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 Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO, HAWAII, IDAHO, INDIANA, LOUISIANA, MAINE, MICHIGAN, MONTANA, PENNSYLVANIA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the State's Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The question presented is: Whether the Nevada Supreme Court erred by applying strict scrutiny to the State's content- and viewpoint-neutral recusal rule.

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STATEMENT OF AMICI INTEREST

The Amici States have an interest in this case because the question of the appropriate judicial standard for laws regulating voting conflicts of state and local officials implicates core issues of federalism. Structuring a government and regulating its officials is a matter necessarily entrusted to the respective sovereign. Each State has a provision regulating a public official's conduct when the official has a conflict of interest; most require recusal in at least some circumstances. The diversity of these laws owes simply to each State's unique and indigenous circumstances. Though the particulars may vary, however, conflict provisions are consistently employed by the States as a means to halt corruption in their governments.

The Amici States are concerned at the prospect of each state recusal law being scrutinized through the harsh prism of strict scrutiny. Strict scrutiny unnecessarily complicates the States' ability to fashion legislation that is responsive to its particular circumstances. At an irreducible minimum, the strict scrutiny standard ensures that public officials who find themselves subject to recusal laws can raise a legal challenge under a standard of review that will place great burdens on the defending State.

A strict scrutiny standard raises a host of additional concerns. Beyond the certain prospect of increased litigation and its attendant consequences, a strict scrutiny standard would necessarily drive States toward a uniform national recusal standard.

States should be permitted the greatest possible leeway to structure ethics laws that implicate when, and if, their own public officials should be prohibited from voting on a particular matter. States' authority to structure and regulate their governments through their ethics rules is at the heart of our federalist system. Amici States urge that respect for their sovereign interests militates strongly in favor of reversal and the establishment of a more deferential standard of review.

SUMMARY OF ARGUMENT

The Nevada Supreme Court's application of a strict scrutiny standard in reviewing the constitutionality of a state law regulating voting recusals by elected officials is misguided. This standard threatens the validity of recusal statutes across the nation, encroaches on core federalism concerns, and makes more difficult the work of state legislatures in creating workable ethical standards for their respective jurisdictions.

First, every State has adopted conflict of interest provisions that apply when a legislator has a personal interest in an issue. The details of these provisions may vary across jurisdictions, but the uniformity of their presence reflects a unified commitment to ensuring that "no man may serve two masters." *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961). States have a great sovereign interest in promoting good governance within their jurisdictions. The scope of these laws reflects the vitality of federalism in allowing each State broad discretion to form its own determination of what parameters should apply.

This discretion is consistent with traditional principles of federalism, including the concept that state legislatures are the institutions best situated to deal with local domestic policy concerns. Strict scrutiny denies States the flexibility to craft legislation that is responsive to their individualized circumstances. The inevitable result of strict scrutiny review will be to unravel the status quo (which appears to be working just fine) and impose a far

more restrictive approach that squelches flexibility and leads to a one-size-fits-all standard.

Second, strict scrutiny is inappropriate because it will prove unduly burdensome moving forward. States will face a Sisyphean task when defending their ethics laws against constitutional challenges. The strict scrutiny standard will encourage perpetual legal challenges in federal courts. Nothing speaks more directly to the social contract between a State and its citizens than its ethics laws regulating the conduct of public officials. A strict scrutiny test would unduly hamper this important relationship and impede the democratic process by second-guessing and undermining the role of the state legislatures in developing solutions to ethics issues. For these reasons, the Nevada Supreme Court's decision should be reversed.

ARGUMENT

I. State laws governing voting conflicts properly are left to the States' sovereign authority and require flexibility to address States' individual circumstances.

Every State has a statute or rule addressing the procedures by which public officials must abide when conflicts of interest arise; these laws are varied and involve differing details due to the diverse circumstances of each State. Yet those diverse circumstances evolved from the same common law principle: "no man can be a judge in his own case." *In re Murchison*, 349 U.S. 133, 136 (1955). The application and regulation of that principle to a State's public officials are matters entirely within the State's sovereign authority. Subjecting recusal laws to strict scrutiny, as the Nevada Supreme Court did below, unreasonably restricts the States' sovereign rule-making authority, opens the litigation floodgates, and denies States the flexibility needed to contour their conflict of interest provisions to meet their individual circumstances.

A. Too strict a standard interferes with the States' significant sovereign interests and short-circuits the democratic process by which recusal laws are adopted.

The imposition of too strict a standard of judicial review undermines the democratic process by which States enact recusal provisions. Recusal laws serve a purpose critical to a State's success by

preventing officials from voting on matters where their impartiality is called into question. These laws assist in protecting States from corruption by ensuring that representatives are not influenced by the inducement of potential financial gain.

