NEVADA COMMISSION ON ETHICS

Annual Report 2010-2011

as required by NAC 281A.180(2)

Caren Jenkins, Esq.
Executive Director

State of Nevada
COMMISSION ON ETHICS
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July 13, 2011

Commissioners:

At the first Commission meeting of each fiscal year, the Executive Director must report on the fiscal, legislative and regulatory matters and any other business of the Commission. NAC 281A.180(2). I offer this document to satisfy the Nevada Administrative Code requirements regarding fiscal year 2010 – 2011.

The Supreme Court of the United States provided the most exciting events of this fiscal year. The Commission's Petition for *Writ of Certiorari* was granted, and the Court considered the Commission's briefs, entertained oral arguments and eventually rendered a decision in the Commission's favor. (A copy of that opinion appears as Exhibit 2 to this report.) Under the *pro bono* leadership of John Elwood, Esq. of Vinson & Elkins, LLP and the University of Virginia School of Law's Supreme Court Litigation Clinic, Commission Counsel Yvonne M. Nevarez-Goodson, Esq. shepherded the Commission through the appeals process, and ultimately landed a precedent-setting opinion affecting the First Amendment to the United States Constitution as it applies to legislative voting. Commissioners Keele, Lamboley and I traveled to Washington D.C. to witness our counsel's skillful oral advocacy. We applaud all who contributed to the effort for their superior work product. Because the Supreme Court remanded the case to the Nevada Supreme Court, next fiscal year will bring a new chapter in the Carrigan matter. The Commission should be very proud to have played a part in the development and application of our Constitution to ethics laws generally, and to Nevada ethics laws in particular.

The Carrigan case brought the Commission significant visibility in Nevada and throughout the nation. The Wall Street Journal, Washington Post, USAToday, Governing Magazine, hundreds of radio and television stations, and National Public Radio covered the case. Nevada's media reported the matter in detail, bringing the public's awareness of the agency to an all-time high.

On a less exciting note, 2010-2011 has been a challenging fiscal year for Nevada and for the Commission. Early in the year, the Commission asked the Governor's office to support and the Legislature to approve two additional staff

positions to help the agency handle its enormously increased workload. We asked for additional funding to permit the agency to catch up on nearly 12 months of not-yet-written opinions and nearly 15 years of not-yet-written digests of opinions. We requested that the Secretary of State's office take the responsibility from the Commission to accept filings and post Financial Disclosure Statements of appointed public officers. Finally, we asked the Legislature to address various deficiencies in NRS Chapter 281A by amending definitions and clarifying various provisions of statute. None of these requests were granted for the coming biennium. What's more, our legislatively-approved biennial budget for 2011-2013 is pared down to the agency's operational budget from 2005-2006, when the caseload was less than half of its current level.

Despite the State's economic challenges, the Commission and its staff continue doing its best with the available time and funding. However, as the demand for our services grows, our ability to maintain even the current, barely-adequate service levels will become impossible with our 5-member staff, and we will simply fall farther behind.

Again, despite the cuts, our current staff is a cohesive and dedicated group; each contributes his or her part, never hesitating to lend a hand to accomplish what needs to be done. We are all committed to the mission of the Commission - assisting public officers and public employees to enhance and maintain the public's trust in government - and it shows.

Among the objectives identified in the last annual report was to gain ground with the Commission's opinion and digest backlog. This report outlines just how much staff has been able to accomplish and sets forth plans to continue that trend. This accomplishment is even more remarkable considering the enormous extra work undertaken with the United States Supreme Court appeal.

I trust that you will continue to advocate zealously for proper authority and funding for the Commission with Executive and Legislative decision-makers, and will maintain the steady stream of leadership, advice, feedback and support you have offered to me and to the Commission staff. For the past year's delivery of such attention and care, I am grateful.

Respectfully submitted,

Caren Jenkins

Caren Jenkins, Esq.
Executive Director

CJ/abm

NEVADA COMMISSION ON ETHICS

Annual Report 2010-2011

as required by NAC 281A.180(2)

Business and Administrative Matters

Commission:

In fiscal year 2010-11, Nevada Commission on Ethics Chair John T. "J.T." Moran III, Esq. and Vice Chairman Erik Beyer served until April 2011 when Chairman Moran resigned from the Commission. At the April meeting, the Commission elected Erik Beyer as Chair and Paul H. Lamboley, Esq. as Vice Chair. On April 26, 2011, Governor Brian Sandoval appointed Keith A. Weaver, Esq. to fill Commissioner Moran's unexpired term. Exhibit 1 to this document lists the composition of the Commission as of June 30, 2011.

Staff:

Executive Director Caren Jenkins, Esq. and Commission Counsel Yvonne M. Nevarez-Goodson, Esq. continued their service to the agency this fiscal year. Michel "Mike" Vavra remains our ever-attentive Senior Investigator and Webmaster. Janet E. Jacobsen joined the staff in November 2010, and is moving into the newly unclassified Senior Legal Researcher position. Finally, Valerie M. Carter will join us as Executive Assistant in July 2011.

Website:

Webmaster Vavra overhauled the Commission's website and launched a new site on January 14, 2011. With statewide photos, new links, easier navigation and a whole new look, the public's response to the new site has been overwhelmingly positive. This powerful Internet resource allows the Commission's information and opinions to be publicly available 24 hours a day, 7 days a week and 365 days a year. Even Nevada residents without computers can access the website free at a local public library. The Commission's website is maintained *pro bono* by Mike Vavra. His contribution to the Commission and the people of Nevada is invaluable.

