No. 10-568

IN THE

Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy and government-reform organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws fostering an open, accountable, and responsive government and protecting consumers, workers, and the public.

In particular, Public Citizen advocates the enactment and enforcement of laws aimed at protecting the political process from the actual and apparent corruption that may result when private financial interests affect the performance of government officials. Among the types of ethical standards Public Citizen supports for government officials are recusal requirements applicable in instances where a public official has a personal interest that could reasonably be expected to affect his official actions. At the same time, Public Citizen strongly supports the First Amendment rights of those who hold or seek election to public office; thus, for example, Public Citizen filed a brief as amicus curiae in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), supporting the rights of judicial candidates to discuss issues of public importance. Public Citizen believes it is of great importance that the

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[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

Court's resolution of this case affirm the legitimacy of recusal standards that seek to ensure that public officials engage in ethical *conduct* while in office without endorsing undue limits on *speech* by elected officials.

SUMMARY OF ARGUMENT

Laws that require legislators to abstain from voting when they have a conflict of interest are not restrictions on speech. A legislator's authority to vote is not a personal "right," but a power, deriving from his office, to take an official action that helps to determine the government's course of conduct. That taking such action may reveal the legislator's views about the matter being voted on does not render the vote protected speech. This Court has consistently rejected the notion that the First Amendment provides a right to utilize the mechanics of governmental decision-making to convey a personal message. Moreover, legislative voting does not merit First Amendment protection on the theory that its legal force makes it a uniquely definitive form of expression, because the Amendment confers no right to have the government amplify the power of one's speech by attaching legal consequences to it.

The purpose of the recusal requirement in Nevada's Ethics in Government Law is to ensure that governmental decisions are motivated by consideration of the public's interests rather than officials' private interests. Because Nevada's purpose in deterring biased legislative votes is unrelated to suppressing any expressive message communicated by those votes, the law is subject to the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), for assessing limits on expressive conduct. And as a content-neutral regulation that advances an important state interest

while reaching no further than necessary, Nevada's rule easily satisfies *O'Brien*'s standards.

Some courts, echoed by the dissent below, have held that restrictions on speech by legislators are subject to the balancing test set forth in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), for limits on the speech of government employees. Such a view, although it leads to the same result as application of the *O'Brien* standard in this particular case, fundamentally misapprehends the rationale for the government's heightened power to restrict the speech of its employees, which derives from the need for supervisory control over ministerial agents hired to efficiently implement government programs. Moreover, this approach contravenes numerous holdings by this Court and its repeated admonishments that the functioning of the democratic process depends on elected officials being given the fullest scope to publicly express their views. Consistency with this principle demands that restrictions on actual *speech*—as opposed to the conduct at issue here—by members of legislative bodies be held to the highest level of First Amendment scrutiny.

ARGUMENT

I. Nevada's Recusal Requirement for Public Officials Neither Restricts Speech Nor Unduly Limits Expressive Conduct.

A. Ethical Standards That Require Members of Legislative Bodies to Abstain From Voting Do Not Regulate Speech but Rather the Authority to Perform an Official Act.

1. Rules that require legislators to recuse themselves from voting on matters in which they have a conflict of interest are not restrictions on speech. They are restrictions on a legislator's power to perform an official act with legal force. By casting a vote, a legislator commits her apportioned share of the legislature's power to the passage or defeat of a proposal. A recusal rule in itself does not prevent legislators from saying anything about their views, and neither directs legislators to vote nor prohibits them from voting in a particular way. Recusal requirements do not concern the content of expression, but merely determine whether individual legislators are qualified to vote, based on financial or personal interests that indicate a potential for bias. *See* Nev. Rev. Stat. § 281A.420(2) (2007).[2] That legislative voting is fundamentally an act of governance is illustrated by its rec-

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[2] In addition to its recusal requirement, Nevada's statute directs that public officers shall not "advocate the passage or failure of, but may otherwise participate in the consideration of" matters in which they have a conflict of interest. Nev. Rev. Stat. § 281A.420(2). This clause is not at issue here: respondent Carrigan was censured solely for casting a vote. Pet. App. 4a-5a, 41a, 47a-48a.

ognition as an "official act" under federal statutory law[3] and a "legislative act" under federal constitutional law.[4]

Although this Court has never decided the issue, members of the Court have recognized that legislative voting is official conduct, not speech. In *Spallone v. United States*, 493 U.S. 265 (1990), for example, Justice Brennan, joined by three other members of the Court, emphatically rejected the contention that legislative voting is a protected form of speech. In *Spallone*, a federal district court had imposed sanctions on Yonkers city council members in response to the council's failure to enact an ordinance that was required by an earlier consent decree entered into by the city. The council members argued that by compelling them to vote in favor of specific legislation, the sanctions infringed their rights to freedom of speech under the First Amendment. *Id*. at 274.

