No. 15-682

In the Supreme Court of the United States

GORDON VANCE JUSTICE JR.; SHARON BYNUM; MATTHEW JOHNSON; ALISON KINNAMAN; and STANLEY O'DELL,

Petitioners,

v.

DELBERT HOSEMANN, in his official capacity as Mississippi Secretary of State; and JAMES M. HOOD, III, in his official capacity as Attorney General of the State of Mississippi,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Should this Court grant certiorari where:

(1) The Fifth Circuit easily distinguished and otherwise directly adhered to this Court's precedent;

(2) No determinative circuit conflict is presented; and

(3) The lack of a factually-developed record makes this case an inappropriate vehicle for certiorari review of a First Amendment challenge?

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INTRODUCTION

The petition should be denied because it presents no question worthy of certiorari and no opportunity for an alternate disposition of the case. A three-judge panel, in a sensible opinion, held: (i) that there was an insufficient basis in the record from which to evaluate Petitioners' as-applied challenge under the First Amendment, and (ii) that Petitioners failed to show that Mississippi's disclosure requirements are unconstitutional in all applications so as to mount a facial challenge to the statute. That determination does not conflict with decisions from this Court or any other circuit courts of appeals.

To be sure, nothing in the Fifth Circuit's opinion in *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014) (reprinted at Pet. App. 1), strays from—let alone rejects—this Court's decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). *Citizens United* struck down the requirement that a single corporation must form a separate political committee before it spends funds to influence voters. In contrast, Mississippi, other states, and the federal government merely require that *if* a group of individuals voluntarily joins together to pool resources and solicit donations for the exclusive purpose of expressly influencing voters, *then* the group is operating as a political committee and must register and disclose basic financial information just as any other political committee must. Pet. App. 5-6. Individuals need not form a political committee when acting individually and spending their own funds to influence voters. Pet. App. 7-8. The decisions of this Court clearly endorse and encourage basic registration and disclosure requirements for political committees as

the best method to inform voters so they may evaluate those seeking to influence their decisions. This "informational interest" is a recognized basis on which to affirm the constitutionality of disclosure and related registration requirements.

Separately, the argument that the Fifth Circuit's decision has created a determinative circuit split is a pure fiction. The circuit courts uniformly have adopted the exacting scrutiny standard for disclosure and organizational requirements, and this consensus is true to this Court's precedent. The only purported difference in the circuits is in the results of the application of that standard to the different and factually-developed records (or lack thereof) before those courts. For example, though the Tenth Circuit Court of Appeals in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), reached one result in analyzing the strength of the "informational interest" in the context of ballot initiatives, that result derived from an application of the exacting scrutiny standard to the specific facts of an as-applied constitutional challenge.

The Tenth Circuit in *Sampson,* the Fifth Circuit in *Justice*, and numerous other circuit courts have found that the government has an interest in educating voters about those seeking to influence their votes in the context of ballot initiatives. *See Sampson*, 625 F.3d at 1259; Pet. App. 26-29. The Tenth Circuit's statement that the government's interest was "attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight" is not at odds with the Fifth Circuit's holding nor is it relevant to the Petitioners' situation. 625 F.3d at 1259. The Petitioners' intention to influence voters

in the 2011 election and future elections separates them from *Sampson*'s "single ballot issue" plaintiffs. Pet. App. 12, 17-18; Pet. App. 184-185 (Compl. ¶ 62). Unlike the *Sampson* plaintiffs who presented an as-applied challenge based on a record of specific funds they raised and spent, the Fifth Circuit rightfully declined to strike down a statute in an "as-applied" challenge based on the hypothetical and vague assertion that the Petitioners' total contributions and expenditures would have been "slight." Pet. App. 15-21. As the Fifth Circuit explained in distinguishing *Sampson*: "The cases Plaintiffs rely on do not counsel a different result; rather, they illustrate the concrete facts that properly underlie an as-applied challenge to a statute." Pet. App. 21.

With those "concrete facts" missing, the Fifth Circuit reached a different outcome than the Tenth Circuit. That as-applied challenges on First Amendment grounds yield "as-applied" results is precisely what this Court envisioned and precisely what the Fifth Circuit embraced. And neither the Tenth Circuit nor any other circuit has invalidated the disclosure laws at issue facially.

But even in the event of a desire to rearticulate the informational interest for disclosures in the context of ballot initiatives, this case presents an inappropriate vehicle for reaching that result. This Court routinely has emphasized both the need to make an independent examination of the entire record in cases involving First Amendment issues and that a developed factual record is essential in as-applied challenges. In no less than thirteen (13) times in its analysis, however, the Fifth Circuit expressed concern about this matter's

"lack of a sufficiently specific record" and the "scant record" presented on appeal.

Contrary to Petitioners' argument, the Fifth Circuit's opinion on the constitutional challenge is not based on "pure speculation." Quite the opposite, it is based on the rightful hesitation to speculate. Petitioners' as-applied challenge failed because the appellate record is bereft of the specific facts necessary to properly evaluate the claim. This same reason applies *a fortiori* to this case being a bad candidate for certiorari. Without the prospect of a factually-developed record, it would be wholly advisory for this Court to determine the merits of—or even set any clear guidance on—Petitioners' as-applied First Amendment challenge to Mississippi's disclosure requirements for ballot initiatives. No other questions worthy of certiorari are even remotely presented.