The website (http://ethics.nv.gov) offers information about the Commission and staff, allows the public to read and search Nevada's Ethics in Government Laws, the Commission's regulations, Commission opinions and panel determinations. It also allows public access to financial disclosure statements of appointed public officers, judges and judicial candidates and the Commission's forms and instructions for requests for opinion.

Prior Commission annual reports have relied on the State Department of Information Technology, aka "DoIT", for statistics on the number of "hits" and users of the website. Now, the Commission's new website uses sophisticated analytic software that collects data, which Mr. Vavra evaluates and compiles into comprehensive statistical reports. These reports provide a very important tool for constant enhancement of our web-based services.

According to our visitor statistics, the Commission's website receives approximately 1000 visits per month, or a few over 30 hits each day. The website had visitors from 48 US states and 17 countries. Over 78% of visitors were computing in Nevada, followed by hits from California and Washington DC. Of the Nevada visits, 38% were from Reno, 37% from Las Vegas, and the remaining 25% were from other parts of the state. Most visitors used high-speed internet connections in 79.5% cases and only 0.3% used a dial-up connection, which is important when we consider making upgrades to our website.

Offices:
The Commission's staff and office is located at:

704 West Nye Lane, Suite 204
Carson City, Nevada 89703
775-687-5469 - telephone
775-687-1279 - fax

Our Senior Investigator works from a small non-public office in the Grant Sawyer State Office Building in Las Vegas.

Commission Activities

***Financial Disclosure Statements*:**

2006-07	2007-08	2008-09	2009-10	2010-11
345	595	583	740	878

In 2010–2011, pursuant to NRS 281A.600 and NRS 281A.610, the Commission accepted the filing of **878** Financial Disclosure Statements from appointed public officers and judges. Judges filed 223 statements and appointed public officers filed 655 statements. The Commission posted all Financial Disclosure Statements to its website for public view.

As is required by NRS 281A.600(4), the Commission reported to the Secretary of State's office **52** public officers who failed to file a FDS at all within 30 days of the deadline (an increase of 12) and **19** public officers who filed late (a decrease of 5 from 2009-2010).

Acknowledgments of Statutory Ethical Standards:

Pursuant to NRS 281A.500, public officers filed **813** Acknowledgment of Statutory Ethical Standards forms with the Commission this year. The Commission received nearly **452 more** such acknowledgments this year than last year. This requirement became law in 2009, and the increased filing numbers reflect the increased public awareness of the new statutory provisions.

Disclosures of Agency Representation:

Pursuant to NRS 281A.410, the Commission received **13** filings of Disclosures of Agency Representation (a decrease of **2**) in 2010-2011.

Requests for Opinion:

	2006-07	**2007-08**	**2008-09**	**2009-10**	**2010-11**
First-Party Advisory	22	13	14	27	27
Third-Party Complaint	60	9	31	27	46
Rejected (no jurisd. or insuff. evid.)	(presumed included above)	33	50	55	41
TOTAL	**82**	**55**	**95**	**109**	**114**

The number of requests for opinion filed with the Commission increased again in 2010-2011. The Commission received **114** requests this year, which is **5 more** than last year.

The Commission received **27** requests for first-party advisory opinions in 2010-2011 and in 2009- 2010 – nearly doubling the volume of such requests from the prior biennium. Intriguingly, the Commission received **46** third-party requests for opinion (aka "complaints") which represents a 70% increase over the prior year.

Commission staff rejected **41** requests in 2010-2011 either due to the Commission having no jurisdiction over the subject matter of the request (either the allegation did not involve NRS 281A, did not involve a public officer or public employee, was filed by an incarcerated person (NRS 281A.440(3)), or the requester failed to provide the minimal level of evidence required with any request). This represents a reduction from last year's volume, again likely attributable to an increased awareness of the Commission's jurisdiction and limits.

Ethics in Government Law Training:

2006-07	2007-08	2008-09	2009-10	2010-11
18	16	10	28	25

Staff provided **25** training sessions for the public, and for city, county, state and other governmental entities in 2010-2011 throughout the state. The staff's ability to travel was limited by the availability of in-state travel funds and the time required to attend to matters related to the legislative session.

Litigation:

The Commission was a party to several cases this fiscal year:

- *Nevada Commission on Ethics v. Carrigan*
  Supreme Court of the United States, No. 10-568,
  reversed and remanded, June 13, 2011.

In 2006-2007, Sparks City Councilman Mike Carrigan filed a Petition for Judicial Review of Requests for Opinion Nos. 06-61, 06-62, 06-66 and 06-68 in the First Judicial District Court of Nevada in Carson City. The Court found in the Commission's favor in May 2008. Carrigan appealed the decision to the Nevada Supreme Court which ruled in Carrigan's favor nearly two years later, stating that the First Amendment to the United States Constitution prevented the Commission from requiring Councilman Carrigan to abstain from voting due to his conflict of interest.

The Supreme Court of the United States granted the Commission's Petition for Writ of Certiorari in late 2010. The University of Virginia School of Law Supreme Court Litigation Clinic provided able volunteer research and support to *pro bono* counsel John Elwood, Esq. of Vinson & Elkins. Mr. Elwood, joined by Commission Counsel Yvonne M. Nevarez Goodson, Esq., represented the Commission to the High Court. The NCOE's merits briefs were supported by several "friend of the court" or *amicus* briefs. Several *amici* joined Councilman Carrigan's position, and a lively oral argument took place in Washington D.C. on April 27, 2011.

