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 NEVADA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioner Nevada Commission on Ethics censured an elected member of a city council for voting on one of the most important and controversial questions before the council—a question that dominated the contemporaneous election. The Ethics Commission held that the councilmember was disqualified because a key campaign volunteer had lobbied the city council on the issue. The question presented is what level of First Amendment scrutiny applies to Nevada's unique disqualification provision.

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INTRODUCTION[1]

Petitioner Nevada Commission on Ethics wants to take the politics out of democracy.

The Ethics Commission censured Respondent Michael Carrigan for a vote he cast as an elected member of the Sparks City Council. The vote was on *the* question that dominated the election: whether to authorize development of a new casino. Councilmember Carrigan had no financial interest in the project. But the development was to be in his ward, and he had aggressively intervened at its inception and persuaded the developer to transform the proposal into a mixed-use project that he believed would benefit his constituents.

Another local casino bent on defeating the new competitor instigated an ethics proceeding against Councilmember Carrigan. The Ethics Commission held that Councilmember Carrigan was disqualified from the crucial vote on the proposal he helped craft. The disqualification was over a political relationship: One of Councilmember Carrigan's key campaign volunteers had lobbied the council in support of the

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[1] This brief uses the following abbreviations: Ethics Commission's opening brief ("Pet'r"); Joint Appendix ("J.A."); Cert. Petition ("Pet'n"); Petition Appendix ("P.A."); Ethics Commission hearing transcript ("Tr."); Administrative Record on Appeal to the Nevada District Court, filed at docket entries 49 and 50 before the District Court ("R.O.A."); Councilmember Carrigan's Corrected Opening Brief in Petition for Judicial Review ("P.O.B."); his Opening Brief in the Nevada Supreme Court ("A.O.B."). Because two different versions of the Nevada Revised Statutes are cited, we specify the year for each Nevada provision cited. All other statutory citations are to the most recent current version of the relevant code.

development—albeit long after the legislator had staked out his supportive position. The volunteer had the honorific "campaign manager"—but "key campaign volunteer" is more apt: He simultaneously performed the same function for multiple other campaigns, while also holding down several day jobs. The Ethics Commission professed a concern about the corrupting influence of Councilmember Carrigan's political "loyalties." P.A. 112a.

The Ethics Commission calls this case "literally unprecedented," Pet'r 3, and, outside of Nevada, it is. No other state agency appears to have ever disqualified an elected official on the basis of a political relationship. Equally unique is the catch-all statutory provision that invited this result. Nevada's ethics law starts where all the standard ethics statutes start, clearly enumerating several categories of disqualifying relationships: An official must abstain if a vote implicates his own financial interests or those of a household member, a relative, an employer, or anyone else with whom the official has a substantial and continuing business relationship. Nev. Rev. Stat. § 281A.420(2), (8) (2007). But Nevada stands alone in supplementing those broad categories with a catch-all that disqualifies the official for any relationship that is "substantially similar" to the ones enumerated.

The Nevada Supreme Court correctly struck the catch-all disqualification provision as unconstitutional. That ruling should be upheld for two reasons.

First, the catch-all disqualification provision is unconstitutionally vague. Councilmember Carrigan voted only because the City Attorney, after a tho-

rough legal analysis, concluded that the provision did not cover his relationship with the volunteer. And the Ethics Commissioners, for their part, could not even agree on whether the relationship was "similar" to a disqualifying business relationship or a disqualifying family relationship.

Second, even if the provision were clear, the censure severely burdens First Amendment rights. As a general matter, as the Nevada Supreme Court understood, a legislator's vote is expressive in its own right. It is also the culmination of numerous forms of constitutionally protected political expression and association. But under the Ethics Commission's ruling, the provision burdens far more than the expressive and associational aspects of the legislative vote. The Ethics Commission puts every candidate and key campaign volunteer to an untenable—and unconstitutional—choice: They both have a First Amendment right to associate to advance the candidate's election. But if they do, the volunteer must be prepared to check his right to petition the government at the campaign door. And the candidate must be prepared to miss critical votes on any issue that may turn out to be of interest to the volunteer.

This Court should affirm.

STATEMENT OF FACTS

Mr. Carrigan Launches a Grass Roots Campaign and Wins

Michael Carrigan is the type of local politician the country needs. He served as a naval aviator for 24 years, attaining the rank of Commander. J.A. 198. Upon retirement from the Navy, he became a jour-

nalist and then an instructor of media writing and ethics at the University of Nevada. J.A. 198–99.

Over the years, he found himself increasingly vexed by his local government's decisions. J.A. 199. In 1999, the City Councilwoman from his ward declined to run for reelection. *Id.* Carrigan mentioned to his wife that he hoped that the replacement council member would at least "know what's going on" in the city. *Id.* His wife replied that "if you think you can do a better job, why don't you try." *Id.*; *see also* J.A. 164. So, merely two weeks before the filing deadline, he threw his hat into the ring. J.A. 199. A political novice, Carrigan was the dark horse in a field with six other candidates. J.A. 164.

Carrigan overcame all the odds by running the 1999 campaign as a "grass roots" effort on a shoestring budget. Tr. 126. He won by 41 votes. J.A. 168. His constituents have since reelected him three times—in 2003, 2006, and 2010—by wide margins. J.A. 168–69, 173–74. He is about to celebrate his twelfth anniversary representing his ward.

Carlos Vasquez Volunteers on the Campaign

Obviously, no single factor—and no one person—can be credited with Councilmember Carrigan's political success. But some of the credit goes to a key campaign volunteer named Carlos Vasquez. J.A. 164.

Vasquez is a local businessman with interests in multiple ventures. He worked as a public relations consultant on dozens of local development projects. Tr. 118. He also owned an advertising agency, a

printing company, an internet firm, and even a gym. J.A. 232–33.

On the side, Vasquez frequently worked on local elections. J.A. 162, 231–32. Vasquez had previously offered to help Carrigan if he ever decided to run. J.A. 162. So it was only natural that Carrigan enlisted Vasquez's help when he decided to run. J.A. 162–64. Vasquez volunteered on that campaign and the next two campaigns as well. J.A. 163, 168, 172.

Councilmember Carrigan called Carlos Vasquez his "campaign manager." J.A. 163. But in tiny Sparks, Nevada (pop. 87,000, J.A. 223–24), campaigns are brief affairs. J.A. 168, 171–72. They run on shoestring budgets with a handful of volunteers—mostly family and close friends—that can fit around a card table. Tr. 125–26. Vasquez's campaign activities were extracurricular, performed in addition to his multiple day jobs. J.A. 232–33. At the time relevant to this case, he was working for several other political candidates. Tr. 128–29, 151. His title meant little more than that Vasquez offered Councilmember Carrigan advice on political strategy and help in soliciting campaign contributions. J.A. 164, 170. Vasquez has "managed" 92 campaigns in his career, serving 50 to 60 different candidates between 1999 (when Carrigan first ran) and 2006 (when the vote in this case was held). J.A. 231–32; Tr. 151. Sometimes he was paid—usually not. J.A. 232.

Councilmember Carrigan did not pay Vasquez. Pet'r 6, 8. Although Nevada does not impose any disclosure requirement on volunteer work, *see* Nev. Rev. Stat. § 294A.007(a) (2009) (excluding volunteer services from definition of "contribution"), Council-

member Carrigan disclosed Vasquez's volunteer work as an "in-kind" contribution for each of his elections to ensure his campaign was completely "above board." J.A. 175–76. Vasquez also acted as a middleman between the campaign and various vendors without taking a cut, J.A. 175, 242, and did so "at cost," P.A. 44a. Thus, as the Ethics Commission found, "Vasquez and his companies did not make any profit from these services." *Id.*; *see* P.A. 105a.

Vasquez volunteered because he "believed in Mr. Carrigan," J.A. 231, and was sure he would always "do the right thing, no matter what it costs," Tr. 151. Working together over several campaigns, Councilmember Carrigan and Vasquez naturally considered each other as friends. J.A. 168, 171, 231. But their social interactions in non-election years were limited to the occasional dinner and political discussion. J.A. 171, 204–05. Their professional association never extended beyond their campaign relationship. J.A. 189, 205–06.

The Lazy 8 Dominates the Third Campaign

A single issue dominated the election of 2006: the Lazy 8. J.A. 173–74.

The Lazy 8 was a casino project. Back in early 2005—a year and a half before the City Council vote in question—the Red Hawk Land Company ("Red Hawk") submitted an application to the City of Sparks Planning Department. P.A. 3a. The application sought an amendment to one of the City's planned development handbooks that would allow Red Hawk to construct a casino in Councilmember Carrigan's ward. J.A. 20. Any such project would also eventually require City Council approval, which

the Council could grant or withhold for any or no reason. City of Sparks Municipal Code § 20.18.060.