COUNTERSTATEMENT OF THE CASE

A. Background

After the panel decision of the Fifth Circuit was handed down, Petitioners filed a petition for en banc rehearing. Pet. App. 125. It was denied without a single judge requesting that the court be polled. *Id*. This petition for a writ of certiorari followed.

B. Factual Misstatements in the Petition

Under this Court's rules, opposing counsel has an obligation to note perceived misstatements of fact or law contained in the petition. *See* Sup. Ct. R. 15. While disagreements regarding the interpretation of law and fact are noted throughout the opposition, attention must be drawn to the factual misstatement that

Petitioners would "spend less than $1,000" total to influence Mississippi voters during the 2011 election cycle and future election cycles. *See* Pet. 5.

Petitioners made the decision before the district court to stand on a woefully underdeveloped record. The only evidence describing the scope of Petitioners' planned fundraising and political expenditures is the verified complaint itself, which is reprinted at Pet. App. 166.[1] *See also* Pet. App.15-17. No testimony from the Petitioners was submitted to the district court in connection with the dispositive cross-motions for summary judgment. Pet. App. 16, n. 8.

The allegations in the complaint clearly indicate that Petitioners as a group intended to collect and spend well in excess of $1,000 to influence voters in 2011 and future election cycles. The complaint contains no allegation that the Petitioners would undertake the counterintuitive act of refusing or refunding donations once an arbitrary ceiling of $1,000 was reached. In fact, the verified complaint contains statements which are inconsistent with any belatedly asserted cap. And, evidence submitted to the district court by the State

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[1] Petitioners describe their suit as a pre-enforcement, as-applied challenge leaving the Court and the State defendants to speculate as to how much money their hypothetical political committee would have raised and spent to influence voters during 2011 election cycle and future election cycles. There is no evidence in the record that Petitioners actually contributed their funds to the hypothetical group. There is no evidence that the group ever solicited or received any donations, made any expenditures, or even existed. And, Petitioners never attempted to register as a political committee or to complete any of the registration or disclosure forms.

established the ease in which a similar group raised tens of thousands of dollars in opposition a similar ballot initiative during the same 2011 election cycle.

Specifically, each of the five Petitioners alleged that they would have donated to their group "in excess of $200 of his [or her] own money, individually or in combination with the other Plaintiffs." Pet. App. 169-170, 179 (Compl. ¶¶ 8-12, 45). Petitioners placed no maximum limit on the amount they would have personally contributed to the group. If all five Petitioners contributed only the referenced minimum $200, the political committee would have reached its alleged $1,000 maximum without the need for any of the further fundraising efforts detailed in the complaint.

In addition to their personal contributions, Petitioners also planned to solicit and accept large and small donations from the general public. With respect to expected large donations, the complaint bemoans that Petitioners would be required to disclose the identity of each individual and group that donated in excess of $200 to their cause in a single month. Pet. App. 173, 181, 183, 184, 188 (Compl. ¶¶ 23, 51(a), 58, 59, 60, 76). If just five members of the public gave one-time $200 donations, the group would have collected an additional $1,000. With respect to small donations, Petitioners planned to raise money through the informal means of "passing the hat" at political meetings. Pet. App. 184 (Compl. ¶ 58). The size and frequency of these anticipated meetings are unknown, but Petitioners are veteran political organizers who have met "regularly for a few years," are members of various political groups and a political party, and have

experience "organizing" political "rallies." Pet. App. 171, 172 (Compl. ¶¶ 16, 17). If just five other members of the general public who they encountered through their other political group, political party, or organized rallies contributed $200, the group would have collected an additional $1,000.

The State submitted evidence to the district court noting the ease in which significant sums of money were raised by a similar group in opposition to another ballot initiative during the same 2011 election cycle. As the Fifth Circuit noted, the evidence established that a "novice political operator" raised over $22,000 in just six weeks to oppose a ballot initiative during the 2011 election cycle. Pet. App. 17. Petitioners, who are experienced political operatives and were supporting an initiative which eventually passed with over 70% support, were likely to easily raise and spend significant sums. *See id*.

The expenditures Petitioners planned in order to influence voters confirm that the group expected to raise in excess of $1,000. Pet. App. 171 (Compl. ¶¶ 15 (confirming intent to "run[] independent political advertisements")); Pet. App. 180 (Compl. ¶ 46) (referencing full page newspaper advertisements costing $1,200 per day)).

Far from artificially limiting their donations and expenditures to $1,000, the complaint evidences that Petitioners were motivated to raise and spend all the money they could in order to influence as many voters as possible because Petitioners "strongly support[ed] the [eminent domain] initiative," "feel strongly about . . . private property rights," and believe eminent domain to be "unconscionable." Pet. App. 172, 173

(Compl. ¶¶ 18, 21). The contention that the Petitioners would have refused and refunded additional donations once they reached $1,000 is unsupported and unsupportable in light of the explicitness of the verified complaint.

The complaint also indicates that the Petitioners are not a "single issue" group which would disband after the November 2011 election. The Petitioners intend to solicit unspecified donations and make unspecified expenditures to influence voters about other ballot initiatives "in the future." Pet. App. 185 (Compl. ¶ 62); Pet. App. 12, 17-18.

