No.

In the Supreme Court of the United States

THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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 Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is:

Whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict scrutiny, as held by the Nevada Supreme Court and the Fifth Circuit, (ii) the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for government-employee speech, as held by the First, Second, and Ninth Circuits, or (iii) rational-basis review, as held by the Seventh and Eighth Circuits.

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OPINIONS BELOW

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

JURISDICTION

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

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:

> 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 * * * [h]is commitment in a private capacity to the interests of others.
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> * * * * *
>
> 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(2), (8)(a) (2007).

STATEMENT

In a divided decision, the Nevada Supreme Court invalidated a content-neutral recusal provision governing elected officials' voting by subjecting it to the most rigorous First Amendment standard of review—strict scrutiny. That holding is incorrect and squarely conflicts with the decisions of other appellate courts that apply either the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or rational-basis review. Indeed, the decision below creates the intolerable situation where state and federal courts in Nevada are governed by different standards.

The Nevada Supreme Court's decision calls into question a century of common-law recusal restrictions and casts doubt on the validity of widely adopted recusal statutes. The decision exposes other

states' recusal schemes to legal challenge and invites litigation questioning a host of other common restrictions on voting by local elected public officials, ranging from states removing subjects from local control to federal spending programs that provide incentives for municipalities to adopt certain programs. Because the decision below misapplies bedrock First Amendment principles and deepens an entrenched, three-way split among appellate courts, this Court's review 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), (2)(b) (2009). To that end, the Law establishes recusal requirements mandating that a public official "avoid conflicts between [his] private interests * * * and those of the general public whom the public officer * * * serves." Nev. Rev. Stat § 281A.020(1)(b) (2009). The law includes a provision prohibiting various "public officers," including local legislators,[1] from voting on matters on which their "commitment in a private capacity to the interests of others" would "materially affect[]" the "independence of judgment of a reasonable person in [the public officer's] situation."

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[1] See Nev. Rev. Stat. § 281A.160 (2009). Because the Nevada Constitution provides that the Legislature is the sole judge of its conduct, the Law does not govern the conduct of state legislators. See Nev. Const. art. 4, § 6.

Nev. Rev. Stat. § 281A.420(2)(c) (2007).[2] The Law defines those disqualifying "commitment[s]" as those involving: (a) "member[s] of [the public officer's] household"; (b) relatives by "blood, adoption, or marriage"; (c) employers of the public officer or a member of the officer's household; (d) persons with whom the public officer "has a substantial and continuing business relationship"; and (e) "any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." Nev. Rev. Stat. § 281A.420(8)(a)-(e) (2007).

Nevada's Ethics in Government Law is administered and enforced by the State's Commission on Ethics. See generally Nev. Rev. Stat. § 281A.200 (2009). The Legislature structured the eight-member Commission to provide non-partisan, expert enforcement of the Law. See, *e.g.*, Nev. Rev. Stat. § 281A.200(2) (2009) (requiring "at least two" members to be "former public officers" and "at least one" member to be an actively-licensed attorney); Nev. Rev. Stat. § 281A.200(2)–(3) (2009) (dividing power to appoint members equally between the Nevada Legislative Commission and the Governor);

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[2] At the time of relevant events, the provision of the Ethics in Government Law was codified at Nev. Rev. Stat. § 281.501 (2006). The provision was recodified without substantive change the following year at Nev. Rev. Stat. § 281A.420 (2007). In 2009, the provision was amended again to require recusal only in "clear cases," but the Nevada Supreme Court did not believe that change cured the perceived overbreadth of the recusal statute. See App., *infra*, 2a n.2. Nor did the change affect the standard of review applied by the court to the recusal statute.

Nev. Rev. Stat. § 281A.200(4) (2009) (prohibiting "more than four members" of the Commission from being "members of the same political party"); Nev. Rev. Stat. § 281A.200(5) (2009) (imposing specified prohibitions on the members' outside activities). The Law grants the Commission authority to "investigate and take appropriate action regarding an alleged violation" of the Ethics in Government Law, Nev. Rev. Stat. § 281A.280(1) (2009), including the imposition of civil penalties for willful violations, Nev. Rev. Stat. § 281A.480(1)–(3) (2009). The Commission is also 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." Nev. Rev. Stat. § 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 approval. App., *infra*, 3a. 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-pending effort to be reelected to the City Council. *Ibid.* Vasquez's consulting firm also provided services to Carrigan's campaign at cost. App., *infra*, 44a, 88a, 105a.

The Lazy 8 project came before the Sparks City Council for tentative approval in August 2006. 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 asked * * * for an advisory opinion" from the Commission on whether his relationship with Vasquez required abstention, App., *infra*, 100a. 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. *Id.* at 4a. After making the suggested disclosure, Carrigan voted to approve the Lazy 8 project. The measure failed by a single vote. *Id.* at 99a.