Councilmember Carrigan worried about how his constituents would react to a casino in their backyards. J.A. 191–92. Under Nevada law, it was typically impermissible to build a stand-alone casino. *See* Nev. Rev. Stat. §§ 463.01865, .1605 (2009). Casino projects were usually conditioned upon the developer's willingness to build other facilities, including a sizeable hotel. *Id.* But Red Hawk had a grandfathered license that would have allowed it to build a stand-alone casino. J.A. 191–92; Tr. 148. Councilmember Carrigan believed that such a project would be unpopular with his constituents. J.A. 191–92, 216–17, 235. So he "took it upon [himself]" to take a stand with Red Hawk's owner, a prominent businessman named Harvey Whittemore. J.A. 191–92. "Mr. Carrigan was very clear [the Lazy 8] initial design of this project in his opinion was inappropriate for the area." J.A. 235. He predicted that a stand-alone casino would never pass. J.A. 191–92. So he insisted that the developer include a hotel, retail area, and other amenities, *id.*, signaling to the developer and the public that he would support the project with those adjustments.

Councilmember Carrigan's interventions were transformational. He persuaded the developer to drop plans for an 18,000-square-foot stand-alone casino in favor of an entertainment area that was more than 15 times the size. J.A. 216–17. The new 300,000 square-foot proposal included a hotel, a 14-screen movie theater, five restaurants, and a facility to be used as either a police station or a fire station. *Id.* Councilmember Carrigan also persuaded Red

Hawk to donate $300,000 for affordable housing. J.A. 217.

Beyond that, Councilmember Carrigan pored over the plans and negotiated numerous design details. Through his persistence, the developer agreed to redesign the development so that families could reach the restaurants, theater, and other amenities without walking through the casino. J.A. 216–17. He also successfully urged Red Hawk to make concessions on all sorts of design details, from the height of buildings, to lighting, to traffic flow, to features that would better meld with the surrounding neighborhood. *Id.*; Tr. 120–22.

Councilmember Carrigan obviously had a clear sense of what was right for his ward. But he was not acting only on instinct. The Lazy 8 attracted a media maelstrom, which necessarily precipitated a lot of interest from constituents. J.A. 192–93. In the early phases of the negotiations, Councilmember Carrigan drew reactions and ideas from numerous communications with his constituents. *Id.* But as the approval process wore on, he had a much more direct way of gauging his constituents' wishes: The campaign season was under way. And in the months leading up to the primary election in August 2006, Councilmember Carrigan knocked on 2500 doors and asked his constituents face to face what they thought about his plan for the Lazy 8. J.A. 173. These conversations convinced him that at least 70% of his constituents supported his vision of the project. J.A. 193.

Even so, the project had its share of vocal detractors. Four challengers rose up to try to beat Coun-

cilmember Carrigan. R.O.A. 501. One especially ardent challenger was Jim de Prosse. John Ascuaga's Nugget ("the Nugget"), a competing casino, handpicked, recruited, and funded de Prosse to run against Councilmember Carrigan in the hopes of defeating the Lazy 8. J.A. 173. De Prosse turned the election into a single-issue referendum on the Lazy 8. J.A. 173–74.

The primary was on August 15, 2006. R.O.A. 501. The top two vote-getters were Councilmember Carrigan (54%) and Jim de Prosse (22%). *Id.* That meant that they would face each other in the general election. De Prosse persisted in focusing the general election debate entirely on the Lazy 8. J.A. 173–74.

The Lazy 8 Hires Vasquez as a Consultant

At some point in the approval process, Red Hawk and the developer hired Vasquez, the perennial campaign volunteer, as a public relations consultant. J.A. 192. Both the developer and Red Hawk's parent company had already retained Vasquez on numerous past projects. Tr. 106–07.

Vasquez's assignment was to "manage the misinformation" surrounding the project, handle media requests, and help Red Hawk understand the City Council's demands. Tr. 107, 140–41. In this regard, Vasquez met individually with the Mayor and each of the City Council members, including Councilmember Carrigan, to ascertain what it would take to get the project approved. J.A. 234; Tr. 138.

The record does not reflect exactly when the Lazy 8 proponents engaged Vasquez, but it was long after Councilmember Carrigan had intervened in the Lazy

8 negotiations, J.A. 193, 207, and after he had decided to support the project, as modified by the improvements he negotiated, J.A. 193.

The City Attorney Advises Councilmember Carrigan That He May Vote on the Lazy 8

The public debate was to come to a head at a City Council meeting on August 23, 2006—just a week after the primary. Before the meeting, Councilmember Carrigan sought legal advice from the Sparks City Attorney as to whether his relationship with Vasquez presented any conflict of interest under Nevada's ethics laws. Contrary to the Ethics Commission's assertion that "Carrigan was aware that his relationship with Vasquez was potentially disqualifying," Pet'r 7, Councilmember Carrigan was confident that the relationship was *not* disqualifying, J.A. 196. Vasquez had assured Councilmember Carrigan that the Council's decision on the Lazy 8 would not affect him personally, regardless of which way the vote went. J.A. 193–94. But Councilmember Carrigan nevertheless sought the opinion because he "wanted to make sure that everything was out in the open" and "did not want somebody to think that [he] was voting in a certain way because Carlos [was] a friend." J.A. 196.

The week before the City Council meeting, the City Attorney issued a memorandum to the Mayor, the City Council, and the City Manager, advising them that the "only type of bias which may lead to disqualification of a public official 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. The City Attor-

ney wrote that "simple personal connections and friendships" did not constitute a disqualifying possibility of "financial or personal gain or loss." J.A. 87. Had the City Attorney advised Councilmember Carrigan to abstain from voting on Lazy 8's application, he would have done so. J.A. 212. But because his financial stake was no more or less than anyone else's in the community, Councilmember Carrigan believed that he was not required to abstain. J.A. 197. Councilmember Carrigan knew that he could seek an advisory opinion from the Ethics Commission itself. J.A. 222. He did not do so, however, because he believed that the City Attorney had contacted the Ethics Commission and incorporated its advice into his recommendation. J.A. 222–23.

Councilmember Carrigan Loses the Lazy 8 Vote But Wins the Election

Following the City Attorney's advice, at the start of the August 23 City Council meeting, Councilmember Carrigan disclosed that Vasquez was his "personal friend" and "campaign manager." J.A. 82.

The meeting on the Lazy 8 became a "contentious and fairly dramatic" debate. J.A. 178. Challenger de Prosse was especially vocal. He declared that 70% of the voters in the ward opposed the Lazy 8. J.A. 173.

In the end, Councilmember Carrigan voted to approve the Lazy 8 proposal to which he had devoted so much time and which he had a major role in recrafting to benefit his constituents. J.A. 79–80. His position lost 3-2. J.A. 80.

Immediately upon losing the City Council vote, Red Hawk sued the City, claiming that an earlier development agreement with the City gave it the right to construct the Lazy 8. A.O.B. 3. The City settled the suit on September 1, 2006, by approving the Lazy 8 development as proposed at the August City Council meeting, including the improvements Councilmember Carrigan fought to impose. *Id.*; *see also* R.O.A. 528, 534. The Council publicly voted to approve the settlement on September 20, 2006. A.O.B. 4.

The general election was a little over a month away. De Prosse turned the election into a referendum on Councilmember Carrigan's Lazy 8 vote. J.A. 173–74. Councilmember Carrigan defeated de Prosse by a landslide, 62% to 38%. *Id.*

The Lazy 8's Opponents File Ethics Complaints

The Lazy 8's opponents were not prepared to concede defeat. The Nugget recruited citizens to file ethics complaints against Councilmember Carrigan. R.O.A. 449. Two weeks after Red Hawk's lawsuit was settled, several of these recruits submitted identical ethics complaints to the Ethics Commission. A.O.B. 4; *see also* J.A. 159. They asserted that Councilmember Carrigan was disqualified from voting on the Lazy 8 because his relationship with Vasquez gave the volunteer "undue influence" over his vote. A.O.B. 3.

Nevada law requires a public official's disqualification whenever the matter involves someone to whom the official has a "commitment in a private capacity." Nev. Rev. Stat § 281A.420(2)(c) (2007). Consistent with many states' ethics laws, the statute

defines such a disqualifying commitment to include relationships with (i) household members; (ii) family members; (iii) employers; and (iv) people with whom the official has a substantial and continuing business relationship. *Id.* § 281A.420(8)(a)–(d). But Nevada adds a unique catch-all provision extending the disqualification to any relationship that is "substantially similar" to any of the enumerated ones. *Id.* § 281A.420(8)(e).

When an official is burdened by any of the described relationships, the "officer shall not vote upon" the matter, and may not even "advocate the passage or failure of" the measure. *Id.* § 281A.420(2). So if this provision applied to Councilmember Carrigan's relationship with Vasquez, the law muzzled him from advocating and voting on the proposal that he had spent over a year crafting—just because an interested party hired Vasquez long after Councilmember Carrigan had taken a public stand on the project.

The Ethics Commissioners struggled with how the disqualification provision applied to this case. Most were clear that Councilmember Carrigan's relationship with Vasquez was not among the enumerated relationships. But they could not agree on which of the forbidden relationships most resembled their relationship. *See* J.A. 247–52. Two thought the relationship actually was, or was similar to, "a substantial and continuing business relationship," J.A. 247, 250, one thought it was more like a close family relationship, J.A. 248, and one thought it was both, J.A. 251–52.

