Case No. 13-60754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Mississippi

BRIEF *AMICUS CURIAE* FOR CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Gordon Justice Jr., et al. v. Delbert Hosemann, et al. No. 13-60754

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Gordon Vance Justice, Jr., a resident of Lafayette County, Mississippi and a named plaintiff in this matter.
2. Sharon Bynum, a resident of Lafayette County, Mississippi and a named plaintiff in this matter.
3. Matthew Johnson, a resident of Lafayette County, Mississippi and a named plaintiff in this matter.
4. Alison Kinnaman, a resident of Lafayette County, Mississippi and a named plaintiff in this matter.
5. Stanley O'Dell, a resident of Lafayette County, Mississippi and a named plaintiff in this matter.
6. Russell Latino, III, counsel for plaintiffs in this matter.
7. Paul V. Avelar, counsel for plaintiffs in this matter.
8. Stephen M. Simpson, counsel for plaintiffs in this matter.
9. Diane Simpson, counsel for plaintiffs in this matter.
10. Defendant Delbert Hosemann, Mississippi Secretary of State.
11. Defendant Jim Hood, Attorney General of the State of Mississippi.
12. Kim Turner, Assistant Secretary of State, Office of the Secretary of State.
13. Harold E. Pizzetta, III, Assistant Attorney General and counsel for the defendants.

14. J. Gerald Hebert, counsel for *amicus curiae* in this matter.
15. Paul S. Ryan, counsel for *amicus curiae* in this matter.
16. Megan McAllen, counsel for *amicus curiae* in this matter.

The undersigned counsel of record also certifies the following with respect to *amicus curiae* Campaign Legal Center (CLC): The CLC is a nonprofit, nonpartisan corporation; the CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC.

/s/ J. Gerald Hebert
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Dated: March 3, 2014

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance and political disclosure. The CLC has participated in numerous past cases addressing campaign finance disclosure, including *Citizens United v. FEC*, 558 U.S. 310 (2010), *McConnell v. FEC*, 540 U.S. 93 (2003), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here.

INTRODUCTION & SUMMARY OF ARGUMENT

This case challenges a range of Mississippi's campaign finance registration and reporting requirements that are crucial to the state's constitutional ballot measure process because they enable the "electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

Plaintiffs-Appellees Gordon Vance Justice, Jr., *et al.* (collectively, "Plaintiffs"), wish to raise and spend money to sway those voting on constitutional amendment initiatives in Mississippi without providing any disclosure of their activities to such voters. Plaintiffs are five individuals who intend to pool their

[1] Appellant and Appellees, through counsel, have consented to the filing of this brief *amicus curiae*. No party's counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation and submission.

funds and act as a group to support and oppose constitutional ballot initiatives in Mississippi. Each plaintiff intends to spend some amount "in excess" of $200 for that purpose, either individually or as part of the group's collective advocacy efforts. Compl. ¶¶ 8-12 (ROA.15, ROA.16). In addition, Plaintiffs intend to solicit donations from other individuals to support their ballot measure advocacy—presumptively, in amounts exceeding the $200 threshold below which contributions are not itemized on monthly campaign finance reports. *See* Compl. ¶¶ 58-60 (ROA.28).

In the district court, Plaintiffs challenged a range of Mississippi disclosure requirements—both facially and as applied—applicable to those who advocate for the passage or defeat of constitutional ballot measures in state elections. *See* Miss. Code Ann. §§ 23-17-47 to -59. Under Mississippi law, once a group has collected or spent more than $200 to influence voters for or against a constitutional ballot measure, the group must register as a political committee by completing a simple one-page form. Miss. Code Ann. §§ 23-17-47; 23-17-49(1). Each political committee is then required to file monthly reports with its name, address, and telephone number, *id.* § 23-17-53(a), as well as information about the committee's finances over the pertinent period. *Id.* § 23-17-53(b). Each contribution exceeding $200 must be itemized on the reports with the contributor's name and address, the amount contributed, the date of receipt, and the cumulative amount contributed by

that person. *Id.* § 23-17-53(b)(vii). The reporting requirements for individuals are substantially the same. *Id.* § 23-17-53(c).

This straightforward disclosure framework, which Plaintiffs attack as unduly burdensome and unconstitutionally restrictive of their speech, is neither. Instead, the registration and reporting provisions at issue effectuate Mississippi's interest in political transparency but "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." 558 U.S. at 366 (internal quotation marks and citations omitted); *see also Asgeirsson v. Abbott*, 696 F.3d 454, 463 (5th Cir. 2012) (recognizing that disclosure laws are "treated more leniently than are other speech regulations" under the First Amendment).

