RECORD NO. 12-14074-AA

In The
United States Court of Appeals
For The Eleventh Circuit

ANDREW NATHAN WORLEY; PAT WAYMAN; JOHN SCOLARO,

Plaintiffs – Appellants,

versus

KENNETH W. DETZNER, *et al.*,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREW NATHAN WORLEY, et al.,
Appellants,

v. Docket No. 12-14074-AA

KENNETH W. DETZNER, et al.,
Appellees.

APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. L. R. 26.1, Appellants Andrew Nathan Worley, Pat Wayman and John Scolaro, hereby file this Certificate of Interested Persons and Corporate Disclosure Statement:

Browning, Kurt S. – Former Defendant in his official capacity as Florida Secretary of State

Cruz-Bustillo, Jorge L. – Former Defendant in his official capacity as Chair of the Florida Elections Commission

Davis, Ashley E. – Counsel for Appellees/Defendants

Detzner, Kenneth W. – Appellee/Defendant

DeWolf, Diane G. – Counsel for Appellees/Defendants

Faraj-Johnson, Alia, S. – Appellee/Defendant

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Hall, Sean – Appelle/Defendant

Hinkle, Robert L. – United States District Court Judge

Holladay, Tim – Appellee/Defendant

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Jacobs, Jr., E. Leon – Appellee/Defendant

Jean-Bart, Leslie Scott – Appellee/Defendant

Kane, Julie B. – Former Defendant in her official capacity as member of the Florida Elections Commission

King, Gregory – Appellee/Defendant

Mellor, William H. – Counsel for Appellants/Plaintiffs

Nordby, Daniel E. – Counsel for Appellees/Defendants

Roberts, Dawn K. – Former Defendant in her official capacity as Florida Secretary of State

Rodgriguez, Jose Luis – Former Defendant in his official capacity as member of the Florida Elections Commission

Rossin, Thomas E. – Former Defendant in his official capacity as member of the Florida Elections Commission

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Schwartz, Darren A. – Counsel for Appellants/Plaintiffs

Scolaro, John – Appellant/Plaintiff

Seymour, Brian M. – Appellee/Defendant

Sherman, Paul M. – Counsel for Appellants/Plaintiffs

Stern, Barbra – Appellee/Defendant

Stublen, Robin – Former Plaintiff

Upton, C.B. – Former Counsel for the Florida Secretary of State

Wayman, Pat – Appellant/Plaintiff

Worley, Andrew Nathan – Appellant/Plaintiff

Appellants/Plaintiffs are not subsidiaries or affiliates of a publicly owned corporation, and no publicly owned corporation, not a party to the litigation, has a financial interest in the outcome of this case.

Dated this 9th day of October, 2012.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants respectfully request oral argument, as this case presents novel and complex questions of constitutional law, including the limits the First Amendment imposes on the government's power to regulate grassroots political speakers.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this constitutional challenge to a state statute under 42 U.S.C. § 1983. The district court issued a final judgment disposing of all claims on July 3, 2012. Plaintiff-Appellants ("Plaintiffs") filed a timely notice of appeal on August 1, 2012. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under Florida law, grassroots groups of citizens who wish to fund their own political speech promoting or opposing ballot issues are subject to extensive regulation as "political committees" and must also include state-mandated disclaimers in their political advertisements. The questions presented on appeal are:

1. Whether the district court erred by concluding that Florida's imposition of political-committee burdens on groups that merely advocate the passage or defeat of ballot issues does not violate the First Amendment either facially or as-applied.
2. Whether the district court erred by concluding that Florida's disclaimer requirement for advertisements by groups that merely advocate the passage or defeat of ballot issues does not violate the First Amendment either facially or as-applied.
3. Whether the trial court erred in refusing to strike certain testimony presented by the government in defense of the foregoing requirements?

STATEMENT OF THE CASE

This is a constitutional challenge to various provisions of Florida law that regulate grassroots groups that promote or oppose the passage of ballot issues. Plaintiffs filed their six-count complaint for declaratory and injunctive relief in

September 2010. R-1-1.[1] In October of that year, the district court entered an order denying in substantial part Plaintiffs' motion for preliminary injunction. R-1-B at 6, Dkt. 27. Following discovery, the parties filed cross-motions for summary judgment. R-1-B at 7, Dkt. 39, 40. Plaintiffs also filed a motion to strike certain inadmissible testimony by the Defendants' expert witness. R-2-48. The district court heard argument on the motions during a hearing on July 27, 2011. On July 3, 2012, the district court entered a final judgment disposing of all pending claims and a separate order denying as moot Plaintiffs' motion to strike. R-2-59; R-2-60.