Ultimately, the Ethics Commission declined to pick one. It concluded vaguely that the "sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated" in the statute—*all* of them. P.A. 105a. The Ethics Commission was concerned that as Councilmember Carrigan's "campaign manager and political advisor," "Mr. Vasquez … was instrumental in the success of all three of Councilman Carrigan's elections." P.A. 104a. Thus, the Ethics Commission concluded, Councilmember Carrigan must have had "strong loyalties" to his "close friend, confidant and campaign manager." P.A. 112a.

The Ethics Commission found, however, that Councilmember Carrigan's decision to participate in the Lazy 8 vote was not a "willful" violation of the ethics code, because he had relied on the advice of the City Attorney and "did not consider his relationship with Mr. Vasquez a relationship that falls under the statute." J.A. 264–66; *see also* P.A. 112a. Thus, the Ethics Commission declined to impose any monetary penalty, but did "censure" Councilmember Carrigan for the violation. P.A. 1a; *see also* P.A. 112a.

Councilmember Carrigan did not take the censure lying down. He had always adhered to the Navy's honor code, J.A. 194–95, and to the ethics he taught at the University, J.A. 198–99. He had always exceeded legal requirements, as he did with reporting volunteers as in-kind contributors. J.A. 169, 175, 194–95. This was the sole blemish in an otherwise sterling career. He took the Ethics Commission to court.

The State District Court Affirms the Censure

In the state district court, Councilmember Carrigan challenged the decision on factual and legal grounds, including a First Amendment challenge. The Nevada District Court concluded that "Vasquez's role as Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend" gave him "a substantial and continuing political, professional, and personal relationship" with Councilmember Carrigan that met the statutory definition. P.A. 62a. The district court assumed that the First Amendment protected voting by elected officials, but held that "the *Pickering* balancing test … is the proper standard of review." P.A. 60a. The court found that the statute survived that balancing test. P.A. 61–62a.

The Nevada Supreme Court Vacates the Censure

In a 5-1 decision, the Nevada Supreme Court reversed. It held that the catch-all disqualification provision violated the First Amendment. The court found that "voting [on legislation] is a core legislative function" and that "voting by an elected public officer on public issues is protected speech under the First Amendment." P.A. 11a. The court then held that strict scrutiny was the appropriate standard. P.A. 13a.

In so ruling, the Court emphasized "that promoting the integrity and impartiality of public officers through disclosure of potential conflicts of interest is clearly a compelling state interest." P.A. 16a; *see also* P.A. 8a n.5. But the catch-all provision failed to "provide sufficient limitations and explanations con-

cerning when recusal is required to avoid overreaching in unnecessary situations." P.A. 8a n.5. Consequently, the "statute's reach [was] substantially overbroad in its regulation of protected political speech," P.A. 16–17a, and not sufficiently "narrowly tailored" to further the asserted interest, P.A. 16a.

SUMMARY OF ARGUMENT

1. As the Ethics Commission acknowledges, whether the Nevada Supreme Court erred in applying strict scrutiny to the State's unique disqualification rule depends on how much First Amendment activity that particular provision burdens. No state other than Nevada includes a catch-all provision in its disqualification rules. And no other state appears to have invoked its disqualification rules based on a political relationship. Because Nevada's catch-all disqualification provision is unique and unprecedented, its demise will be no "calamit[y]." Pet'r 3.

2. Nevada's unique catch-all disqualification provision implicates two sets of First Amendment rights. First, a legislator's vote is protected expression because it states a policy position and associates the legislator with allies. The message conveyed by a vote is the culmination of a long series of political expressions and associations that this Court has held are protected by the First Amendment. That the vote has a "legal effect" does not "somehow deprive that activity of its expressive component." *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2818 (2010).

Second, the provision burdens the rights of a campaign volunteer and a political candidate to associate with one another. Councilmember Carrigan and his key campaign volunteer were engaged in

core political activity that harkens back to the foundation of our democracy and that is, even today, the very essence of democratic participation. Yet the Ethics Commission disqualified Councilmember Carrigan from the critical Lazy 8 vote because of his "strong loyalties" to his campaign volunteer. The sorts of political "loyalties" that the Ethics Commission targets threaten core associational rights.

3. Because the catch-all disqualification provision severely burdens a constellation of expressive and associational rights, it is subject to strict scrutiny. It establishes a dynamic where volunteers have to check their right to petition government at the campaign door and candidates are forced to choose between enlisting volunteers who are politically active or safeguarding their duty to vote on issues of public importance. But standard statutes disqualifying a legislator for voting on a bill that advances her own pecuniary interests (or those of her husband, daughter, employer, or business partner) should be subject to intermediate scrutiny. That is the level of scrutiny that applies to a variety of other expressive acts. Such provisions would easily survive any appropriate level of scrutiny.

4. Nevada's catch-all disqualification provision fails any appropriate level of scrutiny. To begin with, it is hopelessly vague. Even the most intelligent layperson reading the statutory language should not be expected to know that this relationship is "substantially similar" to a business relationship, where a City Attorney, in an extensive analysis, concludes the opposite. And the layperson should not be expected to do any better than the Ethics Commissioners, whose views were so disparate that they

could not agree on which enumerated relationship the Vasquez relationship was most like—and so declined to specify. The vague provision impermissibly allowed the Nugget to co-opt an ethics agency to override losses fairly sustained in the political process.

Even if the Legislature had drafted a clear provision applying to campaign managers, it would be unconstitutional. The state has no legitimate interest, much less a compelling interest, in prohibiting a vote based on political loyalty. This case is not about Councilmember Carrigan's personal economic interests, but his *political* interests. The Ethics Commission aspires to a sterile political utopia in which elected officials make all their political decisions free from these sorts of political "debts." But such a utopia (if that is what is) is unattainable, foreign to our democracy, and unconstitutional. Responsiveness and accountability are the key features that distinguish restrictions on elected *representatives* from restrictions on elected *judges*.

Finally, the disqualification provision is unconstitutionally underinclusive and overbroad and it burdens more speech than is necessary to achieve the purported objective.

ARGUMENT

I. NEVADA'S CATCH-ALL DISQUALIFICATION PROVISION IS UNIQUE AND UNPRECEDENTED

The Ethics Commission originally posed the question "whether the First Amendment subjects state restrictions on voting by elected officials to (i) strict

scrutiny … , (ii) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, … or (iii) rational-basis review." Pet'n i. It is impossible to answer that question in the abstract, just as it would be impossible to answer definitively whether the First Amendment subjects election laws to strict scrutiny. As the Ethics Commission acknowledges, the answer depends on the nature of the restriction—and specifically, on how much First Amendment activity the provision burdens. Pet'r 36; *see Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999). That is presumably why the Ethics Commission has shifted to the more case-specific, and answerable, question: "[w]hether the Nevada Supreme Court erred by applying strict scrutiny to *the State's … recusal rule*." Pet'r i (emphasis added).

When the focus is properly on Nevada's catch-all disqualification provision, it becomes evident that the Ethics Commission's dominant theme is markedly off target. "[L]iterally unprecedented," gasps the Ethics Commission. Pet'r 3. An affirmance would be "calamitous," *id.*, it proclaims, jeopardizing most any law that requires a legislator (or any other government official) to disqualify himself on any basis, *see* Pet'r, 16–17, 44–46.

The panic is overwrought. Nevada's provision is unique—literally unprecedented—and it can be struck on either of the two bases that make it unique.

First, the Ethics Commission correctly points out that "[v]irtually every State has enacted conflict-of-interest regulations for legislators"—and that they

tend to "encompass[] officials' relatives and business associates." Pet'r 22. But it neglects to mention that Nevada is the only state that has engrafted a catch-all "substantially similar" provision (or anything similar to it) onto its disqualification rules.[2]

Second, so far as we can tell, no other state has *ever* disqualified an elected official from voting based on a political relationship of any sort. The Ethics Commission does not cite a single instance in which any state or local jurisdiction ever passed a law that explicitly targeted an elected official's relationship with campaign volunteers, or campaign managers, for disqualification. Nor has the Ethics Commission cited any other instance where an ethics authority has *interpreted* a disqualification provision to reach such a relationship. We have found only one that even comes close—and it was not even an ethics law: It was a state statute prohibiting lobbyists from vo-

[2] Many states require disqualification when the matter implicates the financial interests of the legislator, or the interests of the legislator's family members, business associates, or employer. *See, e.g.*, N.J. Stat. Ann. § 40A:9-22.5(d); Mo. Rev. Stat. § 105.452(4). Notably, all of the state conflict of interest provisions cited by the Ethics Commission are of this type, *see* Pet'r 22–23 n.7, as is the model code provision suggested by a leading scholar in the field, *see* Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, in *Government Ethics and Law Enforcement: Toward Global Guidelines* 97, 119 (Yassin El-Ayouty et al., eds., 2000). A few other states generally prohibit a legislator from participating in any matter in which the legislator has a "personal," "private," or "substantial" interest without defining what constitutes such a disqualifying interest. *See e.g.*, Colo. Rev. Stat. § 24-18-109(3)(a). Some states appear to require only disclosure instead of disqualification. *See, e.g.*, Idaho Code Ann. § 59-704.

lunteering their services to candidates for state office. *See Barker v. Wis. Ethics Bd.*, 815 F. Supp. 1216, 1218 (W.D. Wis. 1993) (discussing Wis. Stat. § 13.625(1)(b)). It was struck on First Amendment grounds. *Id.* at 1221–22.