On June 13, 2011, the nation's highest Court held in favor of the Commission, that the First Amendment to the United States Constitution does not shield a legislator from the imposition of statutory provisions governing conflicts of interest that require one to abstain from voting. The Court held that a legislator's vote and related debate in the legislative forum is not "speech" entitled to the Constitutional "free speech" protections that accrue to private individuals. In other words, a legislator has no First Amendment right to vote if a disqualifying conflict of interest exists.

The Court remanded the case to the Nevada Supreme Court for entry of a new order not inconsistent with the Supreme Court of the United States' holding.

- *Carrigan v. Comm'n on Ethics,*
  Petition for Judicial Review, Second Judicial District Court
  Judge Patrick Flanagan, Dept. 7, CV09-02453

Approximately two years after the initial Commission determination in his case, Councilman Carrigan brought a First Party Request for Advisory Opinion to the Commission. In his RFO, he claimed that changed circumstances should allow him to vote on matters regarding which the Commission had previously ruled he must abstain from voting.

The Commission upheld its earlier decision, finding a continuing effect of the original conflict of interest, and Councilman Carrigan filed a Petition for Judicial Review of that opinion in the Second Judicial District Court of Nevada in Reno. The Court issued its opinion in July 2010, setting aside on constitutional grounds the Commission's determination regarding Councilman Carrigan's duty to abstain.

The Nevada Supreme Court dismissed the appeal of the Second Judicial District's opinion on mootness grounds. However, based on another matter decided in this year (known as the "Personhood" case), the issue has not been precluded from being litigated again.

- *Wiideman v. Comm'n on Ethics,*
  Petition for *Writ of Mandamus*, Seventh Judicial District Court

Wiideman, an inmate in a prison in Ely, Nevada, filed a petition to the court challenging the prohibition on the Commission rendering an opinion in response to a request filed by a person incarcerated in a correctional facility in Nevada. See NRS 281A.440(2). The Attorney General's office has been engaged to appear on the Commission's behalf, as the same Plaintiff has filed numerous cases against various agencies of State government, and its staff is better prepared to respond in this matter. An Answer to the Petition has been filed.

Fiscal Matters

Commission Budget:

The Commission's actual budget for fiscal year 2010-2011 was $634,983. Due to a continuing decline in the State's economy, all State agencies, including the Commission, were required to reduce budgets significantly. Commission employees took nearly a 5% reduction in salary and undertook 12 day of mandatory unpaid furlough. Every penny that could be shaved from unexpended funds was redirected. These actions resulted in an annual agency budget

reduction of $105,000 from the agency's operational budget in the previous biennium.

Because the Commission derives its funding proportionally from the State General Fund and from local governments based on its previous biennium's caseload, governments participated in a 35%:65% state-to-local government cost-sharing ratio. The 2011 Nevada Legislature modified the 2011-2013 proportions to reflect the 2009-2011 actual caseload, adjusting the proportion to a 26% state and 74% city/county cost-share.

Penalties Imposed:

In 2010-2011, Commission members imposed and collected $750.00 in civil penalties. Pursuant to State law, the Commission deposited the civil penalties into the State General Fund. An additional sum of sanctions went uncollected and was referred to the State Controller for action.

Legislative Matters

In the early part of the fiscal year, the Commission submitted a comprehensive package of suggestions to the Governor's Office for consideration as a Bill Draft Request for the 2011 Legislative Session. The suggestions, with one exception, were rejected by Governor Jim Gibbons and his staff, but captured the attention of Senator David Parks of Las Vegas, Chairman of the Senate Committee on Government Affairs. The Committee introduced the Commission's BDR and assisted in moving the bill through various amendments and through the Senate. While in the Assembly Committee on Legislative Operations, the Senate Bill died.

Through the budget committees of the Legislature, the Commission was able to move its Legal Researcher position from the State Classified Service into an unclassified position, equalizing the Commission's staff. In addition, the agency's budget moved from the Office of the Governor into its own department category. This change emphasizes the Commission's independence from both the legislative and executive branches of government.

Regulatory Matters

The only regulatory changes that took place this year were those related to the statutory changes made during the 2009 Legislative session.

Goals

In last year's annual report, several goals were identified:

- **Create an interactive web-based training tool.** While several of the Ethics Trainings have been recorded and raw material continues to be compiled, without funding to support the development of a web-based training, this goal

may never be met. The Executive Director has been working with the Personnel Division to create some web-based materials, but is far from completing any useable product.

- **Update all forms, materials and website.** This goal has been met. All of the Commission's forms and other public materials as well as the new NCOE website are newly revised. This goal requires an ongoing effort to keep the material fresh and easy to follow.

- **Barring extraordinary circumstances, publishing written opinions within 40 days of a final determination by the Commission or a Panel.** In consideration of the Supreme Court matter, this objective has been derailed based upon priority. Strides have been made to offer Requesters an oral outcome at the time of the hearing and offering to provide an unofficial letter outlining the Commission's determination prior to issuance of the formal opinion. Much has been accomplished to reduce the waiting period, but relief from the burdens of other high priority assignments must be achieved to accomplish this goal.