Almost forty years ago, the Supreme Court made clear in *Buckley v. Valeo*, 424 U.S. 1 (1976), that "there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights], such as "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent . . . ." *Id.* at 66-67 (emphasis added) (footnote omitted) (internal quotation marks omitted). Because disclosure laws promote core First Amendment goals, any burdens they place on individual rights must be weighed against the competing democratic values and governmental interests that they protect. Transparency is an essential aspect of any democracy; after all, in the words of Justice Scalia, "requiring people to stand up in public for their political

acts fosters civic courage, without which democracy is doomed." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring in the judgment).

None of the challenged provisions prevent Plaintiffs from "speak[ing] out in the future about ballot initiatives . . . [or] exercising their constitutional rights of free speech and association." *See* Compl. ¶¶ 62-63 (ROA.29). The question before this Court is therefore not whether plaintiffs can make expenditures to advocate the passage or defeat of constitutional ballot initiatives, nor whether they may raise contributions for that purpose, but simply whether they must provide disclosure of their ballot issue advocacy to the Mississippi public. According to the district court, the answer is "No." In the memorandum of law that follows, *amicus* CLC urges this Court to reverse that decision.

Although the district court plainly recognized its obligation to review Plaintiffs' challenge under the relatively lenient "exacting scrutiny" standard, it was unduly stringent in its application of that standard. As a result, the court gave short shrift to the state's interests and focused overwhelmingly on the law's supposed "burdens." Likewise, despite conceding the validity of the state's "informational" interest, "even" in the context of ballot measures, *see* Summary Judgment Opinion ("SJ Op.") at 12-15 (ROA.2302-2305), the court failed to give this interest proper weight. Given that disclosure laws "enable[] the electorate to make informed decisions and give proper weight to different speakers and

messages[,]" *Citizens United*, 558 U.S. at 371, the informational interest should apply with particular force in the ballot measure setting, where voters act as legislators and decide matters of extreme public significance. Finally, for the reasons detailed below, the court's refusal to apply *Buckley*'s deferential standard for evaluating disclosure thresholds is indefensible.[2]

In reaching its decision, the district court improperly discounted the state's interests, disproportionately emphasized the Plaintiffs' burdens,[3] and failed to pay any deference to the line-drawing expertise of Mississippi's elected legislators. The decision must be reversed.

ARGUMENT

I. Plaintiffs Have Not Laid the Foundation for an As-Applied Challenge.

To escape the clear weight of the case law upholding comparable disclosure laws, the district court adopted the view that this case presents an "as-applied" challenge. *See* SJ Op. at 8-9 (ROA.2298-2299). This characterization does not comport with the Supreme Court's campaign finance jurisprudence, nor is it appropriate based on the record in this case.

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[2] This refusal is particularly suspect given that the distinguishing factor between this case and *Buckley*, according to the district court, is that this challenge is "as applied." *See* Part I, *infra*.

[3] To the extent the court reached its conclusion about the "burdens" of the law based on the supposed lack of clarity as between the "duplicitous, yet distinctive" requirements of Chapters 15 and 17, *see* SJ Op. at 26 (ROA.2316), *amicus* agrees with Appellants that *Pullman* abstention was warranted. *See* Appellants' Br. at 52-53 n.24.

In *Doe*, the Supreme Court rejected a similar attempt to avoid the more rigorous standards applicable to facial challenges. The *Doe* plaintiffs challenged Washington's Public Records Act "as applied" to the disclosure of referendum petitions generally.[4] Despite noting that the claim had "characteristics of both" an as-applied and a facial challenge, the Court ultimately deemed it a facial challenge, reasoning: "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." 130 S. Ct. at 2817 (2010). The Seventh Circuit followed this guidance in *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012), a case presenting both facial and as-applied challenges to Illinois electioneering communication disclosure requirements. Because the plaintiff had provided "only a general idea of what its hypothetical broadcasts might say[,]" it was "impossible for [the] court to fashion a remedy" tailored to the plaintiff's particular circumstances. Accordingly, the court found that the plaintiff had "not laid the foundation for an as-applied challenge." *Id.* at 475-76.