3. The Commission received several complaints that Carrigan had violated the Ethics in Government Law by voting on the Lazy 8 matter. In October 2007, after a hearing at which both Carrigan and Vasquez testified, App., *infra*, 97a, the Commission issued a written opinion "censuring Carrigan for * * * failing to abstain from voting on the Lazy 8 matter," *Id.* at 4a. The Commission noted that: Vasquez was Carrigan's campaign manager at the time of the Lazy 8 vote; Vasquez and his company had provided services to Carrigan's three campaigns at cost; Carrigan considered Vasquez's assistance "instrumental" to Carrigan's three successful campaigns; and Carrigan, by his own admission, confided in Vasquez "on matters where he would not confide in his own sibling." *Id.* at 105a.

The Commission concluded that "a reasonable person would undoubtedly have such strong loyalties to [his] close friend, confidant and campaign manager as to materially affect [that] person's independence of judgment." App., *infra*, 111a. The Commission determined 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 family relationship and a "substantial and continuing business relationship." *Id.* at 105a-106a. The Commission thus unanimously concluded that Carrigan had violated Nev. Rev. Stat. § 281A.420(2)(c) "by not abstaining from voting on the Lazy 8 matter." *Id.* at 111a. But the Commission determined that "Carrigan's violation was not willful," and so imposed no civil penalty besides censure. *Id* at 112a.[3]

4. The First Judicial District Court denied Carrigan's petition for judicial review and affirmed the Commission's decision. App., *infra*, 40a-95a. The court held that Nev. Rev. Stat. §§ 281A.420(2) and (8)(e) (2007) "are facially constitutional under the *Pickering* balancing test" and constitutional as applied to Carrigan. *Id.* at 63a. Under the *Pickering* test, "the Court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in 'promot[ing] efficiency and integrity in the discharge of official duties.'" *Id.* at 60a (quoting *Connick* v. *Myers*, 461 U.S. 138, 150-51 (1983)). The court reasoned that "the free speech and associational rights of public officers * * * are not absolute," *id.* at

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[3] The Commission concluded that two other ethics complaints against Carrigan, alleging that he had "secured or granted unwarranted privileges" in violation of Nev. Rev. Stat. § 281.481(2), and that he had voted on a matter in which he had an undisclosed pecuniary interest, in violation of Nev. Rev. Stat. § 281.501(4), were not well founded. App., *infra*, 106a-109a.

58a, and that the state's "vital" "interest in securing the efficient, effective and ethical performance of governmental functions 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.[4] The court also rejected Carrigan's argument that the Ethics in Government Law was unconstitutionally overbroad and vague. *Id.* at 70a, 81a.

5. A divided Nevada Supreme Court reversed, holding Nev. Rev. Stat. § 281A.420(8)(e) (2007) facially unconstitutional. App., *infra*, 1a-17a. The majority observed 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 the interest balancing required under *Pickering* was inappropriate because an elected public officer's "relationship with the state differs from that of most public employees." *Id.* at 12a. An elected officer's "'employer' is the public itself," the majority reasoned, "at least in the practical sense, with the power to hire and fire," and an elected officer is someone "about whom the public is obliged to inform itself." *Ibid.* (quoting *Jenevein* v. *Willing*, 493 F.3d 551, 557 (5th Cir. 2007)).

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[4] The district court also rejected Carrigan's arguments that the Commission's decision violated Nevada's Administrative Procedure Act. App., *infra*, 54a-56a. Those conclusions are not at issue here.

Having rejected the *Pickering* 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." App., *infra*, 11a; see also *id.* at 13a (quoting *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010), for the proposition that "[l]aws that burden political speech are subject to strict scrutiny").

The majority acknowledged that the recusal requirement "furthers a compelling state interest" by "promoting the integrity and impartiality of public officers." App., *infra*, 16a. Nonetheless, the majority declared that subsection 8(e), which requires recusal when a person has a "commitment or relationship that is substantially similar" to one of the relationships explicitly enumerated in Nev. Rev. Stat. § 281A.420(8)(a)-(d), "is not narrowly tailored" because it "does not inform or guide public officers as to what relationships require recusal." *Id.* at 17a. The majority thus concluded that the recusal requirement "is substantially overbroad, sweeps within its control a vast amount of protected speech, and violates the First Amendment." *Ibid.*

6. Justice Pickering dissented. She acknowledged "the communicative element in a public official's vote." App., *infra*, 23a (citing *Spallone* v. *United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting)). Justice Pickering observed, however, that the recusal requirement's "target is conduct—acts of governance—not personal, expressive speech." *Id.* at 26a. Noting decisions of the First and Eighth Circuits, Justice Pickering concluded that the proper standard of review for a "content-neutral" (App., *infra*, 23a) "law limiting an elected official's ability to

vote on matters as to which he has an actual or apparent conflict of interest" is the *Pickering* balancing test, rational-basis review, or "at most" intermediate scrutiny. *Id.* at 24a-27a (discussing *Mullin* v. *Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002), and *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619 (8th Cir. 1997)). She rejected the majority's conclusion that *Pickering* was inapplicable to city council members who stand for election, noting that the Seventh Circuit has applied *Pickering* to elected officials. *Id.* at 25a (citing *Siefert* v. *Alexander*, 608 F.3d 974 (7th Cir. 2009), reh'g en banc denied, 2010 U.S. App. LEXIS 18163 (7th Cir. Aug. 31, 2010)).

