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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondents' brief in opposition confirms that this Court should grant the petition for certiorari. Moreover, two circuit cases issued since the Petition reaffirm the need for this Court's review.

First, nothing in the brief changes that Petitioners are a demonstrably small group and entitled to both facial and as-applied relief. Respondents and the court below demand Petitioners make a fact showing beyond what this Court and other circuits require for as-applied relief. The decision below means that small groups are unable to obtain as-applied relief and have no choice but to have their speech suppressed or violate the law.

Second, nothing in the brief harmonizes the several circuit court splits set forth in the Petition. Respondents do not distinguish this Court's controlling cases. They do not address the multiple circuit decisions distinguishing "PAC burdens" from "disclosure." Neither do they address the limits of the informational interest in pure speech about ballot measures, about which the circuits are split.

The circuits are in conflict with each other and with this Court's decisions. These conflicts mean that some small grassroots groups – like Petitioners – are subjected to burdensome speech regulations and are not able to challenge those requirements in court. This Court is particularly solicitous about grassroots activity that is subjected to complicated regulations. *E.g.*, *Randall v. Sorrell*, 548 U.S. 230, 260 (2006)

(citizens had "to keep careful track of all miles driven, postage supplied (500 stamps equals $200), pencils and pads used, and so forth[, a]nd any carelessness in this respect can prove costly"). This Court should grant the Petition.

I. There is no vehicle problem; nothing in Respondents' brief changes that Petitioners are a small group and have standing to seek both facial and as-applied relief.

Respondents assert, as did the Fifth Circuit, that Petitioners have not proven themselves to be a small group and that this precludes as-applied relief in this case. BIO 4-9. They are wrong, as a recent Tenth Circuit ruling demonstrates. Moreover, their position ignores facts and conflicts with this Court's rulings on both pre-enforcement and "capable of repetition yet evading review" challenges under the First Amendment. Petitioners are entitled to both facial and as-applied relief.

A. The record proves Petitioners are a small group, like speakers in the Tenth Circuit.

The record leaves no doubt that Petitioners engage in small-scale political speech. It is undisputed that Petitioners are a group of friends with no formal structure, who join together when and where convenient to share their thoughts and sometimes to engage in ordinary grassroots political activity. Pet.

4-7. They fund this activity by literally passing a hat. Pet. 5. Petitioners only wanted to purchase some flyers, a handful of posters, and a local newspaper advertisement. *Id.*; App. 8. The Fifth Circuit itself recognized that Petitioners sought only to speak about ballot measures in a way that "mirrored" their previous activities. App. 8.

It is similarly undisputed that Petitioners sought an injunction that would have allowed them to pool only up to $1,000 for a local newspaper advertisement, a handful of posters, and flyers in 2011. BIO 8 n.2.

Respondents have not and cannot point to any contrary *evidence* about Petitioners or the scope of their activity – in 2011 or otherwise. Rather, Respondents cite *speculation* about Petitioners and information about *other* groups. BIO 6-7. The Fifth Circuit made the same mistake. App. 17-18.

A recent decision of the Tenth Circuit conflicts with the Fifth Circuit's approach and demonstrates that Petitioners sufficiently established they are entitled to as-applied relief. In *Coalition for Secular Government v. Williams*, the court was faced with an organization that had "*expected* activity of $3,500." ___ F.3d ___, No. 14-1469, 2016 WL 814814, at *5-6 (10th Cir. Mar. 2, 2016) (emphasis added). This expected activity was in line with the Coalition's prior activities. *Id.* at *4-5. Based on the Coalition's prior activities and request for a $3,500 preliminary

injunction, *id.* at *6, the court held the Coalition was entitled to as-applied relief, *id.* at *12.

As in *Coalition for Secular Government* and *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010), the record proves this case "is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues." Petitioners are entitled to as-applied relief.