In its opinion on the merits, the district court held that Florida's political-committee requirements did not violate the First Amendment as applied to ballot-issue speakers in general or to small groups like Plaintiffs. R-2-59 at 5–11. The district court also held that Florida's disclaimer requirements, which require political speakers to devote a substantial amount of their advertising time to a state-mandated message, do not violate the First Amendment as applied to ballot-issue speakers in general or to Plaintiffs' proposed radio ads. R-2-59 at 11–14. The district court did hold, however, that a provision of Florida's laws that prohibited political committees from spending any money raised in the last five days before an election until after the election had passed violated the First Amendment. R-2-

[1] In accordance with Circuit Rule 28-5 references to the record conform to the following format: R-<volume number>-<document number>-<sub-document number, if any> at <page or paragraph number, if applicable>.

59 at 14–15. Because none of the district court's reasoning relied on the expert testimony that Plaintiffs had moved to strike, the district court denied that motion as moot. R-2-60.[2] Plaintiffs filed their notice of appeal on August 1, 2012. R-2-65. The state did not file a cross-appeal regarding the five-day expenditure restriction.

Statement of Facts

I. The Plaintiffs and Their Speech.

Nathan Worley, Pat Wayman, and John Scolaro—collectively, "Plaintiffs"—are Florida residents who, along with former Plaintiff Robin Stublen,[3] wanted to speak out against proposed Amendment 4 to the Florida

[2] The court's failure to resolve the question of admissibility puts Plaintiffs in a difficult position on appeal. Plaintiffs have no way of knowing whether the State will again attempt to rely on this inadmissible evidence, but Plaintiffs must raise the issue (Issue 3) in this initial brief to avoid its being "considered abandoned." *Sovereign Military Hospitaller Order of St. John v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of St. John*, No. 11-15101, 2012 U.S. App. LEXIS 19104, at *41 (11th Cir. Sept. 11, 2012). Thus, in the event that the State relies on the objected-to statements by Professor Smith, Plaintiffs wish to preserve the objections to the admissibility of that testimony set forth in Plaintiffs' Motion to Strike Certain Testimony of Daniel Smith, Ph.D., and Plaintiffs' reply brief in support of that motion. R-2-48; R-2-52-1. Whether this evidence conforms to the requirements of Federal Rules of Evidence 701 and 702 is a pure question of law that this Court may determine in the first instance, should it become necessary to do so.

[3] On November 23, 2010, Robin Stublen filed notice that he was voluntarily dismissing his claims against Defendants. The district court entered an order dismissing Mr. Stublen's claims without prejudice on December 1, 2010. Although Mr. Stublen is no longer a plaintiff, he provided undisputed testimony that, if the laws challenged in this case are struck down, he will pool his money with the remaining Plaintiffs to fund political ads in future elections. R-1-40-5 at 7, ¶ 24.

Constitution during the 2010 election. R-1-40-2 at 1–2, ¶¶ 1–4; R-1-40-3 at 1–2, ¶¶ 1–4; R-1-40-4 at 1–2, ¶¶ 1–4; R-1-40-5 at 1–2, ¶¶ 1–4. Amendment 4, if enacted, would have required local governments to submit all changes to their comprehensive land-use plans to a referendum of the voters for approval. R-1-40-17 at 1. Plaintiffs considered Amendment 4 an affront to property rights that would have had a devastating effect on Florida's economy. R-1-40-2 at 2, ¶ 4; R-1-40-3 at 2, ¶ 4; R-1-40-4 at 2, ¶ 4; R-1-40-5 at 2, ¶ 4. Accordingly, they wanted to urge their fellow Floridians to vote against the amendment on the November ballot. *Id.*

In order to make their speech as effective as possible, Plaintiffs wanted to associate with one another by pooling their money to purchase advertising time on a local talk-radio station. R-1-40-2 at 2–3, ¶ 7; R-1-40-3 at 2, ¶ 7; R-1-40-4 at 3, ¶ 7; R-1-40-5 at 2–3, ¶¶ 7–10. In addition to allowing them to purchase more ads than they could individually, associating with one another would have allowed Plaintiffs Nathan Worley, Pat Wayman, and John Scolaro to take advantage of Robin Stublen's greater experience with radio advertising. *Id.* Collectively, Plaintiffs were prepared to spend at least $600 ($150 apiece) on their effort, and would have spent even more if others had agreed to contribute to their efforts. R-1-40-2 at 2–4, ¶¶ 7, 12–13; R-1-40-3 at 2–4, ¶¶ 7, 12–13; R-1-40-4 at ¶¶ 7, 13–14; R-1-40-5 at 2–4, ¶¶ 8, 14–15. Based on price quotes Plaintiffs received from a local

talk-radio station, this amount of money would have allowed them to run 30 advertisements of 30 seconds at $20 apiece. R-1-40-5 at 2, ¶ 8; R-1-40-7 at 1, ¶ 3.