Justice Pickering also concluded that the "substantially similar" language of the recusal statute was not overbroad. App., *infra*, 33a-39a. She noted that the words of the provision are "not free-standing," but are to be read in light of the other relationships explicitly enumerated in the provision. *Id.* at 37a. Furthermore, the provision was consistent with "the long common law history disqualifying local officials from voting on matters as to which they have conflicts of interest." *Id.* at 38a. Finally, Justice Pickering warned that "applying First Amendment strict scrutiny * * * to invalidate state conflicts-of-interest laws that govern local government officials who vote is a mistake that * * * opens the door to much litigation and little good." *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

I. THE NEVADA SUPREME COURT'S DECISION DEEPENS A THREE-WAY SPLIT OVER WHETHER AND HOW THE FIRST AMENDMENT APPLIES TO REGULATION OF VOTING BY ELECTED PUBLIC OFFICIALS

This Court has long recognized that *speech* by elected officials qualifies for First Amendment protection, *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), but it has never decided how, if at all, the First Amendment relates to *voting*. See *Spallone* v. *United States*, 493 U.S. 265, 274 (1990) (declining to reach the issue); see also *Doe* v. *Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment) ("Plaintiffs point to no precedent from the Court holding that legislating is protected by the First Amendment."). Although the four Justices who reached the question in *Spallone* concluded that "the act of publicly voting on legislation * * * is quintessentially one of governance" rather than speech, 493 U.S. at 302 n.12 (Brennan, J., dissenting), lower courts have splintered over whether public officials' votes amount to protected speech and, if so, which standard of review applies to regulations on official voting.

Along with the Fifth Circuit, the Nevada Supreme Court now holds that a "strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues." App., *infra*, 11a. That rigorous standard of scrutiny renders recusal statutes "presumptively invalid," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), and statutes would only "rarely" survive that test. *Burson* v. *Freeman*, 504 U.S. 191, 200 (1992).

In contrast, the First, Second, and Ninth Circuits evaluate restrictions on voting under the intermediate standard of review applicable to speech by government employees. Finally, the Seventh and Eighth Circuits—echoing Justices Brennan and Scalia—reject equating speech to voting and hold that restrictions affecting voting are subject to rational-basis review.

A. The Fifth Circuit And The Nevada Supreme Court Apply Strict Scrutiny To Restrictions On Voting By Elected Public Officials

In the opinion below, the Nevada Supreme Court explicitly joined the Fifth Circuit in applying strict-scrutiny review to laws regulating voting by elected officials. App., *infra*, 11a-13a. According to the Fifth Circuit, there is "no question that political expression such as [council members'] * * * votes on City matters is protected speech under the First Amendment." *Colson* v. *Grohman*, 174 F.3d 498, 506 (1999). Restrictions affecting such speech, in turn, are subject to "strict scrutiny" in the Fifth Circuit. See *Jenevein* v. *Willing*, 493 F.3d 551, 558 (2007).

In *Jenevein*, the Fifth Circuit recognized that a deferential standard of review applies to regulations limiting the speech of government employees. 493 F.3d at 557. But the court reasoned that an *elected* government employee has a "relationship with his employer differ[ent] from that of an ordinary state employee" because the employer of elected officials "is the public itself, at least in the practical sense, with the power to hire and fire." *Ibid.* In light of this difference—and because elected officials' expressions of views are "political speech at the core of the First

Amendment"—the Fifth Circuit applied strict scrutiny when assessing an ethics commission's order censuring an elected judge for speaking publicly about a pending case. *Id.* at 555, 557-558. The Fifth Circuit later confirmed that its analysis in *Jenevein* extends to all elected officials, not judges alone, and that strict scrutiny would apply to a statute that limits city council members' speech. *Rangra* v. *Brown*, 566 F.3d 515, 525-526, reh'g en banc granted, 576 F.3d 531, vacated as moot, 584 F.3d 206 (2009).[5]

B. Three Circuits Analyze Voting Restrictions Under The Government-Employee Speech Doctrine

The First, Second, and Ninth Circuits have concluded that voting by elected public officials is protected by the First Amendment, but those courts depart from the Fifth Circuit and the Nevada Supreme Court by applying a more flexible, less stringent standard of judicial review to measures that restrict elected officials' speech. Rather than strict scrutiny, these courts have adopted the

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[5] Two other circuits have rejected application of the government-employee speech doctrine to speech by elected public employees, but those circuits have not specified which standard should apply instead. See *Phelan* v. *Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246-1247 (10th Cir. 2000) (rejecting application of *Pickering* to an elected member of school board of trustees but declining to identify alternative standard of review); *Clarke* v. *United States*, 886 F.2d 404, 413, 416 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699, 700 (D.C. Cir. 1990) (refusing to apply *Pickering* to city council members but declining to select standard of review). *Clarke* also held that legislative votes qualify as protected speech, 886 F.2d at 411-413, while the Tenth Circuit has not addressed the question.

balancing test developed in government-employee speech cases, which weighs state interests against "the interests of [a government employee], as a citizen, in commenting upon matters of public concern." *Pickering* v. *Board of Education*, 391 U.S. 568 (1968); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006); *Connick*, 461 U.S. at 150-151.

