No. 10-568

In the Supreme Court of the United States

THE COMMISSION ON ETHICS
OF THE STATE OF NEVADA,

Petitioner,

v.

MICHAEL A. CARRIGAN,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Despite respondent's strenuous efforts to reconcile the patchwork of First Amendment standards that courts apply to restrictions on elected officials' voting, at bottom, it cannot be denied that the courts are deeply and intractably divided. Respondent does not even attempt to deny that this is an important issue—indeed, he acknowledges its importance. Even if he did not, a group of states representing every state in the Fifth Circuit (which has embraced strict scrutiny for such regulations), plus states from the Sixth, Ninth, Tenth, and Eleventh Circuits, note the "uncertainty and confusion" affecting state entities "charged with implementing these critical state ethics laws as well as * * * the officials subject to them." Brief of Florida et al. ("States Br.") 12. Given the undeniable importance of this issue to state ethics enforcement, years of uncertainty over the proper standard, and the conflicting standards applicable in Nevada under Ninth Circuit and Nevada Supreme Court precedent, review is plainly warranted.

A. The Split Is Real

Respondent maintains that there is no conflict about the standard applicable to restrictions on voting by elected officials, contending that "the distinctions drawn [by various courts] are entirely consistent with the conclusion of the Nevada Supreme Court that state-imposed restrictions on legislative voting by elected representatives are subject to strict scrutiny under the First Amendment." Br. in Opp. 14. Although respondent labors for seven pages to transform the current

hodgepodge of standards into a uniform national rule of strict scrutiny, his efforts do not survive even casual review. As the officials who are responsible for state ethics laws emphatically confirm, the multitude of standards has spawned pervasive "uncertainty and confusion as to the validity of their ethics laws" which will persist until this Court "grant[s] certiorari and settle[s] the split." States Br. 1.

Respondent concedes that "[t]he First Circuit employed the *Pickering* balancing test" to restrictions on the voting of public officials (Br. in Opp. 14) in *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 41 (2002), but claims that decision is "entirely consistent" (Br. in Op. 14.) with the decision below because that case involved *appointed* officials and, respondent claims, the First Circuit affords greater protection to *elected* officials. But in *Stella* v. *Kelley*, 63 F.3d 71 (1995), a case *Mullin* itself repeatedly cited with approval (see 284 F.3d at 37, 38 n.7, 41 n.9), the First Circuit squarely rejected the idea that "the First Amendment right at issue applies less broadly to appointed officials as contrasted with elected officials," calling it "a distinction without a difference," and "a wholly artificial dichotomy." 63 F.3d at 76. The First Circuit concluded that voting by appointed public officials on a municipal zoning board was "constitutionally protected speech." *Id.* at 75. But while respondent claims that *all* circuits agree that the protection afforded voting is "nearly absolute" (Br. in Opp. 11), the First Circuit concluded that "[t]his protection is far from absolute," and that "public officials voting on matters of public concern * * * retain First Amendment protection 'so long as

[their] speech does not unduly impede the government's interest[s].'" 284 F.3d at 37 (quoting *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993)).

Respondent claims that *Camacho* v. *Brandon*, 317 F.3d 153 (2d Cir. 2003), is "inapplicable" (Br. in Op. 16) because it "concerned the firing of an appointed employee of a city council member, not a restriction on that elected official's right to free speech." *Id.* at 15. But as explained in the Petition (Pet. 14-15 & n.6), because the employee was terminated "in retaliation for the vote cast by [the] City Council member," 317 F.3d at 155, the employee's claim was derivative of the elected official's and "must succeed or fail based on whether [the official's] activities enjoyed the protection of the First Amendment." *Id.* at 160. The Second Circuit *explicitly held* that action taken against an elected public official for "[v]oting on public policy matters" (*ibid.*) was subject to "*Pickering* balanc[ing]." *Id.* at 161. Nothing in *Velez* v. *Levy*, 401 F.3d 75 (2d Cir. 2005), affects that conclusion. *Velez* "involve[d] the *outright removal* of the board member * * * from her office," completely stripping her ability to vote on *every* issue, "based on [her] political views." *Id.* at 97-98 (emphasis added). The permanent removal of an official "in retaliation for her [views]" (*id.* at 97) is a far cry from a content-neutral recusal requirement.