Plaintiffs prepared a script for their advertisement. R-1-40-5 at 3, ¶ 9; R-1-40-6. The draft advertisement consisted of what Plaintiffs viewed as the top five reasons why voters should reject Amendment 4. R-1-40-6. The draft advertisement did not contain the legally required disclaimer discussed in more detail in Part II, below. *Id.* As written, it took a full 30 seconds to read Plaintiffs' advertisement. R-1-40-5 at 3, ¶ 9.

II. Florida's Campaign-Finance Laws.

Had Plaintiffs gone forward with their proposed advertisements, they would have been considered a "political committee." R-1-40-18 at 1 (Defs.' Resps. to Pls.' Req. for Admis. No. 1). Under Florida law, a political committee is any group of people that raises or spends more than $500 for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue that will appear on the ballot. Fla. Stat. § 106.011(1) (2012).

Political committees (commonly called PACs) are the most heavily regulated entity under Florida's campaign-finance laws. Among other things, every PAC is required to:

- register with the state within 10 days after it is organized or, if it is organized within ten days of an election, register immediately, Fla. Stat. § 106.03(1)(a);

- appoint a treasurer and establish a campaign depository, *id.* § 106.021(1);
- deposit all funds within five days of receipt, *id.* § 106.05;
- make all expenditures by check drawn from the campaign account, *id.* § 106.11;[4]
- keep "detailed accounts" of receipts and expenditures, current to within no more than two days, *id.* § 106.06(1);
- maintain records for at least two years after the date of the election to which the accounts refer, *id.* § 106.06(3);
- file regular reports with the Division of Elections, itemizing every single contribution and expenditure, no matter how small, *id.* § 106.07(4)(a); and
- submit to random audits by the Division of Elections, *id.* § 106.22(10).

PACs also face numerous prohibitions on their activities. For example, PACs are prohibited from spending anonymous contributions or receiving cash contributions greater than $50, which effectively prohibits them from "passing the hat" for donations. *See id.* § 106.09; Fla. Div. of Elections, *Anonymous Contributions*, DE 89-02 (1989), *available at* http://opinions.dos.state.fl.us/searchable/pdf/1989/de8902.pdf (last visited October 7, 2012).

Of the 24 states that hold ballot-issue elections, Florida is one of only four that has no minimum threshold for reporting contributions to, or expenditures

[4] Committees are permitted to establish "petty cash" funds, but those funds cannot be used to pay for any advertising expenses. Fla. Stat. § 106.12(3).

made by, a PAC.[5] All contributions and expenditures, regardless of size, must be individually reported. Fla. Stat. § 106.07(4)(a). This means that if the PAC receives even one dollar from a contributor, it must record that contribution and report it to the state along with the contributor's name and home address. *Id.* § 106.07(4)(a)1. Similarly, PACs must disclose even minor expenditures, like pens or other office supplies. *Id.* § 106.07(4)(a)6. All of this information is then disclosed on the Florida Division of Elections website. *See* R-1-40-19 at 1 ("For committees, the campaign finance database contains all contributions and expenditures reported to the Florida Division of Elections since January 1, 1996.").

In addition to these PAC requirements, all speakers in Florida, including PACs, that make independent expenditures must include disclaimers in their political advertisements that prominently state "Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee)." Fla. Stat. § 106.071(2).

III. The Burden of Florida's Campaign-Finance Laws on Plaintiffs.

As Plaintiffs' expert witness Dr. David Primo observed, "Campaign finance disclosure laws place burdens on individuals who wish to work together to speak on a ballot issue. . . . First, and most importantly, the requirements for complying

[5] The other three are Alaska, Alaska Stat. § 15.13.040(e)(5)(A) (2012), Michigan, Mich. Comp. Laws. § 169.226(e) (2012), and Ohio, Ohio Rev. Code. Ann. § 3517.10(B)(4)(b) (2012).

with disclosure laws may be onerous and burdensome." R-1-40-8 at 5, ¶ 15. In addition to these compliance costs, Plaintiffs face two additional burdens: the chilling effect on their speech caused by the complexity of Florida's campaign-finance laws and the direct regulation of the content of their speech by Florida's disclaimer requirement. Ultimately, Plaintiffs considered these burdens so significant that they did not run their proposed advertisement. R-1-40-2 at 3–5, ¶¶ 11, 18; R-1-40-3 at 3, 5, ¶¶ 11, 18; R-1-40-4 at 4, 6, ¶¶ 12, 19.