In *Miller* v. *Town of Hull*, 878 F.2d 523, 532 (1989), the First Circuit held 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," and "[t]his is especially true when the agency members are elected officials." In a later case, however, the First Circuit noted that First Amendment protection for public officials' votes "is far from absolute," and ruled that voting restrictions should be analyzed under the *Pickering* standard because "public officials voting on matters of public concern * * * retain First Amendment protection '*so long as* [their] speech does not unduly impede the government's interest'" in efficient public services. *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 37 (2002) (emphasis added) (quoting *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993)).

The Second Circuit has also concluded that "[v]oting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment." *Camacho* v. *Brandon*, 317 F.3d 153, 161, 163 (2003). But it has nonetheless held that restrictions affecting a city

council member's voting freedom are properly analyzed "under *Pickering*." *Id.* at 163.[6]

Likewise, the Ninth Circuit has held that "the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540, 545 (2010) (quoting *Stella* v. *Kelley,* 63 F.3d 71, 75 (1st Cir. 1995)). At the same time, however, that court has invoked the *Pickering* balancing test when analyzing rules that constrain speech by city council members. *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 646 (2000). In *DeGrassi*, for instance, the Ninth Circuit weighed a council member's interest in fully participating in council meetings against the government's interest in preventing "potential conflict between [one's] role as a Council member and [one's] personal interest." See *ibid.* Citing *Pickering*, the court concluded that such conflict-of-interest rules were "reasonable" and permissible under the First Amendment. *Ibid.*

By departing from the Ninth Circuit's balancing test and treating restrictions on legislative voting as presumptively invalid under the First Amendment, the Nevada Supreme Court has done more than perpetuate doctrinal confusion; it has rendered the constitutionality of state and municipal voting rules dependent on where suit is filed. If an elected official

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[6] The plaintiff in *Camacho* was a non-elected legislative aide, but he asserted a third-party claim on behalf of Fuentes, an elected councilman. 317 F.3d at 159-160. Accordingly, the court's analysis turned on "whether Fuentes' activities"—which included voting against the mayor's budget—"enjoyed the protection of the First Amendment." *Id.* at 160.

of one of Nevada's seventeen counties, seventeen school districts, or eighteen cities challenges a voting rule in state court, strict scrutiny will apply. If the official files the *same* challenge in a Nevada federal court, the Ninth Circuit's balancing test will stand as binding precedent. When the meaning of the First Amendment turns on the happenstance of the court in which a suit is filed, an untenable conflict arises that requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve a conflict between the Eleventh Circuit and the Florida Supreme Court over which First Amendment standard of review applied to a disputed injunction).

C. Two Circuits Reject The Equation Of Speech And Voting And Thus Apply Rational-Basis Review

Unlike four circuits and the Nevada Supreme Court, the Seventh and Eighth Circuits have refused to equate elected public officials' voting with speech.[7] Writing for the Seventh Circuit, Judge Posner rejected the assumption that "freedom of speech is enlarged or contracted by rules" affecting state legislators' votes because in that context, "'the right to vote, per se, is not a constitutionally protected right,' and the right to speak is." *Risser* v. *Thompson*, 930 F.2d 549, 553 (7th Cir. 1991) (quoting *Rivera-*

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[7] The Sixth Circuit has recognized that jurists are divided on this point. See *Zilich* v. *Longo*, 34 F.3d 359, 363 & n.3 (1994) (stating that legislative voting "may" be speech but noting the conflict between the First Circuit and Justice Brennan's *Spallone* dissent).

Rodriguez v. *Popular Democratic Party*, 457 U.S. 1, 9 (1982)). The court acknowledged that "the power of one's speech can indeed be augmented or diminished by voting power," but it dismissed that connection as too tenuous to transform voting into speech. *Ibid.* Judge Posner then concluded that equating speech and public officials' voting is an "analogy gone wild." *Ibid.* Consequently, the court rejected the plaintiff-legislators' First Amendment claim without further analysis and effectively endorsed rational-basis review for restrictions affecting voting. See *id.* at 553-554 (noting that statute was a "rational measure" to accomplish a legislative goal).[8]

Similarly, the Eighth Circuit has recognized that measures regulating elected public officials' voting have only a "conceivabl[e]" relationship to elected officials' free-speech rights. *Peeper*, 122 F.3d at 623 n.4. In *Peeper*, the governing board of a county ambulance district—a political subdivision of a state—prohibited one of its publicly elected members from voting on employee-related matters because her

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[8] Although the Seventh Circuit did not explicitly articulate which standard of review it was applying, its rationale dictates that rational-basis review applies by default. See, *e.g.*, *Lyng* v. *Auto. Workers*, 485 U.S. 360, 370 (1988) ("Because the statute challenged here has no substantial impact on any fundamental interest * * * we confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'") (quoting *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533 (1973)). Even if, contrary to *Risser*, the Seventh Circuit were to equate legislative voting and speech, it would apply *Pickering* to restrictions on such speech, in conflict with the decision below. See *Siefert*, 608 F.3d at 985 (applying *Pickering* to restrictions on speech by elected officials).

husband worked for the district. *Id.* at 620-621. Peeper was "directed to recuse herself" from "hearing, participating in, or voting upon" employee issues. *Id.* at 621. The Eighth Circuit concluded that this voting restriction did not implicate Peeper's free-speech rights, *id.* at 623 n.4, and therefore eschewed the "rigid strict-scrutiny standard" in favor of "rational-basis review." *Id.* at 623.

