

LEGAL SERVICES

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MEMORANDUM

March 25, 2021

SUBJECT: First Amendment protection of a legislator's speech outside of the legislature (SB 31; Work Order No. 32-LS0303\A.1)

TO: Senator Mia Costello
Attn: Melodie Wilterdink

FROM: Daniel C. Wayne 
Legislative Counsel

Transmitted herewith is the amendment you requested. If adopted, the amendment would probably make the bill unconstitutional. The U.S. Supreme Court has found that "restrictions upon legislators' voting are not restrictions upon legislators' protected speech."¹ The Court explained:

[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. . . . [T]he legislator casts his vote as trustee for his constituents, not as a prerogative of personal power. In this respect, voting by a legislator is different from voting by a citizen. While a voter's franchise is a personal right, the procedures for voting in legislative assemblies pertain to legislators not as individuals but as political representatives executing the legislative process.²

Notwithstanding this finding, the Court also recognized a general rule that "the First Amendment prohibits laws abridging the freedom of speech, which, as a general matter means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."³ If the proposed amendment is adopted it will prohibit a legislator from committing to vote a certain way on a piece of legislation – not just in a legislative caucus, hallway, or office, but anywhere. For that reason, if the bill is

¹ *Nevada Com'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011).

² *Id.* at 125–126 (Internal quotation marks and citations omitted).

³ *Id.* at 121 (Internal quotation marks and citations omitted)

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challenged in litigation a court will probably find that it violates the First Amendment, depending on specific facts. For example, at present a legislator running for reelection may in some instances lawfully make a public pledge to vote a certain way on a pending bill in order to gain support from the electorate. If amended as proposed, SB 100 would prohibit a legislator (but not the legislator's election opponents) from making that promise in any instance. "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."⁴

If I may be of further assistance, please advise.

DCW:lme

21-165.lme

Attachment

⁴ *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (Internal quotation marks omitted).