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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Constitution and Statutes:

Administrative Materials: **Page(s)**

Miscellaneous:

REPLY BRIEF FOR THE PETITIONER

At the urging of Sparks City Council Member Michael A. Carrigan, the Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that recusal provisions of the State's Ethics in Government Law are subject to strict scrutiny. The Court then granted respondent's request to hold facially overbroad a provision requiring recusal when the independent judgment of a reasonable person in the official's position would be materially affected by a relationship "substantially similar to" one of four other relationships covered by the statute (involving members of an official's household, relatives, employers, and business relationships).

We restate the holding under review at the outset because reading respondent's brief, it would be easy to forget why this case is here. Respondent touches only momentarily (Resp. 23-29[1]) on the rationale of the opinion below, which was his central thesis throughout this litigation. The bulk of his brief is instead devoted to arguing that: (1) the provision is unconstitutionally vague (*id.* at 41-49)—an issue that, as respondent conceded, B.I.O. 24, the court below declined to address, Pet. App. 6a n.4; and (2) the provision unconstitutionally burdens the right of association of officials and supporters, Resp. 29-41—a right respondent mentioned only fleetingly in his

[1] This brief follows the abbreviation conventions of the Respondent's Brief, Br. for Respondent ("Resp.") 1 n.1. Respondent's Brief in Opposition appears as "B.I.O."

opening brief below while discussing his vagueness and speech claims, see A.O.B. 9, 18, and that the court below did not address. Respondent nominally disavows (Resp. 21) the facial challenge he avidly urged below (A.O.B. 6, 15, 23), although facial arguments appear throughout his brief. Respondent's brief in opposition gave no hint that any of these matters was at issue. See B.I.O. 7-24. Respondent's eleventh-hour shift away from voting as speech after *years* of litigation reflects an awareness that his speech claim fails. To the (doubtful) extent that his newly revived claims are properly before the Court, see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, No. 09-834, slip op. 14 (Mar. 22, 2011); *Skinner* v. *Switzer*, No. 09-9000, slip op. 14 (Mar. 7, 2011), they fare no better.

Respondent faults our opening brief for focusing on speech and ignoring other "severe" burdens, such as on the First Amendment right of Vasquez's client to "engage the entire [City Council]" (Resp. 34) through the lobbyist of its choice or potential burdens on the "relationship" between "volunteers" and candidates. Respondent contends that the Lazy 8's rival hoodwinked the Commission into investigating respondent in "its self-appointed role as the police of political purity" (*id.* at 59), and that his disqualification here is part of an unprecedented effort to "take the politics out of democracy," *id.* at 1, by prohibiting officials from voting for policies favored by their political supporters. *Id.* at 52. Respondent says that the very "fabric of our democracy" (Resp. 58) is at stake.

Not so. This case involves a straightforward disqualification based on an unexceptional combina-

tion of private interests and personal and business relationships. Carlos Vasquez's interest in the casino development—the basis for recusal—was private and pecuniary, not political. His relationship with respondent did not center on shared views about the Lazy 8, nor did he appear at the Council meeting as an "activist" petitioning his government on that issue. Vasquez became involved when (with the reelection campaign already under way) the developer, who had him on a $10,000-a-month retainer, J.A. 239, directed him to win City Council approval.

Nor was Carrigan's relationship with Vasquez, a professional political consultant, see J.A. 162; C.A.V. Strategies, Ltd., http://www.cavstrategies.com/about_management.htm (last visited Apr. 14, 2011), typical of that of candidate and "perennial campaign volunteer." Resp. 9. The services Vasquez provided to respondent included managing *three* successful campaigns (including the one ongoing at the time of the Lazy 8 vote) and furnishing the services of his advertising and printing firms; indeed, 89 percent of respondent's 2006 campaign expenses were paid to Vasquez's advertising firm. Pet'r 6. Vasquez furnished those services at cost because they were "long-term friends," J.A. 230, not because of respondent's position on any issue. Whether a hypothetical law specifically requiring legislators to refrain from voting on matters involving the private interests of (current) campaign managers would pass constitutional muster (Resp. 50) is one of many diversions in respondent's brief. Under the neutral Nevada law at issue, the political context here was purely incidental: Given their close, longstanding, and continuing personal relationship, the same reasonable questions about respondent's objective

impartiality—and the need for recusal—would have been present if their relationship had been "forged" (Resp. 32) in real estate development.