* * * * *

The courts are deeply divided about whether and how the First Amendment applies to laws and rules that regulate voting by elected officials. The standards range from strict scrutiny, which would render even content-neutral conflict-of-interest provisions presumptively unconstitutional, to rational basis review, under which courts accord states and localities broad latitude to adopt rules requiring office-holders to refrain from voting on matters in which they have an interest. In between are the circuits that apply the *Pickering* balancing standard. This three-way conflict, and the deeper doctrinal confusion that it represents, shows no sign of abating absent review by this Court.

II. THE NEVADA SUPREME COURT ERRED IN APPLYING STRICT SCRUTINY TO RESTRICTIONS ON VOTING BY ELECTED OFFICIALS

The Nevada Supreme Court concluded that because voting is a form of speech, all restrictions affecting voting by elected public officials are subject to strict scrutiny. App., *infra* 11a-13a. Even if such voting is considered speech, however, strict scrutiny is clearly the wrong standard to apply. This Court

has reserved strict scrutiny for restrictions on private speech that "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 643 (1994). The Court has applied a less exacting standard to laws that do not target the "speaker's point of view," *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), to regulations that seek to advance government interests unrelated to the suppression of ideas, *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000), or that target only the "secondary effects" of speech. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Indeed, in the context of public employee speech, the Court has refused to apply strict scrutiny even to content-based official action. See *Garcetti*, 547 U.S. at 418. This Court's decisions clearly support the application of a more deferential standard to assess restrictions affecting the voting of elected officials.

A. This Court's Decisions In A Number Of Contexts Indicate That Restrictions On Voting By Elected Public Officials Should Not Be Subject To Strict Scrutiny

Legislative voting could be characterized as pure speech, analogized to an ordinary citizen's vote, or treated as expressive or government conduct. Regardless of how it is characterized, strict scrutiny is not the proper standard to assess a regulation of voting like the one at issue here.

1. If voting by elected public officials is considered pure speech, one appropriate framework would be the balancing standard established for government employee speech in *Pickering* and

Connick and recently refined in *Garcetti*. Under that test, speech made by a government employee "on a matter of public concern" and not "pursuant to official duties" may be protected by the First Amendment. *Garcetti*, 547 U.S. at 418, 421. The government may even restrict speech based on its content, when the "interest in the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's interest in speaking. *Connick*, 461 U.S. at 150.

The Nevada Supreme Court's conclusion that the *Pickering* standard applies to appointed officials but not elected ones is inconsistent with this Court's decision in *United States* v. *Nat'l Treasury Emp. Union ("NTEU")*, 513 U.S. 454 (1995). There, this Court applied *Pickering* to § 501(b) of the federal Ethics Reform Act of 1989, which prohibited an "officer or employee" of the federal government from accepting compensation for an "appearance, speech or article." *Id.* at 459-460. Though the plaintiffs were low-level executive branch employees, the ban applied equally to the legislative and judicial branches. *Id.* at 458. Noting that the "the Government ha[d] based its defense of the ban on abuses of honoraria by Members of Congress," the majority struck down § 501(b) only as applied to the plaintiffs, leaving it intact as to elected officials. *Id.* at 472-473, 479-480. In reaching that conclusion, this Court compared the burdens imposed and the governmental interests supporting the ban as applied to low-level Executive Branch employees with the burdens and interests implicated for lawmakers. *Id.* at 469–470, 472–73. None of the opinions in that case so much as hints that a different First

Amendment standard might apply to elected officials and employees. Although *NTEU* did not squarely address the issue, it strongly suggests that *Pickering* would apply to elected officials just as it applies to employees.

2. If legislative voting is instead considered expressive conduct, it should be subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting) ("While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance."). Under that standard, a regulation on conduct that burdens speech only incidentally is permissible as long as it is content-neutral and "narrowly focuses on [a] substantial interest." *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984).

Nevada's recusal provision is unquestionably content-neutral because its application to conduct does not "depend[] on [its] likely communicative impact." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989). The conditions triggering the recusal requirement—"commitment in a private capacity to the interests of others," Nev. Rev. Stat. § 281A.420(2)(c)—do not depend on likely communicative impact. The regulation is solely designed to prevent conflicts of interest, which all agree is a compelling governmental interest. Accordingly, as a content-neutral regulation of expressive conduct, Nev. Rev. Stat. § 281A.420(2)(c) would easily survive *O'Brien*'s requirement that it "narrowly focuses on [a] substantial interest." *Clark*, 468 U.S. at 296.