[4] The *Doe* plaintiffs also challenged Washington's Public Records Act "as applied" to a particular referendum on the ground that disclosure would subject the plaintiffs, signatories of the referendum petition at issue, to threats, harassment or reprisals. This claim was not before the Supreme Court. *See Doe*, 130 S. Ct. at 2817, 2820. On remand, the parties engaged in discovery and filed cross-motions for summary judgment on the narrower claim. The district court ruled that the plaintiffs' evidence of "threats, harassment or reprisals" was insufficient to overcome the state's strong interest in disclosure. *Doe v. Reed*, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011) ("[I]f a group could succeed in an as-applied challenge . . . by simply providing a few isolated incidents of profane or indecent statements, gestures, or other examples of uncomfortable conversations[,] . . . disclosure would become the exception instead of the rule"), *appeal dismissed as moot*, 697 F.3d 1235 (9th Cir. 2012).

Here, Plaintiffs have communicated their intent to expressly advocate for or against state constitutional amendment ballot measures, both by raising and spending unspecified amounts in excess of Mississippi's statutory disclosure thresholds, as well as by soliciting contributions of unspecified amounts in excess of Mississippi's statutory itemization thresholds. Based on these allegations, the district court concluded that the challenged thresholds for reporting and itemization are "simply too low" as applied to "individuals and groups seeking to raise or expend in excess of $200" in constitutional ballot measure elections. SJ Op. at 32-33 (ROA.2322-23). That this decision "reach[es] beyond the particular circumstances of these plaintiffs" can scarcely be debated. *See Doe*, *id.* The district court's decision seemingly enjoins the $200 threshold itself—not just its application to these particular plaintiffs, or even to similarly-situated groups, but to all groups and individuals subject to the challenged registration and reporting requirements triggered by the threshold.

Upon being presented with a practically identical set of facts, the Eleventh Circuit concluded:

> [W]e 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. While Challengers have emphasized that they are merely a grassroots group of four people who want to spend a modest amount of money in a ballot issue election, they also emphasize their desire to solicit contributions. We know little if anything about how much money they intend to raise or how many people they wish to solicit. We will not speculate about their future success as fundraisers. Based

> on the record we do have, we consider this challenge . . . to be a facial challenge.

Worley v. Florida Sec'y of State, 717 F.3d 1238, 1249-50 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (U.S. 2013). This record is likewise bereft of any concrete information about the upper limits of Plaintiffs' proposed activities—if, indeed, there are any.[5]

Even assuming the district court meant to limit its holding to "informal" groups and individuals who spend "just in excess" of the threshold, SJ Op. at 31 (ROA.2321), the meaning of "informal" or "grassroots," like the location of a hypothesized constitutional line "just in excess" of $200, is far from clear. This imprecision would invite groups to test the disclosure laws, or circumvent them entirely. The possibilities here are untenably speculative to maintain this as an as-applied challenge.

More importantly, the Supreme Court has articulated only one basis for an as-applied challenge to a campaign finance disclosure law. In rare circumstances, a disclosure requirement may be unconstitutional "as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370 (rejecting as-applied claim notwithstanding the arguments of several *amici*,

[5] Conversely, the Tenth Circuit's decision in *Sampson v. Buescher*, which *amicus* believes was wrongly decided (*see* Part III.A , *infra*), invalidated a disclosure threshold on the basis of a specified level of spending ($782.02). 625 F.3d 1247, 1252 (10th Cir. 2010).

including Plaintiffs' counsel Institute for Justice, that disclosure would subject donors to retaliation and harassment). The few cases applying this narrow standard make clear that it is reserved for groups facing severe societal hostility, state-sanctioned animus, and the real prospect of physical harm.[6]

Plaintiffs have made no apparent attempt to meet this narrow as-applied showing, so their challenge is properly subject to the more demanding standards of facial review. Under the standard for facial challenges in the First Amendment context—which this Court has called "daunting"—a law "may be invalidated . . . if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Voting for America, Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quoting *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1587 (2010)).

II. Disclosure Laws Are a 'Cornerstone' of Effective Campaign Finance Regulation Subject to Exacting Scrutiny, Not Strict Scrutiny.

Fundamentally, the First Amendment embraces the principle that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v.*

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[6] *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 98-99 (1982) (finding that Ohio campaign disclosure laws could not be constitutionally applied given "substantial evidence of both governmental and private hostility toward and harassment of [Socialist Workers Party] members and supporters"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting the NAACP's "uncontroverted" evidence that disclosure would subject members to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"). In the absence of a similar showing, the important state interests advanced by disclosure outweigh vague allegations of "chill." *See Buckley*, 424 U.S. at 69-74 (concluding that the "substantial public interest in disclosure" "outweigh[ed] the harm generally alleged").