To preserve "democracy" (Resp. 58), respondent asks this Court to invalidate a duly enacted law of an elected state legislature concerning how powers of office held under state government may be exercised. The regime he proposes would subject vast numbers of similar democratically adopted laws to exacting scrutiny, routinely making judges the final arbiters of basic questions of self-government. None of this would be an argument against enforcing an actual Free Speech right. But it supplies further confirmation, were any needed, that the answer to the question presented is the one dictated by history, logic, and precedent. The judgment should be reversed.

A. Restrictions On Official Voting Implicate No Personal First Amendment Speech Interest

In his brief discussion of legislators' claimed First Amendment right to cast legislative votes (Resp. 23-29), respondent does not contest that rules dating to the Founding are inconsistent with the notion that legislators have an individual Free Speech right to express their views by voting. Pet'r 20-21, 28-29. Nor does he refute that recusal restrictions are not limitations on speech, but on the use of official powers to effect legally binding governmental action. *Id.* at 23-24. And he does not dispute that, no less than "standard" recusal rules he declares unassailable (Resp. 39-40), this one focuses on interests and relationships and applies without regard to the content or "viewpoint" (if any) a legislator espouses.

Instead, respondent relies on a handful of lower-court opinions dating only to the late 1980s (one vacated as moot and another limited by later precedent), Resp. 25, stating that voting by a member of a public agency or board is protected by the speech guarantee of the First Amendment. *Id.* at 23. But as we explained, Pet'r 29-30 & n.9, those decisions (whose reasoning is questionable even within their narrow context) involved viewpoint-based retaliation or restrictions. Even speech lacking First Amendment protection may not be subject to viewpoint-based regulation. We know of *no* precedent during the first 198 years after the First Amendment's ratification that held that voting or expressive official action was protected speech. Nor are we aware of any constitutional challenge to a generally applicable recusal rule during that time—a remarkable silence given the widespread use of such rules and respondent's thesis that *all* such laws warrant at least "heightened" First Amendment scrutiny.

Respondent halfheartedly suggests that this Court *already decided* that legislative votes are protected speech when it held that a citizen "'expresses a view on a political matter when he signs a petition under [a state's] referendum procedure.'" Resp. 26 (quoting *Doe* v. *Reed*, 130 S. Ct. 2811, 2817 (2010)). But *Reed* held only that citizens' petition circulation, which is "core political speech," *Meyer* v. *Grant*, 486 U.S. 414, 421-422 (1988), and "a classic means of political expression," *Reed*, 130 S. Ct. at 2830 n.1 (Stevens, J., concurring in part and concurring in the judgment), did not *lose* its character simply because it could have legal effect. *Id.* at 2818. "It is one thing" to say that adding potential legal effect to a recognized form of expression "does not *deprive* it of protection, and

another thing altogether to suggest that an action * * * [that] exists only because of[] its legally operative effect as an exercise of official authority is First Amendment expression in the first place." Public Citizen Br. 7-8; cf. *Garcetti* v. *Ceballos*, 547 U.S. 410, 421-22 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). As Justice Scalia stated in *Reed* without contradiction by the majority, "[p]laintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment." 130 S. Ct. at 2833 (Scalia, J., concurring in the judgment).