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[3] The federal statute that prohibits bribery and gratuities to influence any "official act" defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Legislative voting falls within this definition. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 908 (2010) (explaining that campaign contributions made under a *quid pro quo* arrangement to secure political benefits "would be covered by bribery laws, *see, e.g.*, 18 U.S.C. § 201").

[4] For Speech or Debate Clause purposes, "[a] legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). Naturally, this business includes "the act of voting." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (addressing range of Speech or Debate Clause).

While the majority of the Court found it unnecessary to reach that question, the dissent rejected the council members' argument:

> Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive. While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance.

Id. at 302 n.12 (Brennan, J., dissenting). Nothing in the majority's opinion in *Spallone* was to the contrary.

Similarly, in *Doe v. Reed*, 130 S. Ct. 2811 (2010), Justice Scalia—again without contradiction from the majority—expressed the view that legislative voting is not speech. The question in *Reed* was whether public disclosure of the identities of voters who signed petitions to place a referendum on a ballot would violate a claimed First Amendment right to engage in anonymous political speech. Justice Scalia, concurring in the Court's judgment that there was no First Amendment violation, analogized a voter's signature on a petition to a legislator's vote, which he saw as an official action, not as protected speech. Justice Scalia regarded petition-signing as outside the scope of the First Amendment precisely because he viewed it as legislative act: "A voter who signs a referendum petition is therefore exercising legislative power because

his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue." *Id*. at 2833 (Scalia, J., concurring in the judgment).

The majority in *Reed* disagreed with the analogy between legislating and petitioning, *id*. at 2818, but did not contest the premise that legislative action is not protected speech. The Court instead viewed citizen petitioning, unlike legislative voting, as a core form of political expression. *See id.; see also id.* at 2830 (Stevens, J., concurring in part and concurring in the judgment); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"). The Court reasoned that by *adding* potential legally operative effect to this form of First Amendment protected speech, the state had not deprived it of protection:

> It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment.

Reed, 130 S. Ct. at 2818; *see also id.* ("Petition signing *remains* expressive even when it has legal effect in the electoral process.") (emphasis added).

It is one thing, however, to say that *adding* potential legal effect to a form of expression already recognized to have First Amendment protection does not *deprive* it of protection, and another thing altogether

to suggest that an action, such as legislative voting, that is defined by, and indeed exists only because of, its legally operative effect as an exercise of official authority is First Amendment expression in the first place. Nothing in the *Reed* majority opinion suggests that legislative voting would receive the same protection as a citizen petition. Indeed, *Reed*'s assertion that petition signing "remains expressive *even when* it has legal effect in the electoral process," *id.* (emphasis added), is a recognition that legally operative official acts performed as part of the governmental decision-making process are presumptively *not* speech under the First Amendment.[5]

2. Claiming a First Amendment right to vote on every matter before the Sparks city council, Carrigan emphasizes that voting not only generates legal consequences but also signals a legislator's views about the matter being voted upon. *See* Resp. Cert. Opp. 8. Carrigan's argument boils down to a claim that the First Amendment entitles him to take legally operative official acts because performing those acts provides him with an opportunity to communicate his views. This Court, however, has rejected the notion

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[5] That voting is often accomplished by uttering words does not of course mean that restrictions on voting are restrictions on speech. Prohibitions on conduct are not speech restrictions merely because they entail a limit on the use of speech to effectuate that conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

that the First Amendment provides a right to utilize the mechanics of governance to convey a message.