Sullivan, 376 U.S. 254, 270 (1964). The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment precepts, even calling disclosure a "cornerstone" of campaign finance regulation. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 222-23 (1999) ("*Buckley II*") (O'Connor, J., concurring in the judgment in part and dissenting in part).

When evaluating the constitutionality of campaign regulations, the Supreme Court therefore applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed. Although disclosure laws can implicate the First Amendment rights to speak and associate freely, they also advance the public's interest in maintaining an informed electorate and open government. Because disclosure is considered a "less restrictive alternative to more comprehensive regulations of speech" that advance these interests, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations. *Citizens United*, 558 U.S. at 369; *see also Buckley*, 424 U.S. at 68 (calling disclosure requirements "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.").[7] Disclosure obligations are therefore subject only to "exacting

[7] By comparison, campaign contribution and expenditure limitations are subject to more searching review because they are considered more "restrictive" of First Amendment rights. As the "most burdensome" campaign finance regulations, expenditure restrictions are subject to

scrutiny"—they are valid so long as there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 130 S. Ct. at 2818 (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008) (internal quotation marks omitted).

Since *Buckley*, the Supreme Court has consistently applied "exacting scrutiny" and has consistently upheld disclosure laws against constitutional challenge. Indeed, the Court has upheld challenged disclosure laws three times by 8 to 1 votes since 2003.

In *McConnell*, the Court by an 8 to 1 vote upheld the "electioneering communication" reporting and disclosure requirements of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81. 540 U.S. at 194-99 (opinion of the Court); *id*. at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* 2 U.S.C. §§ 434(f)(2)(A), (B), and (D). All members

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strict scrutiny and reviewed for whether they are "narrowly tailored" to "further a compelling interest." *FEC v. Wis. Right to Life*, 551 U.S. 449, 476 (2007); *see also Buckley*, 424 U.S. at 44-45. Contribution limits are deemed less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'" *McConnell*, 540 U.S. at 136 (internal quotation marks omitted) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003). Finally, disclosure requirements are the "least restrictive" campaign finance regulations and are subject only to "exacting scrutiny." *Buckley*, 424 U.S at 68.

of the Court except for Justice Thomas found the BCRA disclosure requirements justified solely on the basis that they vindicated rather than violated the truly relevant First Amendment interest: that of "individual citizens seeking to make informed choices in the political marketplace." 540 U.S. at 196-97 (citation omitted) (noting that Plaintiffs "never satisfactorily answer[ed] the question of how 'uninhibited, robust and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public").

Citizens United likewise upheld federal law disclosure requirements by an 8 to 1 vote, and reiterated the value of transparency in "[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371.

The Court continued its strong support of disclosure laws in *Doe*, upholding by an 8 to 1 vote a Washington State law providing for disclosure of ballot measure petition signatories. 130 S. Ct. at 2820 (reasoning that "[p]ublic disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot"). Justice Scalia explained in concurrence:

> There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public

> scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Id. at 2837 (Scalia, J., concurring in the judgment).

This Court has confirmed, and the district court recognized, that disclosure laws are reviewed under "exacting rather than strict scrutiny." *Asgeirsson*, 696 F.3d at 462; *see also* SJ Op. at 12 (ROA.2302). However, if Plaintiffs attempt to revive their argument that the challenged Mississippi disclosure provisions are subject to strict scrutiny, *see* SJ Op. at 12 (ROA.2302), *amicus* emphasizes that their position is at odds not only with longstanding Supreme Court precedent, but also with cases in every other Circuit to have considered the question.[8]

III. The Challenged Disclosure Requirements Are Constitutional.

A. Disclosure Laws Effectuate Mississippi's Informational Interest, Which Is of 'The Utmost Importance' in the Ballot Measure Setting.

