No 10-568

In The
Supreme Court of the United States

NEVADA COMMISSION ON ETHICS, Petitioners

v.

MICHAEL A. CARRIGAN, Respondents

On Writ of Certiorari To the Supreme Court of Nevada

Brief Amicus Curiae of the James Madison Center and the Center for Competitive Politics Supporting Respondent

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, a professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M.

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[1] The parties have consented to the filing of this brief. No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission.

Hoersting, a campaign finance attorney and a former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and in-formation flow.

Summary of Argument

Traditionally, states require recusal from voting when a legislator, or in some cases, a family member, has a substantial financial or personal interest in the bill or issue. A few states simply require full disclosure to the voting body about a potential conflict. The Nevada ruling is an outlier in this regard.

These recusal requirements have been expanded recently in the judicial context. States have begun adopting judicial canons that require recusal based upon prior campaign speech. Some states believe such requirements are constitutionally justified under this Court's *Caperton v. Massey* decision, which required a judge to recuse based on substantial independent expenditures made by a litigant during his campaign. Given the effectiveness of these requirements to deter speech in the judicial context, that it is now beginning to be pursued in the legislative context is unsurprising.

These new recusal requirements—whether judicial or legislative—penalize protected speech and association. Candidates must choose between 1) self-censorship and limit associations during their campaigns, and 2) exercising their right to speak and associate but jeopardize their ability to vote.

That they can create this choice is in part derived from their vagueness. But even where they are clear, their broad scope allows them to be applied to political speech and association. Like the judicial context, the effect of such vagueness or breadth is to unconstitutionally chill legislative candidates' protected speech and association and leaves legislative candidates vulnerable to strategic action by other political actors.

Argument

I. The Nevada Rule Extends Recusal Far Beyond Its Traditional Scope.

A. Mandatory Recusal Requirements Traditionally Focus On Personal and Financial Interests.

Not all states have established mandatory recusal rules for legislators. Some states instead only encourage a legislator to abstain from voting, and in some cases from participation in debating the bill. *See, e.g.,* Ariz. Sen. R. 30 ("A member may abstain from taking any action in which he has a personal financial interest"); Ind. Sen. R. 4 ("A Senator may request to be excused from voting on a question because of a direct personal or pecuniary interest . . . . Whether a Senator has a direct personal or pecuniary interest so as to be excused from voting on a question shall be decided without debate"); NY House R. V, Sec. 2 ("A member may abstain from a vote only on the grounds that such vote will constitute a conflict of interest"); NC House R. 24.1A ("Any member shall, upon request, be excused in advance from the deliberations and voting on a particular bill at any time that the reason for the request arises in the proceedings on the bill"); NC Sen. R. 29(c), (e) ("Any Senator may move to be excused at any time from voting on any matter...The Senator so excused shall not debate the bill"); W. Vir. House R. 49 ('When a question is put, any member having a direct personal or pecuniary interest therein should announce this fact and request to be excused from voting").

But in those states that have established mandatory recusal rules for legislative voting, the typical recusal rules are oriented towards financial or personal

interest. Legislators are most commonly directed to abstain from official conduct such as voting on matters where they have a direct, substantial financial interest. *See, e.g.*, Iowa House R. 76 ("No member shall vote on any question in which that person is financially interested"); Miss. House R. 26 ("No member shall vote on any question in the result of which he is pecuniarily interested"); New Mex. Stat. Sec.10-16-4 ("It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing his own financial interest or financial position").

The other typical conflict warranting mandatory recusal is having a substantial personal interest or benefit in the bill, contract, or other legislation before the official. *See*, *e.g.,* Ala. Code 36-25-5(a) ("No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself"); Fla. House R. 3.2(a) ("A member may not vote on any measure that the member knows or believes would inure to the member's special private gain or loss"); Ky. Constitution Sec. 57 ("A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon upon pain of expulsion"). In Nevada, Senators are directed to recuse from a vote when they are "in any way personally or directed interested." Nev. Sen. R. 32.

In some states, recusal based on financial or personal interest extends to the financial interests of family members. *See, e.g.,* Ky. Rev. Stat. 6.761(1) ("A legislator shall not intentionally participate in the discussion of a question in committee or on the floor of the

General Assembly, vote, or make a decision in his official capacity on any matter . . . [i]n which he, or any member of his family, or the legislator's business associate will derive a direct monetary gain or suffer a direct monetary loss as a result of his vote or decision"); La. Rev. Stat. Title 42 Sec. 1112(B), 1120 (requiring elected officials and public servants to recuse themselves from participating in a transaction where a member of their immediate family has a substantial economic interest).