- **Producing and distributing a comprehensive and up-to-date Digest of Commission Opinions.** In tackling this objective, staff determined that digests had not been undertaken since 1998. Over two dozen digests have been completed with the help of interns from the Governor's office, and the agency will continue to work toward closing the gap on the digests to be written.

- **Streamlining the dissemination of information and Financial Disclosure Statement filing process between the Nevada Secretary of State and the Commission.** The 2011 Legislature passed a measure that, beginning in 2013, the Secretary of State will take over the Commission's duties related to the Financial Disclosure Statements, reminders, public posting and development of materials. This shift will remove some of the staffing burden the Commission now faces, though the Commission continues to be responsible for FDS for appointed public officers through December 2012.

Conclusion

Rather than set out grandiose goals and objectives for the next fiscal year, I hope that we can "stay the course" and continue to provide high quality, responsive services to the public officers and public employees of our state. I also hope we can assist to maintain and enhance the public's trust in our government, for without that trust, our system of democracy unravels. By chipping away at the opinion backlog and balancing that task against the more immediate demands of the requests for opinion received, the Commission can be proud of its performance. The Carrigan matter will demand additional attention

this fiscal year. And training and outreach requests will be met with an inquiry for financial participation in travel costs.

In light of the foregoing, no new objectives reasonably can be identified under the current economic climate, and staff cannot be reasonably expected to produce any more than it already does, especially with the imposition of another 2.5% reduction in salary and six mandatory unpaid furlough days in 2011-12. Still, I am encouraged by the staff's morale and willingness to persevere under such difficult circumstances. I continue to be amazed by the dedication, investment and sincerity of the members appointed to this important Commission. Thank you all for your fine work.

Exhibit 1

NEVADA COMMISSION ON ETHICS COMMISSIONERS

as of June 30, 2011

Appointed by the Governor

Chair Erik Beyer, P.E. (R)
(07/01/08 – 06/30/12)

Gregory J. Gale, C.P.A. (D)
(07/01/09 – 10/31/11)

Magdalena Groover (R)
(07/01/2011 – 06/30/15)

Keith A. Weaver, Esq. (D)
(04/26/2011 – 09/30/11)

Appointed by the Legislative Commission

Vice Chair Paul H. Lamboley, Esq. (D)
(05/07/08 – 09/30/11)

George M. Keele, Esq. (R)
(10/01/07 – 09/30/11)

James M. "Jim" Shaw (D)
(07/01/08 – 06/30/12)

John W. Marvel (R)
(10/01/09 – 09/30/13)

Staff

Caren Jenkins, Esq.
Executive Director

Yvonne M. Nevarez-Goodson, Esq.
Commission Counsel

Michel "Mike" Vavra, M.P.A.
Senior Investigator

Valerie M. Carter
Executive Assistant

Janet E. Jacobsen
Senior Legal Researcher

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Exhibit 2

Supreme Court of the United States

Opinion

<u>Nevada Commission on Ethics v. Carrigan</u>

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEVADA COMMISSION ON ETHICS *v.* CARRIGAN

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 10–568. Argued April 27, 2011—Decided June 13, 2011

Nevada's Ethics in Government Law requires public officials to recuse themselves from voting on, or advocating the passage or failure of, "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by," *inter alia*, "[h]is commitment in a private capacity to the interests of others," Nev. Rev. Stat. §281A.420(2) (2007), which includes a "commitment to a [specified] person," *e.g.,* a member of the officer's household or the officer's relative, §281A.420(8)(a)–(d), and "[a]ny other commitment or relationship that is substantially similar" to one enumerated in paragraphs (a)–(d), §281A.420(8)(e).

Petitioner (Commission) administers and enforces Nevada's law. The Commission investigated respondent Carrigan, an elected local official who voted to approve a hotel/casino project proposed by a company that used Carrigan's long-time friend and campaign manager as a paid consultant. The Commission concluded that Carrigan had a disqualifying conflict of interest under §281A.420(8)(e)'s catchall provision, and censured him for failing to abstain from voting on the project. Carrigan sought judicial review, arguing that the Nevada law violated the First Amendment. The State District Court denied the petition, but the Nevada Supreme Court reversed, holding that voting is protected speech and that §281A.420(8)(e)'s catchall definition is unconstitutionally overbroad.

Held: The Nevada Ethics in Government Law is not unconstitutionally overbroad. Pp. 3–11.

(a) That law prohibits a legislator who has a conflict both from voting on a proposal and from advocating its passage or failure. If it was constitutional to exclude Carrigan from voting, then his exclusion from advocating during a legislative session was not unconstitutional, for it was a reasonable time, place, and manner limitation.

See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293. Pp. 3–4.

(b) "[A] 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional.' " *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785. Here, dispositive evidence is provided by "early congressional enactments," which offer " 'contemporaneous and weighty evidence of the Constitution's meaning,' " *Printz* v. *United States*, 521 U. S. 898, 905. Within 15 years of the founding, both the House and the Senate adopted recusal rules. Federal conflict-of-interest rules applicable to judges also date back to the founding. The notion that Nevada's recusal rules violate legislators' First Amendment rights is also inconsistent with long-standing traditions in the States, most of which have some type of recusal law. Pp. 4–8.