While the $1,000 artificial cap now appears to be the cornerstone of Petitioners' argument, the verified complaint makes no mention of this counterintuitive limitation. As the Fifth Circuit correctly concluded, there is no credible evidence in the record to support the Petitioners' assertion that they would have raised and spent between $200 and $1,000. *See* Pet. App. 15-19. And, ample evidence exists contradicting that assertion.[2] Thus, the Fifth Circuit rightfully concluded

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[2] The Petitioners cite to their counsel's oral argument before the district court and the Fifth Circuit as evidence that they would have refused and refunded any additional donations once they reached $1,000. Pet. 5, 5 n.2. The statements are not helpful. A statement by counsel at oral argument is not evidence and cannot contradict the allegations in the complaint. Moreover, counsel's statement to the Fifth Circuit was that: (1) the offer to stay below $1,000 was made only for the purposes of the preliminary injunction, which was denied; (2) Petitioners refused to stipulate to a maximum amount in connection with the cross-motions for summary judgment; and (3) that "the burden is not on the plaintiffs to allege a maximum spend [sic] that they would have

that the only fact established by Petitioners is that they would raise and spend in excess of $200 with no artificial maximum placed on their fundraising success. As discussed *infra*, Petitioners' decision to leave to speculation how much in excess of $200 they would raise and spend doomed their as-applied argument that the disclosure requirements were overly burdensome in light of the amount of funds at issue.

REASONS FOR DENYING THE PETITION

This case neither presents a determinative circuit split nor any other question of top priority. In a well-reasoned opinion, the Fifth Circuit disposed of a case that presented a failed facial attack of a state statute and otherwise provided no sufficient basis to evaluate the as-applied challenge. Further review is unwarranted.

I. The Fifth Circuit did not, as Petitioners suggest, disregard this Court's precedent.

This Court has long recognized the importance and constitutionality of disclosure requirements. "[P]rompt disclosure of expenditures" provides a "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010); *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which

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had." *See* Oral Argument Recording No. 13-60754, 17:28-17:45 http://www.ca5.uscourts.gov/OralArgRecordings/13/13-60754_9-3--2014.mp3 (cited at Pet. 5, n.2).

democracy is doomed."). While Petitioners argue that disclosure and transparency are impermissible burdens, this Court has found the burden to be minimal and greatly outweighed by the benefit to society: "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," but "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). The important "informational interest" served by disclosures from those seeking to influence voters is a fundamental principle upon which campaign related First Amendment jurisprudence has been built. While striking down limits on contributions, this Court has heralded disclosure requirements as "promot[ing] transparency and accountability in the electoral process to an extent other measures cannot." *Doe,* 561 U.S. at 199. Despite Petitioners' contrary contention, the Fifth Circuit's decision is entirely faithful to this Court's precedent, including *Citizens United* and its progeny.

The disclosure requirements at issue in this case are not unique. Mississippi, a host of other states, and the federal government all recognize that when individuals voluntarily come together to form a group for the sole purpose of soliciting donations and expending funds to influence voters, that group is functioning as a political committee. Pet. App. 4-7, 32-33. Mississippi, other states, and the federal government require such political committees to

register[3] and disclose certain basic financial information. *Id*.

While Petitioners chafe at being labeled a political committee because they have chosen not to have a formal structure or treasurer, it is beyond dispute that they are performing acts which are the hallmark of traditional political committees: pooling their own funds and soliciting donations from the general public in order to purchase express political advertisements influencing voters for or against a candidate or measure appearing on an election ballot. There is no distinction in First Amendment jurisprudence between "informal" and "formal" political committees. A group of individuals functioning as a political committee cannot avoid registration and disclosure requirements by simply choosing to be "informal."

Petitioners contend that designating their group as a political committee and subjecting it to any registration or disclosure requirements is prohibited by *Citizen United*. This is nonsensical and, if true, would end financial disclosures for political committees. C*itizens United* held that the government may not force an individual corporation to form a separate political committee before speaking. *Citizens United* did not hold that a group of individuals who voluntarily come together to function as a political committee have a

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[3] Registration consists of filing a one-page "Statement of Organization" containing basic information about the group. Pet. App. 5-6. Without this one-page document, subsequent disclosures that, as a hypothetical example, "Citizens for Truth" purchased $500,000 in advertisements would be of little benefit to voters as they would not know who are the principals behind "Citizens for Truth."

constitutional right to anonymously influence voters and to resist all registration and disclosure requirements.

More specifically, it was the ban on speech that was the heart of *Citizens United* and this Court's invocation of strict scrutiny. In *Citizens United*, unlike here, if an individual corporation desired to influence voters, it was required to form a separate political committee and speak only through that political committee. Because the corporation was prohibited from speaking directly as an individual corporation, the law's "prohibition on corporate independent expenditures is thus a ban on speech" and subject to strict scrutiny. 558 U.S. at 339.

The same rationale is true for *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986), also relied upon by Petitioners. There, this Court applied strict scrutiny to a law prohibiting a corporation from using "its general funds for campaign advocacy purposes." *Id*. The law at issue required the corporation to speak only through "a separate segregated fund" in the form of a political committee. *Id.*

The ban on speech at issue in *Citizens United* and *Mass. Citizens for Life* is worlds apart from Mississippi's disclosure requirements. Mississippi does not prohibit individuals from speaking as individuals. In Mississippi, if an individual Petitioner desired to spend her own funds to expressly influence voters, that individual is not required to form a political committee. Instead, the individual need only disclose their expenditures when they exceed $200. Pet. App. 7-8; MISS. CODE ANN. §§ 23-17-51(2), 23-17-53(c). This individual disclosure requirement is a standard

component of accepted campaign finance disclosure law. *See* Pet. App. 8. Consistent with *Citizens United*, individuals are free to spend without limit and without forming or registering as a political committee.