The reluctance of the *Reed* majority to embrace the suggestion that a voter's signing a petition is "somewhat like" casting a legislative vote, 130 S. Ct. at 2833 (Scalia, J., concurring in the judgment), reflects basic dissimilarities: Voters are not protected by legislative immunity or absolute § 1983 immunity, and are not typically considered governmental actors, let alone policymakers. See *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 197 (2003).[2]

Lacking legal authority, respondent turns to rhetoric, proffering "tales" of legislators whose votes

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[2] Respondent's "culminating moment" theory (Resp. 24-25) would support a personal Free Speech right for an elected executive's "expressive" official action. Whether to comply with the federal court's desegregation order was "*the* issue" (*id.* at 24) in the Yonkers mayoral election, about which the winning candidate had a strong personal view. See *Spallone* v. *United States*, 493 U.S. 265, 290 n.3 (1990) (Brennan, J., dissenting).

have "express[ed] deeply held and highly unpopular views." Resp. 23-24. (Respondent hastens to add, however, that his Lazy 8 vote particularly warrants protection because it was *very popular* in his ward. *Id.* at 23.) But for all respondent's talk of the communicative value of votes, it is telling that he turns to legislators' *statements* to give them meaning. Resp. 23-24. As noted in our opening brief, Pet'r 27, the expressive content of a vote frequently "is not created by the conduct itself but by the speech that accompanies it." Cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).[3]

At bottom, respondent claims that because legislative voting *could* express a personal viewpoint, legislators have a First Amendment right to vote. While John Quincy Adams's vote on the Embargo Act may have "communicat[ed] a message," Resp. 23, it does not follow that that expressive potential would give him a Free Speech interest in voting on whether to award his brother Charles a government contract, notwithstanding a neutral recusal statute. Nor does the expressive potential of a government-owned printing press give an officer a First Amendment right to use it for personal expression in the face of a

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[3] Respondent wrongly suggests that the statute, which bars disqualified officials from "vot[ing] upon or advocat[ing] the passage or failure of" a measure, Nev. Rev. Stat. § 281A.420(2) (2007), prohibits "advocacy" outside the City Council. Resp. 40. Consistent with the longstanding tradition that an official's participation cease and his "voice [is] disallowed" upon disqualification, Thomas Jefferson, *Manual of Parliamentary Practice* 44 (N.Y., Clark & Maynard 1868) (1801), the Commission has construed the statute to apply only to advocacy in official proceedings.

neutral law reserving it for official use. Although respondent complains that "talk * * * [i]s cheap" without the definitive power of a vote to back it up, Resp. 24, nothing in the First Amendment gives officials a personal entitlement to commit *public resources* to a course of action so they can prove the sincerity of their views.

B. The Recusal Provision Imposes No Material Burden On Rights Of Association And Petitioning

Respondent contends that subsection 8(e)'s "substantially similar" language imposes a "severe" burden (Resp. 36) on "the relationship between the legislator/candidate and her campaign volunteers," and on volunteers' right to petition government, Resp. 33—a burden he claims is not imposed "by any other disqualification provision in the country." *Id.* at 29. The "burdens" that attract so much of respondent's attention—and which he faults petitioner's brief for "ignor[ing]," *id.* at 39—were not "severe" enough even to warrant mention in his brief in opposition. See *Kasten*, slip op. at 14. They are chimerical in any event.

Whatever modest plausibility these arguments have depends on distorting the statute at issue and taking flight from the actual facts of this case. Section 8(e) is not, as respondent claims, "a law that explicitly target[s] an elected official's relationship with campaign volunteers." Resp. 20. Nor does it treat political loyalty "as a new-fangled sort of corruption." *Id.* at 51. Nor does it require disqualification whenever "a former campaign manager" or "volunteer[]" has an interest that comes

before the public official. *Id.* at 35. It is, rather, a neutral law that requires recusal for relationships "substantially similar" to four ongoing relationships that respondent concedes are "just like" those covered in "all the standard [recusal] statutes." *Id.* at 40. In other words, it is for "a relationship that is as close as family or as close as a business partner." Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 10 (Nev. Mar. 30, 1999).[4]

Similarly, although respondent persists in calling subsection 8(e) a "catch-all," it plainly is no such thing. A "catch-all" is "a section or provision made to embrace diverse or unclassified particulars" of any kind. *Webster's New Int'l Dictionary* 422 (2d ed. 1954). Even "catch-*some*" does not acknowledge the narrow limits inherent in tying recusal to four specific relationships. Compare *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part) ("Although something of a catchall, [provision's] omnibus clause is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable (*e.g.,* 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment')."").