A. The complexity of Florida's law.

Plaintiffs had only a limited amount of time to devote to their political advocacy. R-1-40-2 at 3–4, ¶ 11; R-1-40-3 at 3, ¶ 11; R-1-40-4 at 4, ¶ 12. Because they became interested in speaking close to the election, they did not feel that they had enough time to also learn and comply with the many regulations that apply to political committees. *Id.* Plaintiff Pat Wayman had previously reviewed the laws that apply to political committees. R-1-40-4 at 3–4, ¶ 10. Despite having worked in a law office, she found the legal requirements confusing and did not believe that she could balance the time required to serve as a political-committee treasurer with her other responsibilities. *Id.*

The Florida Elections Commission, the agency charged with enforcing Florida's campaign-finance laws, reports that, in all, "[t]here are almost 100 separate violations" possible under Florida's campaign-finance laws, R-1-40-21 at

2, all of which are subject to civil penalties and many to additional criminal penalties or even jail time, *see* Fla. Stat. §§ 106.07(8), .265(1) (civil penalties); *id.* §§ 106.071(4), .08(7), .09(2), .19 (criminal penalties). The Florida Division of Elections itself notes that "the laws governing campaign finance reporting and campaign financing limitations are complex." R-1-40-22 at 2. Indeed, even people with years of experience can make mistakes, as the Rule 30(b)(6) deposition of the Division of Elections demonstrated. The designee for that deposition was Kristi Bronson, an attorney who at that time had served for over six years as chief of the bureau that manages the Division of Elections helpline. During the deposition, the Assistant General Counsel for the Florida Department of State removed her from the room to consult with her because she was giving inaccurate answers to questions about the application of Florida's campaign-finance law to in-kind contributions. R-1-40-23 at 60:2–62:19; R-2-40-24 at 22:21–26:3.

The material with which political committees are expected to be familiar is voluminous. Although the Division of Elections publishes an explanatory handbook for political committees, that 52-page handbook makes clear that it is "a quick reference guide only." For complete information, the handbook advises that political committees review "Chapters 97–106, Florida Statutes, the Constitution of the State of Florida, Division of Elections' opinions and rules, Attorney General opinions, county charters, city charters and ordinances, *and other sources . . . in*

their entirety." R-2-40-25 at 1 (emphasis added). Although the full extent of the material speakers are advised to review in their entirety is unclear,[6] it seemingly includes the 58-page handbook for Florida's online-reporting system, 133 pages of statutes, 94 pages of constitutional provisions, 40 "adopted rules" and 520 advisory opinions. R-1-40-23 at 22:2–13, 29:12–14; R-1-40-16 at 1–2, ¶¶ 4–5.

Groups that lack the time to read or ability to comprehend the sources discussed above may seek formal guidance from the Division of Elections in the form of an advisory opinion, but the length of time it takes to issue an advisory opinion can vary from three days to over a year (the Division of Elections does not know the average length of time). R-2-40-24 at 7:20–8:2. Groups may also contact the Division of Elections for informal advice, where their questions are routinely referred to Gary Holland, an Assistant General Counsel at the Florida Department of State. R-1-40-23 at 16:11–17:3. Mr. Holland, an experienced lawyer, stated that it took him one to two weeks of on-the-job training before he felt comfortable giving advice about "simple questions" that involve "just read[ing] the statute." R-2-40-24 at 12:15–21. It took him almost six months before he was comfortable answering questions about "complex factual situations." *Id.* at 12:21–13:1. Despite being the "go-to guy" for campaign-finance issues, however, Mr. Holland often

[6] The handbook does not specify what "other sources" speakers are expected to review in their entirety. During the Rule 30(b)(6) deposition of the Division of Elections, designee Kristi Bronson acknowledged that this guidance is vague. R-1-40-23 at 26:21–27:4.

advises people who contact him to consult an attorney, and includes a disclaimer to that effect on all of his outgoing email. *Id.* at 15:24–16:1, 18:20–19:2.

B. The chilling effect of Florida's law on Plaintiffs.

Due to the complexity of Florida's campaign-finance laws, Plaintiffs were afraid they might inadvertently violate those laws and subject themselves to civil liability. R-1-40-2 at 5–6, ¶ 20; R-1-40-3 at 5–6, ¶ 20; R-1-40-4 at 6–7, ¶ 21. Plaintiffs' fears were compounded by the fact that, under Florida law, the Secretary of State or any other person may file a sworn complaint with the Florida Elections Commission alleging a violation of the campaign-finance laws. *See* Fla. Stat. § 106.25; *see also* R-1-40-2 at 5–6, ¶ 20; R-1-40-3 at 5–6, ¶ 20; R-1-40-4 at 6–7, ¶ 21. The Florida Elections Commission estimates that 98% of the complaints it receives are "politically motivated." R-2-40-26 at 19:6–15. David Flagg, the investigations manager for the Florida Elections Commission and the Commission's Rule 30(b)(6) designee, testified that "many times" complaints are filed by individuals seeking "to punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign." R-2-40-26 at 16:16–18:2. Because of the risk of investigation and civil liability for even inadvertent errors, Plaintiffs would not have felt comfortable running their ads unless they hired a lawyer, which they could not afford to do. R-1-40-2 at 5–6,