B. Respondents wrongly demand Petitioners subject themselves to the challenged laws to obtain as-applied relief.

To cast doubt on the undisputed facts, Respondents disparage Petitioners' verified complaint for not stating a particular dollar amount as a cap on their spending in future elections and speculate about Petitioners' future activity. BIO 5-9. But the lack of a budgeted cap is not a flaw – it is a fundamental part of Petitioners' identity. Petitioners are an informal group that literally passes a hat to pool funds. App. 171-72. To demand they budget for their future political activity is to demand they change their structure by becoming a more formalized group – the very requirement this Court has held unconstitutionally burdensome. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (plurality), 266 (O'Connor, J., concurring) (1986) (*MCFL*). Respondents cannot demand that Petitioners endure the speech burden they object to in order to challenge it. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

Petitioners did not need to state a hard cap in their complaint. *MCFL*, 479 U.S. at 263 ("desire for a bright-line rule" does not justify infringement of First Amendment where "concerns underlying the regulation of . . . political activity are simply absent with regard to" challenger).

Similarly, the Fifth Circuit speculated about Petitioners' future activities to deny as-applied relief in the face of record facts. The court recognized Petitioners wanted to speak about ballot measures in a way that "mirrored" their previous activities by purchasing flyers, some posters, and a local newspaper advertisement. App. 8. Nevertheless, the court refused to consider Petitioners' request for as-applied relief. App. 13-21. Rather than address Petitioners' previous activities – including those they sought to do in 2011, App. 8 – the court deemed it "implausible" that they would spend a small amount of money on an issue they cared about. App. 16. The court refused to accept that Petitioners would have spent a small amount of money in 2011 or that Petitioners would similarly spend a small amount of money on future ballot initiatives. "Maybe, far from being a limited operation," the court speculated, "their small group would have been a rousing fundraising success." App. 17.

On the Fifth Circuit's "dubious reading, all or most grassroots activity could conceivably, maybe, grow by leaps and bounds such that ad hoc, issue-specific associations are usually prospects to become second-generation versions of American Crossroads"

and preclude as-applied relief for small groups. Bob Bauer, *The Corporation and the Little Guy in the 11th Circuit*, More Soft Money Hard Law (Sept. 16, 2013), www.moresoftmoneyhardlaw.com/2013/09/5736/ (criticizing a similar flaw in *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013), on which the Fifth Circuit relied here). As amici note, it is unlikely that *any* plaintiff could develop sufficient facts for a pre-enforcement as-applied claim under the standard announced in this case. Br. Center for Competitive Politics et al. 5-10. And the court's approach here is paradigmatic of lower courts refusing pre-enforcement as-applied relief by demanding heightened standards of evidence and substituting hypotheticals for record evidence. *Id.* at 14-18.

It is possible, of course, that one of the Petitioners could win the lottery. But it is not likely that a group that passes the hat after sharing pizza will suddenly become a national foundation. Petitioners' rights are being violated *now* and they are a small group *now*. A court cannot refuse to hear their claims because it can imagine a different and incredible scenario.

C. Respondents wrongly ignore Petitioners' past conduct.

Respondents – like the Fifth Circuit – have refused to address the particular facts of Petitioners' 2011 proposed activities. Noting that the 2011 election was over, the court refused to address Petitioners'

past desired activity – when Petitioners wanted to pool less than $1,000 under a preliminary injunction – because it was moot. App. 11-12. Instead, the court turned to Petitioners' "political advocacy in future ballot initiative cycles" without reference to the $1,000 preliminary injunction request. *Id.*

The Fifth Circuit's decision here is contrary to the Tenth Circuit's in *Coalition for Secular Government*. There, the Tenth Circuit looked to the Coalition's prior small-scale activities and request for a preliminary injunction to determine the Coalition was a small group entitled to as-applied relief for future activity. *Coal. for Secular Gov't*, 2016 WL 814814, at *4-6. The Tenth Circuit did not ignore the Coalition's prior activity and request for a preliminary injunction in order to speculate about potential "rousing fundraising success," as did the Fifth Circuit here.

