No. 10-568

IN THE
Supreme Court of the United States

NEVADA COMMISSION ON ETHICS,
Petitioner,

v.

MICHAEL A. CARRIGAN,
Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE STUDENT PRESS LAW CENTER AND 14 OTHER NEWS ORGANIZATIONS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici (described in Appendix A) and the journalists that they represent have an interest in protecting the public's right to freely monitor and oversee the ethical and open workings of its government. Equating acts of governance by elected officials to pure political speech that is protected by the First Amendment strict scrutiny standard may significantly compromise the ability of the press to monitor and inform the public of the actions taken by representatives in their official capacity. *Amici* file this brief to emphasize the dangers that the adoption of the Nevada Supreme Court's reasoning in this case could pose to open government.

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[1] Pursuant to Supreme Court Rule 37 (2010), counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that counsel for the petitioner and respondent have filed blanket written consents to the filing of *amicus curiae* briefs in this matter.

SUMMARY OF ARGUMENT

Interpreting acts of governance, such as voting by public officials, as pure political speech protected by the strict scrutiny review standard carries "broad implications." *See Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc). They extend beyond conflict of interest regulations to also reach other ethics and open government laws, where the ramifications are undoubtedly real and significant.

As members of the media constitutionally charged with holding government accountable to the people, *amici* urge this Court to consider Respondent's First Amendment claim within the broader context of traditional government measures designed to promote open and honest governing. Neither history nor practice suggests that a constitutional amendment "[p]remised on mistrust of government power," *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010), is meant to be a vehicle for government officials to avoid compliance with content neutral ethics and open government laws.

This Court should hold that recusal statutes and other generally applicable and evenhanded regulations on acts of governance do not qualify as restrictions on political speech that are subject to strict scrutiny under the First Amendment. An official government action, such as the casting of a legislative vote, certainly may include an expressive component. But that fact does not mean that voting and other actions taken by elected officials in their official capacities implicate the type of expression that the First Amendment's Free Speech Clause was

"meant to protect." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Moreover, even if an elected official's vote is considered protected political expression, strict scrutiny remains inappropriate here. Recusal statutes like Nevada's, which regulate the mechanics of local government, are not attempts to stifle expression. The secondary effect that recusal regulations may have on such expression is modest and is justified by legitimate governmental interests that are "unrelated to First Amendment values." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

ARGUMENT

I. Finding a Strict Scrutiny Standard of Review Applicable in this Case Could Fatally Expose a Variety of Open Government and Ethics Laws to Constitutional Challenges

Amici, as independent monitors of government affairs, are naturally concerned about the potential impact on government openness if this Court were to establish a strict scrutiny standard of review in cases involving government officials' freedom to "speak"[2] or otherwise associate in any First Amendment sense. One means of ensuring accountable and ethical government conduct is through state and federal Sunshine laws that require government officials to hold all deliberations and voting on matters coming before their respective bodies in public. Another is the myriad of state and federal ethics laws that govern the conduct of legislative, executive and judicial branch figures. These can range from laws forbidding associations that raise an appearance of impropriety to

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[2] For purposes of the arguments raised in Section I herein, *amici* assume *arguendo* that there is no legally significant distinction between a government official's speech and his or her related government action for which the First Amendment would not apply. As set forth in Section II, however, *amici* maintain that the activity at issue in this case – that is, an elected official casting a vote – is not protected private speech but in fact government action that raises no recognizable First Amendment claims. Nonetheless, *amici* highlight herein the potential fallout from a finding that a government official's duties and related actions implicate First Amendment protections.

those that require disclosing actual or perceived conflicts. Indeed, as the Nevada Supreme Court rightfully found in this case, "promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law." *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 623 (Nev. 2010).

Promoting honest and impartial government is surely a compelling state interest and that aspect of a strict scrutiny standard cannot be reasonably assailed. However, certain facets of open meetings and numerous ethics laws could potentially fail the "narrowly tailored" component of such an analysis as they would often be found unconstitutionally vague or overbroad. By their very nature, ethical dilemmas often operate in zones of gray, where clear standards of appropriate behavior are difficult to delineate. Hence, laws intended to curb unethical behavior can be facially read as possibly overinclusive, arbitrary or ill-defined.