Several states do not require legislators to recuse from voting based on personal or financial interest, but instead require only that they disclose such interests. For example, Nevada Assembly members needed to only disclosure any conflict of interest. Nev. Assembly R. 23. *See also* Tennessee Senate Rules 13, 85 (allowing senators to vote provided that "the Senator declares that 'It may be considered that I have a degree of personal interest in the subject matter of the bill, but I declare that my argument and my ultimate vote answer only to my conscience and my obligation to my constituents and the citizens of the State of Tennessee'"); Utah Code Sec. 76-8-109(2)(b)("Before or during any vote on legislation or any legislative matter in which a legislator has actual knowledge that the legislator has a conflict of interest . . . the legislator shall orally declare to the committee or body before which the matter is pending that the legislator may have a conflict of interest and what that conflict is").

No party disputes the constitutionality of recusal requirements generally. All of these recusal requirements relate to current conflicts of interest, and not

prior interests, statements, or associations.[2] And none of these standards—whether a direct personal or financial interest, or that of a family member—reflect any concern that mere campaign associations and speech create grounds for a conflict of interest that warrants recusal. Indeed, the Nevada rule is an outlier in that it has been interpreted and applied to campaign speech and association. And it is when recusal requirements implicate First Amendment rights that their constitutionality is called into question.

B. Recent Changes to Recusal Requirements Encompass Campaign Speech and Association.

Recently, some states have attempted to broaden the role of recusal to include matters of political speech and association. This first occurred in the judicial speech realm.

In 2002, this Court ruled in *Republican Party of Minnesota v. White*, 536 U.S. 475 (2002) that judicial candidates have a First Amendment right to announce their views on disputed legal, social, and political issues. *Id.* Since then, numerous courts have struck down judicial canons that reached announced views through vaguely-worded "commits" clauses and overbroad "pledges and promises" clauses. *See, e.g., Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005) (overruled on other grounds); *Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006) (overruled on other grounds); *Kansas Judicial*

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[2] *See* James Bopp, Jr. and Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of* Caperton v. Massey*,* 60 Syracuse L. Rev. 305, 320-21 (2010).

Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006)*; North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005). However, these cases also found the application of recusal requirements to campaign announcements to be constitutional despite the chilling effect it had on candidates' campaign speech. *Alaska Right to Life,* 380 F. Supp. 2d at 1083-84; *Indiana Right to Life,* 463 F. Supp. at 887; *Kansas Judicial Watch,* 440 F. Supp. 2d at 1234-35; *North Dakota Family Alliance,* 361 F. Supp. 2d at 706-09.

In response to the *White* decision and the subsequent demise of the pledge and promises and commits clauses, the American Bar Association revised its Model Code of Judicial Conduct twice, moving the offending commits clause, which directly regulated judicial candidates' political campaign speech, to the recusal canon. *See* ABA Model Code of Judicial Conduct Canon 3E(1) (2003) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding"); ABA Model Code of Judicial Conduct 2.11(A)(5) (2007) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [instances where] . . . [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a par-

ticular result or rule in a particular way in the proceeding or controversy").

Following the ABA's lead, several states began to adopt these model revisions into their code of judicial conduct. *See* Fla. Code of Judicial Conduct 3E(1)(f) (substantially adopting the ABA's 2003 revision); Ind. Code of Judicial Conduct 2.11(A)(5) (adopting the ABA's 2007 revision); Wis. SCR 60.04(4)(f) (adopting the ABA's 2007 revision after its adoption of the ABA's 2003 revision was held unconstitutionally vague and overbroad under the First Amendment by a federal district court). The net effect and goal of these new recusal requirements has been to impose an indirect restriction on campaign speech and association.

Some viewed this Court's recent decision in *Caperton v. A.T. Massey Coal Co.,* 129 S. Ct. 2252 (2009), as an affirmation of this new regulatory strategy.[3] In *Caperton*, this Court held that a West Virginia Supreme Court justice was required by due process to recuse himself from a matter involving a party that gave 2.5 million to a third party organization that supported the justice's election bid. Notably, the *Caperton* decision was focused on due process concerns as implicated by those who disproportionately and substantially participate in a judicial election and then subse-

[3] John Gibeaut, *Caperton Capers: Court's Recusal Sparks States to Mull Judicial Contribution Laws,* ABA Journal, Aug. 2009, *available at* http://www.abajournal.com/magazine/article/caperton_capers; JoAnne Viviano, *Ohio Chief Justice Wants New Ethics Policy*, Ohio.com, June 10, 2009, http://www.ohio.com/news/ohiocentric/47548647.html.