For instance, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court considered Minnesota's ban on "fusion" candidacies, which prohibited candidates from appearing on the ballot as the candidate of more than one party. The respondent argued that the fusion ban violated its First Amendment associational rights by burdening its "right ... to communicate its choice of nominees on the ballot on terms equal to those offered other parties, and the right of the party's supporters and other voters to receive that information." *Id.* at 362. The Court was "unpersuaded ... by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363. Similarly, even if the act of publicly voting on legislation contains a communicative element, "the act is quintessentially one of governance," *Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting), and accordingly, is not speech protected by the First Amendment.

Earlier, in *Burdick v. Takushi*, 504 U.S. 428 (1992), on which *Timmons* relied, the Court upheld a state ban on write-in voting against a voter's First Amendment challenge. The voter argued that the prohibition "deprive[d] him of the opportunity to cast a meaningful ballot, condition[ed] his electoral participation upon the waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminate[d] against him based on the content of the message he [sought] to

convey through his vote." *Id.* at 437-38. The Court disagreed, finding the voter's argument to be based on a "flawed premise[]." *Id.* at 438. As the Court explained, "the function of the election process is to winnow out and finally reject all but the chosen candidates .... Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* (internal quotation marks omitted).

Similarly, the function of the legislative voting process is to accept or reject proposed courses of state action. That legislative voting also has the effect of registering a legislator's "will, preference, or choice," Resp. Cert. Opp. 8 (quoting *Clarke v. United States*, 886 F.2d 404, 411 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990)), does not change its fundamental character as official conduct. The First Amendment therefore confers no right to employ this particular method of registering one's preference. Ascribing a generalized expressive function to legislative voting—thus creating a First Amendment right of officials to vote on every matter before them—would both contravene the reasoning of *Timmons* and *Burdick* and interfere with the states' ability to reduce bias and corruption through ethical standards designed to ensure that officials cast their votes based solely on public considerations.

3. Some courts and commentators that regard legislative voting as protected speech suggest that voting possesses value as speech precisely because its binding legal force makes it a uniquely powerful and definitive form of expression, one that signals devotion to a viewpoint with a strength that speech alone cannot sufficiently convey. *See, e.g.*, *Miller v. Town of Hull*,

878 F.2d 523, 532 (1st Cir. 1989); *Clarke*, 886 F.2d at 411; Steven N. Sherr, *Note, Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233, 242 (1991). Such reasoning conflicts starkly with the Court's precedents, which hold that the First Amendment provides no right to use the mechanisms of governmental decision-making as "forums for political expression," *Timmons*, 520 U.S. at 363, or to serve "a more generalized expressive function," *Burdick*, 504 U.S. at 438, and thus foreclose any argument that a particular citizen is entitled to have the power of his speech amplified over that of others by the government's attachment of legal consequences to it that make the speech appear more definitive or sincere.

To regard legislative voting as speech would afford members of legislatures greater First Amendment rights than ordinary citizens. *See Clarke*, 886 F.2d at 410 ("Congress … must respect the broad First Amendment rights that the Council members enjoy *by virtue of their status as legislators*.") (emphasis added). The argument implies that legislators, by virtue of their offices, possess not only the right to express their views that all citizens enjoy, but also a constitutionally based entitlement to have the power of that expression enhanced by the addition of a nonspeech element: the legal force that makes voting a "more definite expression of opinion" than any other form of communication. *Miller*, 878 F.2d at 532. But a legislator's power to cast votes derives from his or her status as an elected official. The Court should reject the argument that the First Amendment transforms that power into a personal constitutional right.

B. Nevada's Recusal Requirement Is Unrelated to the Suppression of Expression and Satisfies the *O'Brien* Test for Limits on Expressive Conduct.

1. To the extent that rules disqualifying legislators from voting on particular matters because of personal or financial interests are subject to any First Amendment review, they should be analyzed as restrictions on conduct that incidentally affect the expression ancillary to that conduct. The Court has acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). However, "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id*. at 406. Conduct with an expressive component does not enjoy the same level of protection as speech, *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (citing *O'Brien*, 391 U.S. at 376-77), because permissible regulations on expressive conduct target the effects of the conduct, not the effects of the message expressed through that conduct. That is, conduct with an expressive element "can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