Thus, striking Nevada's catch-all disqualification provision based on its unconventional features would have little effect outside Nevada. The Ethics Commission's parade of horribles emerges not from the Nevada Supreme Court's *holding* that the catch-all provision is unconstitutional, but from some of that court's broader language suggesting a rule that would lead to strict scrutiny for reviewing all disqualification statutes. Pet'r 44; *see, e.g.,* P.A. 13a. But this Court has no obligation to crib from the Nevada Supreme Court's opinion. Prudence would dictate that this Court address only the statutory provision before it. Indeed, even the Nevada Supreme Court emphasized that it was addressing "only" the catch-all provision, leaving intact "the remainder of the statute, including all the enumerated bases for disqualification." P.A. 17a n.10.

Which brings us to another threshold matter: whether to treat this challenge as facial or as-applied. The majority and the dissent below disagreed on the answer. *Compare* P.A. 13a *with* P.A. 31a n.5. Councilmember Carrigan raised both. A.O.B. 5, 9–10, 15. This is an as-applied challenge because Carrigan's "claim and the relief that would follow" is limited to him. *Doe*, 130 S. Ct. at 2817. He seeks only to "set aside the August 29, 2007 decision of the Nevada Commission on Ethics and the related published opinion," P.O.B. 29, not an injunction against enforcement of the statute against others.

That said, the labels do not matter, because, as we shall demonstrate, Councilmember Carrigan should prevail regardless of the proper characterization.

II. NEVADA'S UNIQUE DISQUALIFICATION PROVISION BURDENS SEVERAL FIRST AMENDMENT RIGHTS

Before the Nevada Supreme Court, Councilmember Carrigan argued that the catch-all disqualification provision burdens constitutional rights in two distinct ways. He argued generally that most any disqualification statute burdens the expressive and associational aspects of a legislator's right to vote. A.O.B. at 16–19. And, more specific to this unique provision, he argued that "Mr. Vasquez' participation in Councilman Carrigan's campaigns amounts to political volunteerism that is protected by the United States Constitution" on both sides of the relationship, A.O.B. 9—both for "Mr. Vasquez' right to volunteer, and Councilman Carrigan's right to accept" his support, A.O.B. 18.

The Nevada Supreme Court focused on the more general First Amendment implications of restricting a legislator's vote. This Court cannot, however, adequately determine the level of scrutiny without assessing the full range of First Amendment rights burdened by the provision under review precisely because, as the parties agree, the level of scrutiny depends on the precise manner in which a provision burdens First Amendment rights. *See supra* at 18–19. We, therefore, address the two different sets of rights in turn, beginning with the right the court below addressed.

A. The Provision Burdens A Legislator's First Amendment Right To Express Political Views And To Associate With Political Allies

There can be no doubt that Councilmember Carrigan was expressing something when he proclaimed "Aye" on the Lazy 8. The vote was the ultimate—and definitive—expression of his controversial viewpoint that the development, as modified by his advocacy, was right for his ward. In so voting, he gave voice to the 2500 constituents he consulted during the campaign, J.A. 173, and particularly the 70% who supported the project, J.A. 193. "[V]otes of the individual Council members are intended to express their positions on issues of public policy, and are understood to do so by the Council members' constituents and other observers." *Clarke v. United States*, 886 F.2d 404, 412 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc). "There can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989).

Our history is rich with tales of legislators using their votes to express deeply held and highly unpopular views, often at great personal or political peril. John Quincy Adams was communicating a message when he broke with his beloved Federalist Party—knowing it would cost him his Senate seat—to vote for the Embargo Act of 1807 because, he believed, that was what the "public good" demanded. John F. Kennedy, *Profiles in Courage* 48 (Commemorative ed. 1991). Sam Houston was sounding a clarion call for equality when he joined with only one other

Southern Senator to vote against repeal of the Missouri Compromise—"the most unpopular vote I ever gave [but] the wisest and most patriotic," he explained. *Id.* at 109. Representative Jeannette Rankin (R-Mont.) was expressing her conscience when she cast the lone vote in Congress against entering World War II, declaring, "As a woman, I can't go to war and I refuse to send anyone else." Lynne E. Ford, *Encyclopedia of Women and American Politics* 276 (2008). The list can go on for pages: Senator Edmund Ross (R-Kan.). Representative Meyer London (Socialist-NY). Senator Clair Engle (D-Cal.). Senators Wayne Morse (D-Ore.) and Ernest Gruening (D-Alaska). The trio of Senate protagonists of the "Palm Sunday Compromise." All the talk these figures might have uttered—about the evils of British imperialism, slavery, war, impeachment, the Sedition Act, racial discrimination, and the like—was cheap compared to the message packed by their votes.

Councilmember Carrigan has no delusions of being a modern day Adams and the Lazy 8 was not World War II. But in that particular community at that particular moment, the Lazy 8 was *the* issue and he was *the* political protagonist behind it.

The vote, moreover—like each of the foregoing votes—was the culmination of a lengthy political process: It began with the kitchen table conversation that kick-started Councilmember Carrigan's campaign. It escalated with his door-to-door efforts to gauge his constituents' will and his cajoling the developer to conform the development to his and his constituents' interests. It reached a fevered pitch with Councilmember Carrigan's election campaign,

which became a public referendum on the development, and the swirl of public advocacy by him and others debating the project. The electorate spoke resoundingly on the issue by choosing Councilmember Carrigan and his vision of the Lazy 8 over his single-issue opponent. All this came to a head when Councilmember Carrigan joined allies in the City Council to vote in support. This Court has imbued every step along this path with the highest level of First Amendment protection. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675–76 (1998) (campaign debates); *Brown v. Hartlage*, 456 U.S. 45, 58 (1982) (campaign promises); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (public advocacy); *Buckley v. Valeo,* 424 U.S. 1, 48 (1976) (campaign spending and fundraising). It seems incongruous to assert that the very notion of First Amendment protection for the culminating moment of all these protected activities is "alien to the American constitutional tradition." Pet'r 14.

The first circuit to address the issue found the point so self-evident that it thought it "unassailable." *Miller*, 878 F.2d at 532. "[W]e have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes with the freedom of speech guarantee of the first amendment," the court held, "especially … when the agency members are elected officials." *Id.* Other circuits have agreed. *See Clarke*, 886 F.2d at 412; *Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003) ("Voting on public policy matters coming before a legislative body is an exercise of expression long protected by the First Amendment.").

This Court, too, reached the same conclusion just last Term in the analogous context of a referendum where each citizen is "acting as a legislator." *Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring). The threshold question there was whether there was any First Amendment protection in a citizen-legislator's decision to sign a petition to put a piece of legislation up for public vote. *Id.* at 2817. This Court, too, had no difficulty finding that a citizen-legislator "expresses a view on a political matter when he signs a petition under [a state's] referendum procedure." *Id.*

The Ethics Commission concedes that a legislative vote "'arguably contains a communicative element.'" Pet'r 25 (quoting *Spallone v. United States*, 493 U.S. 265, 303 n.12 (1990) (Brennan, J., dissenting)). An act that is "sufficiently imbued with elements of communication" necessarily has *some* First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation omitted); *see also United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Nevertheless, the Ethics Commission argues that "[l]egislators do not have an individual free speech right to vote," mainly because "'the act is quintessentially one of governance'" rather than speech. Pet'r 24–25 (quoting *Spallone*, 493 U.S. at 303 n.12 (Brennan, J., dissenting)).

But *Doe* rejects that very argument. 130 S. Ct. at 2818. This Court acknowledged that the citizen-legislator's signature on the referendum petition is a "legally operative legislative act," just like an elected legislator's vote. *Id.* But that did not change the First Amendment analysis: "[W]e do not see how

adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment." *Id.* To the contrary, the act "remains expressive even when it has legal effect in the electoral process." *Id.*

The Ethics Commission also protests that a vote cannot be expressive because it is "no simple matter" to discern the precise message conveyed by a legislator's vote. Pet'r 27. But *Doe* disposed of that argument as well. It recognized that it is no simple matter to discern the meaning in a citizen-legislator's "vote" to put a statute on the ballot. Sometimes an "individual's signature will express the view that the law subject to the petition should be overturned," but other times the signature "expresses the political view that the question should be considered 'by the whole electorate.'" 130 S. Ct. at 2817. "In either case," the Court explained, "the expression of a political view implicates a First Amendment right." *Id.*

Next, the Ethics Commission protests that First Amendment protection of Councilmember Carrigan's vote "is inconsistent with the broad discretion this Court traditionally has afforded each State to 'structure its political system.'" Pet'r 25 (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13–14 (1982)). Once again, *Doe* is eloquent on this point: The "State, having 'cho[sen] to tap the energy and legitimizing power of the democratic process, … must accord the participants in that process the First Amendment rights that attach to their roles." *Doe*, 130 S. Ct. at 2817 (quoting *Republican Party of*

Minn. v. White, 536 U.S. 765, 788 (2002) (alteration by *Doe*)). Moreover, there is no inconsistency between the position that a vote has *some* element of expression and the caveat that the First Amendment permits some state regulation. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (upholding ban on fusion candidacies because the "burdens [the state] imposes on the party's First … Amendment associational rights—though not trivial—are not severe").

