No. 13-333

In the

Supreme Court of the United States

ANDREW NATHAN WORLEY, ET AL.,

Petitioners,

v.

FLORIDA SECRETARY OF STATE, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization engaged in public education about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through academic research and state and federal litigation.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

Amici have participated in many of the notable campaign finance and political speech cases, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011). *Amici* have an interest in this case because it involves a restriction on political participation that, in their view, violates the First Amendment as applied to the Petitioners and those similarly situated.

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[1] No party contributed to the preparation or filing of this brief, which was authored entirely by counsel for *Amici*. Pursuant to Rule 37 of this Court, all parties received timely notice of *Amici*'s intention to file this brief and consented to such filing.

SUMMARY OF ARGUMENT

While disclosure of political spending has been a cornerstone of campaign finance law since *Buckley v. Valeo*, 424 U.S. 1 (1976), some forms of disclosure are more burdensome than others. In *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), this Court recognized PAC requirements in particular as capable of imposing unconstitutional burdens upon certain nonprofit organizations. A plurality of the Court focused on the chilled speech resulting from the imposition of such onerous requirements on groups like MCFL. *MCFL*, 479 U.S. at 255 (Brennan J., plurality opinion). Similarly, Justice O'Connor expressed concern about the chilling effect of PAC organizational requirements. *Id.* at 266 (O'Connor, J., concurring).

This case involves a group of individuals who wish to pool their modest resources to purchase $600 worth of local radio commercials. Consistent with *MCFL,* the Court of Appeals ought to have reviewed the burdens imposed upon this political speech—the speech of poorly-financed actors—by Florida's PAC requirements. Instead, the Eleventh Circuit chose, *sua sponte,* to treat this case as a facial challenge to those provisions.

That decision, based upon a hypothetical million-dollar donor created at oral argument, was mistaken. This Court has long held that as-applied challenges are the preferred method of constitutional adjudication. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006). Indeed, this Court expressly upheld the as-applied path of constitutional litigation

for campaign finance challenges in *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006).

The Eleventh Circuit based its decision, in part, on a standard of "exacting scrutiny." Pet'rs' App. 10 (citing *Citizens United*, 558 U.S. at 366-67; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012)). But "exacting scrutiny" must be *some* scrutiny—indeed, even if this case were viewed through the lens of disclosure, exacting scrutiny still "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010). The approach taken by the Court of Appeals, which ignored a factual record developed before the district court in favor of a hypothetical posed at argument, does not meet this standard, and furthermore conflicts with the Tenth Circuit's approach in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

Given the differing approaches taken by the Courts of Appeals, the need for as-applied challenges to remain a viable means of vindicating constitutional liberties, and the important First Amendment issues implicated here, the petition for *certiorari* should be granted.

ARGUMENT

This Court should grant the petition for *certiorari* to address the Judiciary's duty to meaningfully review as-applied challenges to laws burdening fundamental First Amendment rights.

A. PAC status burdens speech more fundamentally than does mere "disclosure," and the Eleventh Circuit below failed to consider this burden in assessing the Florida law's constitutionality.

Reporting and disclosure of political spending have been a fundamental part of campaign finance law since this Court's landmark ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976). Indeed, "[t]he Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (citing *MCFL*, 479 U.S. at 262 (1986)). But not all laws claiming to regulate "disclosure" impose the same burden upon speakers.

Less burdensome disclosures include, for example, requirements that candidates disclose information about contributions above a certain monetary threshold. *See, e.g., Buckley*, 424 U.S. at 68. In Florida, however, PACs are required to register, record, and report beyond such baseline disclosures—indeed, the state provides no baseline, instead requiring disclosure of all contributions to and expenditures by a PAC, regardless of amount. *Compare, e.g., Citizens United*, 558 U.S. at 337-38; *MCFL*, 479 U.S. at 252 (Brennan, J., plurality).

Laws that impose the additional organizational requirements of PAC status are invalid when they are unduly burdensome in light of the underlying government interest. This Court recognized such an instance in *MCFL*, which invalidated a state law requiring an incorporated nonprofit advocacy group to create a separate segregated fund in order to make independent expenditures.

In doing so, the Court balanced the government's anti-corruption interest against the burden imposed by the segregated fund requirement, and concluded that the law swept too broadly. Noting that MCFL was formed to "disseminate political ideas, not to amass capital," *id.* at 259, the Court recognized that "[r]egulation of corporate political activity…has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL…do not pose that danger of corruption." *Id.*

A plurality of the Court noted "the effect of additional reporting and disclosure obligations," *id.* at 255 n. 7, on nonprofits like MCFL. Justice Brennan, the opinion's author, clearly stated that the additional burdens unjustifiably chilled speech: "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak." *Id.* He also expressed concern that

> [d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear…. [I]t would not be

> surprising if at least some groups decided that the contemplated political activity was simply not worth it.