In general, disclosure enables voters to weigh the merits of competing messages by arming them with information about the different interests vying for their votes. *Citizens United*, 558 U.S. at 370; *McConnell*, 540 U.S. at 196-97. The

[8] *See Worley v. Florida Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (U.S. 2013); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 37-40 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 163 (U.S. 2012) ("*McKee II*"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41-44, 55 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (U.S. 2012) ("*McKee I*"); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (U.S. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 477 (7th Cir. 2012); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (U.S. 2010).

district court acknowledged the validity of this "informational" interest, "even" with respect to constitutional ballot measure elections. SJ Op. at 15 (ROA.2305). But the court's plain implication—that the informational interest is somehow diminished in the ballot measure context—is simply untenable. Plaintiffs likewise assert that there is "something of a lack of clear guidance from the Supreme Court" regarding the validity of the informational interest in ballot issue elections as compared to candidate elections. *See* Pls.' Mem. Supp. SJ at 14, ECF No. 43. They contend that because the challenged laws do not involve candidate elections, the informational interest has no relevance. This interpretation is at odds with Supreme Court precedent and the overwhelming weight of the case law, which repudiates any such distinction and finds instead that the "informational" interest applies with particular force in the ballot measure setting.

The Supreme Court has demonstrated approval of the informational interest in a variety of electoral contexts. In *Buckley*, the Court identified three broad categories of governmental interests supporting campaign finance disclosure requirements. 424 U.S. at 66-67 (finding that disclosure is justified by informational, anti-corruption and enforcement interests). The Court later refined that framework to incorporate the particular interests at stake in ballot measure elections. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 (1978). While the risk of campaign finance-related corruption present in candidate elections may not

apply in the ballot measure setting, *see id.* at 790, the informational interest is particularly salient where citizens legislate directly by public initiative.

Campaign finance disclosure channels important information into the "marketplace of ideas," thereby improving the overall quality of political discourse and ensuring that citizens are "armed with information" necessary to make political choices and to hold government actors accountable for any misdeeds. *Buckley*, 424 U.S. at 67. As the Supreme Court pointed out in *Buckley*, "informed public opinion is the most potent of all restraints upon misgovernment." *Id.* at 67 n.79 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (relating to federal lobbying disclosure requirements)); *see also Human Life of Wash. v. Brumsickle*, 624 F.3d. 990, 1005-06 (9th Cir. 2010) ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment."), *cert. denied*, 131 S. Ct. 1477 (2011). Therefore, in the context of constitutional amendment ballot initiative elections—in which voters act as legislators and decide matters of extreme public significance—having an informed and active citizenry is particularly essential. *See, e.g.*, *Doe*, 130 S. Ct. at 2828 (Sotomayor, J., concurring) (stating that disclosure advances the vital interest in "sustaining the active, alert responsibility of the individual citizen in a democracy for the wise

conduct of government") (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-89 (1978)).

Indeed, the Supreme Court has never rejected the "informational interest" as a sufficient justification for disclosure requirements in ballot measure elections. In *Bellotti*, for instance, the Supreme Court noted approvingly that disclosure has a "prophylactic effect" on the electoral process because it allows people "to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. The Court's reasoning in *Buckley II* rested on similar grounds. There, the Court upheld a Colorado regulation requiring ballot initiative sponsors to disclose "the source and amount of money paid by proponents to get a measure on the ballot," even though it struck down other requirements relating to Colorado's petition process. 525 U.S. at 203. The Court again invoked the state "informational interest" shortly after *Bellotti*, in *Citizens Against Rent Control v. City of Berkeley (CARC)*, 454 U.S. 290 (1981), which involved a challenge to the City's ordinance limiting contributions to ballot measure committees. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from such committees. *See id*. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance . . . . "). The language in *CARC*

supporting disclosure may be dictum, but, as the Ninth Circuit has recognized, it "certainly suggests that the Court would have upheld the requirement had the question been raised." *Family PAC v. McKenna*, 685 F.3d 800, 810 (9th Cir. 2012).

While the Supreme Court's latest ruling on ballot measure disclosure did not explicitly rely on the state's informational interest, neither did it discount that interest's continuing validity. *See Doe*, 130 S. Ct. at 2819. Instead, the Court simply did not reach Washington's second asserted justification for disclosure. *See id.* ("Because we determine that the State's interest in preserving the integrity of the electoral process [is sufficient to defeat Doe's challenge] . . . we need not, and do not, address the State's 'informational' interest."). If anything, *Doe* supports a conclusion that the political transparency attained through disclosure is even more necessary in direct democracy elections. The opinion suggests that transparency functions dually in this context, advancing both electoral integrity and informational interests. *See id.* at 2819-20 (tying the "transparency" traditionally associated with the informational interest to the state's "undoubtedly important" interest in electoral integrity).