(c) Restrictions on legislators' voting are not restrictions on legislators' protected speech. A legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. He casts his vote "as trustee for his constituents, not as a prerogative of personal power." *Raines* v. *Byrd*, 521 U. S. 811, 821. Moreover, voting is not a symbolic action, and the fact that it is the product of a deeply held or highly unpopular personal belief does not transform it into First Amendment speech. Even if the mere vote itself could express depth of belief (which it cannot), this Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. See, *e.g., Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351. *Doe* v. *Reed*, 561 U. S. ___, distinguished. Pp. 8–10.

(d) The additional arguments raised in Carrigan's brief were not decided below or raised in his brief in opposition and are thus considered waived. P. 11.

126 Nev. 28, 236 P. 3d 616, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–568

NEVADA COMMISSION ON ETHICS, PETITIONER *v.* MICHAEL A. CARRIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

[June 13, 2011]

JUSTICE SCALIA delivered the opinion of the Court.

The Nevada Supreme Court invalidated a recusal provision of the State's Ethics in Government Law as unconstitutionally overbroad in violation of the First Amendment. We consider whether legislators have a personal, First Amendment right to vote on any given matter.

I

Nevada's Ethics in Government Law provides 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," *inter alia*, "[h]is commitment in a private capacity to the interests of others." Nev. Rev. Stat. §281A.420(2) (2007).[1] Section

[1] At the time of the relevant events in this case, the disclosure and recusal provisions of the Ethics in Government Law were codified at Nev. Rev. Stat. §281.501 (2003). They were recodified without relevant change in 2007 at §281A.420, and all citations are to that version. The Nevada Legislature further amended the statute in 2009, see Nev. Stats., ch. 257, §9.5, p. 1057, but those changes are not relevant here.

281A.420(8)(a)–(d) of the law defines the term "commitment in a private capacity to the interests of others" to mean a "commitment to a person" who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his household; or has a substantial and continuing business relationship with the officer. Paragraph (e) of the same subsection adds a catchall to that definition: "[a]ny other commitment or relationship that is substantially similar" to one of those listed in paragraphs (a)–(d).

The Ethics in Government Law is administered and enforced by the petitioner in this litigation, the Nevada Commission on Ethics. In 2005, the Commission initiated an investigation of Michael Carrigan, an elected member of the City Council of Sparks, Nevada, in response to complaints that Carrigan had violated §281A.420(2) by voting to approve an application for a hotel/casino project known as the "Lazy 8." Carrigan, the complaints asserted, had a disabling conflict in the matter because his long-time friend and campaign manager, Carlos Vasquez, worked as a paid consultant for the Red Hawk Land Company, which had proposed the Lazy 8 project and would benefit from its approval.

Upon completion of its investigation, the Commission concluded that Carrigan had a disqualifying conflict of interest under §281A.420(8)(e)'s catchall provision because his relationship with Vasquez was "substantially similar" to the prohibited relationships listed in §281A.420(8)(a)–(d). Its written decision censured Carrigan for failing to abstain from voting on the Lazy 8 matter, but did not impose a civil penalty because his violation was not willful, see §281A.480. (Before the hearing, Carrigan had consulted the Sparks city attorney, who advised him that disclosing his relationship with Vasquez before voting on the Lazy 8 project, which he did, would satisfy his obligations under the Ethics in Government Law.)

Carrigan filed a petition for judicial review in the First Judicial District Court of the State of Nevada, arguing that the provisions of the Ethics in Government Law that he was found to have violated were unconstitutional under the First Amendment. The District Court denied the petition, but a divided Nevada Supreme Court reversed. The majority held that voting was protected by the First Amendment, and, applying strict scrutiny, found that §281A.420(8)(e)'s catchall definition was unconstitutionally overbroad. 126 Nev. 28, ___–___, 236 P. 3d 616, 621–624 (2010).

We granted certiorari, 562 U. S. ___ (2011).

II

The First Amendment prohibits laws "abridging the freedom of speech," which, "'as a general matter . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983)). But the Amendment has no application when what is restricted is not protected speech. See, *e.g.*, *Roth* v. *United States*, 354 U. S. 476, 483 (1957) (obscenity not protected speech). The Nevada Supreme Court thought a legislator's vote to be protected speech because voting "is a core legislative function." 126 Nev., at ___, 236 P. 3d, at 621 (internal quotation marks omitted).

We disagree, for the same reason. But before discussing that issue, we must address a preliminary detail: The challenged law not only prohibits the legislator who has a conflict from voting on the proposal in question, but also forbids him to "advocate the passage or failure" of the proposal—evidently meaning advocating its passage or failure during the legislative debate. Neither Carrigan nor any of his *amici* contend that the prohibition on advo-

cating can be unconstitutional if the prohibition on voting is not. And with good reason. Legislative sessions would become massive town-hall meetings if those who had a right to speak were not limited to those who had a right to vote. If Carrigan was constitutionally excluded from voting, his exclusion from "advocat[ing]" at the legislative session was a reasonable time, place and manner limitation. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984).

III

"[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785 (2002) (internal quotation marks omitted). Laws punishing libel and obscenity are not thought to violate "the freedom of speech" to which the First Amendment refers because such laws existed in 1791 and have been in place ever since. The same is true of legislative recusal rules. The Nevada Supreme Court and Carrigan have not cited a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years.