Some may well argue that the "limitations" of precise drafting actually further the policies underpinning ethics laws as they may tend to encourage individuals to favor a safe, ethical option in the face of uncertainty. Further, it is often impractical to divine and codify every potential ethical dilemma that could arise, thereby necessitating guidelines based on experience, principle and example rather than rigid, absolute constructions. This rationale is, for example, supported by the Judicial Conference's Code of Conduct for United States Judges (hereinafter,

"Judicial Code of Conduct"), discussed *infra*, which notes in commentary to rules regarding judicial impropriety that "[b]ecause it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not necessarily mentioned in the Code." Code of Conduct for United States Judges, Commentary to Canon 2A (last revised June 30, 2009).[3]

What follows is an illustrative overview of the variety of laws designed to promote ethical and open government that would be susceptible to constitutional challenge should this Court hold that a strict scrutiny analysis applies to any law affecting a government official's "speech" or association rights related to their official actions. The ongoing viability of such laws is of critical importance to *amici* because they help to ensure that the media can effectively report and analyze government activity for the public's benefit.

A. Federal and State Open Meetings Laws

Finding the strict scrutiny standard applicable to restrictions on government officials' "speech" could have fatal implications for state and federal open meetings laws that require government officials forbear from deliberating in private to discuss matters before their respective bodies. As such laws are

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[3] *Available at*: http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

worded, government officials could argue that such restrictions are not narrowly tailored in that they often ban a wide swath of communications between officials that relate to or could affect their public voting decisions.

For example, the federal Government in the Sunshine Act, 5 U.S.C. § 552b *et seq.* (hereinafter "Sunshine Act"), states that "every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b(b) (2010). Subject to a few enumerated exceptions, the act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." *Id.* § (a)(2). In short, the law requires agency collegial bodies to deliberate and cast votes in full public view and prevents a quorum of any collegial agency body to deliberate or predetermine agency action. As its legislative history suggests:

> It is not sufficient for the purposes of open government to merely have the public witness final agency votes. The meetings opened by [the Sunshine Act] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decision-making process, not merely its results, must be exposed to public scrutiny.

S. Rep. No. 94-354, at 18 (1975).

In interpreting the meaning of "meeting" under the Sunshine Act, this Court has noted that potentially illegal private "discussions must be 'sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.'" *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 471 (1984) (quoting R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978)).

States have substantially similar open meetings laws requirements that generally forbid agency body heads, local councilmembers, commissioners, and other like public officials from engaging in private discussions with colleagues on matters pending before the body. For example, Colorado's open meetings law states that "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." Colo. Rev. Stat. § 24-6-402(2)(a) (2010). It goes on to define a "meeting" as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." *Id.* § (1)(b).

Similarly, Kentucky's open meetings laws state that subject to limited exceptions, "[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times . . . ." Ky. Rev. Stat. § 61.810(1) (2010). Kentucky defines a

"meeting" under the act as "all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting." Ky. Rev. Stat. § 61.805(1) (2010).

It is easy to envision constitutional challenges asserting that laws like those cited above are arbitrary (quorum requirements), overbroad (bans on any discussion of public business or business that may come before a body) or vague (discussions that could reasonably lead to officials forming opinions on pending matters). Yet these laws are in place precisely to stem such activity through relatively broad and far-reaching limitations so as to capture a wide range of potentially unethical behavior without specifically detailing every instance or scenario in which actual ethical breaches will undoubtedly result.

The above concern is not purely supposition. *City of Alpine v. Abbott* is a case currently pending before the U.S. District Court for the Western District of Texas in which local Texas officials are challenging the constitutionality of the state's open meetings laws. *See City of Alpine v. Abbott*, No. 09-CV-00059 (W.D. Tex. filed Dec. 14, 2009). Officials claim that the imposition of criminal penalties for violations of the state act – which include prohibitions on discussing public business in private – infringe on officials' First Amendment rights. If a court were required to analyze Texas' open meetings law "speech" restrictions under strict scrutiny, it may well find that they are not narrowly tailored enough to pass constitutional muster. This would turn the purpose of the

First Amendment, which is designed to protect the people from government, on its head.

