [their] speech does not unduly impede the government's interest... in the efficient performance of the public service it delivers through' its *appointed* officials." *Id.* at 37 (emphasis added) (quoting *O'Connor v. Steeves*, 994 F.2d 905, 912 (1st Cir.1993)). In fact, the only discernable time that the First Circuit has considered the First Amendment rights of *elected* officials, the court easily resolved the dispute in favor of preserving the First Amendment rights of elected representatives without applying a balancing test of any kind: "we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment," *Miller*, 878 F.2d at 532.

The Commission's assertion that the decision of the Second Circuit in *Camacho v. Brandon*, 317 F.3d 153 (2d Cir.2003) stands for the premise that "restrictions affecting a city council member's voting freedom are properly analyzed 'under *Pickering*,'" is similarly unavailing. Pet.14-15. *Camacho* concerned the firing of an appointed employee of a city council member, not a restriction on that elected official's right to free speech.[8] Accordingly, the holding in *Camacho* is

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[8] Moreover, the Commission's conclusion that the Second Circuit applied the *Pickering* balancing test to the vote of an elected representative in *Camacho* is a drastic and misleading oversimplification of the holding. In *Camacho*, a legislative aide to a city council member was fired by the city council, allegedly in retaliation for the manner in which his boss, a council member, had voted on a particular measure before the Council. *Camacho*, 317 F.3d at 156-158. The employee then brought a third-party First Amendment claim against the other council members on behalf of his former supervisor. *Id.* It is well established that the

inapplicable to the situation at issue in this case - as the Second Circuit explained in *Velez v. Levy*: "[t]he official in *Camacho* remained free to express his views in the council chamber, to cast votes, and to serve his constituents in his capacity as a member of the council even after his assistant was terminated." 401 F.3d at 97.

A more accurate illustration of the Second Circuit's recognition of the First Amendment protections afforded to elected officials is set forth in *Velez*, where the court considered whether the First Amendment protected an elected official against removal from her position on a school board in retaliation for her votes on particular policy issues. *Id.* at 80-84. Rather than analyze the matter under *Pickering*, or as an employment retaliation suit as in *Camacho*, the court surmised that the votes of elected officials are entitled to robust protection under the First Amendment, and concluded:

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political affiliations and the expressions of non-elected "policymaking" public employees are not constitutionally protected from government retaliation. *Elrod v. Burns*, 427 U.S. 347, 367-368 (1976); *Branti v. Finkel*, 445 U.S. 507, 517-518 (1980). In *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir.1997), the Second Circuit concluded that when the employee is a "policymaker," there is generally no First Amendment violation in retaliation cases in which the government's retaliation is motivated by both political association unprotected under the *Elrod/Branti* decisions and expression protected under *Pickering*. As a result of *McEvoy*, the court in *Camacho* rejected the employee's First Amendment retaliation claim out of hand because of the elected official's "policymaker" status, and then noted that the elected official's vote would have been protected speech under *Pickering* without actually applying the balancing test. *Camacho*, 317 F.3d at 162.

> [w]e cannot permit a state official to oust an elected representative of the people on the bald ground that she voices unsympathetic political views - that is, that she engages in an activity that is at the core of what is protected by the First Amendment. Such an action by a state official, if allowed, would offend the basic purposes of the Free Speech clause - the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people's views to those charged with decision making. *Id.* at 97-98.

Noting that this conclusion was not discordant with the court's earlier holdings, the court revisited *Camacho*, and its concurring opinion authored by Chief Judge Walker, and explicitly distinguished the broad First Amendment protections afforded to elected officials from the rights retained by ordinary public employees. *Id.* at 98

The Ninth Circuit has also recognized that "the free speech rights of elected officials may well be entitled to broader protection than those of public employees generally," and that "[l]egislators are given 'the widest latitude to express their views *on issues of policy*.'" *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir.2000) (emphasis added) (quoting *Bond*, 385 U.S. at 136). In *DeGrassi*, the circuit court concluded that a former city council member's First Amendment rights were not violated when she was prevented from participating in a series of closed council meetings because the matter considered at those meetings did not relate to "issues of policy or to any matter of political, social or other concern to the community," and the council member was not otherwise precluded

from speaking out in public on the issue, directly with other council members, or representing her constituents.[9] *Id.*

The vote at issue in this case involved issues of legislative policy of the utmost importance to the community at large - whether non-restricted gaming was appropriate along a major thoroughfare outside the downtown corridor of the City of Sparks. The project at issue is located in the City's Fourth Ward, which Carrigan is elected to represent, and a majority of the constituency of the Fourth Ward "favored the Lazy 8." Pet. App. 99a. In fact, the First Judicial District Court of Nevada recognized that "[d]uring Councilman Carrigan's 2006 reelection campaign, the