The Fifth Circuit's refusal to address Petitioners' past desired activity is also in tension with this Court's approach to election law challenges under the "capable of repetition yet evading review" doctrine. Recognizing that elections are fleeting events and adjudication of challenges to election laws "will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held," *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), this Court considers a challenger's past activity to determine forward-looking relief. As this Court has explained, once challengers show what their past activity was to be, they need not spell out in minute detail what their

future activity will look like. "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge – down to the last detail – would effectively" eliminate application of "capable of repetition yet evading review" to as-applied challenges. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007). Instead, it is enough for Petitioners to credibly claim they want to engage in "materially similar" activity in the future. *Id.*; *accord Coal. for Secular Gov't*, 2016 WL 814814, at *4-6. Petitioners did so here. App. 184-85.

There is a certain irony in the Fifth Circuit's denying Petitioners' claim for as-applied relief. If Petitioners had pooled their $1,000 – legally following a preliminary injunction, as in *Hatchett v. Barland*, 816 F. Supp. 2d 583, 589, 594 (E.D. Wis. 2011), or illegally as in *Sampson*, 625 F.3d at 1251-52 – then the Fifth Circuit would have considered Petitioners' facts. App. 21. But Petitioners were wrongly denied a preliminary injunction in 2011 and could not legally speak in that election. The Fifth Circuit then compounded Petitioners' harm by denying relief *because* Petitioners obeyed the law.

II. This case implicates multiple circuit splits; nothing in Respondents' brief harmonizes the conflicts about PAC burdens or the informational interest in pure speech about ballot measures.

Respondents attempt to downplay the several serious constitutional issues raised by the Petition.

They do this by papering over the effect of the challenged laws, stating that no circuit split exists by omitting the cases that disagree with their position, and mischaracterizing this Court's precedent on the informational interest. Respondents have not countered the Petition's merit.

A. The challenged scheme imposes the same burdens the scheme in *MCFL* and *Citizens United* did.

Respondents try to distinguish both *MCFL* and *Citizens United* by arguing that those cases involved a direct ban on speech but that the challenged statutes here do not. BIO 12-13. Respondents are wrong: Mississippi's laws ban associational speech just as the statute in *Citizens United* and *MCFL* did.

Respondents admit Petitioners cannot associate to speak without becoming a political committee. BIO 14. A political committee is a creature of law that is a separate association from the underlying group. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010). That the political committee can speak is of no matter; the underlying group cannot. This is a ban on speech.

Both *MCFL* and *Citizens United* recognize that the option to form a political committee does not render this ban not a ban. MCFL, an association of like-minded people, could not speak but through a political committee. This requirement "[did] not remove all opportunities for independent spending

[but] the avenue it [left] open [was] more burdensome than the one it foreclose[d]." *MCFL*, 479 U.S. at 255 (plurality); *see also id.* at 252 (describing burdens), 266 (O'Connor, J., concurring) (same). In *Citizens United*, this Court deemed the same requirement "a ban on corporate speech" notwithstanding the option to form a political committee. 558 U.S. at 337-38 (highlighting burdens of PAC option).

The same is true here. The laws Petitioners challenge demand they form a political committee to engage in speech as a group. BIO 14. These laws then subject Petitioners to the same requirements held too burdensome for sophisticated corporations in *Citizens United* and *MCFL*. Pet. 23-32. Respondents' only defense is existential: People who join together to advocate political issues simply are a political committee, they claim. BIO 12-13. But Americans have been joining together in political advocacy since the founding of this country without being forced to create a separate entity subject to burdensome regulations.

Ultimately, what Respondents miss, or dismiss, "is the significance of the means by which [Petitioners] wish to be heard, and believe they will be heard most effectively:" in association with one another as a group. Bauer, *supra.* Each Petitioner can speak as an individual and skip some (but not all) PAC burdens. *Cf.* BIO 13. But Petitioners are banned from speaking as a group unless they organize by law as a political committee. BIO 14. Mississippi law thus foists on Petitioners a choice between the right to

speak and the right to associate – a choice Respondents admit they cannot foist on corporate entities. BIO 12. Accordingly, the holdings of both *MCFL* and *Citizens United* are directly on point.