¶ 20; R-1-40-3 at 5–6, ¶ 20; R-1-40-4 at 6–7, ¶ 21. Thus, Plaintiffs remained silent. R-1-40-2 at 3–5, ¶¶ 11, 18; R-1-40-3 at 3–5, ¶¶ 11, 18; R-1-40-4 at 4–6, ¶¶ 12, 19.

C. The effect of Florida's disclaimer requirement on Plaintiffs.

In addition to the foregoing burdens, Plaintiffs' speech was burdened by Florida's disclaimer requirement. Plaintiffs calculated that the required disclaimer for their proposed advertisement would have taken at least six seconds to read. R-1-40-5 at 5, ¶ 17. Because the radio station on which Plaintiffs wished to advertise followed the standard industry practice of selling time in only 30- or 60-second increments, adding the disclaimer would necessarily have required Plaintiffs either to shorten their political message by at least 20% or to buy ads in 60-second increments (thus cutting in half the number of ads they could buy). R-1-40-5 at 5, ¶¶ 17–19; R-1-40-7 at 2, ¶¶ 4–5. Plaintiffs calculated that if they had shortened their ad to include the disclaimer, they would only have been able to convey three reasons to vote against Amendment 4, rather than the five reasons they had in their original script. R-1-40-5 at 5, ¶ 18.

IV. Plaintiffs' Lawsuit and Their Future Activities.

Plaintiffs felt unable to speak under the conditions imposed by Florida's campaign-finance laws and did not want to run the risk of accidentally violating those laws, thereby incurring civil or criminal penalties. R-1-40-2 at 3–6, ¶¶ 11, 20–21; R-1-40-3 at 3, 5–6, ¶¶ 11, 20–21; R-1-40-4 at 4, 6–7, ¶¶ 12, 21–22.

Accordingly, Plaintiffs filed this lawsuit on September 28, 2010, challenging those laws on First Amendment grounds. After Plaintiffs filed suit, Amendment 4 was defeated in the November 2010 election. R-1-40-17 at 2. Because Plaintiffs and Mr. Stublen are all politically active, they want to engage in similar political activity in the future, particularly if a proposal like Amendment 4 is on the ballot again. R-1-40-2 at 5, ¶ 19, R-1-40-4 at 6, ¶ 20, R-1-40-3 at 5, ¶ 19; R-1-40-5 at 6, ¶ 22. If they do so, however, they will again be subject to the laws described above.

Standard of Review

This Court reviews the district court's ruling on the parties' cross-motions for summary judgment de novo. *Owen v. I. C. Sys., Inc.*, 629 F.3d 1263, 1270 (11th Cir. 2011).

SUMMARY OF ARGUMENT

In Florida, grassroots groups that wish to speak out about ballot issues face a choice: They may either speak through a heavily regulated PAC and devote a substantial proportion of their message to a government-mandated disclaimer or they may remain silent. That compelled choice is unconstitutional. The U.S. Supreme Court has held that forcing associations of citizens either to speak through a PAC or remain silent is, in practical effect, a ban on speech that cannot survive strict scrutiny. The Court has further held that applying disclaimer

requirements to speech about ballot issues violates the First Amendment by unconstitutionally compelling speech. As discussed in more detail below, the district court's decision to uphold the application of these laws to Plaintiffs in spite of this precedent and the State's utter failure to produce admissible evidence justifying these burdens was reversible error.

ARGUMENT

If there is an overarching theme to the district court's errors in this case, it is the court's apparent conclusion that the First Amendment imposes no meaningful limits on campaign-finance "disclosure" laws. But the U.S. Supreme Court has made clear that federal courts are not to rubberstamp government-imposed burdens on political speech simply because they may be generically characterized as involving "disclosure." As discussed in more detail below, the Supreme Court has held that political-committee requirements like Florida's go far beyond mere disclosure and are unconstitutional as applied to independent speakers. Additionally, the Supreme Court has held that advertising-disclaimer requirements violate the First Amendment when applied to speech about ballot issues. The State failed to come forward with evidence sufficient to uphold either of these requirements under either strict scrutiny or under the more lenient (but still rigorous) exacting scrutiny that the Supreme Court has applied to some disclosure

laws in different contexts. The district court's contrary holding was reversible error.