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[9] The Commission on Ethics suggests that the Ninth Circuit's conclusion in *DeGrassi* represents an intolerable split of authority between Nevada's state and federal courts. Pet. 15-16. Although Nevada has waived common law sovereign immunity for itself and its political subdivisions in its own courts, it has not waived its Eleventh Amendment protection from suit in federal court. See Nev.Rev.Stat. § 41.031 (2003). The Ninth Circuit has repeatedly held that under this statute Nevada retains immunity from suit in federal court under the Eleventh Amendment. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.1999) (Nevada Gaming Control Board); *Austin v. SIIS*, 939 F.2d 676, 678 (9th Cir.1991) (State Industrial Insurance System). As a result of these decisions, the United States District Court for the District of Nevada concluded, the day before the instant petition for certiorari was filed, that the Nevada Commission on Ethics has sovereign immunity as an agency of the State of Nevada. *Williams v. Clark County Public Administrator*, No. 2:09-cv-00810-RCJ-LRL, 2010 WL 4340654 (D.Nev. Oct. 26, 2010). Accordingly, the Commission's suggestion that a conflict exists between the state and federal courts of Nevada is unfounded for a very simple reason - the Eleventh Amendment precludes suit against the State of Nevada and the Nevada Commission on Ethics in federal court.

predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project." Pet. App. 45a. In Nevada, if a public officer is required to abstain from voting under Nev.Rev.Stat. § 281A.420(2) (2007), he is also precluded from advocating for the passage or failure of that measure. Therefore, the restriction imposed by the Nevada Commission on Ethics in this case does implicate a matter of legislative policy, is a complete restriction on meaningful and effective political speech, deprives an elected official of the opportunity to represent his constituents in a meaningful fashion and strips the citizens represented by the silenced legislator of their voice in local government.

In *Risser v. Thompson*, 930 F.2d 549 (7th Cir.1991), the Seventh Circuit examined the partial veto provision of the Wisconsin Constitution. However, because *Risser* did not involve a state-imposed restriction on the ability of an elected official to vote on legislative measures, the holding is inapplicable to the matter now before the Court.

Finally, the Commission's summation of the Eighth Circuit's holding in *Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619 (8th Cir.1997) is fundamentally inaccurate. In *Peeper*, the Eighth Circuit applied the rational-basis test to invalidate partial restrictions on the political speech of an elected official on equal-protection grounds. *Id.* at 624-625. In stark contrast to the Commission's assertion, the Eighth Circuit explicitly declared that "limitations on an elected official's participation in the proceedings of a public body... would require us to apply strict scrutiny," because "limitations on an officeholder... provide voters no opportunity to be heard through an

alternative representative. If the restrictions prevent the officeholder from meaningfully representing the voters who elected the official, *such restrictions are subject to strict scrutiny*." *Id.* at 623 n. 4; n.5 (emphasis added). Not only does Nev.Rev.Stat. § 281A.420(2) (2007) obligate public officials who are required to abstain from voting on an issue but it requires that they also refrain from advocating for the passage or failure of the measure. Therefore, the Nevada statute precludes elected officials from representing the voters in any meaningful fashion and is subject to strict scrutiny.

Contrary to the Commission's argument, there is no genuine split of authority concerning the First Amendment protection afforded to elected officials' ability to vote on legislative measures. The Commission on Ethics has failed to provide the Court with any case employing a reduced standard of constitutional scrutiny to a restriction on legislative voting by an elected official.

The Commission has similarly failed to demonstrate that a different standard of constitutional scrutiny equates to a different result in this case - even partial restrictions on the speech of elected officials have been struck down under the rational-basis test. *Id.* at 623. In fact, the only case discussed by the Commission that directly considers a state's ability to regulate elected officials' ability to vote on legislative measures is the one now before the Court. Accordingly, there is no conflict between the decision of the Nevada Supreme Court in this case and the previous decisions of the First, Second, Seventh, Eighth and Ninth Circuit Courts of Appeal.

III. State-Imposed Boundaries on Local Governments' Authority are Unaffected by the Decision Below

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). However, as the D.C. Circuit Court has concluded, once legislative authority for a municipality is ceded to a local body, the state must respect the protections afforded the local legislators by the First Amendment. *See Clarke*, 886 F.2d at 410 ("[u]nless and until Congress restructures District government to divest the Council of its legislative functions, it must respect the broad First Amendment rights that Council members enjoy by virtue of their status as legislators"). The decision below does not conflict with this principle.

In *Clarke*, 886 F.2d 404 (D.C. Cir.1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir.1990), the Circuit Court for the District of Columbia concluded that Congress could not compel the popularly elected members of the Council of the District of Columbia to enact a particular piece of legislation. The court explained that Congress' authority over the structure of local government in the District of Columbia "is not boundless," and that when Congress created a democratic form of government within the District, it vested legislative power of the local government in the Council. *Id.* at 410. Similarly, the Nevada Legislature has vested the legislative power of the City of Sparks in the Sparks City Council. *See* Sparks City Charter § 2.010, Chapter 470 Statutes of Nevada (1975). Accordingly, a state statute that obligates members of

the Sparks City Council to refrain from advocating, vote in a particular way, abstain from voting, or imposes an affirmative requirement that a member cast a vote at all exists in conflict with the First Amendment.[10]