The Supreme Court has also evinced approval for the "informational interest" in different, though related, contexts. For instance, the informational interest has supported a line of Supreme Court and lower court decisions approving

disclosure relating to lobbying. In *United States v. Harriss*, 347 U.S. 612 (1954), the Court upheld the federal Lobbying Act of 1946, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to disclose their clients and their contributions and expenditures. 347 U.S. at 615 & n.1. Lower courts have uniformly followed *Harriss* and upheld state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *See, e.g.*, *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460-61 (11th Cir. 1996); *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985); *Comm'n on Indep. Colls. and Univs. v. N.Y. Temp. State Comm'n*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982). Like lobbying, ballot measure advocacy constitutes a direct effort to intervene in the legislative process. Just as "Congress may require lobbyists to disclose who is paying for [their] services," voters in issue elections "have an interest in knowing who is lobbying for their vote." *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) ("*CPLC I*").

Also at odds with Plaintiffs' position is the overwhelming weight of authority from other Circuits, which have widely endorsed the government's

informational interest in ballot measure elections.[9] Indeed, several Circuits have held that the informational interest is not only sufficient, but is "of the utmost importance," "compelling" and "of the highest order" in ballot measure elections. In *Family PAC*, for example, the court noted that because disclosure requirements "impose only modest burdens on First Amendment rights" but serve "a governmental interest in an informed electorate that is of the utmost importance[,]" the Ninth Circuit has "repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions." 685 F.3d at 806 (emphasis added); *see also Human Life*, 624 F.3d. at 1007 (affirming district court decision finding "an extremely compelling interest in 'following the money' in ballot initiative elections so that the electorate's decision may be an informed one") (emphasis added); *CPLC I*, 328 F.3d at 1105 (noting that initiative and referendum elections produce a "cacophony" of information, so "being able to evaluate who is doing the talking is of great importance"); *Cal. Pro-Life Council v. Randolph*, 507 F.3d 1172, 1178-80 (9th Cir. 2007) ("*CPLC II*") (finding a compelling interest in requiring disclosure of contributors to ballot measure committee). The First Circuit has

[9] *See, e.g.*, *Worley*, 717 F.3d at 1245-49; *Ctr. for Individual Freedom*, 697 F.3d at 480-85; *Family PAC*, 685 F.3d at 803-14; *Human Life*, 624 F.3d at 1002-19; *Nat'l Org. for Marriage, Inc. v. McKee II*, 669 F.3d at 40; *McKee I*, 649 F.3d at 57.

likewise found that "transparency is a compelling objective" in the ballot measure context. *See McKee II*, 669 F.3d at 40; *McKee I*, 649 F.3d at 57.

Plaintiffs urge this Court to reject this general consensus and instead follow the Tenth Circuit's decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), a case concluding that "[t]he legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue elections." The Tenth Circuit's reasoning in *Sampson* is not only at odds with the long list of cases discussed above, but also flatly contradicts the Supreme Court's repeated endorsement of the informational interest in the ballot measure context, which *Sampson* dismisses as dicta. *See id.* at 1258.

B. The Burdens Associated with the Challenged Disclosure Laws, If Any, Are Slight.

Plaintiffs charge that Mississippi's registration and reporting requirements "unconstitutionally burden and chill" protected First Amendment rights, both on their face and as applied to Plaintiffs. Compl. ¶ 68 (ROA.30). But these laws entail only disclosure obligations: they "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (citations and internal quotations marks omitted). The many courts that have upheld disclosure laws, even while striking down "more restrictive" limitations on contributions and expenditures, have not ignored similar claims of "chill." The Buckley Court acknowledged that disclosure might "deter some individuals who

otherwise might contribute[,]" but nevertheless upheld FECA's disclosure requirements because they appeared to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68; *see also Family PAC*, 685 F.3d at 806-07 (finding the burdens associated with disclosure to be "modest"); *Ctr. for Individual Freedom*, 697 F.3d at 482 (finding it "regrettable" that Illinois reporting requirements would deter plaintiff "from engaging in its preferred form of public advocacy[,]" but that burden was not sufficient to conclude that "voters must remain in the dark" about the sources of campaign speech). Plaintiffs here cannot overcome the manifest state interest in disclosure by simply asserting that compliance with the laws is "onerous." Compl. ¶ 65-66, 71 (ROA.29, ROA.31).