B. There is a real and deepening split about the distinction between PAC burdens and disclosure; Respondents simply ignore the cases that demonstrate this.

Respondents downplay the PAC burdens circuit split, *cf.* Pet. 23-38, and assert that every court of appeals to address the distinction between PAC burdens and "disclosure" requirements has found such laws to be "disclosure laws," BIO 14-15. But to make this claim, Respondents ignore the cases contrary to their position. Respondents also do not cite recent cases that demonstrate this split is deepening.

Cases from the Third, Seventh, and Eighth Circuits all recognize the distinction between PAC burdens and disclosure requirements. Pet. 32-35 (citing *Del. Strong Families v. Att'y Gen.*, 793 F.3d 304, 312 n.10 (3d Cir. 2015); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (en banc)). Not one of these cases is cited when Respondents assert there is no circuit split. BIO 15.

Further, since the Petition was filed, the Tenth Circuit has issued two decisions that deepen the

circuit split here. First, *Independence Institute v. Williams* recognized that this Court's cases treat "obligations that come with political committee status, including reporting and auditing requirements . . . [as] considerably more burdensome than disclosure requirements." ___ F.3d ___, No. 14-1463, 2016 WL 423759, at *5 n.9 (10th Cir. Feb. 4, 2016). And *Coalition for Secular Government* held Colorado's political committee regulatory scheme "too burdensome for small-scale issue committees like the Coalition" even though the Coalition expected to raise $3,500 *and* the burdens of Colorado's scheme had been reduced. 2016 WL 814814, at *9-11.

Because Respondents do not mention, much less attempt to distinguish, these cases, Respondents' brief does not actually dispute that there is a real – and deepening – circuit split over whether there is a distinction between PAC burdens and disclosure provisions. And, as *Coalition for Secular Government* demonstrates, that split has real-world effects: In the Tenth Circuit, groups "bigger" than Petitioners receive First Amendment protections; in the Fifth Circuit, Petitioners do not.

C. Respondents' "disclosure" cases do not involve pure speech about ballot measures; only *McIntyre* is on point, and there is a circuit split about *McIntyre*.

Respondents' brief contains numerous citations to cases approving "disclosure." *E.g.*, BIO 9-10. Again,

this case is not about disclosure; it is about PAC burdens. Pet. 23-37.

Regardless, Respondents' disclosure cases are inapplicable. They rely on a variety of government interests – primarily the anti-corruption interest – not applicable here. But Respondents do not dispute that this case involves only pure speech about ballot measures and that such speech does not present any threat of corruption. Accordingly, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), this Court's only decision regarding "disclosure" absent the threat of corruption, controls here.

Petitioners do not invoke *McIntyre* as "establish[ing] a general right to anonymously influence voters." BIO 16. Rather, *McIntyre* holds that the "informational interest" standing alone is "less powerful" than other interests that may support speech regulations. 514 U.S. at 354-56. Indeed, *McIntyre* expressly distinguished the kinds of cases Respondents cite because those cases rely on other interests. *Id.* at 354. And since *McIntyre*, even when this Court has upheld a "disclosure" law, it has carefully distinguished *McIntyre*'s protection of pure speech about a ballot measure. *E.g.*, *Doe v. Reed*, 561 U.S. 186, 197 (2010) (refusing to address the informational interest when an anti-fraud interest applied); *id.* at 212-13 (Sotomayor, J., concurring) (distinguishing measures to "control the mechanics of the electoral process" from the "regulation of pure speech" as in *McIntyre* (quotation marks omitted)); *id.* at 216 (Stevens, J., concurring) (same).

As *Coalition for Secular Government* reinforces, 2016 WL 814814, at *9-11, the circuits remain split about the strength of the informational interest following *McIntyre*, Pet. 21-23. In the Tenth Circuit, groups "bigger" than Petitioners are protected from the "substantial burdens" of political committee status because of the "minimal informational interest." *Coal. for Secular Gov't*, 2016 WL 814814, at *11. But in the Fifth Circuit and elsewhere, small groups like Petitioners are subjected to these same burdens. Free speech should not depend on geography.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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