The cases relied on by the Commission on Ethics do not oppose this conclusion. *See City of Cambridge v. Attorney General*, 571 N.E.2d 386, 390 (Mass.1991) (noting that the plaintiff municipalities voluntarily accepted a state law requiring the provision of health insurance to municipal employees, and therefore could not now opt out of general state insurance mandates); *State Board of Health v. City of Greenville*, 98 N.E. 1019, 1023 (Ohio 1912) ("[t]he state does not seek to control the discretion of the municipal authorities, but, on the contrary, refuses to commit to them any discretion touching the particular matters committed to the care and control of the State Board of Health. In so far as they are charged with any duty in reference to the carrying out of the orders and directions of the State Board of Health, they are ministerial officers only..."); *Consolidated Rail Corp. v. Smith*, 664 F.Supp.1228, 1238 (1987) (holding that municipal code regarding railroad safety was preempted by federal law). Although these cases represent restrictions on municipal authority, they do not raise First Amendment concerns because they do not relate to subject matter over which the local governments in

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[10] See *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796-797 (1988) (the right to free speech "necessarily comprises the decisions of both what to say and what not to say"); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (an individual has a right not to be made an "instrument [of]... an ideological point of view he finds unacceptable").

question had any power, and therefore do not affect local elected officials' ability to meaningfully represent their constituents. Similarly, state laws governing the lowest responsive bid for public projects and federal conditional spending programs do not restrict the ability of local public officials to vote in a particular way - local officials are free to vote for or against the award of a bid or the acceptance of federal funds as they see fit. *See California v. United States*, 104 F.3d 1086 (9th Cir.1997) (rejecting claim that conditional federal assistance eliminates voluntary choice).

IV. The Commission Has Identified Only One Other State Which Employs a "Catch-All" Provision Similar to Nev.Rev.Stat. § 281A.420(8)(e) (2007)

Where a governmental agency is given unfettered discretion to restrict speech, First Amendment freedoms are threatened by the possibility of arbitrary application. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Many states' requirements for recusal are exceptionally broad, including Nevada's other disqualifying relationships. *Compare* Nev.Rev.Stat. § 281A.420(2)(b) (2007) (a public official may not vote on a matter in which he has a "pecuniary interest") *with* Va. Code Ann. § 30-108 (2001) ("A legislator who has a personal interest in a transaction shall disqualify himself from participating in the

transaction").[11] In the decision below, the Nevada Supreme Court left Nev.Rev.Stat. § 281A.420(2) (2007); and Nev.Rev.Stat. § 281A.420(8)(a)-(d) (2007) undisturbed. Pet. App. 17a. The ruling invalidates only Nev.Rev.Stat. § 281A.420(8)(e) (2007) - the "catch-all" provision - as unconstitutionally overbroad. *Id.* The Commission has identified only one other state, New Jersey, which employs a "catch-all" provision similar to Nev.Rev.Stat § 281A.420(8)(e) (2007) when restricting the First Amendment rights of elected officials, and has not shown that any other state restricts local elected officials' ability to advocate for or against a particular viewpoint the way Nev.Rev.Stat. § 281A.420(2) (2007) does. Pet. 26. Accordingly, the decision below cannot reasonably be said to affect "a large number of other states' recusal provisions" as claimed by the Commission on Ethics.

V. This Case Does Not Present an "Ideal Vehicle" to Resolve the Issue Presented for Review

The underlying appeal to the Nevada Supreme Court raised three distinct constitutional challenges to the Nevada Ethics in Government Law, two of which were not reached in the decision below: (1) that Nev.Rev.Stat. § 281A.420(8) (2007) is unconstitutionally vague; and (2) that the binding

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[11] Importantly, the Virginia law "shall not prevent any legislator from participating in the discussions and debates." Va. Code Ann. § 30-108 (2001). The Nevada law at issue in this case explicitly forbids public officials who are required to recuse themselves from voting on an issue from advocating for the passage or failure of the matter, and therefore treads more heavily on the First Amendment rights of public officials and the rights of the electorate. See Nev.Rev.Stat. § 281A.420(2)(c) (2007).

advisory opinion process established in Nev.Rev.Stat. § 281A.440 (2007) is an unconstitutional prior restraint. Pet. App. 6a. Councilman Carrigan and the Commission on Ethics are presently litigating these undecided issues before the Nevada Supreme Court in a separate dispute (Docket No. 56462). Accordingly, the statute at issue in this action may be struck down as unconstitutional for reasons independent of those presented in the instant petition and this case does not present the Court with an opportunity to cleanly resolve the constitutional infirmities of Nev.Rev.Stat. § 281A.420(8) (2007).

Reviewing this issue prior to the consideration of the other constitutional challenges associated with the matter by the Nevada Supreme Court invites incomplete discussion and increases the possibility of incongruous conclusions. Simply put, applying a different standard of review to state-imposed restrictions on the political speech of elected officials does not guarantee a different result and may not prevent the ultimate demise of Nev.Rev.Stat. § 281A.420(8) (2007) on other constitutional grounds.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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