Since *United States v. O'Brien*, the Court has applied a relaxed form of First Amendment scrutiny to

prohibitions on conduct that incidentally affect expression. The *O'Brien* standard requires a lesser showing from the state than that required for laws that prohibit speech, but it ensures that the restriction genuinely regulates conduct rather than speech. Thus, whether the *O'Brien* standard applies hinges at the outset on whether a prohibition is designed to suppress expression. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *accord Johnson*, 491 U.S. at 403. If not, *O'Brien* affirms the constitutionality of a conduct regulation if it satisfies a four-part standard:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

Because Nevada has a legitimate purpose for deterring self-interested votes from being cast, and because that purpose is unrelated to suppressing the votes' expressive component, the recusal provision is a regulation of conduct subject to the *O'Brien* standard. Specifically, Nevada's recusal rule seeks to ensure that governmental decisions result from consideration of the public's interests rather than officials' private interests. Carrigan was censured for the conduct of casting a legally operative vote, not for the vote's expressive message. The recusal requirement affects only the authority to vote, not what the official may say in speeches or campaign ads, for example. That is,

Carrigan was censured not for expressing an opinion but for acting to authorize a proposal. *See O'Brien*, 391 U.S. at 382 ("For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

Just as a statute's overly broad scope can reveal that it is aimed at expression as well as behavior, a selective scope can reveal that its true target is the expressive content of that behavior, *e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969) (noting that "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance," but merely armbands in protest of the Vietnam War), or that it impermissibly exempts favored content from its purview, *e.g.*, *Carey v. Brown*, 447 U.S. 455 (1980) (striking down ban on residential picketing that exempted labor picketing). Nevada's recusal provision has no such flaw. The provision does not penalize legislators for voting one way but exempt them if they vote another way. Instead it requires them to abstain, no matter how they would vote, if a private interest in the matter is reasonably likely to affect the independence of their judgment. *See* Nev. Rev. Stat. § 281A.420(2). The imperative to abstain is thus triggered by the official's personal financial interests and relationships, not by the content of the vote he would cast. The recusal requirement is therefore a regulation of conduct unrelated to the suppression of expression and falls squarely within *O'Brien*.[6]

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[6] *See Erie*, 529 U.S. at 293 ("Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral."); *Clark v. Cmty. for Creative*

(*Footnote continued*)

2. Nevada's recusal requirement easily satisfies *O'Brien*'s four-part test for limits on expressive conduct.

First, the law is within the state's constitutional authority. Nevada surely has the power to establish ethical recusal standards for its elected officials, including municipal officials. *Cf. Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("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.... The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.").

Second, the Nevada recusal requirement furthers an important government interest in having members of legislative bodies cast votes based solely on the members' views of the public good, not on private pecuniary interests or personal commitments. "[P]reventing corruption" among elected officials is an interest "of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978).

Even apart from the threat of outright corruption, permitting legislators to cast votes when they have a significant personal stake in the outcome creates a risk of unconscious bias because the legislator's incentives in relation to the matter are divided. Such di-

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Non-Violence, 468 U.S. 288, 295 (1984) ("[T]he prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented.").

vided incentives cause a "perversion of the normal legislative process." *Spallone*, 493 U.S. at 279, 280. Nevada's recusal rule seeks to prevent that situation.

Third, Nevada's interests, as discussed above, are unrelated to the suppression of expressive content, and the recusal provision is entirely content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.") (internal quotation marks omitted).

Carrigan argues that Nevada's statute is content-based "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*." Resp. Cert. Opp. 10. This claim is meritless: an official with a conflict of interest who votes "aye" on a matter and an official with a conflict of interest who votes "nay" on the same matter have equally violated the statute. Nor is it the case, as Carrigan argues, that "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." *Id*. The concern of the statute is not the "message" sent by improperly motivated votes, but the damaging impact on the public welfare of governmental action that is or appears to be based on private interests.[7]

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[7] To be sure, the prohibition itself may send a message that allowing improperly motivated votes is undesirable, just as laws against other illegal conduct send a message that society does not

(*Footnote continued*)

The recusal requirement, moreover, is manifestly not aimed at "ideologies or perspectives." *Id*. It does not, for example, prevent a legislator from voting on a project such as the "Lazy 8" based upon his or her views—one way or the other, and however formed—on the economic benefits or morality of such projects, or the desirability of conferring a benefit on the particular private interests who stand to gain or lose from approval or disapproval of the project. The statute does not address any "perspectives" on what is best for the community, but only votes that may be motivated by personal commitments, not community interests.