Id. at 254-55.

Justice O'Connor, concurring in the judgment, agreed that the disclosure requirements, in and of themselves, did not make the separate segregated fund requirement unconstitutionally burdensome for groups like MCFL.

> [T]he 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.…[E]ngaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates [its] sources of funding…These additional requirements do not further the Government's informational interest in campaign disclosure.

Id. at 266 (O'Connor, J., concurring) (emphasis supplied).

Justice O'Connor also reiterated what is axiomatic in this constitutional context: that it is incumbent upon the government—not the speaker—to demonstrate that burdensome laws are justified. "Although the organizational and solicitation restrictions are not invariably an insurmountable burden on speech, in this case *the Government has failed to show* that groups such as MCFL pose any danger that would justify infringement of its core

political expression." *Id.* (citing *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982)) (emphasis supplied).

Petitioners here were denied such review even though "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [that statute] as an infringement on First Amendment activities." *MCFL* at 255 (Brennan, J., plurality) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958)). *See also, MCFL* at 265 (O'Connor, J., concurring) ("In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on a group's own speech.") (citing *Buckley* at 66-68; 74-82)).

The Eleventh Circuit did not consider whether Florida's "registration, bookkeeping, and reporting requirements," Pet'rs' App. 2, unconstitutionally burdened the Petitioners' speech. It instead considered a number of First Amendment cases—many of them as-applied challenges—and concluded, vaguely, that it could not "say that the PAC regulations are too broad to be substantially related to Florida's informational interests." Pet'rs' App. 29. *See also,* Pet'rs' App. 22 ("Our reading of Supreme Court and persuasive Circuit precedent compels us to conclude that promoting an informed electorate in a ballot issue election is a sufficiently important governmental interest to justify the Florida PAC regulations we consider here.").

This level of judicial review is particularly alarming for Petitioners who, in contrast to large

political committees that formed the model for modern PACs, wish to disseminate political ideas (like the plaintiff in MCFL), and have only the modest resources required to spend $600 on radio advertisements. Indeed, the Eleventh Circuit noted that Florida law required the Petitioners to, *inter alia*, organize, register, appoint a treasurer, establish a depository, keep records current to within no more than two days, file regular reports of every contribution and expenditure—whatever the size—and submit to random audits. Pet'rs' App. 3-4. This is incompatible with *MCFL*, which found an additional organizational requirement unduly burdensome for a plaintiff which, by virtue of its status as a nonprofit corporation, was already responsible for moderately sophisticated filings with the state. The Court of Appeals ought to have noted that if the burden of PAC status was too heavy for an established nonprofit—complete with corporate form, counsel, and regularized governance—it was arguably too heavy for the Petitioners.

B. The Eleventh Circuit's failure to consider the burden Florida PAC requirements impose upon the Petitioners resulted from its *sua sponte* decision to consider their challenge facially rather than as applied.

Because they balance a measure of legislative deference with the need to protect the constitutional rights of individual citizens, as-applied challenges are the preferred method of constitutional adjudication, *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006) ("a statute may be invalid as applied to one

state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far") (internal citations and quotation marks omitted). As-applied challenges allow aggrieved parties to address gravely flawed statutes in light of the fact that "[a] facial challenge to a legislative Act is…the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The as-applied path is particularly important in the campaign finance context. This Court's holding in *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") illustrates the error committed below, and underscores the need for serious judicial review in the campaign finance context.

The *WRTL I* plaintiffs challenged the application of a statute previously upheld against a facial challenge. *WRTL I*, 546 U.S. at 411. The lower court dismissed the action. *Id.* at 411. This Court vacated and remanded for consideration on the merits of the as-applied challenge, noting that in upholding a statute facially, the Court "did not purport to resolve future as-applied challenges." *Id.* at 411-12; *see also*, *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) ("[W]e note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.").

Despite clear precedent requiring courts to review challenged statutes on an as-applied basis, the

Eleventh Circuit's analysis assumed facts not in evidence—indeed, facts which created a best-case scenario for defending the challenged statute. This approach sidestepped the record, which illustrated the statute's effect upon the Petitioners. *See, e.g.,* Pet'rs' App. 6 n. 2 ("Based on the record now before us, we have analyzed this case as a facial challenge to the Florida Campaign Financing statutes made by groups spending to influence ballot issue elections as opposed to candidate elections.").

The Court of Appeals relied upon counsel's comment—in response to the court's question at oral argument—that if some hypothetical donor were to give the Petitioners a million-dollar donation, "[Petitioners] would be happy to spend it." *Id.* The record, however, indicates that this scenario is extremely implausible.