B. "Revolving Door" Legislation

Laws designed to prevent conflicts of interest and government-private sector "revolving doors" in legislative and executive branch officials are also potentially at risk of being declared unconstitutional should this Court rule that strict scrutiny applies to restrictions on government officials' speech or freedom to associate in an official capacity. For example, at the federal level, 18 U.S.C. § 207 prevents former executive officials from influencing pending matters in which they participated or were under their responsibility at the time of their government employment. Specifically, the law provides for both permanent and two-year restrictions on certain "communications" or "appearances" by former executive branch officers and employees "knowingly" made with the "intent to influence" current government officials on a particular matter. *See* 18 U.S.C. § 207(a)(1)-(2) (2010). These provisions restrict contact when: (1) the government is a party to or "has a direct and substantial interest" in the matter; (2) the former official had a role in the matter (or in the case of two-year restrictions, matters he or she "knows or reasonably should know was actually pending under his or her official responsibility . . . within a period of one year before the termination of . . . employment"); and (3) specific parties were involved at the time the former official was involved in the matter. *Id.*

Additional one-year restrictions prohibit representing, aiding or advising third parties on trade and treaty negotiations. *Id.* § (b). High-level executive officials and appointees are governed by additional restrictions. *See id.* § (c). The same law imposes similar restrictions on former members of Congress and staffers. *See id.* § (e). The Obama administration has placed further revolving door restrictions on executive agency appointees. *See* Exec. Order No. 13490, 74 Fed. Reg. 4673-78 (Jan. 21, 2009). Similar laws are also in place at the state level across the country. *See, e.g.*, Ala. Code § 36-25-13 (2011); Cal. Gov't Code § 87406 (2010); Mo. Rev. Stat. § 105.454(5)-(6) (2011); N.Y. Pub. Off. Law § 73(8) (2011); Wis. Stat. § 19.45(8) (2010).

There is clearly an interest in preventing government employees from immediately transitioning into the private sector and working on matters for which they had input or responsibility as a government employee. Such rules prevent unfair private sector advantage in the legislative process and diminish the possibility of untoward influence within executive agencies. However, if such laws were subjected to a strict scrutiny standard it could prove difficult to justify the various time restraints imposed under federal law or determine what kinds of communications are knowingly made with the intent to influence – a phrase that could be interpreted as both vague and overbroad. Such prohibitions intended to prevent revolving door practices are by design drafted to be relatively sweeping and open-ended so as to cover the wide variety of speech and association that would frustrate its intent.

C. Judicial Ethics

The federal judiciary is also subject to a variety of ethical rules designed to engender legitimacy in, and respect for, the adjudicative process. The Judicial Code of Conduct places a number of constraints on judges' activities that would arguably implicate a judge's "speech" or association rights under the First Amendment. Failure to abide by such ethical rules could lead to censure, impeachment and ultimately removal from the bench.

Canon 5A, for example, prohibits federal judges from engaging in a variety of core political speech activities including: (1) holding leadership positions in "political" organizations; (2) making speeches on behalf of such organizations; (3) publicly endorsing or opposing a political candidate; and (4) raising money for or contributing to a political organization or candidate. *See* Judicial Code of Conduct, Canon 5A. Canon 4 places even broader restrictions on a judge's extrajudicial activities, prohibiting "activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties [or] reflect adversely on the judge's impartiality . . . ." Judicial Code of Conduct, Canon 4.

Canon 2A goes even further to state simply that judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Judicial Code of Conduct, Canon 2A. The commentary to Canon 2A notes that

judges must avoid any actual impropriety or the appearance of impropriety in both his or her professional and private life. *See id.* It defines an appearance of impropriety as those situations where "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as judge is impaired." *Id.*

It is clear from the plain language of the code that a judge's ability to speak freely on issues of public concern and associate with any groups or movements regarding such concerns is limited and impinges on many of the freedoms the average citizen can freely exercise. It is arguably unclear what activities may even be subject to such restrictions. As noted in the code itself, however, the Canons eschew narrowly drawn and precise rules of ethics in favor of generally applicable guidelines to ensure the integrity of the judicial system. Hence, they are naturally open ended and sweeping so as to give cover to the variety of situations that may reflect negatively on judicial independence. Like the laws discussed previously, these ethical constraints could risk constitutional challenges should this Court find that restrictions on government officials' "speech" rights are subject to strict scrutiny.