"[E]arly congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning,'" *Printz* v. *United States*, 521 U. S. 898, 905 (1997) (quoting *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986)). That evidence is dispositive here. Within 15 years of the founding, both the House of Representatives and the Senate adopted recusal rules. The House rule—to which no one is recorded as having objected, on constitutional or other grounds, see D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, p. 10 (1997)—was

adopted within a week of that chamber's first achieving a quorum.[2] The rule read: "No member shall vote on any question, in the event of which he is immediately and particularly interested." 1 Annals of Cong. 99 (1789). Members of the House would have been subject to this recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none.

The first Senate rules did not include a recusal requirement, but Thomas Jefferson adopted one when he was President of the Senate. His rule provided as follows:

> "Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to." A Manual of Parliamentary Practice for the Use of the Senate of the United States 31 (1801).

Contemporaneous treatises on parliamentary procedure track parts of Jefferson's formulation. See, *e.g.*, A. Clark, Manual, Compiled and Prepared for the Use of the [New York] Assembly 99 (1816); L. Cushing, Manual of Parliamentary Practice, Rules of Proceeding and Debate in Deliberative Assemblies 30 (7th ed. 1854).

Federal conflict-of-interest rules applicable to judges also date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been coun-

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[2] The House first achieved a quorum on April 1, 1789, 1 Annals of Cong. 96, and it adopted rules governing its procedures on April 7, 1789, see *id.*, at 98–99.

sel to a party appearing before them. Act of May 8, 1792, ch. 36, §11, 1 Stat. 278–279. In 1821, Congress expanded these bases for recusal to include situations in which "the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit." Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. The statute was again expanded in 1911, to make any "personal bias or prejudice" a basis for recusal. Act of Mar. 3, 1911, §21, 36 Stat. 1090. The current version, which retains much of the 1911 version's language, is codified at 28 U. S. C. §144. See generally *Liteky* v. *United States*, 510 U. S. 540, 544 (1994); Frank, Disqualification of Judges, 56 Yale L. J. 605, 626–630 (1947) (hereinafter Frank). There are of course differences between a legislator's vote and a judge's, and thus between legislative and judicial recusal rules; nevertheless, there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges' First Amendment rights.[3]

The Nevada Supreme Court's belief that recusal rules violate legislators' First Amendment rights is also inconsistent with long-standing traditions in the States. A number of States, by common-law rule, have long required recusal of public officials with a conflict. See, *e.g.*, *In re Nashua*, 12 N. H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve"); *Commissioners' Court* v. *Tarver*, 25 Ala. 480, 481 (1854) ("If any member . . . has a peculiar, personal interest, such member would be disqualified"); *Stubbs* v. *Florida State Finance Co.*, 118 Fla. 450, 451, 159 So. 527, 528 (1935) ("[A] public official cannot legally participate in his official

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[3] We have held that restrictions on judges' speech during elections are a different matter. See *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002) (holding that it violated the First Amendment to prohibit announcement of views on disputed legal and political issues by candidates for judicial election).

capacity in the decision of a question in which he is personally and adversely interested").[4] Today, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest. See National Conference of State Legislatures, Voting Recusal Provisions (2009), online at http://www.ncsl.org/?TabID=15357 (as visited June 9, 2011, and available in Clerk of Court's case file).

In an attempt to combat this overwhelming evidence of constitutional acceptability, Carrigan relies on a handful of lower-court cases from the 1980's and afterwards. See Brief for Respondent 25 (citing *Clark* v. *United States*, 886 F. 2d 404 (CADC 1989); *Miller* v. *Hull*, 878 F. 2d 523 (CA1 1989); and *Camacho* v. *Brandon*, 317 F. 3d 153 (CA2 2003)). Even if they were relevant, those cases would be too little and too late to contradict the long-recognized need for legislative recusal. But they are not relevant. The first was vacated as moot, see *Clark* v. *United States*, 915 F. 2d 699, 700, 706 (CADC 1990) (en banc), and the other two involve retaliation amounting to viewpoint discrimination. See *Miller*, *supra*, at 533; *Camacho*, *supra*, at 160. In the past we have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First Amendment, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 383–386 (1992). Carrigan does

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[4] A number of States enacted early judicial recusal laws as well. See, *e.g.*, 1797 Vt. Laws, §23, p. 178 ("[N]o justice of the peace shall take cognizance of any cause, where he shall be within either the first, second, third, or fourth degree of affinity, or consanguinity, to either of the parties, or shall be directly or indirectly interested, in the cause or matter to be determined"); 1818 Mass. Laws, §5, p. 632 ("[W]henever any Judge of Probate shall be interested in the estate of any person deceased, within the county of such Judge, such estate shall be settled in the Probate Court of the most ancient next adjoining county . . ."); *Macon* v. *Huff*, 60 Ga. 221, 223–226 (1878). See generally Frank 609–626.

not assert that the recusal laws here are viewpoint discriminatory, nor could he: The statute is content-neutral and applies equally to all legislators regardless of party or position.

IV

But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. As we said in *Raines* v. *Byrd*, 521 U. S. 811, 821 (1997), when denying Article III standing to legislators who claimed that their voting power had been diluted by a statute providing for a line-item veto, the legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." In this respect, voting by a legislator is different from voting by a citizen. While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman* v. *Miller*, 307 U. S. 433, 469–470 (1939) (opinion of Frankfurter, J.).