I. The District Court Erred by Upholding Florida's Political Committee Requirements As Applied to Plaintiffs.

Plaintiffs in this case are prohibited from speaking collectively unless they do so through a PAC. But as the Supreme Court has recognized, "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). Accordingly, the Court has applied strict scrutiny to such laws and required the government "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 898 (internal quotation marks omitted). The district court however, failed to apply strict scrutiny, choosing instead to apply a more lenient standard of "exacting scrutiny." In Section A, below, Plaintiffs will explain why strict scrutiny is the appropriate standard of review and the errors that led the district court to instead apply exacting scrutiny. In Section B, Plaintiffs will explain why Florida's PAC requirements fail strict scrutiny. Finally, in Section C, Plaintiffs will explain why Florida's PAC requirements are unconstitutional even under exacting scrutiny.

A. The district court erroneously reviewed Florida's PAC requirements with "exacting scrutiny," rather than "strict scrutiny."

In *Citizens United v. FEC*, the Supreme Court considered the constitutionality of a federal campaign-finance law that prohibited corporations and unions from speaking in candidate elections unless they did so through a PAC. The Court found that the law functioned as a "ban on speech" notwithstanding the option for corporations to establish and speak through a PAC because "PACs are burdensome alternatives" that are "expensive to administer and subject to extensive regulations." *Id.* at 897. Accordingly, the Supreme Court subjected the federal PAC requirements to strict scrutiny and held the regulatory scheme unconstitutional. *Id.* at 898, 913.

The reasoning of *Citizens United* applies with even greater force here. Just as corporate directors, employees, and shareholders were prohibited from speaking collectively unless they did so through a PAC, Plaintiffs cannot speak collectively unless they do so through a PAC. And Florida's PAC requirements are at least as burdensome as the federal PAC requirements held unconstitutional in *Citizens United*. Under both Florida and federal law, PACs must "appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for [two or three] years [respectively], and file an organization statement and report changes to this

information within 10 days." *Id.* at 897. And, as the Supreme Court noted, "that is just the beginning," because, under both state and federal law, PACs must provide extensive, ongoing disclosures of their financial activity. *Id.*

While these similarities alone would be enough to trigger strict scrutiny under the Supreme Court's ruling in *Citizens United*, Florida's PAC regulations are, in other respects, far more burdensome than the federal PAC requirements held unconstitutional in that case. For example, while federal law does not require itemized reporting of contributions or expenditures of $200 or less, 2 U.S.C. § 434(b)(3)(A), Florida law requires disclosure of the names and addresses of *all* contributors and recipients of expenditures, regardless of the amount, including "in-kind" contributions. Fla. Stat. §§ 106.011(3)(a), .07(4).

Despite the clear similarities between the law reviewed in *Citizens United* and the law at issue in this case, the district court did not review Florida's PAC requirements with strict scrutiny. Instead, the court erroneously avoided applying strict scrutiny in three ways. First, the court improperly analyzed the burdensomeness of the law's various requirements separately, rather than examining the overall burden of the statutory scheme as is required under Supreme Court precedent. Second, the court erroneously concluded that the burden of Florida's law was mitigated by the fact that Plaintiffs remained free to forgo associating with one another and speak separately, an argument that has been

considered and expressly rejected by the Supreme Court. Finally, the court improperly concluded, on the basis of no evidence, the Florida's PAC requirements simply are not burdensome enough to trigger meaningful First Amendment scrutiny. Below, Plaintiffs discuss each of these errors in turn and conclude by explaining the absurd result created by the district court's ruling, which gives greater First Amendment protection to for-profit corporations than to grassroots groups like Plaintiffs.

1. The district court failed to examine the overall burden of Florida's statutory scheme, as required by *Citizens United*.

Sections II and III of the district court's opinion separately analyze what the court characterized as Florida's "contributor-disclosure requirements" and Florida's "political-committee regulations." But this bifurcated approach is in direct conflict with *Citizens United*. When the Court in *Citizens United* considered the constitutionality of requiring corporations to speak through a PAC, the Court did not consider the constitutionality of the disclosure requirements imposed on PACs separately from the other burdens imposed on PACs. Rather, the Court examined the overall burden of federal PAC requirements—*including* the disclosure requirements imposed on PACs—and concluded that those burdens collectively triggered strict scrutiny. 130 S. Ct. at 897–98.