The above is but a representative sampling of the kinds of laws potentially affected by the Court's ruling in this case. Surely there are others. However, those presented here suggest that this case has much greater implications on open government and ethics laws than the single Nevada law at issue. Should

this Court hold that First Amendment protections apply in this case, *amici* respectfully urge this Court to carefully consider the effect establishing a strict scrutiny standard for restrictions on government officials' speech may have on the myriad of laws intended to promote open and honest government.

II. Neither Tradition nor Precedent Supports Applying First Amendment Strict Scrutiny Review to Generally Applicable and Evenhanded Regulations on Acts of Governance

In addition to the significant repercussions on governing that could flow from subjecting traditional open government and ethics laws to strict scrutiny, such an approach also is inconsistent with both the historical purpose of the First Amendment and this Court's practice in other contexts in which content neutral regulations serve a purpose other than the restriction of expression. Accordingly, *amici* urge this Court to hold that open government and ethics statutes that are generally applicable and evenhanded regulations on acts of governance should not be viewed as restrictions on political speech subject to strict scrutiny under the First Amendment.

A. Extending First Amendment Speech Rights to Official Government Actions Is Inconsistent with the Traditional Purpose of the First Amendment

There is a long history of protecting the ability of legislative officials to speak and perform their official

duties. That history, however, suggests that it is the Speech and Debate Clause, U.S. Const. art. I, § 6, and similar state privileges that are intended to protect the official acts of legislators, not the First Amendment, U.S. Const. amend. I.[4]

"Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *accord Spallone v. United States*, 493 U.S. 265, 279 (1990). This "legislative freedom" – which extends to legislative voting, *see, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) – was established in multiple State constitutions prior to the ratification of the Federal Constitution, and is traced directly to a similar privilege in Parliament. *Tenney*, 341 U.S. at 372-74. The purpose behind providing legislators with the "fullest liberty of speech" in the exercise of their duties was "to enable and encourage a representative of the public to discharge his public trust with firmness and success." *Id.* at 373 (quoting II Works of James Wilson 38 (Andrews ed. 1896)).

As Justice Pickering noted below, however, this speech protection for lawmakers has traditionally been premised on the U.S. Constitution's Speech and

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[4] *Compare* U.S. Const. art. I, § 6 ("[F]or for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.") *with* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

Debate Clause and state legislative immunity, not the First Amendment. *See Carrigan*, 236 P.3d at 625 (Pickering, J., dissenting) (citation omitted). As reflected in *Tenney* and other cases, the premise of the Speech and Debate Clause and similar state provisions was that protecting the actions of government officials in their legislative capacity would benefit their constituents. *See Tenney*, 341 U.S. at 373-74 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), as explaining the intent of the legislative privilege as being "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal").

In contrast, the drafting of the First Amendment's Free Speech Clause does not suggest an intent to protect acts *by* government officials, but rather an intent to restrict the government's ability to censor private speech. The First Amendment sprung directly from James Madison's desire to protect individuals from tyranny and government censorship. *See* Raymond Shih Ray Ku, *F(r)ee Expression? Reconciling Copyright and the First Amendment*, 57 Case W. Res. L. Rev. 863, 874 (2007) (observing that the First Amendment was "a direct response to the evils of censorship in England"). Madison's writings consistently indicate that he envisioned the First Amendment to act as a restraint on governmental power; he explicitly claimed that "the amendment is a denial to Congress of all power over the press." James Madison, "Report on the Virginia Resolu-

tions," *Writings 6:385-401* (Jan. 1800).[5] Implicit in the First Amendment is the idea that access to governmental affairs allows the public to better understand its government. Madison, *supra* ("[T]he several amendments proposed were to be considered as . . . extending the ground of public confidence in the Government.").