Thomas Jefferson noted that recusal laws play an integral role in the preservation of democratic governance:

> 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 has been disallowed, even after 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 cause, it is for the honor of the House that this rule of immemorial observance should be strictly adhered to.

See Tex. Const. art. III, § 22, Interpretive Commentary (2007) (quoting II, *The Writings of Thomas Jefferson* 368 (Library ed. 1903)). The States' modern day codes evolved from this common law tradition going back to before the founding of our nation.

As an example, prior to Florida's codification of its ethics rules, the Florida Supreme Court established that public officials should not participate in matters where they have an interest in a personal gain or loss. *See Stubbs v. Fla. State Fin. Co.*, 159 So. 527, 528 (Fla. 1935). The court explained

that "[t]his principle has many times been recognized by this court and is not only founded upon a wholesome public policy, but is undergirded by the familiar scriptural quotation attributed to One 'who spoke as never man spake,' to the effect that 'no man can serve two masters.' " *Id.* (citing *Lainhart v. Burr*, 38 So. 711 (Fla. 1905); *State v. Gautier*, 146 So. 562 (Fla. 1933)). That same year, the court reiterated:

> No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle.

City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 479 (Fla. 1935). The current codification of the State's ethics rules developed during the mid- to late-1960s. *See, e.g.*, Nineteenth Statewide Grand Jury First Interim Report, *A Study of Public Corruption in Florida and Recommended Solutions*, No. SC09-1910, at 7 (Dec. 17, 2010), *available at* http://myfloridalegal.com/webfiles.nsf/WF/MRAY8CTPTV/$file/19th1stInterimReport.pdf (last visited Feb. 26, 2011) [hereinafter Grand Jury Report]. States require flexibility — which strict scrutiny will eviscerate — to amend their codes to changing instances and understandings of corruption, resulting in standards "more precise" than their common law lineage. Pet'r Br. 22.

Conflict provisions within state ethics codes are a key element in how the States structure and regulate their governments, and therefore are entitled to substantial deference. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (recognizing "the authority of the people of the States to determine the qualifications of their most important government officials"); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."). These provisions operate in a sphere uniquely suited to state governance; States must deal directly with the consequences of unscrupulous public officials and the decline of public confidence in government. *See Gregory*, 501 U.S. at 463 (decisions as to the parameters of these officials' powers lie at "the heart of representative government") (citation and quotation marks omitted). Recusal and conflict of interest provisions therefore are "beyond an area traditionally regulated by the States; [they are] decision[s] of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460; *see also Ex Parte Curtis*, 106 U.S. 371, 373 (1882) (noting that it "is within the just scope of legislative power" to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service").

Absent the presence of a core constitutional right historically deserving of strict scrutiny, courts should defer to state legislatures; they are often

closest to the problems at issue and are the institutions best able to reflect what a particular "community desires"[1] from its government. *See generally Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J. dissenting) ("I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."). The merit of these recusal laws should be determined by the ordinary democratic process; the adoption of too strict a judicial review standard would unnecessarily force States to overcome significant hurdles to protect the constitutionality of their provisions. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) (observing that, in the First Amendment context, "rarely" will a litigant be able to overcome strict scrutiny).

Nevada's legislators, by codifying section 281A.420(2)(c), have passed a comprehensive recusal law that delineates when the State's public officials can, and cannot, vote on matters that might impinge

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[1] *See Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J. dissenting) ("There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.").

on their impartiality. Under fundamental democratic principles, the process by which the elected state representatives in Nevada decided this standard was necessary is deserving of the greatest judicial deference.

The strict scrutiny standard should be rejected in favor of a more reasonable and deferential standard that accounts for the realities of lawmaking on this topic. Strict scrutiny fails to accord due deference to the reasoning underlying recusal provisions, and it potentially short-circuits the democratic process by usurping the legislature's role, "constrain[ing States'] ability to adopt and enforce basic rules for self-government." Pet'r Br. 18. Applying an unnecessarily strict degree of scrutiny will inevitably impede the States' abilities to craft useful legislation on the critical issue of ethics and public officials.

B. State conflict of interest provisions reflect the diverse and independent circumstances of the States and are consistent with federalism principles.