Under Mississippi law, once a group has collected or spent more than $200 to influence voters for or against a constitutional ballot measure, the group must register as a political committee by completing a simple one-page form. Miss. Code Ann. §§ 23-17-47; 23-17-49(1). Each political committee is then required to file monthly reports with its name, address, and telephone number, *id.* § 23-17-53(a), as well as information about the committee's basic finances over the pertinent period, including:

- total receipts and expenditures, *id.* § 23-17-53(b)(i) to (b)(iii);
- balance of cash and cash equivalents on hand, *id.* § 23-17-53(b)(iv);
- total contributions received from persons contributing under $200, *id.* § 23-17-53(b)(v); and

- total contributions received from persons contributing $200 or more, *id.* § 23-17-53(b)(vi).

In addition, each contribution and disbursement exceeding $200 must be itemized on the reports with the contributor's name and address, the amount contributed, the date of receipt, and the cumulative amount contributed by that person. *Id.* § 23-17-53(b)(vii); Monthly Report (ROA.759); Itemization Forms (ROA.760, ROA.761). The reporting requirements for individuals are substantially the same. *Id.* § 23-17-53(c). A committee may file a termination report as soon as it finishes receiving contributions or making expenditures, at which point its reporting obligations cease. Its final monthly report can even be its termination report. *See* Miss. Code Ann. § 23-17-51(3); Appellants' Br. at 12.

Beyond these basic obligations to register, report, and maintain minimal records, Mississippi imposes few organizational requirements on political committees. By comparison, many states prohibit cash contributions entirely, or require committees to appoint a registered agent and open a separate bank account upon registration—a distinction that the district court actually recognized in denying Plaintiffs' Motion for Preliminary Injunction. *See Justice v. Hosemann*, 829 F. Supp. 2d 504, 519 (N.D. Miss. 2011) (finding that the challenged disclosure requirements "do not unduly inhibit the ability of the Plaintiffs to raise money, nor do they impose overly burdensome structural requirements on the Plaintiffs").

In upholding Maine's disclosure law against a similar claim of "unconstitutional burden," the First Circuit noted approvingly that the law "does not condition political speech on the creation of a separate organization or fund, establishes no funding or independent expenditure restrictions, and imposes three simple obligations on an entity qualifying as a PAC: filing of a registration form disclosing basic information, quarterly reporting of election-related contributions and expenditures, and simple recordkeeping." *McKee I*, 649 F.3d at 56; *see also Human Life*, 624 F.3d at 1009-10.[10] Like the challengers in *McKee I*, Plaintiffs have not demonstrated that the compliance burdens associated with this reporting are anything other than marginal.

Instead, they claim that the inherent "burdens" of disclosure are unconstitutional, and cite several Supreme Court cases that purportedly support this conclusion. *See* Pls.' Mem. Supp. Summ. J. at 17-21 (citing *Citizens United* and *Mass. Citizens for Life v. FEC*, 479 U.S. 238 (1986) ("*MCFL*")). Plaintiffs'

[10] The decision by the Eighth Circuit Court of Appeals in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012), although incorrectly reasoned, does not compel a different conclusion. There, the Eighth Circuit considered a Minnesota disclosure law that required associations making more than $100 in independent expenditures to register a "political fund," file regular reports and comply with a range of organizational requirements. The Court of Appeals upheld much of the "political fund" disclosure regime, but struck down the "ongoing" reporting requirement as applied to non-major-purpose groups, stating that an "event-driven" reporting requirement would adequately address the government's interests in disclosure. 692 F.3d at 873. *Amicus* believes the Eighth Circuit was unduly stringent in its review of the law: although the Court claimed to apply "exacting scrutiny," it incorrectly held each aspect of Minnesota's disclosure regime to the "least restrictive means" standard that should be reserved for strict scrutiny review. *Id.* at 876. However, the Court let stand the majority of Minnesota's disclosure requirements.

proffered authority misses the mark. *MCFL* was not a disclosure case: instead, it involved a challenge to a federal law prohibition on corporate political spending. The challenged law required MCFL to speak through a "separate segregated fund" rather than its general treasury, imposing a "substantial" restriction on MCFL's speech. 479 U.S. at 252 (plurality opinion of Brennan, J.). MCFL notably did not challenge the federal law definition of "political committee," *see* 2 U.S.C. § 431(4), nor any of the federal law disclosure requirements applicable to political committees. *See* 2 U.S.C. §§ 432-34. Indeed, Justice O'Connor made clear in concurrence that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." 479 U.S. at 266 (O'Connor, J., concurring in part and concurring in the judgment). Mississippi's disclosure laws involve only a fraction of the disclosure requirements that were applicable to MCFL, and do not impose either the substantive fundraising restrictions or organizational requirements of federal law.