Finally, the Ethics Commission cites several standing cases for the proposition that a legislator does not have a "personal" or "private" right to cast a legislative vote. Pet'r 24–25. But if anything, the standing cases show the opposite. On the one hand, legislators *do* have standing to sue for "something to which they *personally* are entitled"—such as their "seats as Members of Congress after the constituents had elected *them.*" *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (original emphasis). On the other hand, they do not have standing to sue for an "institutional injury" that "damages" all legislators "equally" so that no one legislator is "singled out for specially unfavorable treatment." *Id.*; *see also*, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 464 (1939) (Frankfurter, J., concurring) (claims did not "relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty"). The Ethics Commission simply cited cases in the latter category, while ignoring cases in the former. Under these cases, Councilmember Carrigan *does* have standing to sue, for he, alone, was disqualified from voting, and his interest in expressing his views is personal to him. *Cf. Bond v. Floyd*, 385 U.S.

116, 136–37 (1966) (holding elected state legislator had First Amendment right to be seated). If the Ethics Commission seriously believed that Councilman Carrigan did not have standing, would not have sought review from this Court.

In sum, there is no reason to except a legislator's vote from the types of political expression and association protected by the First Amendment.

B. The Disqualification Provision Burdens A Candidate's And A Campaign Volunteer's Right To Associate With One Another

Nevada's catch-all disqualification statute imposes a second, distinct set of First Amendment burdens that are not implicated by any other disqualification provision in the country. Although the disqualification falls directly on the legislator, the statute also burdens the relationship between the legislator/candidate and her campaign volunteers.

1. The disqualification was based on a political relationship

The Ethics Commission's opinion at points mentioned Councilmember Carrigan's "close personal friend[ship]" with Vasquez. *See* P.A. 105a, 112a. But the dominant factor in its opinion was their political relationship—and particularly the view that Vasquez was "instrumental in the success of all three of Councilman Carrigan's elections." P.A. 104a. As one Commissioner put it, "I don't think mere friendship requires disclosure," but "here … [w]e have the close friendship and relationship of a campaign manager, of a political confidante and adviser as

well." J.A. 254. According to another Commissioner, it was "a dependent relationship … that has a *feeling of debt* or I'm here because this person got me elected and has kept me elected." J.A. 250–51 (emphasis added); *see also* J.A. 252.

This was not a new theme for the Ethics Commission. In an opinion known as the "Terminal D Opinion," the Ethics Commission censured a legislator for voting on a matter involving two political supporters. *Gates v. Nev. Comm'n on Ethics*, No. A393960, slip op. at 2 (Clark Cnty. Nev. Dist. Ct. Sept. 9, 1999) (App'x 2–3a).[3] One had "served on [the legislator's] campaign for her County Commission seat." *Id.* The other was "a fundraiser who had organized hundreds of thousands of dollars to be contributed to Petitioner's campaign funds." App'x 3a. The Ethics Commission found that "a political alliance" is disqualifying if "both [parties] are dedicated to common causes, one of which is the furtherance of the [legislator's] political aspirations." *In re Gates*, Nev. Comm'n on Ethics Op. Nos. 97-54 et al. (Aug. 26, 1998), available at http://ethics.nv.gov (unpaginated document). Disqualification is also mandatory whenever a close relationship is "forged in the context of common political and philosophical beliefs

[3] A state court overturned the Terminal D decision, on the ground that an earlier version of the disqualification provision (one without the enumerated relationships) was unconstitutionally vague. App'x 12–15a. But Terminal D remains very much alive, because the Ethics Commission has taken the position that the current catch-all provision was a codification of the opinion. J.A. 249–50. The state court decision is not available online or in any electronic database. For the Court's convenience, the case is reproduced in an appendix to this brief and cited as "App'x."

that both [parties] felt strongly enough about that they had become politically active on behalf of those causes." *Id.*; *see also* J.A. 106–07 (Nev. Attorney General Op. 98-27, discussing the Terminal D Opinion).

2. The disqualification provision burdens a protected relationship

Vasquez gave voice to a venerable tradition of political volunteerism when he testified: "I donated my time" to Councilmember Carrigan because, "[s]omebody comes along that I believe in … and I think they can do the right things, it's not necessarily that they are going to be on the right place with all my stuff." Tr. 126. The Ethics Commission considers political relationships like the one Vasquez describes to be troubling. But the relationship harkens back to the foundation of our democracy and exemplifies, even today, the very essence of democratic participation.

James Madison "was Jefferson's campaign manager, long before the term was coined." Andrew Nurstein & Nancy Isenberg, *Madison and Jefferson* 319 (2010) ("To use modern parlance, … Congressman Madison may be described as the first presidential campaign consultant."). And their "friendship" of "a half century" "united" them in "the same principles and pursuits of what [they] have deemed for the greatest good of our country." 12 Thomas Jefferson & Paul Leicester Ford, *The Works of Thomas Jefferson* 481 (1905). The Founders would have been horrified at the notion that Madison's support for a bill would have disqualified President Jefferson from

signing it into law because some commission thought their political "loyalties" corrupting. P.A. 112a.

Certainly, no condemnation of such relationships is to be found in Jefferson's *Manual*, which the Ethics Commission features so prominently. *See* Pet'r 15, 19–21, 28, 38. Jefferson declared (and we agree) no "man [may] be a judge in his own cause." Thomas Jefferson, *Manual of Parliamentary Practice* 44 (New York, Clark & Maynard 1868) (1801). But so far as we know, neither he nor any contemporary ever intimated that no man may be a judge in his political ally's cause, his volunteer's cause, or even his campaign manager's cause. And we have been unable to find any instance in our history in which a relationship forged in politics was ever viewed as disqualifying or otherwise sanctionable.

In targeting these sorts of "political alliances" and "loyalties," the Ethics Commission has taken aim at core First Amendment rights of political speech and association on both sides of the political relationship.

Burdening the campaign volunteer's rights. This Court long ago held that the First Amendment protects the right of activists like Vasquez "to associate actively through volunteering services" as a form of political association, *Buckley*, 424 U.S. at 28, and more specifically that "political campaigning and management" are "activities … protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 370–71 (1976); *see NAACP v. Button*, 371 U.S. 415, 428–45 (1963) (holding that activists and their representatives both have First Amendment rights of association).

Moreover, like many political activists, Vasquez's activism does not hibernate between elections. He promotes candidates he believes in because he wants legislators who will implement policies he favors. So beyond the campaign, Vasquez exercises his right "to petition the Government for a redress of grievances." U.S. Const., amend. I. The First Amendment protects Vasquez's right to engage in these political activities as well. His mediating activities between the Lazy 8 and the City Council were quintessential examples of the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990). Vasquez's public relations activities, too, lay "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776.[4]

Under Nevada's regime, the price of exercising the associational right to volunteer for a campaign is to check one's right to petition government at the campaign door. Before volunteering on a campaign, a citizen with strong political convictions must make a calculation: "If I want this candidate to win *because of* his political convictions—i.e., because of how I expect him to vote—am I prepared to forego the

[4] Vasquez did not lose his First Amendment protection because he was a hired advocate. *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 645 n.28 (1st Cir. 1995) (Lynch, J., dissenting). As this Court has recognized, "[s]ome of our most valued forms of fully protected speech are uttered for profit." *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

right to engage the entire legislature on a vote that is important to me?"

When the volunteer knows up front that a major vote is looming, the burden is direct and palpable. An executive director or senior official of any local organization will have to decide whether to help manage a candidate's campaign or lobby the legislative body on the important issue. The activist will be leery of joining the campaign, particularly if the legislature is closely divided on the issue—which is the only time the election effort really matters. The very act of volunteering on a candidate's campaign could yield a disqualification that defeats the volunteer's political agenda.

Even more chilling are circumstances in which the consequences of volunteering are unpredictable. A political activist might have numerous political passions. She has no idea which of them may arise in some upcoming multiyear legislative term. The only way to preserve her right to engage in future political advocacy on such an issue—known or unknown—is to sit out the election.

Burdening the candidate's associational rights. Councilmember Carrigan, for his part, has a correlative right to associate with the volunteers who believe in him—a right that is "deeply embedded in the American political process." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981). "[R]eliance on volunteers [is] absolutely essential and, in light of the enormous significance of citizen participation to the preservation and strength of the democratic ideal, absolutely desirable, indeed indispensable."

Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 627–28 (1976) (Brennan, J., concurring in part).

The candidate's right to associate with volunteers encompasses the right to choose the best person to fill each volunteer role that needs to be filled to win a campaign. *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (the First Amendment "protects [activists'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). The disqualification provision deprives the candidate of the latitude to choose the best advocates and strategists to advance his campaign. Candidates who take their public obligations seriously will be reluctant to enlist a campaign manager whose interests and activities might eventually come before the legislature.