Where Petitioners err is in their contention that *Citizens United* prohibits the government from requiring a group of persons acting as a traditional political committee from registering as a committee if the group claims to be "informal," refuses to appoint a treasurer, or merely declares that it does not want to be considered as a political committee. Mississippi, other states, and the federal government require only that *if* individuals voluntarily form a group to solicit donations and spend money to influence voters, *then* the group is functioning as a political committee and must register and disclose as required of all other political committees. Pet. App. 5-7, 32-33. Here, Petitioners have clearly formed what can only be considered to be a traditional political committee. Petitioners' actions are properly regarded as a political committee under state law and indistinguishable from the actions of countless political committees who are required by the states and federal government to register and disclose basic information.

This is unlike *Citizens United* because Mississippi (and other states) does not prohibit an individual from spending funds to influence voters nor does it require an individual to form a political committee before speaking. The circuit courts of appeals, including the Fifth Circuit, have recognized this crucial distinction. As explained by the district court in *Worley*, and later affirmed by the Eleventh Circuit, "[e]ach plaintiff is free to speak as much as the plaintiff chooses and need

not register as a political committee in order to do so. It is only the plaintiffs' decision to act jointly—and to pool their funds—that triggers the application of [...] political-committee provisions." *Worley v. Roberts*, 749 F. Supp. 2d 1321, 1325 (N.D. Fla. 2010) (denying preliminary injunction); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (noting that *Citizens United* did not hold that "any law defining an organization as a PAC is subject to strict scrutiny.") (internal quotations omitted)).

Moreover, the actual registration and reporting requirement for political committees under Mississippi law is minimal, especially when compared with the requirements of other states and the federal government. Pet. App. 5-7, 32-33. A political committee soliciting and expending funds to influence voters must designate a person to be in charge of the funds; file a one-page, eight-question "Statement of Organization" identifying the group; and periodically report the group's contributions and expenditures. Pet. App. 5-6; MISS. CODE ANN. §§ 23-17-47(c), 23-17-49. A group that collects or spends $200 or less is exempt from registration and reporting requirements. Pet. App. 5-6; MISS. CODE ANN. §§ 23-17-49(1), 23-17-51(1). Placing someone in charge of the funds which are solicited from the general public and maintaining receipts is "little more if anything than a prudent person or group would do in these circumstances anyway." Pet. App. 32 (quoting *Worley*, 717 F.3d at 1250).

While Petitioners superficially brand these requirements as "PAC burdens" in an attempt to liken them to the portion of the law held unconstitutional in *Citizens United*, this tactic does not carry Petitioners

where they need to go. The laws being challenged are disclosure laws that differ greatly from an unconstitutional ban on speech. Notably, every circuit to address the issue agrees. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41-44, 55 (1st Cir.) [*McKee I*], *cert. denied,* 132 S. Ct. 1635 (2011); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 37-38, 39-40 (1st Cir.) [*McKee II*], *cert. denied*, 133 S. Ct. 163 (2012); *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 548 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 471-72, 476-77, 480-81 (7th Cir. 2012); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 997-99, 1005 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011); *Sampson*, 625 F.3d at 1249-50, 1255, 1261; *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir.) (en banc), *cert. denied sub nom Keating v. Fed. Election Comm'n*, 562 U.S. 1003 (2010); *Worley v. Florida Secretary of State*, 717 F.3d 1238, 1243 (11th Cir.), *cert. denied*, 134 S. Ct. 529 (2013). Indeed, the requirement that the group appoint a treasurer to track and report funds is, at its heart, a fundamental component of a disclosure requirement. *E.g., Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 439 (5th Cir. 2014) ("the treasurer-appointment requirement is a disclosure requirement").

These basic disclosure and organizational requirements enable "the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. And simply because a law imposes such requirements does not transform it into a ban on speech subject to strict scrutiny. Instead, the Fifth Circuit and all other

circuits to address the matter have followed this Court's direction to apply exacting scrutiny to political committee registration and disclosure requirements. *See Doe*, 561 U.S. at 196; *Citizens United*, 558 U.S. at 366-67; Pet. App. 24; *Worley*, 717 F.3d at 1244 (collecting cases from the First, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits). Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe*, 561 U.S. at 196 (quotation marks and citations omitted). The reasoning for exacting scrutiny rather than strict scrutiny in this context is simple: "[D]isclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (quotation marks omitted). In embracing this logic, the Fifth Circuit correctly distinguished *Citizens United* and got the exacting scrutiny analysis exactly right.

Finally, the Petitioners' invocation of *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), does nothing to alter the correctness of the Fifth Circuit's application of exacting scrutiny or its affirmance of the constitutionality of Mississippi's campaign finance disclosure laws. *McIntyre* involved a criminal statute prohibiting the distribution of anonymous campaign literature as applied to an "individual leafleteer" distributing handbills to fellow attendees at a school board meeting. 514 U.S. at 337; 514 U.S. at 358 (Ginsburg, J., concurring). While Petitioners proclaim *McIntyre* to establish a general right to anonymously influence voters without reporting requirements, this Court has not recognized it as such. *See Doe*, 561 U.S. at 218 n. 4 (Stevens, J., concurring).