The Eighth Circuit has explicitly "disagree[d] that strict scrutiny applies to" such recusal requirements, and instead applied rational basis review to review a resolution that "directed [a board member] to recuse herself" from matters in which her husband had an

interest. *Peeper* v. *Callaway Cnty. Ambulance Dist.*, 122 F.3d 619, 621-623 (1997). Respondent attempts to cloud that straightforward holding through ellipses-laden quotation of dicta in footnotes, all of which addressed what might happen if greater restrictions had been imposed, namely "[i]f the restrictions prevent[ed] the officeholder from meaningfully representing the voters," *id.* at 623 n.5, or if restrictions were placed on her ability to vote or speak as any other citizen might regarding the board. *Id.* at 623 n.4.[1] But no such restriction is at issue here either. Respondent's rights to participate in politics as a citizen have not been infringed, and he provides no reason to believe that the Eighth Circuit would conclude that restricting a legislator's ability to cast a vote on a matter championed by his campaign manager would prevent him from "meaningfully representing the voters" as a general matter. Indeed, the Eighth Circuit said that strict scrutiny would not apply where restrictions "only limit[] [the member's] participation as a member of the Board." *Ibid.* So it is here.

Respondent does not contest that the Seventh Circuit has held that legislative voting is not speech and that restrictions that affect voting are subject to

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[1]Although, as respondent notes (Br. in Opp. 20), *Peeper* invalidated the recusal restrictions under rational-basis review, that was because they extended well beyond ones "related to her husband" and thus "d[id] not rationally relate to" valid interests in avoiding conflicts of interest. 122 F.3d at 624. The same cannot be said for the restrictions here, which directly relate to preventing officials from voting on matters in which persons to whom they are closely connected have an interest.

rational-basis review. See *Risser* v. *Thompson*, 930 F.2d 549, 553 (1991). Respondent does not explain why that conclusion is "inapplicable" here, Br. in Opp. 19, given the obvious implication that that court employs a lower standard of review for challenges like his. And respondent has no response whatever to our observation (Pet. 17 n.8) that the Seventh Circuit applies *Pickering* balancing to restrictions on elected officials' *pure speech*. See *Siefert* v. *Alexander*, 608 F.3d 974, reh'g en banc denied, 2010 U.S. App. LEXIS 18163 (Aug. 31, 2010), pet. for cert. filed, 10-405 (filed Sept. 22, 2010).

Respondent does not dispute that the Ninth Circuit applied *Pickering* balancing to review the exclusion of an elected legislator from meetings "[b]ecause of the potential conflict between [her] role as a Council member and her personal interest" in the matter under discussion. *DeGrassi* v. *City of Glendora*, 207 F.3d 636, 646 (2000). He contends that *DeGrassi* is distinguishable because those restrictions did not prevent the legislator "from speaking out in public on the issue, directly with other council members, or representing her constituents." Br. in Opp. 18. But the same is true of respondent. He participated fully in the City Council's deliberations on the Lazy 8 at its August 2006 meeting, and there is no suggestion he was restrained from addressing his constituents. The Commission later censured respondent *only* for "*not abstaining from voting* on the Lazy 8 matter," Pet. App. 112a (emphasis added), not because of any statements he made. The restriction on voting is the sole reason the court below applied strict scrutiny, and the sole basis on which it invalidated the statute.

Id. at 3a, 10a-11a. Nothing in *DeGrassi* even remotely suggests that the Ninth Circuit would have applied strict scrutiny when faced with the facts presented here.

As we noted in our petition (Pet. 15-16), the difference in standards employed by the Ninth Circuit and the Nevada Supreme Court creates an intolerable situation where the standard for deciding challenges to the same ethics law depends on the court in which an action is filed. The best response that respondent can offer (Br. in Opp. 18 n.9) is that the Commission *itself* will not be subject to inconsistent judgments because the State of Nevada has not waived sovereign immunity so it cannot be sued in federal court in its own name. This response essentially concedes the existence of a conflict in legal standards. While technically correct, it is misleading and misses the point. As respondent's authority (*ibid.*) itself notes, entities such as the Commission *are* subject to conflicting standards because "[s]tate employees sued in their individual capacities for injunctive relief * * * are not protected by [the] state's Eleventh Amendment immunity." *Williams* v. *Clark Cnty. Pub. Adm'r*, No. 2:09-cv-00810-RCJ-LRL, 2010 U.S. Dist. LEXIS 115008, *11 (D. Nev. Oct. 26, 2010). This untenable situation requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994).