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[4] *Every significant element* of the Carrigan-Vasquez relationship is absent from respondent's fanciful hypothetical about Thomas Jefferson and James Madison. See Resp. 31. Respondent offers no basis for believing the Founders would have thought a legislator's *First Amendment rights* to be implicated in the considerably different situation of voting on a matter in which a paid lobbyist, who was currently performing work for the legislator, had a special pecuniary interest.

The narrow recusal provision actually in force (as opposed to respondent's caricature of it) has not caused respondent's hypothesized cavalcade of recusals in a decade of use. Respondent cites no case in which the transient (and completed) affiliation of an ordinary campaign volunteer was deemed so close as to be tantamount to "a relationship to a family member" or a "substantial and continuing business relationship," Pet. App. 106a, and the legislative history indicates the provision would not support recusal in the case of "a[n official] and someone who had worked on her campaign." *Id.* at 69a. The small number of subsection 8(e) recusals belies respondent's fevered hypotheticals.

Respondent insists that disqualification for political relationships is a particular "theme" (Resp. 30) of the Commission's, citing a decade-old decision involving an earlier version of the statute. See Resp. 30 (citing *In re Gates*, Nos. 97-54 et al. (Nev. Comm. Ethics, Aug. 26, 1998) (*available at* http://ethics.nv.gov)). There, the Commission censured members of a county government body for promoting friends' applications for airport concessions for which they lacked relevant business experience. That decision says little about how the Commission construes current law because, as the opinion emphasized, the Legislature had not yet added the language at issue here "defin[ing] th[e] types of interpersonal interests or relationships that would trigger disclosure and abstention." If anything, the opinion shows that the political nature of *some* of those relationships was purely incidental. The opinion emphasized the "many facets of their lives" in which officials were connected to the would-be contractors, including being "best friends" and

assisting on a business matter; some had *no* political ties to the officials. While political relationships is a "theme" of respondent's brief, two cases in a *decade* (only one involving language still in force)—out of hundreds of advisory opinions on a range of relationships—hardly bespeaks an effort to create "a sterile political utopia," Resp. 18.

Also meritless is respondent's worry that recusal would be triggered when a person in a covered relationship supports official action for *policy* reasons, thereby preventing officials from "voting on an issue that is important to [their] political allies and supporters," such as legislation favored by "the NRA or NAACP." Resp. 52. The recusal provision applies only to a commitment "in a *private* capacity" to "the *interests* of others," Nev. Rev. Stat. § 281A.420(2)(c) (2007) (emphasis added), indicating that only (typically pecuniary) private interests are covered. Moreover, recusal is not required where the benefit or detriment to the interested party "is not greater than that accruing to any other member of the general business, profession, occupation or group" affected, *id.* § 281A.420(3), as is ordinarily the case when a person supports legislation for policy reasons.

Of the many hats respondent asks Vasquez to wear—"petitioner," "perennial volunteer"—"issue activist" is most ill-fitting. There is no indication that Vasquez supported respondent because of his position on the Lazy 8 or even had any view on it until its developer engaged his services and he gained a financial interest. On the contrary, it was respondent's defense that Vasquez supported his candidacy *without regard to* issue positions. A.O.B. 17.

Recusal here had nothing to do with the "responsiveness and accountability" (Resp. 53) of government officials as that is ordinarily understood—*i.e.*, that an elected representative who "'favor[s] certain policies'" would "'favor the voters and contributors who support those policies.'" Resp. 51 (quoting *Citizens United* v. *FEC*, 130 S. Ct. 876, 910 (2010)). Vasquez's private interest was utterly unlike the situation of respondent's constituents, whose support for his candidacy was likely influenced by his position on the casino, and for whom "the resulting benefit or detriment accruing" from the casino's approval was "not greater than that accruing to any other member" of the public (such that their interests would not support respondent's recusal). Nev. Rev. Stat. § 281A.420(2) (2007).