McIntyre itself drew a distinction between that statute's "compelled self-identification on all election-related writing" and the holding in *Buckley v. Valeo* which "expressed approval of a requirement that even 'independent expenditures' in excess of a threshold level be reported to the Federal Election Commission." 514 U.S. 334, 355; *see also Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 299-300 (1981) (the "integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions"). In this matter, Petitioners are challenging the *Buckley*-type reporting requirements and have not challenged any *McIntyre*-like statute compelling identification on political advertisements.

This Court's decisions since *McIntyre*, including *Citizens United*, underscore the inapplicability of *McIntyre* to traditional campaign finance disclosure requirements. *See Citizens United*, 558 U.S. at 480 (Thomas, J., concurring in part and dissenting in part); *Bailey v. Maine Comm'n on Governmental Ethics & Election Practices*, 900 F. Supp. 2d 75, 83-84 (D. Me. 2012) (analyzing cases); *Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399-400 (D. Vt. 2012) (analyzing cases) *aff'd*, 758 F.3d 118 (2d Cir. 2014). Lastly, Petitioners' intention to publicly solicit funds from the general populace, along with their filing of this suit in their own names in the weeks before the November 2011 election, contradicts any claim by the Petitioners that they desired to remain anonymous in their political endeavors. *See* Pet. App. 166, 191. In sum, this Court has never found a constitutional right

to anonymously contribute to a political committee or a general constitutional right of a political committee to resist disclosure.

II. This case does not present a true and determinative circuit conflict.

Petitioners contend that the Fifth Circuit's decision "exacerbates three separate circuit splits." Two of the three so-called circuit splits center on the appropriate level of scrutiny (strict versus exacting) to be applied to Mississippi's disclosure scheme. The remaining alleged circuit split involves the strength of the "informational interest" in the context of ballot initiatives. These purported splits are false—or, at a minimum, not determinative of this case.

A. The circuit courts agree that exacting scrutiny is the appropriate level of scrutiny to be applied in this context.

Despite Petitioners' repeated assertion, this Court in *Citizens United* did not subject federal PAC requirements to strict scrutiny or hold that those requirements are unconstitutionally burdensome as a matter of law. In fact, no circuit has accepted the strict scrutiny argument that Petitioners advance. Pet. App. 24-25. Even the case relied on by Petitioners from the Tenth Circuit adopted the exacting scrutiny standard. *Sampson*, 625 F.3d at 1255. Similarly, although the Eighth Circuit questioned the appropriate level of scrutiny to be applied, the court nonetheless applied exacting scrutiny to examine Minnesota's political fund rules. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-77 (8th Cir. 2012).

The Eleventh Circuit summarized the consensus nicely in rejecting the same strict scrutiny argument advanced by Petitioners here: "Challengers' position is in conflict with cases from every one of our sister Circuits who have considered the question, all of whom have applied exacting scrutiny to disclosure schemes." *Worley*, 717 F.3d at 1244 (collecting cases from the First, Fourth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits); *The Real Truth About Abortion, Inc.*, 681 F.3d at 549 (noting that, "after *Citizens United*, it remains the law that provisions imposing disclosure obligations are reviewed under the intermediate scrutiny level of 'exacting scrutiny'"). The Fifth Circuit's decision is in accord with the circuit courts, and Petitioners' claimed circuit split on the appropriate level of scrutiny is a fiction.

B. There is no determinative circuit split on the strength of the informational interest in the context of ballot initiatives.

The Fifth Circuit's decision does not "exacerbate" a circuit split in the application of the exacting scrutiny framework. The familiar first question under the exacting scrutiny standard is whether the government has identified a "sufficiently important governmental interest" in its disclosure scheme. Pointing primarily to the Tenth Circuit's decision in *Sampson*, Petitioners contend that this case presents a circuit split on whether the "informational interest" is a sufficient interest in the ballot initiative context. Not so.

Even in *Sampson*, the Tenth Circuit did not reject the premise that disclosure in the context of ballot initiatives serves the government's important

"informational interest" in educating voters. The *Sampson* court, instead, held the law unconstitutional on an as-applied basis after recognizing the informational interest but remarking that the interest is "attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." 625 F.3d at 1259. As the Eleventh Circuit put it, "even *Sampson* does not, in the end, call into question that there *could be* a 'sufficiently important' informational interest in requiring disclosure in the ballot issue context." *Worley*, 717 F.3d at 1249 (emphasis in original).

The Fifth Circuit, while finding the informational interest to be more than minimal, did not reject Petitioners' as-applied claim on this ground. Quite differently, the Fifth Circuit found that Petitioners failed to set forth the facts necessary to mount an as-applied challenge to the state statute. Pet. App. 15-21; s*ee also Worley*, 717 F.3d at 1249-1250. Because of the "bereft of facts," the Fifth Circuit did not (and could not) truly analyze the informational interest in the context of Petitioners' as-applied challenge. And, importantly, neither the Fifth Circuit nor the Tenth Circuit struck down the law at issue facially. It is thus undeniable that the Fifth Circuit's decision is not in conflict with cases from the Tenth Circuit, any other circuit, or this Court.

C. The Fifth Circuit's decision is correct, and it does not conflict with any decisions from this Court or any other circuit courts of appeals.

The Fifth Circuit rightfully found Petitioners' as-applied challenge to be a non-starter. And the same is true for the Fifth Circuit's proper rejection of the facial challenge. Thus, not only does the Fifth Circuit's opinion not present a determinative circuit split, but the decision reached also was correct.