As the state *amici* attest, "confusion among the circuits as to the appropriate test for laws regulating public officials' voting casts a shadow of uncertainty over the validity of [recusal] provisions," States Br. 4, which affects "the parties charged with implementing

these critical state ethics laws as well as * * * the officials subject to them." *Id.* at 12.

B. Restrictions On Legislative Voting Are Not Subject To Strict Scrutiny

Respondent's defense of the judgment rests on twin propositions: first, that legislative voting represents "the pinnacle of political speech" (Br. in Opp. 7); and second, that restrictions on such speech are subject to strict scrutiny. The first proposition finds no support in this Court's precedents; the second is flatly wrong.

Respondent begins by claiming that legislative voting is "widely recognized as protected political speech" under the First Amendment. Br. in Opp. 8 (capitalization omitted). Tellingly, he cites no precedents of this Court that establish this "widely recognized" principle. The passage he cites from *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 (1979)), see Br. in Opp. 8, merely states that *federal* legislative voting is immune from civil liability under the *Speech or Debate Clause*, which suggests that congressional voting is safeguarded as part of the "legislative process" protected by that Clause rather than as a form of expression protected by the First Amendment. The cited passages in *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), and *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949), see Br. in Opp. 8, involve penalties for *pure speech* (speech criticizing the Vietnam War and speech criticizing political and racial groups, respectively), not voting. Respondent gives no reason to question Justice Scalia's recent observation that there is "no precedent from this Court holding that legislating is protected by the

First Amendment." *Doe* v. *Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment).

Even if legislative voting were considered to have an expressive component, it does not follow that restrictions on it would be subject to strict scrutiny. As explained in our petition, Pet. 18-23, every relevant line of precedent counsels applying a lower standard, whether legislative voting is considered expressive conduct, the speech of a government official or employee, or conduct akin to a citizen's vote. As outlined above, most courts of appeals that have held that voting has an expressive element have nonetheless rejected application of strict scrutiny to restrictions on it. See pp. 2-6, supra.

In a strained effort to argue that strict scrutiny is warranted here, respondent repeatedly invokes nongermane lines of First Amendment doctrine. For example, he alleges the Commission has "unbridled discretion" and engages in "arbitrary application" of recusal standards, concepts borrowed from prior restraint doctrine, Br. in Opp. 3-4, 23, though there is no allegation in this case, much less a finding, that the Commission has applied the recusal rules arbitrarily. He also argues that restrictions on pure speech and the ability to "take positions on public issues" (*id.* at 10, 13, 24 & n.11) warrant strict scrutiny, although there is no dispute that respondent freely expressed his views on the Lazy 8 matter, and although the Commission censured him for "not abstaining from *voting* on [it]," Pet. App. 112a (emphasis added), rather than for of any statement he made. The restriction on voting is the sole basis

on which the court below invalidated the statute. *Id.* at 3a, 10a-11a.

The most outlandish of all respondent's feints is his contention that the recusal provision here is "a content-based restriction on protected speech." (Br. in Opp. 10). But the recusal obligation here is no more content-based than a recusal obligation for matters where the legislator has a direct personal conflict (or even an anti-bribery law). The law is tied not to the content of the speech but the nature of the official's relationship to interested parties. As Justice Pickering noted below, without contradiction by the majority, the statute is "content-neutral. It regulates *when* an official may or may not vote, not *how* he or she should vote." Pet. App. 36a.