3. If voting by elected public officials warrants the same level of protection as the voting of ordinary citizens, this Court's observation in *Burdick* v. *Takushi*, 504 U.S. 428, 432–433 (1992), is the place to begin: it is, the Court concluded, an "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Instead, restrictions on a citizen's right to vote are subject to a "more flexible standard." *Id.* at 434 (citing *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-789 (1983)). That standard "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' * * * against the precise interests put forward by the State." *Ibid.* (quoting *Anderson*, 460 U.S. at 789).

4. Finally, voting by elected public officials may not be entitled to any special constitutional protection at all. As the Seventh Circuit has recognized with respect to state legislators, "the right to vote, per se, is not a constitutionally protected right." *Risser*, 930 F.2d at 553 (quoting *Rivera-Rodriguez*, 457 U.S. at 9); see also *Peeper*, 122 F.3d at 623 (expressing doubt that voting is expressive speech). If voting by elected public officials is not constitutionally protected, it follows that restrictions affecting voting should be subject only to rational-basis review. *See Peeper*, 122 F.3d at 623 (applying rational basis review to voting restriction).

However voting by elected public officials is characterized, the Nevada Supreme Court's decision conflicts with this Court's First Amendment jurisprudence. There is no basis in this Court's case law for applying strict scrutiny to such voting; all lines of relevant cases suggest another standard

applies. Cf. *Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring in judgment).

B. *Citizens United* Does Not Support Applying Strict Scrutiny

The Nevada Supreme Court cited this Court's decision in *Citizens United* for the proposition that "[l]aws that burden political speech are subject to strict scrutiny." App., *infra*, 13a (quoting *Citizens United*, 130 S. Ct. at 898). But *Citizens United* does not remotely support the reasoning below. In that decision, this Court applied strict scrutiny to the Bipartisan Campaign Reform Act of 2002, a content-based restriction on corporate funding of traditionally protected political speech. 130 S. Ct. at 900. The voting regulated by the Nevada recusal statute, however, has never enjoyed the constitutional solicitude this Court has shown electioneering communications of the sort at issue in *Citizens United*. The bare, unadorned statement from *Citizens United* relied upon by the court below thus provides no support for applying strict scrutiny to voting by elected public officials.

III. THIS CASE PRESENTS IMPORTANT ISSUES ABOUT THE STANDARD GOVERNING FIRST AMENDMENT REVIEW OF STATE RECUSAL REQUIREMENTS

State recusal requirements prevent conflicts of interest from distorting public decisionmaking. For over a century, courts acting under common law principles have required public officials to recuse themselves from matters when their service presents an actual or potential conflict. In addition, states

have broadly enacted recusal statutes establishing standards for disqualification. These efforts embody a recognition 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). By regulating conflicts of interest, these provisions seek to prevent both corruption and the appearance of corruption. See David Orentlicher, *Conflicts of Interest and The Constitution*, 59 Wash & Lee L. Rev. 713, 719-720 (2002). This Court has "long recognized" that those are important governmental interests. See *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976)).

By applying strict scrutiny to Nevada's recusal statute, and by invalidating as facially overbroad a provision requiring recusal of persons who have a "commitment or relationship that is substantially similar" to explicitly proscribed family, household, employment, and business relationships, the decision below calls into question the validity of numerous state recusal standards that are widely recognized as critical for effective enforcement. Absent this Court's review, the decision below threatens to undermine enforcement of states' ethics laws and immerse states in litigation over the constitutionality of their recusal requirements. This petition thus presents an issue of exceptional national importance. Cf. Texas Pet. for Reh'g En Banc at 14, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. May 8, 2009) (successfully seeking en banc review of decision holding that Texas Open Meetings

Act was subject to strict scrutiny as an infringement of elected legislators' speech, noting "nationwide importance" of issue); Brief Amicus Curiae of 19 States Supporting Reh'g, *Rangra* v. *Brown,* No. 06-51587 (5th Cir. Sept. 4, 2009).

A. The Decision Below Calls Into Question Statutory Recusal Provisions

All fifty states regulate public officials' conflicts of interest.[9] As of 2000, approximately thirty-seven states require public officials not to vote on matters presenting a conflict of interest. See Office of Legislative Research, Conn. Gen. Assembly, Voting Restrictions in State Ethics Codes (Research Rep. No. 2000-R-0155, Feb. 2000), http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0155.htm. In contrast to the recusal provision at issue here, which narrowly applies to conflicts that are "substantially similar" to four specific types of commitments or relationships, many states' statutes employ very general language to prevent circumvention and abuse. See Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation,* 107 U. Pa. L. Rev. 985, 985 (1959) (noting that conflict-of-interest laws for public officials are often drafted in general and broad terms). The decision below calls the validity of general recusal standards into question.