As-Applied Challenge. Petitioners contend that the Fifth Circuit based its as-applied decision on speculation contrary to the record. But only the opposite is true. The Fifth Circuit opened its as-applied analysis with an accustomed question: "is there a sufficient basis in the record from which to evaluate [the] as-applied challenge?" Pet. App. 13. In answering that question in the negative, the Fifth Circuit rightfully refused to rely on speculation or a hypothetical set of facts to support the as-applied constitutional challenge.

This result is entirely compatible with this Court's precedent. *See Citizens United*, 558 U.S. at 331 ("The distinction [between as-applied and facial challenges] is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."). Indeed, the very hallmark of an as-applied challenge is an evaluation of the law as applied to the "particular circumstances of the plaintiffs." *Doe*, 561 U.S. at 194; *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007); *United States v. Phillips,* 645 F.3d 859, 863 (7th Cir. 2011).

Without question, the burden was on Petitioners to develop the necessary and sufficient factual record to substantiate their constitutional arguments. *E.g.*, *In re Cao*, 619 F.3d 410, 430, 434 (5th Cir. 2010) (noting that "a plaintiff seeking an injunction in an as-applied challenge generally has the burden to allege enough facts for the Court to decide the constitutional claim") (citing *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450 (2008)). This burden is one Petitioners did not carry.

To be sure, while Petitioners are quick to complain that Mississippi's disclosure requirements are unduly burdensome, they never attempted to comply with the registration and reporting requirements. Pet. App. 16, n.8. That is, they never attempted to fill out any form(s). Because of this, there was no evidence in the record that Petitioners found the requirements to be unduly burdensome, to be a limitation on their fund raising or expenditures, or to be confusing. *Id*. To the contrary, the only evidence before the Fifth Circuit was from a citizen who completed the registration and reporting requirements, which demonstrates only that the one-page registration form and reporting requirements are, at best, a minimal burden. Pet. App. 17.

As noted above, the assertion of Petitioners' counsel that Petitioners would refuse and reject contributions once the group received $1,000 is equally unavailing. Pet. App. 15-21. During oral argument, counsel for Petitioners asserted that they would hew closely to

Mississippi's $200 threshold. Yet counsel's "just in excess of $200" group pledge and post-argument emphasis on Petitioners' modest fundraising goals was inconsistent with the scant record before the court. It is not that the Fifth Circuit was seeking to draw a hard, bright-line rule, as suggested on page 18 of the petition. Instead, the Fifth Circuit simply sought the facts necessary to evaluate the claim—a point the court went out of its way to make.

An example is instructive. In Petitioners' federal complaint, never once did they artificially limit their funds to just over the $200 registration and reporting threshold but under $1,000. Certainly, this cannot be seen as an oversight. And if Petitioners had intended to raise "just in excess of $200," as suggested by their counsel, such a factual statement would appear, with clarity and specificity, in sworn statements. But none of this record evidence exists.

The Fifth Circuit was altogether right in refusing to assume facts in the context of an as-applied challenge. As the appellate court aptly concluded, the "record is bereft of facts that would allow us to assume that Plaintiffs intend to raise 'just in excess of' $200 as a group or as individuals." Pet. App. 15. The Eleventh Circuit, in fact, reached the same conclusion when rejecting a materially similar as-applied argument made by the same public interest law firm challenging Florida's registration and reporting requirements. *Worley*, 717 F.3d at 12-49-50.

These reasons are why this case cannot be likened to the Tenth Circuit's *Sampson* decision. The *Sampson* court "assum[ed] that there is a legitimate public interest in financial disclosure from campaign

organizations, [but] also recognize[d] that this interest is significantly attenuated when the organization is concerned with only a *single ballot issue* and when the contributions and expenditures *are slight*." *Sampson*, 625 F.3d at 1259 (emphasis supplied). The plaintiffs there, challenging Colorado's law, established that they spent $782.02 to oppose a petition that would have annexed their neighborhood to a nearby town. The Tenth Circuit did not altogether strike down the law, but instead examined the law as-applied to plaintiffs and on the factually-specific record before it—a record that does not exist here.

No matter: Petitioners suggest that the Fifth Circuit outright rejected *Sampson* and that the cases are "factually and legally indistinguishable." That contention simply is untrue. Petitioners have professed a desire to support or oppose future ballot initiatives, and they wholly failed to mount a factually supportable as-applied claim. Both the Fifth Circuit and Eleventh Circuit explicitly distinguished *Sampson* on this ground. Pet. App. 21, 27; *see also Worley*, 717 F.3d at 1249 ("But neither *Sampson* nor *Minnesota Citizens* is helpful to us given the nature of this challenge . . . we are not equipped to evaluate this case as an as applied challenge because the record does not tell us enough about what Challengers are doing.").

To put it simply, there is nothing novel—let alone certiorari worthy—about an as-applied challenge to a statute failing for the lack of a sufficient basis in the record from which to evaluate the claim.

Facial Challenge. The Fifth Circuit properly found Petitioners' facial challenge to fare no better than the as-applied one. After dispensing with Petitioners' strict

scrutiny argument, the Fifth Circuit concluded that Petitioners could not establish that "no set of circumstances exists under which [the law] would be valid or that the statute lacks any plainly legitimate sweep." Pet. App. 23. In so holding, the Fifth Circuit correctly concluded that the informational interest is a sufficiently important governmental interest, so as to survive a facial challenge to Mississippi's disclosure scheme. *Id.* at 33.