This approach stands in sharp contrast to that undertaken by the Tenth Circuit in *Sampson v. Buescher*, 625 F.3d 1247 (2010). The *Sampson* case arose when a group of neighbors came together to oppose a local ballot initiative and distributed signs and mailers summarizing the arguments against the measure. *Id.* at 1251. Like Petitioners, that group spent less than $1,000 in their efforts. *Id.* at 1260; *see also id.* at 1260 n. 5 (detailing contributions and expenditures of the *Sampson* neighbors). A political opponent then initiated an enforcement action, claiming that the group should have registered as a Colorado Ballot Committee. *Id. See also*, COLO. CONST. art. XXVIII, § 9(2)(a) (providing private enforcement of violations of Colorado's campaign finance laws). The enforcement action eventually settled. *Id.* at 1253. Meanwhile, the neighbors

opposing annexation filed suit in the District of Colorado seeking declaratory relief from Colorado's campaign and regulation disclosure regime as applied to their activities. *Id.*

While the Tenth Circuit noted that, because of the timing of their activities, the State's registration and reporting requirements may not have applied to the *Sampson* plaintiffs under Colorado law, the Court of Appeals nonetheless examined the constitutional claims as applied to the neighbors. *Id.* at 1252 n. 2 (noting the registration requirements were not yet triggered); *id.* at 1259 (as-applied analysis of Colorado's registration and reporting requirements). The court balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal." *Id.* at 1260. The Tenth Circuit then held that Colorado's campaign registration and reporting requirements were unconstitutional as-applied to the *Sampson* neighbors. *Id.* at 1261.

The Eleventh Circuit ought to have followed the example set by the Tenth. Deciding an as-applied challenge under a hypothetical set of facts finding no support in the record is problematic, both because of the highly burdensome nature of PAC status and because it preempts the required searching judicial review of statutes which may be valid in only a few contexts. It is incumbent upon this Court to clarify that *WRTL I* requires meaningful review of as-applied challenges to state statutes burdening constitutionally protected activity.

C. The Court of Appeals' decision is particularly troubling since, to sustain the law's constitutionality as applied to Petitioners, the government was obliged to meet a heightened burden.

As Petitioners note, *Citizens United* applied strict scrutiny to a law requiring a corporations to establish PACs before making independent expenditures because PAC status is "burdensome . . . expensive . . . and subject to extensive regulations." *Id.* at 337-38, 340. Nevertheless, the Eleventh Circuit rests its decision, at least in part, upon a holding that "disclosure schemes are subject to exacting scrutiny." Pet'rs' App. 11 (citing *Citizens United*, 558 U.S. at 366-67; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012)).

But even under exacting scrutiny, *some* degree of judicial review is required, and this Court has foresworn "accept[ing] mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). Indeed, even when dealing with freedoms lying further from the core of the First Amendment than political ones, this Court has demanded that the government demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to some degree." *Greater New Orleans Broadcasting Ass'n. v. United States,* 527 U.S. 173, 188 (1999) (internal citations and quotation marks omitted).

The analysis below is insufficient even under exacting scrutiny, which "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To

withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (citations and quotation marks omitted). Because the Eleventh Circuit failed to consider the Petitioners' specific situation, it ignored the "actual burden on First Amendment rights" they suffered, and thus failed to conduct the required analysis.

Allowing the decision below to stand would create substantial burdens for all constitutional litigants. If there exists an unsubstantiated set of facts under which a statute *might* be constitutional, a litigant would be bound by those facts—rather than those established on the record—in seeking vindication of his constitutional rights. While such hypotheticals are a hallmark of facial constitutional challenges, they are wholly inappropriate in an as-applied context.

Finally, allowing the Eleventh Circuit's ruling to stand creates perverse incentives for both government and litigants. Scrutiny—whether exacting or strict—is meaningless if the government can avoid active review of burdensome laws via strategic labeling. The decision below creates incentives for states to label increasingly burdensome requirements as "disclosure," with the assurance that reviewing courts will "defer" to a legislative judgment that such laws are necessary. *See Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 875 (8th Cir. 2012) (state cannot "sidestep strict scrutiny by simply placing a 'disclosure' label on laws imposing…substantial…burdens").

Under the Eleventh Circuit's reasoning, appellate courts will be permitted to evaluate as-applied challenges without reference to the record (itself often developed through considerable effort and expense on the part of the plaintiff). This not only undermines the as-applied challenge as the preferred means of constitutional adjudication, but also teaches citizens that, more often than not, the doors of the federal courts are closed to individual plaintiffs seeking vindication of their political rights.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari* and, at a minimum, remand this case for consideration as applied to the Petitioners, consistent with its ruling in *WRTL I*.

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Respectfully Submitted,

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