By imposing restrictions on government censorship, the First Amendment allows the public to speak freely about governmental affairs. As Madison explained, "[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both . . . . And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 *Writings of James Madison* 103 (G. Hunt ed., 1910). Madison recognized the importance of having the public know and understand governmental affairs, and he intended that the First Amendment be the tool with which such knowledge could be obtained. 2 T. Cooley, *Constitutional Limitations* 885 (8th ed. 1927), *cited in* R. James Assaf, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 Case W. Res. L. Rev. 227, 251 (1990) ("The evils to be prevented [by the First Amendment] were . . . any action by the government by means of which it might prevent such free and general discussion of public matters.").

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[5] *Available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.

This Court has repeatedly embraced Madison's understanding of the First Amendment. In numerous opinions, the Court has acknowledged the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *accord Bellotti*, 435 U.S. at 776-77 (quoting from and reaffirming *Mills*). In acknowledging the protections the First Amendment bestows on the public, Justice Stewart similarly recognized that the First Amendment was expressly not designed to protect the government. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.") (emphases in original).

This Court has also repeatedly emphasized that the First Amendment was designed to protect the public's access to information about its government. *See, e.g., Bellotti*, 435 U.S. at 783 ("[The] First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw."); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (asserting that the First Amendment had a "purpose of assuring freedom of communication on matters relating to the functioning of government"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the First Amend-

ment includes an inherent right to acquire and proliferate knowledge and information).

The Court's precedent on this issue illustrates its understanding that the First Amendment was drafted to provide the public with access to the government. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"). Therefore, the First Amendment cannot be used as a means to *limit* public access to government; doing so would be directly in conflict with the First Amendment's core purpose. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."); *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised.").

B. The Act of Voting by Elected Officials Does Not Constitute the Type of Expression that Should Be Protected by Strict Scrutiny Review Under the First Amendment

A regulation on the act of voting by elected officials is a regulation on an act of governing, not private speech. The First Amendment's Free Speech Clause was not intended to address such government action. Even if such regulations did affect protected expression, the governmental context and content

neutral nature of the regulations render the strict scrutiny standard inappropriate.

1. An Elected Official's Act of Casting a Vote Is an Act of Governance

When an elected official casts an official vote, the official performs an act of governance. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (stating that a councilmember's "acts of voting for an ordinance were, in form, quintessentially legislative"). As Justice Brennan has said, "[w]hile the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance." *Spallone,* 493 U.S. at 302 n.12 (1990) (Brennan, J., dissenting); *see also Doe v. Reed*, 130 S. Ct. 2811, 2833 (2010) (Scalia, J., concurring in judgment) ("A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.") (footnote omitted).

Undoubtedly, that official's act may include an expressive component. As the First Circuit stated in *Miller v. Town of Hull*, voting can be a means for lawmakers to express their position to constituents. 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue.") (footnote omitted). Likewise, this Court's case law supports the proposition that the act of voting by private citizens implicates the First Amendment, and that signing a petition in a referendum process is an expression of a political view. *See Reed*, 130 S. Ct. at 2817-18.

But the fact that voting by public officials may include an expressive component does not mean that any regulation on that act "abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. The First Amendment is certainly "meant to protect" the rights of lawmakers to voice their own opinions: a legislative body, for example, generally may not expel an elected member because of the position that member has expressed publicly. *See Bond v. Floyd*, 385 U.S. 116, 135-37 (1966). But regulations on acts of governance – on the lawmaking process itself – are different. They do not punish legislators for expressing their point of view; legislators remain free to voice their opinion as they see fit. *See, e.g., Reed*, 130 S. Ct. at 2830 ("Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time.") (Stevens, J., concurring in part and in judgment). Instead, recusal requirements generally only restrict the governing act of casting a vote in an official capacity.[6]

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[6] The Eighth Circuit reached a similar conclusion in *Peeper v. Callaway County Ambulance District*, distinguishing between a restriction limiting an official's participation as a local board member and a limitation on participating in a public meeting as a citizen. 122 F.3d 619, 623 n.4 (8th Cir. 1997) (stating that a resolution "does not limit her ability to vote for Board members, to speak before the Board during public comment periods, or to otherwise express her opinions about the District's operation as any other citizen under the First Amendment's free speech guarantee.").