In some states, the requirements for recusal are stated at a most general level. See, *e.g.,* Va. Code Ann. § 30-108 (2001) ("A legislator who has a

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[9] For a comprehensive list of these provisions, see National Conference of State Legislatures, Voting Recusal Provisions (Oct. 2009), http://www.ncsl.org/?TabId=15357.

personal interest in a transaction shall disqualify himself from participating in the transaction."). Others broadly define the types of relationships that might subject an official to recusal. See, *e.g.*, N.C. Gen. Stat. § 138A-37(a) (2006) ("[N]o legislator shall participate in legislative action if the legislator knows the legislator or *a person with which the legislator is associated* may incur a reasonably foreseeable financial benefit from the action") (emphasis added). New Jersey requires public officials to recuse based on a number of specific relationships that are "incompatible with the discharge" of official duties. See N.J. Admin. Code. § 19:61-7.4(d)-(e) (2010). However, the state's regulation also provides more generally that an "incompatible financial or personal interest may exist in other situations which are not clearly within the provisions above * * *, depending on the totality of the circumstances." *Id.* § 19:61-7.4(f).

The decision below thus calls into question a large number of other states' recusal provisions and could subject them to litigation. If the Nevada provision, which specifies that relationships "substantially similar" to four specified disqualifying relationships does not speak with the requisite "high level of [statutory] clarity," App., *infra*, 14a, other states' provisions are obviously vulnerable to legal challenge. See, *e.g.*, Ariz. Rev. Stat. Ann. § 38-503(B) (1968) (requiring recusal when the official or a relative has "a substantial interest in any decision of a public agency"). At a minimum, the decision below exposes other states to litigation to defend the constitutionality of these provisions, which until now were understood to pose no constitutional difficulties.

State recusal provisions are too important for this risk to escape this Court's notice. Because application of strict scrutiny threatens to unsettle longstanding state efforts to avoid conflicts of interest, this Court's review is warranted.

B. The Decision Below Casts Doubt On The Constitutionality Of A Century Of Common Law Governing The Recusal Obligations Of Public Officials

For more than a century, courts applying common law principles have required public officials to recuse themselves from matters in which they have a conflict of interest. See *President & Trs. of San Diego* v. *San Diego & Los Angeles R.R. Co.*, 44 Cal. 106, 113 (1872). Although most states have since adopted recusal statutes, the common law remains significant for two reasons. First, it is used to interpret state recusal statutes, as these statutes largely track common law standards. *Randolph* v. *City of Brigantine Planning Bd.*, 963 A.2d 1224, 1230 (N.J. Super. Ct. App. Div. 2009). Second, because these statutes do not always codify the entirety of a state's common law governing conflicts of interests, the common law remains an independent source of recusal obligations for public officials. See *e.g.*, *Carney* v. *State Bd. of Fisheries*, 785 P.2d 544, 547-48 (Alaska 1990); *Price* v. *Edmonds*, 337 S.W.2d 658, 660 (Ark. 1960).

The decision below calls into question this entire body of law. Compared to the detailed and specific provisions of the Nevada Ethics in Government Law, the common law standards are far more general and thus open to legal challenge. Under the common law, there is "[n]o definite test" governing recusal. *Van*

Itallie v. *Borough of Franklin Lakes*, 146 A.2d 111, 116 (N.J. 1958). Instead, recusal is required whenever the "peculiar facts and circumstances of the particular case" might reasonably suggest a conflict of interest to an objective person. *Anderson* v. *City of Parsons*, 496 P.2d 1333, 1337 (Kan. 1972); see also *Sec. Nat'l Bank of Mason City* v. *Bagley*, 210 N.W. 947, 951 (Iowa 1926); *Siesta Hills Neighborhood Ass'n* v. *City of Albuquerque*, 954 P.2d 102, 105 (N.M. Ct. App. 1998). One court has recognized four broad categories requiring recusal, including three specific relationships like those identified by the Nevada Ethics in Government Law, plus a broader category for an "indirect personal interest." *Hanig* v. *City of Winner*, 692 N.W.2d 202, 208-209 (S.D. 2005) (citing *Wyzykowski* v. *Rizas*, 626 A.2d 406, 414 (N.J. 1993)). Under that standard, courts have routinely disqualified officials in situations similar to those of this case. See, *e.g.*, *Kremer* v. *City of Plainfield*, 244 A.2d 335 (N.J. Super. Ct. Law Div. 1968) (requiring a council member to recuse himself where his nephew was a partner in the law firm representing an applicant); *Kloter* v. *Zoning Comm'n of Vernon Fire Dist.*, 227 A.2d 563, 566-567 (Conn. C.P. 1967) (holding a public official was required to recuse himself where the applicant was his long-time accountant and tax adviser).

The common law's case-by-case approach has never before been thought to raise constitutional questions. But the decision below now places this important and longstanding body of law at risk by subjecting it to the presumptive invalidity of strict scrutiny and providing a basis for constitutional challenges. See generally 28 U.S.C. §§ 1983, 1988.

At the very least, one can expect the decision below to spawn countless challenges by local officials against this important body of law.