C. The Current Uncertainty Has Grave Implications For States' Recusal Requirements

As noted in our petition (Pet. 23-29), decisions deeming regulation of elected officials' voting to be restrictions on speech subject to strict scrutiny render "presumptively invalid" (*R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992)) a host of state recusal statutes and common-law recusal schemes. Tellingly, respondent says *nothing whatever* (Br. in Opp. 23-24) to dispute that such decisions have created uncertainty about the validity of longstanding common-law recusal rules. Nor can he. Compared to the detailed and specific provisions of Section 281A.420(8)(e), which only extends to relationships that are "substantially similar" to one of four narrowly defined types, common-law recusal standards are far more general, and their precise

contours are developed through case-by-case adjudication. Some require disqualification based on such broad standards as "indirect personal interest." *Hanig* v. *City of Winner*, 692 N.W.2d 202, 208-209 (S.D. 2005). See generally Pet. 27-29. Further review is warranted simply to dispel the cloud of uncertainty cast on this important body of law by the decisions of the court below and the Fifth Circuit.

Respondent makes a token effort to address the uncertainty surrounding the validity of state recusal statutes, contending that "only" New Jersey "employs a 'catch-all' provision similar [to Nevada's]." Br. in Opp. 24.[2] But respondent's strained distinction is of no moment, because strict scrutiny would apply to *all* recusal statutes, not simply those that are similar to section 281A.420(8)(e) in some respect. The uncertainty thus extends much more widely. As respondent notes, "*[m]any states' requirements for recusal are exceptionally broad*." Br. in Opp. 23 (emphasis added). See, *e.g.*, N.J. Admin. Code § 19:61-7.4(f) (2010) (requiring recusal whenever an "incompatible financial or personal interest may exist in other situations which are not clearly within the provisions * * * above, depending on the totality of the circumstances"); N.C. Gen. Stat. § 138A-37(a) (2006) ("no legislator shall participate in legislative action if the legislator knows the legislator or *a*

[2] Respondent's characterization of Section 281A.420(8)(e) as a "catch all" is mistaken; the provision "is not free-standing" but instead requires recusal *only* on matters where a relationship is "substantially similar" to the other specifically enumerated "disqualifying [ones] (household, family, employment, or business)." Pet. App. 38a (citation omitted).

person with which the legislator is associated may incur a reasonably foreseeable financial benefit from the action") (emphasis added). *See also* States Br. 16. *Every* recusal law, whether or not "exceptionally broad" (Br. in Opp. 23), would be "presumptively invalid" (*R.A.V.*, 505 U.S. at 382), such that it would only "rarely" survive constitutional review. *Burson* v. *Freeman*, 504 U.S. 191, 200 (1992).

Although respondent makes a perfunctory effort to question whether the application of strict scrutiny makes a difference, Br. in Opp. 20, he elsewhere recognizes that "there is a very *real and meaningful* difference between the limited protection" afforded by *Pickering* (and lower standards) and "the *nearly absolute* protection" of strict scrutiny. Br. in Opp. 11 (emphasis added). Because of the pall this uncertainty casts over state recusal laws, there can be little question that this case presents an issue of exceptional importance. Cf. Texas Pet. for Reh'g En Banc at 14, *Rangra* v. *Brown*, No. 06-51587 (5th Cir. filed May 8, 2009) (successfully seeking en banc review of decision holding that Texas Open Meetings Act was subject to strict scrutiny as an infringement of elected legislators' speech, noting "nationwide importance" of issue).

D. No Vehicle Problem Would Prevent Resolution Of The Issue

Respondent does not contest that this case squarely presents a single issue that was thoroughly litigated below and about which there remain no disputes concerning the facts, application of state law, or jurisdiction. See Pet. 32. The sole vehicle problem respondent could contrive is that another

case involving the state ethics law was (at the time his brief in opposition was filed) pending in the Nevada Supreme Court. That case involved a Commission advisory opinion concerning a different Council vote and a different recusal provision. See Docketing Statement at 6, *Comm'n on Ethics of the State of Nevada* v. *Carrigan*, No. 56462 (filed Aug 13, 2010) (stating appeal involves "the application of paragraph (d) of NRS 281A.420(8) [(2007)] [involving] 'a substantial and continuing business relationship'"). The court has since dismissed that appeal as moot. Supp. Br. of Resp. 1.

Respondent's eleventh-hour claim that the Nevada Supreme Court "may * * * ultimate[ly]" invalidate Section 281A.420(8) on other grounds in some future litigation, Supp. Br. of Resp. 1, is pure speculation, and no reason for this Court to forego reviewing the exceptionally significant decision that is squarely before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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