Carrigan and JUSTICE ALITO say that legislators often "'us[e] their votes to express deeply held and highly unpopular views, often at great personal or political peril.'" *Post*, at 1 (opinion concurring in part and concurring in judgment) (quoting Brief for Respondent 23). How do they express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like "( ) I have a deeply held view about this; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( )

my personal view is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye'"? There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies, see *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989). But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication. Cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 66 (2006) (expressive value was "not created by the conduct itself but by the speech that accompanies it").

Moreover, the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech. Nor does the fact that action may have social consequences—such as the unpopularity that cost John Quincy Adams his Senate seat resulting from his vote in favor of the Embargo Act of 1807, see *post*, at 1. However unpopular Adams' vote may have made him, and however deeply Adams felt that his vote was the right thing to do, the act of voting was still nonsymbolic conduct engaged in for an independent governmental purpose.

Even if it were true that the vote itself could "express deeply held and highly unpopular views," the argument would still miss the mark. This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. For example, in *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351 (1997), we upheld a State's prohibition on multiple-party or "fusion" candidates for elected office against a

First Amendment challenge. We admitted that a State's ban on a person's appearing on the ballot as the candidate of more than one party might prevent a party from "using the ballot to communicate to the public it supports a particular candidate who is already another party's candidate," *id.*, at 362; but we nonetheless were "unpersuaded . . . by the party's contention that it has a right to use the ballot itself to send a particularized message." *Id.*, at 362–363; see also *Burdick* v. *Takushi*, 504 U. S. 428, 438 (1992). In like manner, a legislator has no right to use official powers for expressive purposes.

Carrigan and JUSTICE ALITO also cite *Doe* v. *Reed*, 561 U. S. ___ (2010), as establishing "the expressive character of voting." *Post*, at 2; see also Brief for Respondent 26. But *Reed* did no such thing. That case held only that a citizen's signing of a petition—"'core political speech,'" *Meyer* v. *Grant*, 486 U. S. 414, 421–422 (1988)—was not deprived of its protected status simply because, under state law, a petition that garnered a sufficient number of signatures would suspend the state law to which it pertained, pending a referendum. See *Reed*, 561 U. S., at ___ (slip op., at 6); *id.*, at ___ (slip op., at 3) (opinion of SCALIA, J.). It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so. We have never said the latter is true.[5]

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[5] JUSTICE ALITO reasons as follows: (1) If an ordinary citizen were to vote in a straw poll on an issue pending before a legislative body, that vote would be speech; (2) if a member of the legislative body were to do the same, it would be no less expressive; therefore (3) the legislator's actual vote must also be expressive. This conclusion does not follow. A legislator voting on a bill is not fairly analogized to one simply discussing that bill or expressing an opinion for or against it. The former is performing a governmental act as a representative of his constituents,

V

Carrigan raises two additional arguments in his brief: that Nevada's catchall provision unconstitutionally burdens the right of association of officials and supporters, and that the provision is unconstitutionally vague. Whatever the merits of these arguments, we have no occasion to consider them. Neither was decided below: The Nevada Supreme Court made no mention of the former argument and said that it need not address the latter given its resolution of the overbreadth challenge, 126 Nev. ___, n. 4, 236 P. 3d, at 619, n. 4. Nor was either argument raised in Carrigan's brief in opposition to the petition for writ of certiorari. Arguments thus omitted are normally considered waived, see this Court's Rule 15.2; *Baldwin* v. *Reese*, 541 U. S. 27, 34 (2004), and we find no reason to sidestep that Rule here.

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The judgment of the Nevada Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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see *supra*, at 8; only the latter is exercising personal First Amendment rights.

SUPREME COURT OF THE UNITED STATES

No. 10–568

NEVADA COMMISSION ON ETHICS, PETITIONER *v.* MICHAEL A. CARRIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

[June 13, 2011]

JUSTICE KENNEDY, concurring.

For the reasons the Court explains, the act of casting an official vote is not itself protected by the Speech Clause of the First Amendment; and I join the Court's opinion.

It does seem appropriate to note that the opinion does not, and on this record should not, consider a free speech contention that would have presented issues of considerable import, were it to have been a proper part of the case. Neither in the submissions of the parties to this Court defining the issues presented, nor in the opinion of the Nevada Supreme Court, were the Nevada statutory provisions here at issue challenged or considered from the standpoint of burdens they impose on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote.

The statute may well impose substantial burdens on what undoubtedly is speech. The democratic process presumes a constant interchange of voices. Quite apart from the act of voting, speech takes place both in the election process and during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large. This speech and expression often finds powerful form in groups and associations with whom

a legislator or candidate has long and close ties, ties made all the stronger by shared outlook and civic purpose. The process is so intricate a part of communication in a democracy that it is difficult to describe in summary form, lest its fundamental character be understated. It may suffice, however, to note just a few examples.

Assume a citizen has strong and carefully considered positions on family life; the environment; economic principles; criminal justice; religious values; or the rights of persons. Assume, too, that based on those beliefs, he or she has personal ties with others who share those views. The occasion may arise when, to promote and protect these beliefs, close friends and associates, perhaps in concert with organized groups with whom the citizen also has close ties, urge the citizen to run for office. These persons and entities may offer strong support in an election campaign, support which itself can be expression in its classic form. The question then arises what application the Nevada statute has if a legislator who was elected with that support were to vote upon legislation central to the shared cause, or, for that matter, any other cause supported by those friends and affiliates.