Respondent's assertion that subsection 8(e) infringes the rights of "volunteers" by forcing them to "check [their] right to petition government at the campaign door," Resp. 33, is contradicted by the facts of this case. When Vasquez appeared before the City Council, it was his *client* that was petitioning. Even if the Court were concerned about the "right" of that fourth party to petition through the advocate of its choice in this "as-applied" challenge, it would not be infringed; Vasquez could still appear. The only "burden" respondent can manufacture is to the developer's "right to engage *the entire legislature* on a vote," *id.* at 34 (emphasis added). But we know of no such "right" (it is one that a legislator's spouse, relatives, and business associates do not enjoy) and in any event, it is affected only when the volunteer has a close, *ongoing* relationship, and a distinct interest in the matter being decided. Nor does the provision "penalize[]" volunteers' involvement (*id.* at 37), any

more than recusal provisions "penalize" marriage, household formation, or being someone's employee.

On a halfway realistic view of the statute's negligible burdens, respondent's claim collapses. This statute falls far short of what this Court has held to constitute a violation of the right of association. This Court has upheld the Hatch Act's broad-ranging *direct* prohibitions on government employees' participation in political activity. *Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973). Nevada's recusal provision, like every other, regulates the exercise of official government powers (not campaigns or elections). Without any evidence from the decade the law has been in effect, respondent hypothesizes that it incidentally constrains the activities of a small number of individuals who have especially close relationships to legislators and private interests in matters before them. While respondent cites the truism that the First Amendment precludes the government from "accomplishing indirectly" what it cannot do directly, Resp. 37, this Court has never held that incidental effects as indirect and tenuous as those imagined here warrant heightened scrutiny. *E.g.*, *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 361 (1997) (upholding election regulation against association challenge, noting that statute did not "directly preclude[e] minor political parties from developing and organizing").[5]

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[5] Although respondent relies (Resp. 41) on *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986), to support application of strict scrutiny, this Court has criticized *Tashjian* for not recognizing that "strict scrutiny is appropriate

This Court traditionally has not applied even intermediate scrutiny to neutral regulations of elections, because of the deference owed the States on matters of self-government and because such regulations are unlikely to target expression. They are instead subject to review for reasonableness under the standard of *Burdick* v. *Takushi*, 504 U.S. 428 (1992). Nevada's recusal provision is a core act of self-government, see *Gregory* v. *Ashcroft*, 501 U.S. 452, 462-463 (1991), that should not be invalidated to eliminate hypothetical and trivial barriers to campaign participation.

C. Nevada's Recusal Provision Is No Outlier

Respondent claims that invalidation of the Nevada statute will have no effect on any of the myriad recusal provisions nationwide, because subsection 8(e) is "unique" and "unprecedented" (Resp. 19) in that (1) it is the only statute that includes a provision disqualifying officials based on relationships "substantially similar" to statutorily defined ones; and (2) no other state has disqualified an official because of a relationship "forged in politics." *Id.* at 20, 32. But uniformity (and breadth) would matter only if respondent had first established a severe or even substantial burden on actual First Amendment rights. Absent that, the circumstances under which local office holders may exercise their powers of public office is quintessentially a matter for

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only if the burden is severe." *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005); accord *id.* at 605 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, this case involves a far more modest restriction than *Tashjian*'s blanket ban on independents voting in party primaries.

States to decide, and variation is expected and appropriate given the differing circumstances and experiences to which such laws respond. See Br. of Florida *et al.* 12. As demonstrated by the variation just among the provisions respondent and his *amici* cite, *many* statutes contain some feature that a sanctioned official could depict as "unprecedented." Resp. 20 n.2.