Neither Mississippi's disclosure requirements nor its $200 registration bar are unusual. In fact, Mississippi's $200 threshold is on the high end of many state disclosure laws. Pet. App. 4-7; *see, e.g.,* OR. REV. STAT. ANN. § 260.083(1)(a); State of Montana, Form C–6: Political Committee Finance Report (revised May 2012)[4]; FLA. STAT. ANN. § 106.07(4)(a); LA. REV. STAT. ANN. § 18:1495.5(B)(4) (Louisiana has no minimum threshold requirement for itemizing donations). There also are some states with large populations that set the registration bar higher than Mississippi. For instance, Texas requires political committees to designate a treasurer before receiving or expending $500. *See* TEX. ELEC. CODE ANN. §§ 253.031(b), 254.031(a)(1). And regulations governing political action committees at the federal level start at a $1,000 threshold. 11 C.F.R. § 100.5(a).

In addition, Mississippi's one-page statement of organization form is less onerous than that of other states. Pet. App. 5-6; s*ee, e.g., Catholic Leadership Coal. of Tex*., 764 F.3d at 440 (observing that Texas has

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[4] Montana's Form C-6 is available at http://politicalpractices.mt.gov/content/C6CorporateAdditonPDFform2012

a three-page form seeking "basic information"; the form requires registrants to include the committee's acronym, its campaign treasurer, the person appointing the treasurer, and controlling entity information); *Worley,* 717 F.3d at 1250 (citing Fla. Stat. Ann. § 106.03(1)(a), which requires committees to fill out "four pages of basic information"); *Human Life of Wash. Inc. v. Brumsickle,* 624 F.3d at 998–99 (noting that Washington requires political committees to file a two-page Political Committee Registration Form containing most of the information on Mississippi's forms plus the following: "the ballot proposition or candidate that the committee supports or opposes; how surplus funds will be distributed in the event of dissolution; and the name, address, and title of anyone who works for the committee to perform ministerial functions").

The same is true for Petitioners' objections to monthly reporting requirements for individuals who expend over $200 to influence voters. Pet. App. 7-8.*See* MISS. CODE ANN. §§ 23–17–51(2), 23–17–53(c). Other states, indeed, impose similar reporting requirements on individuals. *See, e.g.,* OHIO REV. CODE ANN. § 3517.105(C)(2)(b) (requiring individuals who expend more than $100 on a ballot initiatives to file an expenditure report); WASH. REV. CODE ANN. § 42.17A.255(2) (requiring individuals who expend more than $100 on a candidate or ballot initiatives to file an expenditure report); MASS. GEN. LAWS ANN. CH. 55, § 22 (setting a $250 threshold).

Because Mississippi's itemization and reporting requirements are so common, the upshot of Petitioners' facial challenge is pervasive. There would, in essence, be no disclosure if Petitioners' arguments were to be

endorsed—a result even more radical now that limits on contributions have been declared constitutionally off-limits. What is more, accepting Petitioners' invitation would fall out of step with this Court's own precedent.

Petitioners focus almost entirely on the portion of *Citizens United* directed at limits on contributions and decided by a 5-to-4 vote. What Petitioners ignore, though, is the second aspect of *Citizens United*—the one favoring disclosure and decided by a lopsided vote. *E.g., Center for Individual Freedom v. Madigan*, 697 F.3d 464, 469-70 (7th Cir. 2012) (noting that *Citizens United*'s first holding "largely overshadowed another part of the decision upholding the same law's campaign finance disclosure provisions"). As this Court reasoned in that case, "prompt disclosure of expenditures" provides a "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371; *see also McCutcheon v. Fed. Election Comm'n*, – U.S. –, 134 S. Ct. 1434, 1459 (2014).

Citizens United does not stand alone in endorsing disclosure. On more than one occasion, this Court has endorsed a state's interest in informing voters through disclosure. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203, 205 (1999) ("To inform the public 'where [the] money comes from,' we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much.'" (quoting *Buckley v. Valeo*)); *Citizens Against Rent Control*, 454 U.S. at 299-300 (the "integrity of the political system will be adequately protected if contributors are identified in a

public filing revealing the amounts contributed"); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 767, 792 n.32 (1978) (noting that the "[i]dentification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected").

The Fifth Circuit recognized these important points, noting that the informational interest that this Court described approvingly in *Buckley* seems to be at least as strong when it comes to ballot initiatives. Pet. App. 27-29. This rationale is sound. Unlike candidate elections, ballot initiatives "lack a straightforward proxy. The initiatives on a ballot are often numerous, written in legalese, and subject to the modern penchant for labelling laws with terms embodying universally-accepted values." Pet. App. 28. The vast majority of circuit courts agree with this reasoning. *See Worley,* 717 F.3d at 1247–48 (collecting cases).

As the First Circuit put it:

> In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the "marketplace of ideas" has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin.

McKee I, 649 F.3d at 57; *McKee II*, 669 F.3d at 41 ("[T]he issue is whether the cumulative effect of disclosure ensures that the electorate will have access to information regarding the driving forces backing and opposing each bill.") (citations and internal quotation marks omitted)); *Cal. Pro–Life Council, Inc. v. Getman,*

328 F.3d 1088, 1106 (9th Cir. 2003). ("[B]allot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation."). Plainly put, the Fifth Circuit entirely was right in concluding that Mississippians—who in deciding constitutional amendments act "as lawmakers"—have an interest in knowing who is lobbying for their vote.