The candidate is even more disadvantaged than the volunteer. At least the volunteer has some sense of the range of issues that interest her. But the candidate has no way of ensuring that a volunteer's activities will not end up interfering with legislative duties. The candidate might consider subjecting prospective campaign volunteers to extensive political questionnaires or seeking a no-lobbying pledge. But those are good ways to lose volunteers and terrible ways to guard against the dangers of disqualification. In any event, none of these measures will protect the candidate from the possibility that an ardent opponent in the Nugget's position might try to win a crucial legislative battle by throwing enough money at a former campaign manager like Vasquez so as to disqualify their legislative opponents.

In the end, the candidate will enlist only the volunteers who are least politically active, which almost by definition translates into volunteers who are least politically effective.

III. THE CATCH-ALL DISQUALIFICATION PROVISION IS SUBJECT TO STRICT SCRUTINY

The severe First Amendment burdens imposed by the specific catch-all disqualification provision are subject to strict scrutiny. The Ethics Commission's arguments for a lower level of scrutiny are unpersuasive.

A. The Severe First Amendment Burdens Imposed By The Disqualification Provision Are Subject To Strict Scrutiny

Let us begin with common ground: Both parties agree that the Nevada Supreme Court was correct in rejecting the test that the district court applied—the balancing test governing public employee speech under *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* P.A. 60a. Under *Pickering*, a court weighs "the interests of the [public employee], as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. *Pickering*, we agree, is not "the most apt doctrinal analogy for this case." Pet'r 32 n.10. As the court below held, *Pickering* is inapposite because it deals with employment-related decisions, such as hiring and firing, rather than the sorts of regulations of democratic processes at issue here. P.A. 12a. But

having agreed that *Pickering* is inapt, the parties diverge widely on what to use instead. The Ethics Commission insists on a standard that is even more lax than *Pickering*, while we propose a standard that is stricter.

The correct standard is strict scrutiny. The Ethics Commission's ruling would surely be subject to strict scrutiny if it directly penalized Vasquez for volunteering on Councilmember Carrigan's campaigns or if it penalized the Councilmember for enlisting his aid in common cause. *See, e.g.*, *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (regulations that "burden the associational rights of political parties and their members" are subject to strict scrutiny). So too, if the Ethics Commission penalized Vasquez for lobbying in support of the Lazy 8. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) ("Congress has no power to ban lobbying itself.").

"[T]he Constitution's protection," however, "is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Rather, First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Accordingly, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990).

By establishing a dynamic where a candidate is forced to choose between enlisting volunteers who

are especially politically active and safeguarding his duty to vote on issues of public importance, the Ethics Commission has burdened both rights. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977) (regulation is impermissibly coercive where "[i]t requires appellee to forfeit one constitutionally protected right as the price for exercising another"). And it has, in effect, accomplished indirectly what it could not constitutionally achieve directly.

FEC v. Davis, 554 U.S. 724 (2008), is instructive. There, this Court considered the so-called "Millionaires' Amendment," which provided that when a candidate spent significant personal funds on her campaign, the candidate's opponent could "qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated expenditures." *Id.* at 736. The law did not ban the self-funded candidate from spending her own money. But this Court described the law as "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* at 739; *see also id.* at 740. The Court observed that "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.* at 739. To the contrary, this Court found that the Millionaires' Amendment "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and therefore could not stand "unless it [was] 'justified by a compelling state interest.'" *Id.* at 740 (internal citation omitted).

B. The Arguments For Lower Scrutiny Here Are Unpersuasive

The Ethics Commission's main argument is: "This Court has repeatedly upheld neutral state rules adopted to regulate the processes of self-government, emphasizing that such rules are ordinarily subject to deferential review even if they necessarily burden interests protected by the First Amendment." Pet'r 35. But as the Ethics Commission elsewhere acknowledges, *see* Pet'r 32–33, this Court has rejected a hard-and-fast rule that applies one level of scrutiny to all "the processes of self-government." Rather, this Court has held that "the rigorousness of [judicial] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). It has emphasized that the states' "power to regulate the time, place, and manner" of democratic processes "does not justify, without more, the abridgement of … the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). And most important for present purposes, it has held that "strict scrutiny appl[ies]" "when … a regulation imposes 'severe' burdens" on First Amendment rights. *Burdick*, 504 U.S. at 434.

So, the debate circles back to the question whether this disqualification provision imposes a "severe" burden. The Ethics Commission asserts that "any burden imposed by the Nevada recusal rule is a very limited one." Pet'r 38 (citation and internal quotation marks omitted). But in so arguing, it ignores the provision's most severe burdens: It focuses only

on "officials' use of voting for personal expression," *id.*, without so much as acknowledging all the associational burdens described above (and argued to the Nevada Supreme Court below) on the candidate and the campaign volunteer.

Shorn of its unique catch-all provision, the statute would be just like all the standard statutes, disqualifying a legislator for voting for a bill that advances her own pecuniary interests (or those of her husband, daughter, employer, or business partner). Such a provision would certainly not be subject to strict scrutiny. Intermediate scrutiny would be much more appropriate, for that is the level of scrutiny that applies to a variety of other expressive acts. *See, e.g., O'Brien*, 391 U.S. 367 (burning a draft card). Such a provision would easily survive any appropriate level of scrutiny. The state's interest in eliminating financial self-dealing by public officials is high, and only disqualification can ensure that a financially interested legislator does not corrupt the political process by voting to advance private economic gain. *Cf. id.* at 378 (government interest in administrative advantages of registration certificate substantial, and law prohibiting destruction of cards specifically protects that interest).

The Ethics Commission also argues that the disqualification provision leaves a legislator "free to communicate his views to his constituents and the public through public speaking, television appearances, newsletters, pamphlets, advertisements, telephone calls, personal visits, and emails." Pet'r 39. In point of fact, it does not, for it prohibits not just the vote but any effort to "advocate the passage or failure of" the measure. Nev. Rev. Stat.

§ 281A.420(2) (2007). Moreover, severe burdens on associational rights are subject to strict scrutiny, even where individuals are still free to speak their minds. *See, e.g., Tashjian*, 479 U.S. at 217.

IV. THE DISQUALIFICATION PROVISION FAILS UNDER EITHER STRICT OR INTERMEDIATE SCRUTINY

The Nevada Supreme Court correctly concluded that the disqualification provision fails constitutional scrutiny, although it did not necessarily apply the most apt doctrinal labels for the various aspects of its analysis. Invoking the "substantial overbreadth" doctrine, the court at one point correctly stated that the provision was unconstitutional even if it could be constitutionally applied to Mr. Carrigan. P.A. 13a n.8. But that purported overbreadth analysis also advanced two additional constitutional arguments.

The first was vagueness. The court held that the "catchall language fails to adequately limit the statute's potential reach *and does not inform or guide public officers as to what relationships require recusal*." P.A. 17a (emphasis added). In support of that conclusion, the court observed that "[t]here is no definition or limitation to subsection 8(e)'s definition of any relationship 'substantially similar' to the other relationships in subsection 8," *id.*, and concluded that the provision "fails to sufficiently describe what relationships are included," P.A. 16a; *see also* P.A. 8a n.5 (framing the question as whether statute has "sufficient limitation and clarity"). Thus, although the court dropped an early footnote saying that "we need not address Carrigan's vagueness … argument[]," P.A. 6a n.4, it obviously was (as the dissent

noted) addressing a vagueness argument, *see* P.A. 37a n.7.

Second, under the overbreadth analysis, the court also held that the catch-all provision "fails ... to meet the 'narrowly tailored' requirement." P.A. 16a.

The court was correct on all these points. Consistent with the court's emphasis, we begin with vagueness. *See infra* Point IV.A. We then demonstrate that the provision does not advance a governmental interest that is even legitimate, much less important or compelling. *See infra* Point IV.B. Finally, we show that the provision is substantially overbroad and underinclusive and burdens more speech than necessary to achieve the stated objectives. *See infra* Point IV.C.

A. The Provision Is Unconstitutionally Vague

The court below was correct that the catch-all disqualification provision is so hopelessly vague that people of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The provision's plain terms do not provide fair warning that it applies to a relationship like Councilmember Carrigan and Vasquez's.[5]

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[5] The dissent below mistakenly asserted that "Carrigan does not contest the Ethics Commission's findings, which the district court upheld, that [his] relationship with Vasquez was disqualifying." P.A. 33a. In fact, Councilmember Carrigan argued emphatically that "Mr. Vazquez' participation in [his] campaigns" was "not a 'business relationship' that is 'substantial and con-

Vasquez is obviously not a "member of [Carrigan's] household," is not "related to [Carrigan] by blood, adoption or marriage within the third degree of consanguinity or affinity," and does not "employ[] [Carrigan] or a member of his household." Nev. Rev. Stat. § 281A.420(8) (2007). And as the Ethics Commission tacitly concedes, the two do not have (and surely do not plainly have) a "substantial and continuing business relationship." As the Ethics Commission found, "Vasquez and his companies did not make any profit from [his] services" even when acting as middleman in some transactions. P.A. 44a.

Instead, the Ethics Commission argues only that a campaign manager is "substantially similar" to one of these enumerated relationships—specifically (it now tells us) to a "business relationship"—and Councilmember Carrigan was supposed to know that. Pet'r 51–52 n.13.[6] The record proves the opposite.