Respondent's categorical assertions are badly mistaken. Seattle, Washington, for example, has adopted a provision that, unlike Nevada's, *is* a "catch-all," requiring disqualification based on a number of listed relationships, or where "it could appear to a reasonable person" that the official's impartiality is impaired because of "a personal or business relationship not covered under [the provisions] above." Seattle Mun. Code § 4.16.070(1) (2011). Respondent is likewise wrong that Nevada's statute is uniquely broad; indeed, by tying the law's application to four explicit categories of relationships, it is *narrower* than many others. New Jersey, for example, broadly prohibits local officials from voting on matters in which they have "a direct or indirect financial or personal involvement that might reasonably be expected to impair [their] objectivity or independence of judgment," N.J. Stat. Ann. § 40A:9-22.5(d) (2010). Other recusal provisions are framed in similar terms.[6] State recusal statutes often

[6] See, *e.g.*, Conn. Gen. Stat. § 8-11 (2011) (disqualifying elected and appointed zoning commissioners "directly or indirectly interested in a personal or financial sense"); N.M. Stat. Ann. § 8-8-1 (2010) (elected Public Regulation Commission members disqualified if "predispos[ed] toward a person based on

require disqualification if a matter involves the interests of an official's "business associates" without defining that potentially broad term.[7] And other States employ broadly worded common-law recusal standards. See Pet. 27-28.[8]

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a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship").

[7] See, *e.g.*, Ky. Rev. Stat. § 6.761(1) (2010) (prohibiting legislator from participating on any matter in which a "business associate" will have direct monetary gain or loss); *City-Cnty. Planning Comm'n* v. *Jackson*, 610 S.W.2d 930, 932 (Ky. Ct. App. 1980) (construing Ky. Rev. Stat. § 100.171(1) to prevent "direct and indirect" benefits to appointed official's "business associates"); 4 Pa. Cons. Stat. § 1202.1(c)(3) (2010) (requiring recusal of appointed official where "objectivity, impartiality, integrity or independence of judgment may be reasonably questioned due to the member's relationship or association with a party connected to any hearing or proceeding or a person appearing before the board"); Vt. Stat. Ann. tit. 24, § 1984(b) (2010) ("business associate").

[8] Respondent is likewise mistaken that no "ethics authority has interpreted a disqualification provision to reach [a political] relationship." Resp. 20 (emphasis omitted). Relationships that are otherwise covered by generally applicable recusal requirements are not exempted because they involve politics. New Jersey law, for example, prohibits local officials from voting on a matter that benefits a "close friend in a non-financial way," *Haggerty* v. *Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. Ct. App. Div. 2006) (quoting *Wyzykowski* v. *Rizas*, 626 A.2d 406, 414 (N.J. 1993)). That has been applied to disqualify an official because of close friendship and "political allegiance." *Ward* v. *Zoning Bd. of Adjustment*, No. BER-L-5354-08, 2009 WL 1498705 (N.J. Super. Ct. Law Div. May 15, 2009).

D. Nevada's Recusal Provision Is Not Vague, Much Less Unconstitutionally Vague

Respondent does not dispute that the four express bases for recusal provided by Nevada law, Nev. Rev. Stat. § 281A.420(8)(a)-(d) (2007), for members of the officer's household, relatives, employers, and substantial and continuing business relationships, are clear and widely used. See Resp 20 n.2, 40. But respondent contends that the provision requiring recusal for relationships "substantially similar" to those "four very specific and concrete" relationships (Pet. App. 77a) is somehow "so hopelessly vague that people of 'common intelligence must necessarily guess at its meaning.'" *Id.* at 42 (quoting *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

This Court has long held that such language helps resolve (not exacerbate) vagueness problems: Under the canon of *ejusdem generis*, general terms at the end of a list are "construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." *Wash. Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) (emphasis added). Congress and state legislatures have routinely used the phrase "substantially similar" in many contexts, including criminal prohibitions,[9] and respondent fails to cite a

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[9] See Pet'r 54 n.14; Ind. Code § 6-1.1-20-3.6(g)(2) (2010) (providing that after referendum fails, "a substantially similar project" cannot be put to public vote for one year); 705 Ill. Comp. Stat. 405/2-13.1(1)(b)(ii)(E) (2010) (eliminating duty to reunite minor with parent convicted of offense that is "similar and bear[s] substantial relationship to" specified offenses); Kan. Stat. Ann. § 21-36a16 (2011) (unlawful to facilitate commission