As noted above, all States have some mechanism to address conflicts of interest on the part of their officials at the state and local levels. The majority of States have enacted legislation or adopted a rule that requires absolute abstention from voting by state legislators in certain circumstances. Those provisions prohibit an official from taking any action on a matter in which he or she has a conflict, most often due to a pecuniary

interest. *See* Office of Legis. Research, Conn. Gen. Assemb., 2000-R-0155, *Voting Restrictions in State Ethics Codes* (Feb. 2000), *available at* http://www.cga.ct.gov/2000/rpt/2000-R-0155.htm (last visited Feb. 26, 2011). And most States have an ethics commission providing independent enforcement of these ethics codes.[2]

While conflict and recusal provisions have developed in response to uniform demands for strengthened ethics in government, their particular requirements are not uniform; nor should they be. In New Jersey, for instance, the circumstances for abstention are numerous: "No member of the Legislature shall participate by voting or any other action, on the floor of the General Assembly or the Senate, or in committee or elsewhere, in the enactment or defeat of legislation in which he has a personal interest," meaning a direct monetary gain or loss for the legislator or a member of his family. N.J. Stat. Ann. § 52:13D-18. Alabama's conflict of interest law is equally wide-reaching: a legislator cannot vote on *any* legislation "*in which he or she knows or should have known* that he or she has a conflict of interest." Ala. Code § 36-25-5(b) (emphasis added).

In Alaska, legislators need only refrain from voting in circumstances when the legislator has

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[2] Forty-one States have ethics commissions. Nat'l Conference of State Legislatures, *Ethics: State Ethics Commissions*, http://www.ncsl.org/?TabId=15331 (last visited Feb. 20, 2011).

> an equity or ownership interest in a business investment, real property, lease, or other enterprise, if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry, or region.

Alaska Stat. § 24.60.030(g). Similarly, in Wyoming, a legislator is only prohibited from voting on matters that present *clear cases* of a personal or private interest. Wyo. Stat. Ann. § 9-13-106.

These types of differing ethical standards could be explained by any number of factors, such as the degree of corruption or scandal within state government,[3] whether term limits are imposed on state legislators,[4] or even differences in population.[5] States need broad leeway to craft ethical standards in this critical area of regulation to adapt to

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[3] It is not surprising that much of the codification of these ethics rules developed during the mid- to late-1960s, at a time when public confidence and trust in government was declining. *See, e.g.*, Grand Jury Report, *supra* p.7, at 7.

[4] Me. Rev. Stat. tit. 1, § 1011 ("Membership in the Legislature is not a full-time occupation and is not compensated on that basis; moreover, it is measured in 2-year terms, requiring each member to recognize and contemplate that his election will not provide him with any career tenure.").

[5] *See generally* Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. Sch. L. Rev. 177, 180 (1995) (explaining that an ethics provision that is good for a largely populated area may devastate a small municipality).

changing circumstances. In Florida, for instance, a recent Statewide Grand Jury Report recommended that willful violations of the State's conflict of interest provisions be subject to criminal penalties, similar to Kentucky Revised Statute section 6.761. Grand Jury Report, *supra* p.7, at 45-47. The Report notes that this would give needed "teeth" to the decidedly sovereign interest that officials "work in the interest of the public first and foremost." *Id.* at 42. The process by which each state legislature determines what standard best applies in its jurisdiction deserves substantial latitude to ensure that ethical standards have vitality and relevance.

II. Strict scrutiny of state voting conflict laws invites a litany of problems including unduly burdensome litigation.

States, as well as local governments, have adopted a range of conflict recusal provisions for the laudable purposes of decreasing corruption and increasing public confidence in elected officials. Strict scrutiny review risks invalidating a wide swath of statutes critical to the States' sovereign authority to structure and regulate their governments. The ethical standards adopted to deal with voting conflicts deserve deference as well as protection from unwarranted federal court litigation.

A. Strict scrutiny will encourage vexatious federal court litigation.

Justice Pickering warned below that the application of strict scrutiny to Nevada's recusal provision "opens the door to much litigation and little

good." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 632 (Nev. 2010) (Pickering, J., dissenting). A decision affirming the majority of the Nevada Supreme Court would invite, and, indeed, encourage lawsuits by public officials. Moreover, the strictest standard would force States to act prospectively (like any litigant would) to minimize their potential for incurring losses, financial or otherwise.

Public officials who fall within the prohibitions of a recusal law would be well-served to mount an aggressive legal challenge with the hope that a strict scrutiny standard may benefit even a blameworthy legislator. The more egregious the action or apparent the violation — and thus the more certain a conviction and penalty — the more worthwhile a constitutional challenge might be.

States may also find themselves subjected to section 1983 actions by public officials who are charged with recusal violations, thereby creating still more costly litigation and subjecting States to potential damages. *See Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009) (city council members brought section 1983 action challenging the Texas open meetings provisions they had been investigated for violating), *reh'g en banc dismissed as moot*, 584 F.3d 206 (5th Cir. 2009); *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 528 (1st Cir. 1989) (officials brought section 1983 actions for First Amendment violations resulting from town prohibiting their participation).