First, even the most intelligent layperson reading the statutory language should not be expected to know that this relationship is "substantially similar" to a business relationship, where a City Attorney, in

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tinuing,' or a relationship that is 'substantially similar' to any other relationship included in NRS 281A.420(8)." A.O.B. 9.

[6] Notably, the Ethics Commission distances itself from the position of the district court and the Nevada Legislature, that the relationship was disqualifying merely because it was a "close, substantial and continuing relationship." P.A. 80–81a; *see*, *e.g.*, Nev. Legis. Br. 32 ("close, significant, and continuing relationship with another person"). No one could ever know for sure what relationships a bare majority of the Ethics Commission would retroactively deem too "close" for comfort. Local party leaders? Confidantes? Running partners? Dinner companions? Book club members?

an extensive analysis, concludes the opposite. Councilmember Carrigan was intelligent enough to land fighter planes on aircraft carriers, but he should not have been expected to override the City Attorney's well-founded conclusion that the disqualification provision captures only relationships where the subject "stood to reap either financial or personal gain or loss as a result of his official action." P.A. 99a. The attorney's conclusion was reasonable under the "interpretative canons of *noscitur a sociis* and *ejusdem generis*," under which the catch-all provision's "general words" are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington v. Guardianship Estate*, 537 U.S. 371, 383 (2003). A layperson of "common intelligence" should not even be expected to have heard of those canons, much less to second-guess learned counsel's application of them.

Second, the Ethics Commission never explains how it expected Councilmember Carrigan to know that his relationship with Vasquez is "substantially similar" to a "business relationship," when one Commissioner confesses, "I don't necessarily believe that there was a substantial and continuing business relationship," J.A. 247, and another says, "substantially similar to a substantial and continuing business relationship gives me pause," J.A. 245. If the Commissioners' views were so disparate and tentative that they could not agree on which enumerated relationship the Vasquez relationship was most like—and so declined to specify, P.A. 105a—then Councilmember Carrigan should not be expected to do any better.

The Ethics Commissioners were not the only who had difficulties with the taxonomy. In upholding the censure, the district court opined that "Carrigan and Vasquez had a substantial and continuing *political, professional* and *personal* relationship." P.A. 62a (emphasis added). Not one of those words is in the provision.

In short, the best Councilmember Carrigan could be expected to do was to "guess at [the provision's] contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). That is especially true here because the phrase "substantially similar," like the terms "general" and "elaboration" at issue in *Gentile*, is a "classic term[] of degree." *Id.* at 1048–49. In the "context" here, the term has "no settled usage or tradition of interpretation in law." *Id.* at 1049. "The [official] has no principle for determining when his [relationships] pass from the safe harbor" of the insubstantially similar to the "forbidden sea" of the substantially similar. *Id.* *Compare Roberts v. U.S. Jaycees*, 468 U.S. 609, 630 (1984) (use of "familiar standards" "ensure[d] that the reach of the statute is readily ascertainable").

In *Gentile*, this Court opined that "[t]he fact that [the speaker] was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the rule] creates a trap for the wary as well as the unwary." 501 U.S. at 1051. Here, however, Councilmember Carrigan's effort was not just conscious, but conscientious. This provision set a trap for the hyper-vigilant.

The Ethics Commission contends that Councilmember Carrigan should have known what the pro-

vision means because of an isolated snippet of legislative history discussing a relationship with a "person [who] ran your campaign time, after time." P.A. 69a (quoting *Hearing on S.B. 478 before Senate Comm. on Gov't Affairs*, 70th Leg. 42 (Nev. Mar. 30, 1999)); *see also* P.A. 104a; J.A. 253–54. The sentence came not in a committee report, nor even from a legislator. It came from the governor's representative. Witness statements like this occupy such a lowly status in the hierarchy of legislative materials, that this Court would probably not even consider it *relevant*. *See* William N. Eskridge, Jr., et al., *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 1019 (4th ed. 2007) (observing that "the Court will not rely on" statements by public, nonlegislative officials who draft or promote statutes "as the most probative—and certainly not the *only*—evidence of statutory meaning").

But the snippet would make no difference even if it were more reliable. "Ordinary people cannot be expected to undertake such an analysis [of legislative history]; rare is the lawyer who could do it; and no two lawyers could be expected to agree." *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting); *see Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring) ("To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.").

The Ethics Commission also makes much of the opportunity a legislator has to "seek confidential guidance from the Commission as to 'the propriety of

[their] … future conduct,' Nev. Rev. Stat. § 281A.440(1) (2009), and about whether a particular relationship requires recusal." Pet'r 54. That is not much of an option in the heat of a legislative battle, especially inasmuch as the Commission is allowed to sit on the request for 45 days. Nev. Rev. Stat. § 281A.440(1) (2009).

More importantly, the freedom to seek an agency's advice does not address the most significant First Amendment burden: the one that occurs *long before* a legislative vote, when the candidate and the volunteer are deciding whether to associate together and may not even know how close their relationship will end up being. As insightful as the Ethics Commission may be about "future conduct," it cannot actually *tell* the future. It cannot opine on what sorts of votes are likely to arise, which ones are likely to excite the campaign volunteer to legislative action, and what clients will materialize to seek his services. Moreover, even if an aspirant to office or prospective volunteer could be sure about an upcoming vote, the Ethics Commission cannot help them, because it is not allowed to issue opinions to anyone but a sitting "public official or employee." Nev. Rev. Stat. § 281A.440(1) (2009); *see Buckley*, 424 U.S. at 40 n.47 (observing that reliance on the FEC to cure ambiguity in the law "is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating [the law] do not have a right to obtain an advisory opinion from the Commission").

Finally, the Ethics Commission insists that this sort of catch-all provision is essential to the administration of ethics laws. Pet'r 52. But the very sugges-

tion is belied by the reality that no other state feels the need to do so. *See supra* at 19–21.[7]

In sum, this case presents the classic situation where a vague law "trap[s] the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 282 (1961).

But this case also illustrates an additional—perhaps even graver—problem of vague statutes regulating the political process: The catch-all disqualification provision here "impermissibly delegates basic policy matters" to those charged with interpreting and enforcing the law, "with the attendant dan-

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[7] In contrast, judicial recusal provisions are often more open-ended. *See, e.g.*, 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). But these provisions are different for two reasons. First, they are often left to the judge's own discretion to implement, and to the extent that there is any enforcement it is usually only for the clearest of violations. *See, e.g.*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 55–56 (2000) ("Currently, the meaning and application of the [Model Code] standard," requiring recusal when a judge's "impartiality might reasonably be questioned," "is left to the discretion of the trial judge ...."). Second, the state has a far more fundamental—indeed, constitutionally imposed—imperative to safeguard against any possibility of judicial favoritism. *See infra* at 53–55. So there is less of a concern of a judge erring on the side of recusal.

gers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109. The First Amendment's vagueness doctrine is designed "in part" to combat "a kind of standardless discretionary authority" that "[v]ague laws delegate to administering officials." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 457 n.117 (1996). "The fundamental purpose of this rule barring standardless discretion thus resides in its capacity to assist in the campaign against impermissible motive." *Id*. at 457.

This case is both an object lesson and a warning of the mischief to come if this Court sustains the catch-all provision: Private interests armed with vague standards will co-opt unelected agencies to override losses sustained in the political process. The Ethics Commission did not thrust itself into this political brawl. It was dutifully responding to a complaint that came at the instigation of the political loser. The Nugget solicited complainants to file an ethics complaint against Councilmember Carrigan. R.O.A. 449. Two identical ethics complaints were filed on the same day. R.O.A. 75–90, 450–451. The complainants are co-plaintiffs in a lawsuit filed by the Nugget, P.O.B. Exhibits 3 & 5, and one of the complainants emailed the Nugget's chief executive thanking her for the help in preparing the complaint, R.O.A. 452.

None of this would have been possible if the disqualification provision had been clear. Conversely, if this Court blesses this provision, it will open a new avenue for end-runs around the democratic process.

B. The State Has No Legitimate, Much Less Compelling, Interest In Prohibiting A Vote Based On Political Loyalty

Vagueness is not the only constitutional flaw. The provision would be unconstitutional even if it had enumerated "campaign manager or other key campaign volunteer" as a disqualifying relationship. Such a disqualification does not advance any legitimate government interest, much less an important or compelling one.

We can stipulate that disqualification rules *generally* are necessary to "maintain 'integrity in the discharge of official duties' and prevent misuse of the office *for private ends*." Pet'r 33 (emphasis added). We agree, also, that "[r]ecusal rules embody the principle that 'no man may serve two masters,' in 'recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their *personal economic interests* are affected by the business they transact on behalf of the Government.'" *Id.* (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 549 (1961)) (emphasis added). These are compelling state interests.

The problem is that these interests have nothing to do with this case. This case is not about Councilmember Carrigan's "personal economic interests." It is about his *political* interests. It is about a perceived problem with political "loyalties," P.A. 112a, with a candidate's "feeling of debt" that "I'm here because this person got me elected and has kept me elected," J.A. 250–51.