C. Applying Strict Scrutiny To Voting By Elected Public Officials Would Call Into Question A Host Of Routine Restrictions Placed On Local Governments

It is well established that states have substantial discretion in determining how much local control to afford political subdivisions, such as municipalities. See *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). Accordingly, a state legislature's judgments about whether to permit local control on an issue or to resolve it through the state legislature has never before been thought to present a constitutional question. If voting is considered pure political speech and voting restrictions are subject to strict scrutiny, however, the ability of states to remove matters from local control would encounter a significant new obstacle. Local officials could claim that such restrictions impair their First Amendment rights and are therefore presumptively invalid under strict scrutiny. A few examples suffice to illustrate the scope of litigation that could ensue under this approach.

Public officials' voting discretion in approving local health and safety laws is routinely limited by measures designed to make those laws consistent with state and federal regulations. Thus, state legislators may impose new requirements requiring local governments to take specified action where they previously had a choice—by, for example, prohibiting development unless certain environmental conditions are met. See, *e.g.*, *City of Cambridge* v. *Attorney*

General, 571 N.E.2d 386 (Mass. 1991) (holding that state may require local governments to approve health insurance plans giving their employees the same benefits as other state employees); *State Bd. of Health* v. *City of Greenville*, 98 N.E. 1019 (Ohio 1912) (holding that state may require city officials to approve the installation of sewage purification works by coercing the officials' votes through threats of penalties); *Consol. Rail Corp.* v. *Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987) (holding that municipal government could not pass an ordinance requiring trains to travel at a speed lower than that imposed under federal regulations).

Such restrictions have never been invalidated before on the basis of the First Amendment, as they neither target nor primarily affect public officials' right to express themselves. But under the decision below, officials could claim that the voting restriction impairs their previous ability to vote on the subject, in contravention of their First Amendment rights, and the restriction would be subject to strict scrutiny. Thus, such provisions are now constitutionally vulnerable and an attractive target for litigation.

Similarly, in order to prevent corruption and promote efficiency, state governments have traditionally limited public officials' discretion in approving contracts between local governments and vendors by imposing procedural and substantive regulations. The most common of these restrictions is to require public officials to approve the vendor who submitted the lowest responsible bid in a competitive process. See *Los Angeles Dredging Co.* v. *City of Long Beach*, 291 P. 839 (Cal. 1930); *426 Bloomfield Ave. Corp.* v. *City of Newark*, 621 A.2d 59, 62 (N.J. Super.

Ct. App. Div. 1993). The purpose of these restrictions, obviously, is not to limit an elected public official's right to free speech. But under the decision below, such restrictions—particularly when newly adopted—may be subject to challenge for impairing a local official's ability to vote on the subject.

Even routine federal conditional spending programs and mandate programs could be subject to challenge under the decision below. Under such programs, the federal government may require local governments to take certain actions as a condition of receiving federal grant money. While the courts have recognized that Congress has broad authority to impose such conditions, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (holding conditional spending constitutional despite its impact on public officials' choice); *California* v. *United States*, 104 F.3d 1086 (9th Cir. 1997) (rejecting claim that conditional federal assistance eliminates voluntary choice), conditional spending programs could be subject to challenge because they necessarily restrict the ability of local public officials to vote in a particular way. Under the reasoning of the decision below, officials could claim that a conditional spending program has placed an unconstitutional condition on their right to vote. Similar challenges could be made to state mandates requiring local officials to implement programs that advance state public policy. See *Opinion of the Justices*, 238 N.E.2d 855 (Mass. 1968). Thus, the decision below will subject well established and routine inter-governmental programs to novel constitutional challenges that will necessarily disrupt and burden their operation.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE ISSUE

This case presents an ideal opportunity to resolve this important and recurring issue. This case squarely presents a single question of federal law: what protection the First Amendment affords to an elected official's vote. The case's procedural history reveals no disputes over facts, the meaning or application of state law, or jurisdiction that would interfere with this Court's resolution of the First Amendment issue. In his petition seeking state court review of the Commission's decision and before the Nevada Supreme Court, Carrigan challenged neither the censure's factual basis nor the Commission's interpretation or application of state law. The Nevada Supreme Court's holding that Nev. Rev. Stat. § 281A.420(8)(e) violated the First Amendment rested solely upon interpretation and application of federal law. Its opinion reveals no state grounds that would supply an alternative basis for its judgment.

The issue is now ripe for review. In both the Nevada District Court and Supreme Court, the First Amendment question was fully briefed and conclusively decided. The Nevada Supreme Court's majority and dissenting opinions explored the issue thoroughly. That discussion marshaled differing perspectives from among the federal courts of appeals, which have wrestled with the issue for well over a decade. Nothing more would be gained from allowing the issue to percolate further.[10]

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[10] This case warrants review regardless of what action this Court takes on the pending petitions in *Siefert* v. *Alexander*, 10-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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405 (filed Sept. 22, 2010), and *Bauer* v. *Shepard*, 10-425 (filed Sept. 24, 2010). Both cases involve restrictions on the actual speech of judges, including restrictions on individual and party fundraising solicitation and endorsements of political candidates. See Pet. for Cert. 2, *Siefert*; Pet. for Cert. 3-9, *Bauer*. Neither case presents an opportunity to address the proper standard of review to apply to restrictions on voting by elected public officials, nor would they address whether voting is a form of speech protected by the First Amendment.

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