Similarly, the Fifth Circuit did not err or exacerbate any circuit conflict in concluding that Mississippi's disclosure requirements are "substantially relat[ed]" to the informational interest. *Doe,* 561 U.S. at 196. Mississippi has calibrated reporting and itemization requirements for committees engaged in campaigns related to constitutional amendments, and the registration burdens are minimal—more minimal than other states. This equally is true for Mississippi's disclosure requirements for individuals who expend over $200 to influence voters. MISS. CODE ANN. §§ 23-17-51(2), 23-17-53(c). Indeed, what the state is asking is "little more if anything than a prudent person or group would do in these circumstances anyway." *Worley,* 717 F.3d at 1250 (internal quotation marks omitted).

Such disclosure regulations, for sure, further the State's interest in providing information to voters. And numerous courts have offered explanations on why. The Seventh Circuit, for example, explained that:

> Educating voters is at least as important, if not more so, in the context of initiatives and referenda as in candidate elections. In direct

> democracy, where citizens are responsible for taking positions on some of the day's most contentious and technical issues, voters act as legislators, while interest groups and individuals advocating a measure's defeat or passage act as lobbyists.

Ctr. for Individual Freedom, 697 F.3d at 480 (quotation marks and alterations omitted); *see also Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012) ("Disclosure also gives voters insight into the actual policy ramifications of a ballot measure. Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown.") (quotation marks and citations omitted); *Worley,* 717 F.3d at 1251 ("Florida also advances its informational interest through a first-dollar disclosure threshold because knowing the source of even small donations is informative in the aggregate and prevents evasion of disclosure.").

Though the Tenth Circuit's outlier decision in *Sampson* found the informational interest to be "minimal," that as-applied conclusion has been rightly criticized. *See Worley*, 717 F.3d at 1249; *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 936-40 (E.D. Cal. 2011) *aff'd in part, dismissed in part sub nom.*, 752 F.3d 827 (9th Cir. 2014). The *Sampson* rationale also defies simple logic and collides with this Court's endorsement of disclosure requirements—a point even *Sampson* recognized. *See Sampson*, 625 F.3d at 1257 ("Although the Court has never rejected a First Amendment challenge to a financial-disclosure

requirement in the ballot-issue context, on three occasions it has spoken favorably of such requirements.”).

But, in any event, the Fifth Circuit’s decision does not conflict with *Sampson*. This is because the Tenth Circuit examined the issue only in the as-applied context. Not even the Tenth Circuit facially struck down the disclosure requirements at issue. As the Ninth Circuit pointed out, “*Sampson* did not ultimately reject the longstanding principle that the public has an interest in learning who supports and opposes ballot measures.” *Family PAC*, 685 F. 3d at 806. Neither did the Eighth Circuit in *Minnesota Citizens*. *See Minnesota Citizens*, 692 F. 3d at 877 (citing to *Citizens United* and noting that the court did not “doubt” the “importance” of the informational interests).

In the end, Petitioners pay only short shrift to the standard for facial challenges. There must be “no set of circumstances” under which Mississippi’s disclosure requirements are constitutional, and this poses a high hurdle to overcome—especially here. “Of the federal courts of appeals that have decided these cases, every one has upheld the disclosure regulations against the facial attacks.” *Madigan,* 697 F.3d at 470 (collecting cases); *see also SpeechNow.org,* 599 F.3d at 696 (“The Supreme Court has consistently upheld organizational and reporting requirements against facial challenges.”). The Fifth Circuit rightly explained why Petitioners could not mount a facial challenge, and the court’s decision goes hand in hand with other courts to address the issue. Accordingly, the purported conflict Petitioners espouse is in reality no conflict at all.

III. This case presents a bad candidate for certiorari.

Even if uniformity in language in the strength of the informational interest is of concern, this case presents a less than ideal canvas for a broad pronouncement by this Court.

One: Petitioners exhaustively try to pigeonhole this case into two other cases: *Citizens United* and *Sampson*. As explained, though, both of those cases present different issues than what is presented here. This case neither presents *Citizens United*'s ban on speech nor *Sampson*'s concrete factual record from which to evaluate an as-applied challenge.

Two: Because the Fifth Circuit found Petitioners' as-applied challenge to be factually unsupportable, the Fifth Circuit never truly weighed the "informational interest" in that context. Indeed, absent pure speculation on the part of the reader, there is nothing in the Fifth Circuit's opinion to suggest how the as-applied challenge would have turned out had there been a sufficient basis in the record from which to evaluate the claim. This reason makes this case a particularly inappropriate vehicle for certiorari review. Without the prospect of a factually-developed record, it would be wholly advisory for this Court to determine the merits of—or even set any clear guidance on—Petitioners' as-applied First Amendment challenge to Mississippi's disclosure requirements for ballot initiatives.

Lastly, this Court denied a petition for certiorari on this very issue less than three years ago. In *Worley*, the same public interest law firm challenged Florida's

registration and reporting requirements, and the Eleventh Circuit rejected a materially similar as-applied challenge. This Court did not grant the petition in *Worley*, and the same course should be followed here. The Fifth Circuit's ruling was correct and well-reasoned and further review is unwarranted.

CONCLUSION

For the foregoing reasons, the State Defendants oppose the Petition for Writ of Certiorari.

Respectfully submitted, this the 29th day of February, 2016.

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