quently appear before that judge. *Id.* at 2256.[4] But it was enough to motivate some state supreme courts to revise their recusal standards, like New York, which is in the process of adopting new recusal rules based on campaign contributions exceeding $2500, NY Rules of the Chief Administrator of the Courts, Part 151 (February 23, 2011), and Michigan, which vastly broadened their rules. *See* Mich. Court R. 2.003(C)(1) *("*A judge is disqualified when . . . (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey,* US (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."); Mich. Court R. 2.003(C)(2) ("A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn. v. White,* 536 U.S. 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.").[5]

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[4] This Court again briefly discussed recusal in *Citizens United v. FEC,* 130 S. Ct. 876, 910 (2010). But there, too, the discussion was not about regulating political speech: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Id.* The *Caperton* analysis did not address the issue of how a candidate's prior speech and association would necessitate that judge's subsequent recusal.

[5] A significant shift in this recusal paradigm is that the legislator cannot fix the conflict. While most pecuniary interests and personal benefits can be remedied by the sale of the interest or removing the source of the benefit, past asso-

In light of this trend in the judicial context, it is not surprising to see efforts to expand these indirect campaign regulations into the legislative realm. Petitioners here ask this Court to adopt the premise that publicly elected officials serve as impartial arbiters like judges, *see* Pet. Br. at 34-35, to tie that final intellectual knot between the two branches and thereby justify the regulation. But the role of legislators has been recognized as having at least some distinction from that of judges by this Court. For example, judicial candidates can be prohibited from making pledges or promises of how they will vote in particular cases because of the due process interest litigants have in having their case heard by an impartial judge. *White*, 536 U.S. at 780-81. In *Brown v. Hartlage,* 456 U.S. 45 (1982), by contrast, this Court held that legislative candidates could not be prohibited from making such pledges and promises. *Id.* at 55 ("Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy.'") (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978))

The Nevada Recusal Rule, however, serves only to undermine *Brown*. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), one of the justifications for disclosure requirements is that the "sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance." *Id.* at 67. Similarly, *Brown* noted that "[c]andidate commitments enhance the accountability of government officials to

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ciations and speech cannot be undone. Bopp, *supra* note 2.

the people whom they represent, and assist the voters in predicting the effect of their vote." *Brown*, 456 U.S. at 55-56. Under *Brown* and *Buckley*, voters may use information about a candidate's associations and responsiveness to different individuals and interest groups to help predict how the candidate will act in office and thus help determine their vote. The Nevada Recusal Rule, however, attempts to overturn the decision of the voters in this regard, by forcing officials to recuse themselves based on the very political associations that may have led voters to support them to begin with. Functionally, the Nevada Rule impairs the ability of voters to predict the effect of their vote by attempting to burden indirectly speech it cannot directly prohibit. *See Davis v. FEC,* 128 S.Ct. 2759, 2772 (2008) (holding that penalties on candidates who "robustly exercise[a] First Amendment right" are just as burdensome as direct restrictions on speech).

In any event, whether legislator or judge, these broad rules—whether vague or solely as applied to political speech and association—create a new and substantial First Amendment burden on candidates: it chills core political speech. *See Duwe v. Alexander,* 490 F. Supp. 2d 968 (W.D. Wis. 2007).

II. Recusal Laws That Reach Political Speech And Association Penalize and Chill First Amendment Rights.

This Court noted in *Davis*, placing burdens on candidates who "robustly exercise[a] First Amendment right . . . is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 128 S.Ct. at 2772. Broadly written recusal rules like those at issue here can have—and likely will

have—the effect of penalizing First Amendment speech and association. They require political candidates to choose between not engaging in political speech and associations during their campaign or enduring the burden of being precluded from engaging in key political speech in office: voting.

Part of this effect is derived from vagueness. This Court has recognized two types of vagueness that will render a law constitutionally invalid. First, a law may be void for vagueness under the Fifth Amendment if it does not give "fair notice" of the meaning of an offense. *United States v. Williams*, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.")

In addition, this Court has also held that a law may be unconstitutionally vague based on the effect that it has on the exercise of First Amendment rights. As this Court held in *Buckley*, "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to' steer far wider of the unlawful zone '. . . than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 at 41 n.48 (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), *quoting Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), *quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)). A law is vague if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."