It is in this respect that the limited burden placed on a public official's expression is most apparent. In *Reed*, this Court recognized that a public disclosure requirement on petition signatures could burden speech. 130 S. Ct. at 2817-18. But "'the amount of speech covered' is small – only a single, narrow message conveying one fact in one place." *Reed*, 130 S. Ct. at 2830 (Stevens, J., concurring in part and in judgment) (citation omitted). And while the act of signing a petition – like the act of casting an official vote – "does serve an expressive purpose, the act does not involve any 'interactive communication,' and is 'not principally' a method of 'individual expression of political sentiment.'" *Id.* (citations omitted).

If the "expressive interests implicated by the act of petition signing are always modest," *Reed*, 130 S. Ct. at 2829 (Sotomayor, J., concurring), the "expressive interests implicated by the act" of casting an official vote are likewise modest. Accordingly, it should "by no means [be] necessary for a State to prove that such 'reasonable, nondiscriminatory restrictions' are narrowly tailored to its interests." *Id.* at 2828 (quoting *Anderson*, 460 U.S. at 788).

2. Regulation of Official Conduct Should Not Be Subject to Strict Scrutiny

Even if this Court concludes that voting by elected officials constitutes political speech, regulations on official government action that affect that speech should not be subject to strict scrutiny so long as the regulations are generally applicable, evenhanded

and serve a purpose unrelated to First Amendment values.

This Court has recognized "the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Citizens United*, 130 S. Ct. at 899. Official legislative actions fit within that framework, and can justify regulations aimed at avoiding bias and an appearance of bias in governance. *See U.S. Civil Svc. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."). Such restrictions are justified by the state's legitimate interests in avoiding corruption and the appearance of corruption, and in maintaining an orderly system of government.

This Court's jurisprudence in the areas of electoral regulations and legislative governance is instructive here. As this Court recognized in *Reed*, the electoral context matters in assessing the First Amendment implications of a regulation. States have "significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that process, the government will be afforded substantial latitude to enforce that regulation." *Reed*, 130 S. Ct. at 2818 (citation omitted). Accordingly, this Court has "upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at

788 n.9, and has "also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values." *Id.*

Evenhanded electoral regulations that are designed to combat fraud and preserve confidence in representative government can burden First Amendment rights. *Anderson,* 460 U.S. at 787-88. But "to 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." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Accordingly, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 434 (citing *Anderson*, 460 U.S. at 788).

Indeed, this Court has repeatedly upheld candidacy restrictions that have a much greater effect on public office holders and candidates than the recusal requirement here. For example, states may permissibly enact "resign to run" provisions that require office holders to resign a public position (either elected or non-elected) before running for a different position. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 972 (1982) (discussing cases). *Clements*, in fact, rejected an elected official's First Amendment challenge to both a "resign to run" requirement and a Texas constitutional provision that went even further: it rendered "an officeholder ineligible for the Texas Legis-

lature if his current term of office will not expire until after the legislative term to which he aspires begins." *See id.* at 960, 972. The "burdens" imposed on the First Amendment interests of such candidates were "insignificant," this Court held, and justified by the state's interests in an orderly government process. *Cf. id.* at 972-73 ("Constitutional limitations arise only if . . . the challenged provision significantly impairs interests protected by the First Amendment.").

The state's interest in a recusal statute is similar to that in a "resign to run" candidate requirement: to protect effective government administration while preventing potential corruption or conflicts of interest. *Compare Clements*, 457 U.S. at 968 (plurality section of opinion) (stating that Texas' resign-to-run provision "seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office"), *with Carrigan*, 236 P.3d at 623 ("We agree with the Commission that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest that is consistent with the public policy rationale behind the Nevada Ethics in Government Law.").

The same is true with regulations on acts of government. An elected official's right to cast official votes should carry no greater First Amendment protection than the right of citizens to vote for candidates, or a candidate's right to run for office. If the goal of avoiding a possible conflict of interest permits a state to force an official to step down from an elect-

ed office before running for another elective position, surely the state can prohibit an elected official from voting on measures in which a conflict of interest is present. *See, e.g.*, *Peeper*, 122 F.3d at 622-23 (comparing restriction on board member's participation in proceedings to restriction on candidacy; rejecting strict scrutiny review).