Moreover, Nevada's statute prohibits a legislator from voting on a matter in which he has a private interest whether or not the legislator votes in furtherance of that interest. It is not difficult to imagine situations where a legislator's vote *against* his private interests would be improperly influenced by the existence of those interests. For example, if it were known that an official had a personal stake in the passage of a matter such as the Lazy 8 proposal, that official might be motivated to vote against his own personal interest to avoid the appearance of corruption, make a showing of independence, and deprive his future opponents of a potent campaign issue. Faced with such considerations, the legislator might vote against the proposal, despite believing that it would benefit the public. The independence of his judgment would be

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tolerate such conduct. But Carrigan has not claimed, nor could he, that the State of Nevada lacks a right to convey such a message.

materially affected by his private interests, although he opted to vote against rather than with them.

Finally, *O'Brien*'s fourth requirement is met because the recusal requirement's incidental constraint on First Amendment expression is no greater than necessary to further Nevada's interests. This step in the *O'Brien* analysis does not require the state to "narrowly tailor" the means for achieving its end. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Here, Nevada's recusal requirement addresses the precise concern that motivates the law and goes no further. The purpose of the ethics statute is to prevent government policy from being decided on the basis of officials' personal interests. Requiring legislators to abstain from voting where they have a conflict of interest—as opposed to merely disclosing that interest—is necessary to the statute's goals. While disclosure has value in informing voters' choices, it does not prevent the legal consequences of a biased legislative act. Recusal rules are necessary to fully vindicate the state's interest, and, again, the recusal requirement does not prevent the expression of legislators' views through other means. The provision therefore causes no greater incidental limit on expression than necessary to achieve its conduct-oriented goals.

II. ACTUAL SPEECH BY LEGISLATORS DESERVES THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION.

Recognizing that ethical restrictions on the eligibility of representatives to vote are not limits on speech facilitates protection of the legislative process without improperly endorsing restrictions on legislators when they do engage in protected speech. By contrast, some courts have affirmed voting limits on a rationale that would do fundamental damage to the First Amendment by holding that restrictions on speech by legislators are subject to the balancing test set forth in *Pickering*, 391 U.S. at 568, for restrictions on the speech of government employees.[8] The implication is that the state may restrict the speech of legislative officials under a more lenient standard than when it restricts the speech of ordinary citizens. These decisions fundamentally misapprehend the rationale for the government's heightened power to restrict the speech of its employees. Furthermore, they ignore the import of holdings by this Court making clear that the robust functioning of the democratic system requires that elected officials be given the fullest scope to express their views publicly.

A. *Pickering* held that although the government lacks *carte blanche* to condition public employment on surrender of individual constitutional rights, 391 U.S. at 568, government employees relinquish some of the speech rights they enjoy as citizens. They may be penalized for speaking as employees on matters unre-

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[8] *E.g.*, *Camacho v. Brandon*, 317 F.3d 153 (2d Cir. 2003); *Mullin v. Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002); *DeGrassi v. City of Glendora*, 207 F.3d 636 (9th Cir. 2000).

lated to political, social, or other public affairs because, as the Court later put it, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149 (1983). But when an employee speaks as a citizen on matters of public concern, the First Amendment requires a weighing of the interests of employee and employer. "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

As the Court has explained, the government's heightened power to restrict the speech of its employees comes from the nature of the employment relationship and the government's "interests *as an employer* in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* (emphasis added). "[P]ublic employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The balancing required by *Pickering* "is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment." *Id.*

To ensure "the effective functioning of the public employer," *id.* at 391, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). These enhanced powers "are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it." *Id.* at 674.

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Id. at 674-75.