The district court's decision to analyze Florida's PAC disclosure requirements separately from the rest of the state's PAC requirements seems to

stem from confusion over the fact that *Citizens United* contains two separate discussions of disclosure. In the first discussion, the Court singled out PAC disclosure as uniquely burdensome and an important reason for reviewing federal PAC requirements with strict scrutiny. *Id.* In the second discussion, the Court considered the constitutionality of federal electioneering-communications disclosure, a separate, less burdensome requirement that the Court reviewed with exacting scrutiny rather than strict scrutiny. *Id.* at 914. The district court erroneously applied the standard of review for electioneering-communications disclosure to Florida's PAC-disclosure requirement, but as explained below, these provisions are quite different.

Federal electioneering-communications disclosure is a one-time-only reporting requirement. Groups that are required to file electioneering-communications disclosures are not required to register with the government, appoint a treasurer, open a separate bank account, or comply with any of the other administrative burdens that come along with regulation as a PAC. *Compare* 2 U.S.C. §§ 432, 433, 434(a)–(b) (describing requirements for federal political-committee registration, administration, and disclosure) *with* 2 U.S.C. § 434(f) (describing disclosure requirements for groups making electioneering communications). A group that intends to speak only once need only file a single disclosure report, and never needs to file another unless it later decides to fund

additional electioneering communications. 2 U.S.C. § 434(f)(4). Because of the limited nature of this type of disclosure, the Supreme Court in *Citizens United* held that it triggered only exacting scrutiny. 130 S. Ct. at 914.

PAC disclosure is different and far more burdensome. In addition to having to register with the government and comply with a host of administrative burdens, PACs are subject to *ongoing* reporting obligations. This means that, "[o]nce initiated, the requirement is potentially perpetual regardless of whether the association ever again makes an independent expenditure." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 U.S. App. LEXIS 18621, at *19 (8th Cir. Sept. 5, 2012) (*en banc*). Even for reporting periods in which the PAC has no financial activity, the PAC is required to file a waiver indicating that they have engaged in no activity. Fla. Stat. § 106.07(7). The only way to end this reporting requirement is to disband the committee. Fla. Stat. 106.03(5). But, "[o]f course, the association's constitutional right to speak through independent expenditures dissolves with the political fund. To speak again, the association must initiate the bureaucratic process again." *Swanson*, 2012 U.S. App. LEXIS 18621, at *20; *see also Citizens United*, 130 S. Ct. at 898 ("PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.").

Given these material differences between the two types of disclosure considered in *Citizens United*, the *en banc* Eighth Circuit rightly observed that "[a]llowing states to sidestep strict scrutiny by simply placing a 'disclosure' label on laws imposing the substantial and ongoing burdens typically reserved for PACs risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Swanson*, 2012 U.S. App. LEXIS 18621, at *26. Yet that is precisely what the district court did by separating its analysis of the PAC disclosure requirements from the other PAC administrative requirements and thereby erroneously concluding that exacting scrutiny was the appropriate standard of review. That approach cannot be reconciled with *Citizens United*'s recognition that the ongoing burden of PAC disclosure is one of the most onerous elements of PAC compliance.

2. The district court erroneously concluded that Plaintiffs were not harmed because they could forgo associating with one another and speak separately.

The district court further erred by attempting to distinguish *Citizens United* on the grounds that, unlike the corporation at issue in *Citizens United*, "[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 the Florida political-committee provisions." R-2-59 at 9–10. But the Supreme Court

considered and rejected this exact argument in *Citizens United*. In that case, the Federal Election Commission argued that it was "simply wrong" to consider the federal prohibition on corporate spending a "ban" on speech because "the individuals who own, fund, or manage a corporation remain free to engage in their own advocacy no matter what restrictions are placed on the corporation." Supp. Reply Br. for the Appellee at 6, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.scotusblog.com/wp/wp-content/uploads/2009/08/FEC-Citz-United-reply-brief-8-19-09.pdf. The Supreme Court, however, properly rejected "the argument that political speech of corporations *or other associations* should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" 130 S. Ct. at 900 (emphasis added) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 1415 (1978).

The Supreme Court's ruling in *Citizens United* was consistent with well-established precedent holding that the First Amendment protects the right of individuals to associate with one another to speak collectively. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1171 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."). Contrary to the district court's apparent conclusion, government may not condition the right

to engage in unfettered speech on one's surrender of the right to engage in political association. *See Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296, 102 S. Ct. 434, 437 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them.").

3. The district court's unsupported conclusion that Florida's PAC requirements are not burdensome conflicts with *Citizens United* and decisions of the Eighth and Tenth Circuit.