Citizens United is also inapposite. To demonstrate the alleged burdensomeness of Mississippi's disclosure laws, both the Plaintiffs and the district court point to the same passage in *Citizens United*, *see* SJ Op. at 26 (ROA.2316); Pls.' Mem. Supp. Summ. J. at 20, in which the Court observed: "The First Amendment does not permit laws that force speakers to retain a campaign

finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." 558 U.S. at 324. But this language is from a part of the decision addressing a direct ban on speech, and has nothing to do with disclosure—a fact conspicuously absent from the lower court's opinion.

In short, Plaintiffs have advanced no credible authority or argument for why Mississippi's minimal reporting requirement fails exacting scrutiny.

C. Mississippi's Reporting Thresholds Are Not "Wholly Without Rationality."

Finally, Plaintiffs charge that Mississippi's $200 disclosure threshold is unconstitutionally low. Contrary to their assertions, however, a $200 disclosure threshold does not fail to satisfy the "wholly without rationality" constitutional standard articulated in *Buckley*.

It is well-settled that the determination of disclosure thresholds is a task best left to the legislature. *See Buckley*, 424 U.S. at 83. As with other issues that demand difficult line-drawing, courts cannot substitute their policy preferences for those of the elected branches. Accordingly, disclosure thresholds are constitutionally valid so long as they are not "wholly without rationality." *Id.* As *Buckley* itself made clear, even apparently "low" thresholds pass constitutional muster under this forgiving standard. *See id.* (noting that although there was "little in the legislative history to indicate that Congress focused carefully on the

appropriate level at which to require recording and disclosure," the requirement was not "wholly without rationality"). Indeed, the Supreme Court suggested in *CARC* that even zero-dollar disclosure thresholds could be constitutionally sound. 454 U.S. at 300 ("[I]f it is thought wise, legislation can outlaw anonymous contributions.").

Almost every other court has recognized that *Buckley* is controlling on this point. In *McKee I*, the First Circuit relied on the "wholly without rationality" standard to uphold Maine's $100 disclosure threshold. The *McKee I* court noted that the plaintiff's argument "operate[d] from a mistaken premise" because reporting thresholds are not subject to "exacting scrutiny" review. 649 F.3d at 60. Instead, the court restated *Buckley*'s "wholly without rationality" standard as one requiring "judicial deference to plausible legislative judgments." *Id.* (internal citations omitted). *See also Family PAC*, 685 F.3d at 811 (9th Cir. 2012) (recognizing that "disclosure thresholds . . . are inherently inexact[,]" so courts "owe substantial deference to legislative judgments fixing these amounts"); *Nat'l Org. for Marriage, Inc. v. Daluz*, 654 F.3d 115, 118-19 (1st Cir. 2011) (applying *Buckley*'s "wholly without rationality" standard to uphold Rhode Island's $100 reporting threshold); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 946 (E.D. Cal. 2011) (observing that California's $100 threshold "falls wells within the spectrum of those mandated by its sister states, which range from no threshold

requirement to $300"). In any event, slight differences in the dollar amounts that trigger disclosure requirements are not of constitutional dimension. They are "distinctions in degree," not significant "differences in kind." *Buckley*, 424 U.S. at 30; *see also id.* ("a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000") (citation and quotation marks omitted).

The circumstances presented to the Tenth Circuit in *Sampson* were materially different. There, the plaintiffs had raised under $1,000 ($782.02) in monetary and in-kind contributions. Here, by contrast, Plaintiffs intend to raise and spend "in excess" of $200, and there is certainly reason to believe they will raise and spend well in excess of that minimum amount. Similarly, the Ninth Circuit's decision in *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), is hardly persuasive authority in favor of invalidating Mississippi's $200 threshold as "unconstitutionally low." *See* SJ Op. at 22-23 (ROA.2312-13). There, the Ninth Circuit held that Montana's zero-dollar threshold for disclosure was unconstitutional as applied to a religious organization that only incidentally engaged in *de minimis*, in-kind political spending. These decisions provided no basis to conclude that Mississippi's $200 disclosure thresholds are anything but reasonable.

CONCLUSION

For the foregoing reasons, the district's court decision should be reversed.

RESPECTFULLY SUBMITTED this 3rd day of March, 2014.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ J. Gerald Hebert
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Dated: March 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for the following participants in the case:

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