Court cases in the area of legislative governance support the same conclusion. To hold that the act of voting by government officials is the type of expression "that the First Amendment was meant to protect" could open the door to all types of challenges to governing rules by local legislators – and other public officials.[7] The denial of a committee assignment could implicate a legislator's free speech rights, as that legislator may be denied an opportunity to vote on a bill. *See, e.g.*, *Davids v. Akers*, 549 F.2d 120, 123 n.3 (9th Cir. 1977) ("We are unable to understand the suggestion of appellants that failure to appoint a Democrat a member of a committee somehow deprives him of freedom of speech. We cannot accept so extravagant a construction of the guaranty of free-

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[7] Indeed, to hold that official acts by public officials constitute political speech protected by the strict scrutiny standard is to open almost any government action to constitutional scrutiny. As Justice Brennan's dissent in *Spallone* noted, an elected official's free speech argument for refusing to comply with a court order to vote for specific legislation could just as easily be made by a housing official that does not want to issue zoning exemptions or by a trial court judge that does not want to comply with a superior court's mandate. *See Spallone*, 493 U.S. at 302 n.12 (Brennan, J., dissenting).

dom of speech."). Similarly, rules for cutting off debate on a bill may constitute the denial of the opportunity to "speak" on the merits of a bill. *See Parker v. Merlino*, 646 F.2d 848, 855-56 (3rd Cir. 1981); *cf. Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991) (Wisconsin's partial veto provision did not implicate free speech).

Subjecting every such claim to strict scrutiny and the narrow tailoring requirement that accompanies such review would have serious repercussions to the performance of government. Elected officials may voice opposition to a law or measure, but the First Amendment should not be used by government officials as a means to not comply with generally applicable and evenhanded regulations of governance.

CONCLUSION

For the reasons addressed above, *amici* requests this Court to reverse the judgment of the Nevada Supreme Court and clarify that recusal statutes and other generally applicable and evenhanded regulations on acts of governance do not qualify as restrictions on political speech that are subject to strict scrutiny under the First Amendment.

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press (AP) is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

The Association of Alternative Newsweeklies (AAN) is a diverse group of 131 alt-weekly news organizations covering every major metropolitan area and other less-populated regions of North America. AAN members have a combined weekly circulation of over 6.5 million as well as a print readership of nearly 17 million active, educated and influential adults in the U.S. and Canada. In addition, AAN-member content is viewed by millions of additional adults via the web and mobile devices.

The Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Trib-

une, Contra Costa Times, Mann Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald, and Vacaville Reporter. These newspapers rely on open government laws, including the federal Freedom of Information Act, to provide vital information to the public about government and corporate activities that affect their lives.

Belo Corp. began as a Texas newspaper company in 1842 and today is a publicly-held television company. Belo owns twenty television stations (nine in the top twenty five United States markets) that reach fourteen percent of United States television households. Belo's media outlets include ABC, CBS, NBC, FOX, and CW network affiliates and its television stations' associated Web sites.

A. H. Belo Corporation is a news and information company that owns and operates three daily newspapers and eleven associated Web sites, with publishing roots that trace to The Galveston Daily News, which began publication in 1842. A. H. Belo publishes The Dallas Morning News (www.dallasnews.com), The Providence Journal (www.projo.com), the oldest major daily newspaper of general circulation and continuous publication in the United States, and The Press-Enterprise (www.pe.com), serving southern California's Inland Empire.

The E.W. Scripps Company is a diverse, 131-year old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's

portfolio of locally-focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, DC-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a non-profit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that the Coalition resists excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The National Press Photographers Association (NPPA) is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the

United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

The Radio Television Digital News Association (RTDNA) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Stephens Media LLC, is the publisher of the Las Vegas Review-Journal, the largest daily newspaper in Nevada. Stephens Media also publishes daily newspapers in 7 other states from North Carolina to Hawaii.

APPENDIX B

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