single case holding that common phrase unconstitutionally vague. Indeed, courts of appeals have "unanimously" rejected vagueness challenges to the federal Analogue Act, *United States* v. *Turcotte*, 405 F.3d 515, 531 (7th Cir. 2005), which imposes criminal penalties on transactions in substances whose chemical structure is "substantially similar to" scheduled controlled substances, 21 U.S.C. § 802(32)(A) (2006). "[P]erfect clarity" has "never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989). This Court has rejected vagueness challenges to language less specific than this. *E.g.*, *Letter Carriers*, 413 U.S. at 568 (prohibition on taking "active part in political management"); *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972) (prohibition on congregating "with intent to cause public inconvenience, annoyance or alarm," and refusing to comply with order to disperse).

Respondent's efforts to minimize the statutory advisory opinion mechanism are unconvincing. This Court has held such provisions centrally important to constitutional vagueness analysis. *E.g.*, *Letter Carriers*, 413 U.S. at 580. While respondent asserts that a process that *could* take up to 45 days is "not much of an option in the heat of a legislative battle," Resp. 47, he does not explain why it was inadequate here, given his "admi[ssion] he had six months lead time before the Lazy 8 application came to a vote," Pet. App. 37a n.7, and given the Commission's practice of providing informal guidance on a few days'

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of enumerated drug offenses "or any substantially similar offense from another jurisdiction").

notice. Respondent's claim that the mechanism is unacceptable because it is unavailable to an "aspirant to office or prospective volunteer" (Resp. 47) is irrelevant because the recusal law does not impose penalties on them (much less the "criminal sanctions" at issue in the sole case respondent cites, see *ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 40 n.47 (1976)). Every person subject to the Commission's (civil) jurisdiction is entitled to invoke the mechanism.

Respondent next points to (1) the divergence between the City Attorney's interpretation and the Commission's and (2) claimed inconsistencies among the "tentative" conclusions of the Commission members. Resp. 43-44. But the City Attorney's analysis was facially deficient: It unequivocally stated that "[t]he *only* type of bias which may lead to disqualification * * * must be grounded in facts demonstrating that *the public official* stands to reap either financial or personal gain or loss as a result of official action," J.A. 91-92 (emphasis added). It *completely failed* to analyze the provision at issue here involving commitments in a private capacity to the interests of others. See J.A. 87 n.1; 260-61 (noting omission).

Although respondent claims the Commissioners could not agree on a basis for respondent's disqualification and so "declined to pick one," Resp. 14 (citing Pet. App. 105a), on the opinion's *next page*, the Commission unanimously concluded that Carrigan was disqualified because of his "close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" Pet. App. 106a. Respondent can maintain that the Commissioners' views were

"disparate and tentative" (Resp. 44) only by citing the initial statements of individual Commissioners when first discussing the matter immediately after the close of testimony at Carrigan's hearing. See J.A. 243. But if disagreement among *jurists* is not enough to establish even "ambiguity," see *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), the differences respondent cites (real and imagined) cannot render a statute unconstitutionally vague. See *United States* v. *Jackson*, 968 F.2d 158, 163 (2d Cir. 1992).

No ill-advised vagueness argument would be complete without a claim of arbitrary enforcement, and respondent does not disappoint. But respondent's effort to cast himself as the victim of arbitrary enforcement by the Commission (Resp. 48-49) is pure fantasy. During the debate over subsection 8(e), the Legislature discussed a hypothetical case eerily similar to this one, contrasting an officer's relationship with a one-time campaign volunteer, which would not be covered, with a "person [who] ran your campaign time, after time, after time," which would be. Pet. App. 69a (quoting Hearing on S.B. 478, at 42). Respondent's offhand claim of "discriminatory application" (Resp. 49) is not credible absent some indication that the bipartisan Commission has failed to censure someone similarly situated; but the Commission sanctioned a Lazy 8 opponent for his vote during the same meeting because of an undisclosed business relationship with the Nugget (which the Lazy 8's developer brought to its attention). Pet'r 9-10 n.4. And the Commission's processes, which include a preliminary investigation to ensure charges are well founded, public hearings with live testimony, public deliberations, and written opinions that are subject to judicial review, are

worlds apart from the "arbitrary enforcement" that concerned the Court in cases like *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).