The state's heightened power to restrict the speech of its employees thus reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. The key consideration in assessing such restrictions is the nexus between the employee's allegedly disruptive speech and the "practical realities involved in the administration of a government office." *Id.* at 154. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). The Court's decisions have consistently grounded the *Pickering* doctrine in

the need to maintain discipline over subordinates and prevent disruption of the workplace.[9]

B. The considerations that animate the *Pickering* line of cases do not apply to elected legislative officials. Legislators are not subordinates hired to carry out tasks in furtherance of policy aims set by others. They do not work under the direction of supervisors who must be assured of control over their actions to guarantee the efficient execution of duties. And their interactions with their colleagues are unlike the working relationships within an office that exists to facilitate the daily provision of government services. Elected legislative officials set government policy, rather than implementing it. Their supervisors are the voters who elect them. And in their interactions with their colleagues and the legislative institution, they are not only permitted but often expected to represent the ideological or partisan views for which they were chosen by the electorate.[10]

Based on their different functions, the Court has distinguished between the First Amendment rights of ministerial government employees and elected officials. In *Wood v. Georgia*, 370 U.S. 375 (1962), the

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[9] *See, e.g.*, *Garcetti*, 547 U.S. at 419; *Waters*, 511 U.S. at 675; *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 154.

[10] Some local boards and commissions that are made up of elected members and that involve voting may nonetheless be subordinate to the control and policy decisions of higher government bodies. *See, e.g.*, *Velez v. Levy*, 401 F.3d 75, 81 (2d Cir. 2005) (elected community school district board charged to "establish educational policies and objectives, not inconsistent with the provisions of this article and the policies established by the city board"). Members of such subordinate bodies might conceivably be subject to *Pickering*.

Court held that an elected sheriff's First Amendment rights were violated when he was held in contempt for expressing his personal views. Distinguishing the sheriff from a government employee whose political activity could be restricted by laws such as the federal Hatch Act, the Court emphasized the sheriff's elected status:

> Petitioner was not a civil servant, but an elected official, and hence this is not a case like *United Public Workers v. Mitchell*, 330 U.S. 75 [(1947)], in which this Court held that congress has the power to circumscribe the political activities of federal employees in the career public service.

Id. at 395 n.21. As an "elected official," the petitioner "had the right to enter the field of political controversy." *Id*. at 394.

Because of the fundamental difference in position between subordinate employees and the elected officials who establish policy, "there is a meaningful distinction between the First Amendment's protection of public employees' speech and … that of elected government officials." *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir. 2009), *dismissed as moot*, 584 F.3d 206 (5th Cir. 2009). "None of [this] Court's public employee speech decisions qualifies or limits the First Amendment's protection of elected government officials' speech." *Id*. at 523.

C. Stretching *Pickering*'s limits on public employee speech to afford less protection to speech by elected officials than to ordinary citizens would undermine the vitality of the democratic system by preventing legislators from communicating their views to the public. *Bond v. Floyd*, 385 U.S. 116 (1966), is the Court's most thorough examination of this point.

Bond arose when the Georgia House of Representatives resolved not to seat Julian Bond because of comments he and an organization with which he was affiliated had made about the Vietnam War. *Id.* at 117-26. Defending Bond's exclusion, Georgia did not argue that Bond's remarks violated any laws, or that an ordinary citizen could be penalized for speaking them. *Id.* at 132. Rather, the state claimed that it "may nonetheless apply a stricter standard to its legislators," *id.* at 133, because they are required to adhere to a unique oath of loyalty and "because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government." *Id.* at 136. The Court found "no support" for these arguments, stating that "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators," *id.*, and holding that Bond's disqualification violated the First Amendment.

Bond established that legislators enjoy the same First Amendment rights as ordinary citizens, and that the responsibilities of their positions do not enable the state to penalize them for expressing their views. It further affirmed that restricting the speech of elected representatives would be especially pernicious because "[t]he 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." *Id.* at 135-36.[11]

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[11] *Bond* also illustrates another important point: Even though legislative voting is not itself speech and a limitation on voting is thus not a direct restriction of speech, preventing a leg-

(*Footnote continued*)

Before *Bond*, the Court had already lauded the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In limiting the state's ability to penalize even false statements on public matters, the Court had explained that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Court had also rejected the contention that the "right to freedom of expression" of a local elected official could "be more severely curtailed than that of an average citizen." *Wood*, 370 U.S. at 393. "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 395.

The Court's decisions have consistently reflected the importance of protecting the unfettered flow of speech by elected officials. Limiting their speech not only threatens the harms associated with any speech restriction, but also impairs the right of members of the public to choose representatives that share their views. The *Pickering* test has no place here because speech by elected members of legislative bodies deserves the full degree of First Amendment protection.

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islator from voting in *retaliation* for speaking would violate the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted,

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