The viability of state recusal laws is dramatically reduced if these laws are subject to the

most stringent and intrusive standard of review in the judicial toolbox. Facing the threat of presumptive unconstitutionality, legislatures may either jettison their attempts to enact creative and effective solutions to the persistent threat of corruption or gravitate to ones whose effectiveness is questionable because they are so minimal and noncontroversial. Adherence to a one-size-fits-all mentality is ill-suited for decisions by individual sovereigns that are "the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Increased litigation would serve no worthwhile purpose other than to impede traditional notions of federalism. Litigation costs and the expenditure of resources needed to defend these suits would place already-beleaguered governmental budgets under greater financial strain. States may be driven to avoid costly federal court litigation and adopt "safer" and less effective recusal provisions, which would yield little success in halting corruption.

B. States defending their ethics laws will face significant burdens under a strict scrutiny standard.

This Court has "readily acknowledge[d] that a law rarely survives [strict] scrutiny." *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) ("Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact. Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model*

for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).").

States protecting their ethics codes and confronting strict scrutiny review face many hurdles. They must show that a compelling governmental interest supports the provision challenged and that the provision is narrowly tailored to reach that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (strict scrutiny test requires that "regulation is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end"). States will carry an evidentiary burden to overcome the presumption that their provisions are unconstitutional. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). When a statute is deemed to encroach on a protected area of speech, courts are wary and demand exacting and supportive justification. *See, e.g., Landmark Commc'ns v. Virginia*, 435 U.S. 829, 841 (1978).

To survive strict scrutiny, the State must bring forth proof that would include "extensive legislative hearings," as well as "witnesses who can testify as to what would happen without" the challenged provisions and the "exact effect of these laws" on their intended targets. *Burson*, 504 U.S. at 208. This Court has noted that strict scrutiny "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). States would face an

onerous, expensive, and time-consuming task in developing an evidentiary record compelling enough to overcome strict scrutiny.

C. Undesirable consequences will occur under a First Amendment strict scrutiny standard.

A study examining federal cases (from 1990 to 2003) involving the application of strict scrutiny concluded that the "fatal in fact" adage is somewhat inaccurate, noting that thirty percent of challenged provisions survived heightened review. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 796 (2006). Of all the categories examined, however, strict scrutiny was most fatal in free speech cases where only twenty-two percent of statutes survive. *Id.* at 815. Particularly relevant here is the rate at which state and local regulations survive. State legislative enactments were upheld only twenty-three percent of the time; local government enactments had only a fifteen percent success rate. *Id.* at 818. As the study noted, local governments "face a scrutiny that is nearly always fatal." *Id.* at 819; *see also id.* at 821 ("One of the most striking and powerful patterns in the strict scrutiny data is how federal governmental actors fare compared to state and local governmental actors. Federal actors, such as Congress, the federal judiciary, and federal agencies are much more likely to have their laws upheld than state and local governmental actors.").

States, which serve as laboratories of democracy, are often the entities counted on to act and react to pressing societal needs. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Given the significant sovereign interests at issue, States should be permitted to respond to their electorates and act in a manner they believe is most consistent with their institutional values. States are incubators for political experimentation; nothing speaks more directly to the social contract between States and their citizens than ethics laws regulating the conduct of public officials.

Simply put, a strict standard under the First Amendment will drive States towards ineffectual uniformity, an undesirable result given the persistent problem of corrupt state and local officials. *See Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."). Indeed, "constitutionally imposed uniformity [is] inimical to traditional notions of federalism." *Rummel v. Estelle*, 445 U.S. 263, 282 (1980); *see also Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system."). Certain areas of the law are particularly well-suited to the central precept of the federal system, i.e., that federal courts should only intrude in matters of state government for the clearest of constitutional violations. Where the federal interests are more opaque, as they are here, courts should

defer to state legislatures' expertise. Public officials subject to recusal provisions are often elected by and serve directly the people in their respective States and localities, and it is these constituents who must deal with the consequences of lax regulation of their public officials.

An implication of the Nevada Supreme Court's holding is that elected officials have an all but unfettered First Amendment right to vote on any matter, despite a neutral regulation to the contrary. A nondiscriminatory ethics regulation on voting conflicts should not be held subject to the same standard of scrutiny as discriminatory prohibitions on core free speech rights. *See generally Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable."). Strict scrutiny should not tie the hands of States seeking to assure that their officials' voting is done fairly and ethically. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest … would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

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In short, respect for state governments is lost where laws regulating voting conflicts of public

officials must first run the litigation gauntlet of strict scrutiny; recusal provisions will be presumptively unconstitutional, permitting public corruption to survive and public confidence to further erode. Instead, States are best able to identify and address their own institutional problems in this context, and should be afforded the necessary freedom to craft appropriate remedies and structure their own governments.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the Nevada Supreme Court.

Respectfully submitted,

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