Finally, respondent's claim that subsection 8(e) "allowed the Nugget to co-opt an ethics agency to override losses fairly sustained in the political process," Resp. 18, again disregards the facts. Even with Carrigan's vote, his side *lost* the City Council vote. The Lazy 8's developer "overr[o]de" that loss through litigation—the Council's prompt "settlement" of a lawsuit brought immediately after that unsuccessful vote.

E. Heightened Scrutiny Would Impose Unwarranted Burdens

Respondent dismisses as "overwrought" (Resp. 19) concerns raised about recognizing an unprecedented (and unsupported) right, claiming that most recusal provisions will trigger only heightened scrutiny, which he assures they will "easily survive." *Id.* at 40. Respondent articulates no First Amendment basis for treating burdens imposed on one set of relationships differently from "substantially similar" ones (his previous rationale, that legislative voting is "core" political speech, Resp. 32, would support the same level of scrutiny for recusal from a vote on "*the* issue" (*id.* at 24) based on a spouse's employment). But that is only one reason among many why respondent's argument is indeed breathtaking. Respondent acknowledges that his theory would subject *every* legislative recusal law in the country to rigorous First Amendment review. *Id.* at 17. Indeed, if expressive exercise of governmental power is entitled to protection, there is no principled basis for

distinguishing between actions of legislators and elected members of other branches, who likewise arrive in office as the culmination of "protected activities." *Id.* at 25.

That such laws would be subject to "only" intermediate scrutiny and likely would survive (if true) is little comfort. That such challenges can be easily brought is itself a serious concern: "Claims that have little chance of success are nonetheless frequently filed." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). Even if such provisions are ordinarily upheld, routine judicial intervention in state self-regulatory processes is "inconsistent with sound principles of federalism and separation of powers." *Garcetti*, 547 U.S. at 423. That is to say nothing of the costs for the system: "[P]redictions that the government is likely to *prevail* in the balance" "do[] not avoid the judicial need to *undertake the balance* in the first place." *Id.* at 449 (Breyer, J., dissenting).

But intermediate scrutiny is not the cakewalk respondent suggests. For routine cases, governments will be haled into court to "demonstrat[e] that the recited harms are real, not merely conjectural," that "the regulation will in fact alleviate those harms in a direct and material way," and that the regulation does not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 664-665 (1994) (plurality opinion) (quoting *Ward*, 491 U.S. at 799). There is no reason to believe sanctioned officials would accept that it is "necessary," for example, for a recusal provision to extend to the third degree of consanguinity, not just the second, or to

require recusal and not just disclosure (or vice-versa). See *id.* at 668 (despite three-year legislative record, remanding to "develop a more thorough factual record" necessary to apply intermediate scrutiny). Indeed, a sanctioned official could claim a law was *under*inclusive (see Resp. 55-56) for compelling recusal where an adult sibling's or brother-in-law's interests are at issue, but not where (as here) the official's personal and financial relationship is closer but the third party is a nonrelative.

Finally, although respondent notes that this Court has upheld disclosure requirements in other contexts (Resp. 57-58), he fails to address the reasons (Pet'r 56-58) why disclosure alone is inadequate to serve Nevada's interests. Even under intermediate scrutiny, there is no "least restrictive alternative" requirement and courts may not second-guess the legislature about "'how much protection [of the government interest] is wise.'" *Ward*, 491 U.S. at 798 (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984)). There can be little question that disclosure alone would serve Nevada's interests "less well" than recusal, and thus is not constitutionally compelled. *Id.* at 800. Under respondent's view, the proponent of a popular project could engage in brazen self-dealing (say, by voting on a measure benefitting his spouse) without consequence, so long as the voters, whether because they agree with the vote or for lack of effective opposition, do not turn him out of office at the next election. This Court has never suggested that the ballot box is the sole constitutional means of ensuring that public offices are "held for the sole benefit of the people." Nev. Rev. Stat. § 281A.020(1)(a).

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed.

Respectfully submitted.

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