The Ethics Commission aspires to achieve a sterile political utopia in which elected officials make all their political decisions free from these sorts of political "debts." But such a utopia (if that is what is) is unattainable, foreign to our democracy, and unconstitutional. The concern that a legislator may act out of economic interest (whether for himself, his spouse, his employer, or his business partner) is fundamentally different from the concern that he will act out of political "loyalty." The former is called "self-dealing" or "corruption"; the latter is called "politics."

No state should be permitted to treat "political loyalty of the purest sort" as a new-fangled sort of corruption. *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). "'It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.'" *Citizens United*, 130 S. Ct. 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)). "There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Ethics Commission has not adduced a shred of evidence—or argument—to show that there is something about the relationship between a campaign volunteer (or, more specifically, the campaign manager) and the candidate that makes it especially susceptible to abuse. It merely "'posit[s] the existence of the disease sought to be cured,'" which, even

under intermediate scrutiny, will not do. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation omitted).

To sustain the Ethics Commission's purported interest is to expose a wide range of political debts to state regulation. If Vasquez's relationship with Councilmember Carrigan is corrupting because he was "instrumental in the success of … Councilman Carrigan's elections," P.A. 104a, then the same would go for any number of equally "instrumental" relationships: the NRA or NAACP activist who rallies the troops to register voters or get out the vote; the party boss or celebrity who delivers a high-profile endorsement; the captain of industry who organizes a dinner for the nascent candidate to meet other well-heeled supporters. The list is endless, and deeply troubling.

"'It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another,'"—or to endorse a candidate or throw armies of members at a vote drive—"'is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'" *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

The state could not directly limit any of these activities, of course. And it seems just as plain that it may not burden these activities by prohibiting a legislator from voting on an issue that is important to any of these political allies and supporters. Other-

wise, disqualification provisions would be an easy back-door route toward reviving all sorts of burdens on speech and association that, however well-intentioned, this Court has consistently and emphatically struck. *See, e.g.*, *id.* at 914 (striking direct prohibition on corporate independent spending); *Randall v. Sorrell*, 548 U.S. 230, 246 (2006) (striking spending limit); *Eu*, 489 U.S. at 228–29 (striking ban on political party endorsements of candidates during nonpartisan primaries).

This responsiveness and accountability are the key features that distinguish restrictions on elected *representatives* from the restrictions on elected *judges* that this Court imposed in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). There, a state supreme court justice declined to recuse himself from an appeal in which one litigant devoted some $3 million to get the justice elected. *Id.* at 2264. The opposing party claimed a due process violation. This Court agreed, holding that, under those "extreme facts," due process demanded recusal. *Id.* at 2265.

"Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (Posner, J.)). "Judges … are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency." *Republican Party of Minn.*, 536 U.S. at 806 (Ginsburg, J., dissenting) (citation omitted). While a legislator may—and would be expected to—give preference to her political suppor-

ters, a judge never should. So the litigant who supports the judge—unlike the lobbyist who supports the legislator—has no First Amendment right to use politics to influence the judge and no legitimate expectation of succeeding in doing so. *Citizens United*, 130 S. Ct. at 910 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

It was the judicial role that was front and center when this Court opined that "that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 129 S. Ct. at 2263–64. But that concern about the judiciary does not translate to a political environment precisely because judges are supposed to be impervious to the sorts of political influences that are the stock and trade of politics.[8]

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[8] All the same points about judges apply with equal force to adjudicative agencies. *See* Pet'r 46 (raising concern about agencies). Amicus Nevada Legislature plainly recognizes the differences between adjudicators and political representatives, which is why it argues that different standards should apply because the Lazy 8 zoning determination is administrative (or quasi-judicial) rather than legislative. Nev. Legis. Br. 16. As a threshold matter, the Nevada Supreme Court rejected the notion that the Lazy 8 vote was quasi-judicial in nature, P.A. 10–11a & n.7 (explaining that the vote was on a public issue, and thus was a "core legislative function"), and the Commission has now waived the issue. But amicus's characterization is wrong anyway. In Nevada, "zoning is a matter within sound legisla-

Unlike a party to a case, the Nugget, or any other opponent of the Lazy 8, has no due process rights in a legislator purged of political loyalty. But even if it did, the political loyalty here is nothing compared to the "extreme facts" that led this Court to find a due process violation in *Caperton*, 129 S. Ct. at 2265, where the supporter spent a king's ransom solely because he wanted to rig the bench with a justice who would sit on his company's own case, *see id*. at 2257. Vasquez had nowhere near such "significant and disproportionate influence," *id.* at 2264, on Councilmember Carrigan's reelection or on his vote, which was based on a position he staked out long before the Lazy 8 hired Vasquez to press its case.

C. The Disqualification Provision Is Overbroad And Underinclusive And Burdens More Speech Than Necessary To Advance The Asserted Interest

Even if the Ethics Commission had a compelling or important interest in guarding against the influence of political loyalty on a legislator's vote, the means Nevada has chosen fails scrutiny.

Overbreadth & underinclusiveness. As an initial matter, the catch-all disqualification provision is both overbroad and underinclusive. We confess a bit of a quandary in explaining why, because neither the Ethics Commission nor the Legislature has defined

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tive action." *Nova Horizon, Inc. v. City Council of Reno*, 769 P.2d 721, 722 (Nev. 1989) (quoting *McKenzie v. Shelly*, 362 P.2d 268, 269–70 (Nev. 1961)) (city council decision to deny a special use permit was a legislative action); *see supra* at 6–7 (explaining City Council's approval power). And this particular dispute was about as political as it gets.

with any level of clarity which relationships are within the statute and which are outside. *See supra* 42–48 (describing vagueness problem). But one observation on each point suffices.

First, the provision is underinclusive so long as the Ethics Commission has chosen to single out some brands of political "loyalties" for special burdens to the exclusion of others that raise the same concerns. As noted above, all sorts of political supporters—independent spenders, endorsers, get-out-the-vote drivers, and so on—can raise graver concerns of political "debt" than a volunteer campaign manager. *See supra* at 51–53. Either all these relationships should be disqualifying or none of them should be. And the Ethics Commission has never indicated that they all are. This "underinclusiveness … raises serious doubts about whether [the state] is, in fact, serving … the significant interests [it] invokes in support of" constitutionality. *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Second, the Nevada Legislature has now formally taken the position that the statute is even broader than the Ethics Commission has suggested, so as to cover: any "close, significant and continuing relationships that … are strictly comparable, alike in substance or essentials, analogous or parallel to the expressly listed relationships." Nev. Legis. Br. 32. That pronouncement not only compounds the vagueness problems already discussed, but sweeps in droves of constitutionally protected relationships with even less influence than a campaign manager.

Tailoring. Whatever its exact scope, the disqualification provision "'burden[s] substantially more

[First Amendment activity] than is necessary to further'" those interests. *Turner Broad.*, 512 U.S. at 662 (citation omitted). Even if it is reasonable to be leery of various political relationships—or close personal ones—it does not follow that the appropriate governmental response is to make the parties choose between not forming the relationship and disqualifying the legislator. The most obvious alternative is disclosure, which "is a less restrictive alternative to more comprehensive regulations of speech" and associational activity. *Citizens United*, 130 S. Ct. at 915 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)).

When a relationship directly impacts a legislator's pocketbook, disclosure might not suffice. Thus, for example, this Court has upheld contribution limits on the ground that the disclosure option does not sufficiently protect against corruption and the appearance of corruption. *See Buckley*, 424 U.S. at 28. But when a relationship has no such direct impact on the official's finances, this Court has typically deemed disclosure to be the appropriate first resort. Thus, for example, this Court has "upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures." *Citizens United*, 130 S. Ct. at 915 (citing *Buckley*, 424 U.S. at 75–76). And it has "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." *Id.* (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

That rule applies here. If, in fact, political loyalty is corrupting at all, it is much less corrupting than money in the pocket or even than independent

spending. So any regime to address the influence of political loyalty on a legislator should revolve around forcing legislators to do exactly what Councilmember Carrigan did here: Describe the relationship in question on the record. Armed with that knowledge, the public can decide whether a public official has overstepped the boundaries of political-loyalty correctness. In this case, Councilmember Carrigan's political enemies and the press played up the disclosure in the weeks leading up to the election. *See, e.g.*, R.O.A. 77 (complaint); J.A. 197. Had voters shared the Ethics Commission's passion for political purity, they would not have reelected him by a landslide. J.A. 173–74.

* * *

The Ethics Commission's prediction of legislative roadkill in the event of an affirmance ignores the salient features of the Nevada law at issue. The Nevada statute is unique on its terms and uniquely hostile to First Amendment values. No one knows what the law means—not Councilmember Carrigan, not the City Attorney, not even the Commissioners who would enforce it. It was this vagueness that permitted the Ethics Commission to be played as a pawn in a larger political game between rival casinos. Political "loyalties" should be embraced as the fabric of our democracy, not vilified as corrupting. The Ethics Commission must make a far greater showing than it has before stripping a legislator of his vote, a candidate of his campaign volunteer, a volunteer of his candidate, and a voting citizenry of its representative. The Nevada Supreme Court

properly rejected the Ethics Commission of its self-appointed role as the police of political purity.

CONCLUSION

This Court should affirm the Nevada Supreme Court's judgment.

Respectfully submitted,

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