Grayned, 408 U.S. at 108-09; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply.").[6]

Vague recusal requirements impose a *Davis*-like involuntary choice upon those subject to them, a choice between speaking and risking recusal or simply not speaking at all.[7] But even when recusal requirements

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[6] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) is not to the contrary. Not only did *Holder* involve a Fifth Amendment rather than a First Amendment vagueness challenge, but the plaintiffs in *Holder* only challenged the statute as applied to them, rather than on its face. *Id.* at 2719 ("in spite of its own statement that it was not addressing a 'facial vagueness challenge,' the Court of Appeals considered the statute's application to facts not before it.") (internal citations omitted). For this reason, this Court held that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim *under the Due Process Clause of the Fifth Amendment for lack of notice*." *Id.* (emphasis added).

[7] This Court requires that any First Amendment chill the results from an allegedly vague law must be more than subjectively stifle speech. *Laird v. Tatum,* 408 U.S. 1, 14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"). Instead, objective harm must arise from offending law. *Bigelow v. Virginia,* 421 U.S. 809,816-17 (1975). When recusal requirements are vague, or can be broadly applied to reach protected speech and association, they present that precise objective harm.

are not facially vague, if they are overbroad, *see* Resp. Br. at 55, or are at least broad enough to be applied to political speech and association, *see* Resp. Br. at 50-51, they still objectively chill candidates' speech because they can be construed to reach political associations (as was done in this case) and campaign speech.

As Respondents demonstrate, Petitioners' application of Nevada's recusal requirement to political association clearly burdens the legislator's right to vote. Resp. Br. at 23-29. Nevada's recusal requirement states that:

> [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:
>
> . . .
>
> (c) The public officer's commitment in a private capacity to the interests of others.

Nev. Rev. Stat. 281A.420(3). Construing recusal requirements like this to prohibit voting based on political associations directly burdens that right to vote.

But this construction will also have the effect of chilling a candidate—who may not yet even be a legislator—from associating with groups and individuals during his campaign because such an association may be sufficiently "committed" that the legislator will be precluded from doing the very thing he is there to do: voting on key legislation. In an effort to avoid creating grounds for possible recusal, a legislative candidate

will choose to avoid, in as much as he is able, any political associations that could trigger recusal. Such avoidance interferes with the heart of the political process by chilling constitutionally protected associations.

This chilling effect is similar to that seen in the judicial campaign context. For example, in *North Dakota Family Alliance*, *Duwe,* and *Kansas Judicial Watch*, judicial candidates would not respond to questionnaires that simply inquired after their views on disputed legal and political issues, including views on marriage, *see, e.g., North Dakota Family Alliance*, 361 F. Supp. 2d at 1028; abortion, *see, e.g., Duwe,* 490 F. Supp. 2d at 971, and taxes, *see, e.g., Kansas Judicial Watch*, 440 F. Supp. 2d at 1217. While the threat of discipline in these cases derived from the direct regulation of the pledges and promises clause and the commits clause, it also stemmed from the indirect, subsequent penalty imposed upon them if and when they assumed the bench. *See North Dakota Family Alliance*, 361 F. Supp. 2d at 1027; *Duwe*, 490 F. Supp. 2d at 971-72; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1218. In exercising their right to announce their views, judicial candidates ran the very real risk of creating grounds for recusing themselves from the very role they were campaigning so hard to acquire. Faced with this choice, they chose to be silent and forego their constitutional right to speak.

There is no reason to believe this would not be the effect in the legislative context as well if this Court holds that the Nevada recusal requirement is constitutional. Allowing vague or broadly-worded recusal requirements to apply to prior campaign associations will create for legislative candidates the invol-

untary choice of either 1) limiting their associations to those they know they would already create a conflict of interest or 2) to associate with volunteers like Mr. Carrigan did with Mr. Vasquez and run the risk of forfeiting the very purpose of their campaign in the first place. And the choice to self-censor associations would be an objective chill given the broad scope of such recusal requirements.

In addition to imposing a involuntary choice on legislative candidates, vague and expansive recusal standards also leave elected officials vulnerable to strategic action by other political actors. *See* Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 72 (2005) (noting that while "the subject of strategic recusal . . . is not often discussed, no doubt because the goal seems unfair and perhaps unethical . . . you can be sure that strategic recusals do occur"). As then Judge Breyer noted in the judicial context, the standards governing recusal "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989).

Recusal requirements like Nevada's objectively chill and thereby at impose a substantial burden on First Amendment speech. They are thus subject to strict scrutiny, *Davis,* 128 S. Ct. at 2772, and under such scrutiny, they fail. *See* Resp. Br. at 41-59.

Conclusion

Because Nevada's recusal requirement chills core political speech, is facially vague and overbroad, and is not narrowly tailored to a compelling state interest as applied to political speech, it is unconstitutional. The Nevada Supreme Court's decision should be affirmed.

Respectfully submitted,

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