As the Court notes, Nev. Rev. Stat. §281A.420(2) (2007) provides:

> "[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."

There is, in my view, a serious concern that the statute imposes burdens on the communications and expressions just discussed. The immediate response might be that the statute does not apply because its application is confined

to the legislator's "commitment in a private capacity to the interests of others." That proposition may be a debatable one. At least without the benefit of further submissions or argument or explanation, it seems that one fair interpretation, if not the necessary one, is that the statute could apply to a legislator whose personal life is tied to the longstanding, close friendships he or she has forged in the common cause now at stake.

The application of the statute's language to the case just supposed, and to any number of variations on the supposition, is not apparent. And if the statute imposes unjustified burdens on speech or association protected by the First Amendment, or if it operates to chill or suppress the exercise of those freedoms by reason of vague terms or overbroad coverage, it is invalid. See *United States* v. *Williams*, 553 U. S. 285, 292–293, 304 (2008). A statute of this sort is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted. See *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1051 (1991).

The interests here at issue are at the heart of the First Amendment. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (internal quotation marks omitted). And the Court has made it clear that "the right of citizens to band together in promoting among the electorate candidates who espouse their political views" is among the First Amendment's most pressing concerns. *Clingman* v. *Beaver*, 544 U. S. 581, 586 (2005) (internal quotation marks omitted).

The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and

inevitable burden on speech and association that preceded the vote. The restriction may impose a significant burden on activities protected by the First Amendment. As a general matter, citizens voice their support and lend their aid because they wish to confer the powers of public office on those whose positions correspond with their own. That dynamic, moreover, links the principles of participation and representation at the heart of our democratic government. Just as candidates announce positions in exchange for citizens' votes, *Brown* v. *Hartlage*, 456 U. S. 45, 55–56 (1982), so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy. See *ibid.*

The Court has held that due process may require recusal in the context of certain judicial determinations, see *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. ___ (2009); but as the foregoing indicates, it is not at all clear that a statute of this breadth can be enacted to extend principles of judicial impartiality to a quite different context. The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, see *ante*, at 6, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.

For these reasons, the possibility that Carrigan was censured because he was thought to be beholden to a person who helped him win an election raises constitutional concerns of the first magnitude.

As the Court observes, however, the question whether Nevada's recusal statute was applied in a manner that burdens the First Amendment freedoms discussed above is not presented in this case. *Ante*, at 10.

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[June 13, 2011]

JUSTICE ALITO, concurring in part and concurring in the judgment.

I concur in the judgment, but I do not agree with the opinion of the Court insofar as it suggests that restrictions upon legislators' voting are not restrictions upon legislators' speech. *Ante*, at 8. As respondent notes, "[o]ur history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril." Brief for Respondent 23. To illustrate this point, respondent notes, among other famous incidents, John Quincy Adams' vote in favor of the Embargo Act of 1807, a vote that is said to have cost him his Senate seat, and Sam Houston's vote against the Kansas-Nebraska Act, a vote that was deeply unpopular in the South. *Id.*, at 23–24 (citing J. Kennedy, Profiles in Courage 48, 109 (commemorative ed. 1991)).

In response to respondent's argument, the Court suggests that the "expressive value" of such votes is "'not created by the conduct itself but by the speech that accompanies it.'" *Ante*, at 9. This suggestion, however, is surely wrong. If John Quincy Adams and Sam Houston had done no more than cast the votes in question, their votes would still have spoken loudly and clearly to everyone who was interested in the bills in question. Voting has an expressive component in and of itself. The Court's

strange understanding of the concept of speech is shown by its suggestion that the symbolic act of burning the American flag is speech but John Quincy Adams calling out "yea" on the Embargo Act was not. *Ibid.**

A legislative vote is not speech, the Court tells us, because the vote may express, not the legislator's sincere personal view, but simply the view that is favored by the legislator's constituents. See *ibid.* But the same is sometimes true of legislators' speeches.

Not only is the Court incorrect in its analysis of the expressive character of voting, but the Court's position is inconsistent with our reasoning just last Term in *Doe* v. *Reed*, 561 U. S. ___ (2010). There, respondents argued that "signing a petition is a legally operative legislative act and therefore 'does not involve any significant expressive element.'" *Id.*, at ___ (slip op., at 6) (quoting Brief for Respondent Reed 31). But the Court rejected this argument, stating:

> "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." 561 U. S., at ___ (slip op., at 6).

But cf. *id.*, at ___ (SCALIA, J., concurring in judgment) (slip op., at 1) ("I doubt whether signing a petition that has the effect of suspending a law fits within 'the freedom of speech' at all").

Our reasoning in *Reed* is applicable here. Just as the act of signing a petition is not deprived of its expressive character when the signature is given legal consequences,

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* See 17 Annals of Congress 50 (1807); see also 15 *id.*, at 201 (1806).

the act of voting is not drained of its expressive content when the vote has a legal effect. If an ordinary citizen casts a vote in a straw poll on an important proposal pending before a legislative body, that act indisputably constitutes a form of speech. If a member of the legislative body chooses to vote in the same straw poll, the legislator's act is no less expressive than that of an ordinary citizen. And if the legislator then votes on the measure in the legislative chamber, the expressive character of that vote is not eliminated simply because it may affect the outcome of the legislative process.

In Part III of its opinion, the Court demonstrates that legislative recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech. On that basis, I agree that the judgment below must be reversed.