Finally there is no merit to the district court's totally unsupported conclusion that Florida's PAC requirements should not trigger strict scrutiny because they are not burdensome. This conclusion conflicts with the Supreme Court's determination in *Citizens United* that requirements like Florida's are burdensome *as a matter of law*. 130 S. Ct. at 897–98.[7] It also conflicts with the overwhelming and unrebutted evidentiary record, showing that political committees in Florida are responsible for being familiar with hundreds, if not thousands of pages of statutes, rules, and

[7] The district court's ruling on Plaintiffs' motion for preliminary injunction suggests that the district court was aware of the tension between the Supreme Court's ruling in *Citizens United* and the district court's subsequent conclusion that Florida's PAC requirements are not burdensome. *See Worley v. Roberts*, 749 F. Supp. 2d 1321, 1325–26 (N.D. Fla. 2010) ("To be sure, political-committee regulation is burdensome; the Court said so in *Citizens United*.").

advisory opinions. R-2-40-25 at 1 (advising political committees to review "Chapters 97–106, Florida Statutes, the Constitution of the State of Florida, Division of Elections' opinions and rules, Attorney General opinions, county charters, city charters and ordinances, *and other sources . . . in their entirety*." (emphasis added). As the Tenth Circuit recently recognized in a case with facts almost identical to this one, this is a substantial burden:

> The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado's constitution, the Campaign Act, and the Secretary of State's Rules Concerning Campaign and Political Finance. Even if those rules that apply to issue committees may be few, one would have to sift through them all to determine which apply.

Sampson v. Buescher, 625 F.3d 1247, 1259–60 (10th Cir. 2010).

Moreover, as the *en banc* Eighth Circuit recently noted, the burdens imposed on PACs are constitutionally significant even if speakers are ultimately capable of complying with these requirements:

> Most associations—no matter the size—are *capable*, for example, of assembling and completing the paperwork necessary to file tax returns. But such paperwork is not a burden interfering with the constitutionally protected marketplace of ideas. Unlike compliance with the mandatory tax laws, the laws at issue here give Minnesota associations a choice—either comply with cumbersome ongoing regulatory burdens or sacrifice protected core First Amendment activity. This is a particularly difficult choice for smaller businesses and associations for whom political speech is not a major purpose nor a frequent activity. Such a disincentive for political speech demands our attention.

Swanson, 2012 U.S. App. LEXIS 18621, at *24–25. The Eighth Circuit's conclusion is consistent with the fact that Citizens United itself had successfully operated a PAC "for over a decade" before filing their challenge to federal PAC requirements. *See Citizens United v. FEC*, 130 S. Ct. 876, 929, 944 & n.40 (2010) (Stevens, J., dissenting). Yet despite the fact that Citizens United had demonstrated that it was *capable* of complying with federal PAC requirements, the Court did not hesitate to hold that those requirements were sufficiently burdensome to trigger strict scrutiny. *See* 130 S. Ct. at 897–98; *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 522–23, 127 S. Ct. 2652, 2697 (2007) (Souter, J., dissenting) (noting, in response to the majority's conclusion that Plaintiff Wisconsin Right to Life could not be forced to speak through a PAC, that the group had successfully operated a PAC that had raised and spent tens of thousands of dollars).

4. The district court's ruling leads to the absurd result that corporations and unions enjoy greater First Amendment rights than grassroots groups of citizens like Plaintiffs.

As explained above, the district court's conclusion that the burdens Florida's PAC requirements impose on Plaintiffs do not trigger strict scrutiny flies in the face of well-established precedent. But more than that, the district court's conclusion leads to the absurd result that shareholders and corporate executives in for-profit corporations enjoy greater rights of association than others who—like Plaintiffs—choose to organize in a more informal manner. The district court

seemed to be aware that this conclusion was problematic. In the course of denying Plaintiffs motion for preliminary injunction, the court observed, "If a multinational corporation can speak without being subjected to [the] burden [of political-committee status], it is hard to explain why four individuals with modest resources cannot." *See Worley v. Roberts*, 749 F. Supp. 2d 1321, 1326 (N.D. Fla. 2010). Plaintiffs submit that explaining this preferential treatment for multinational corporations over grassroots speakers is more than hard—it is impossible. If PAC requirements like Florida's trigger strict scrutiny when they are applied to General Motors or the AFL-CIO, then surely they must trigger strict scrutiny when applied to grassroots groups like Plaintiffs. As explained in the following section, Florida's PAC requirements cannot survive this review.

B. Florida's PAC requirements fail strict scrutiny.

Under strict scrutiny, the State was required to demonstrate that Florida's PAC requirements "further[] a compelling interest and [are] narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (internal quotation marks omitted). As discussed below, the state failed to satisfy either of these requirements.

1. Florida's PAC requirements are not supported by a compelling state interest.

To date, the Supreme Court has identified only one interest compelling enough to justify PAC requirements: the prevention of "*quid pro quo* corruption"

of political candidates. *Citizens United*, 130 S. Ct. at 909; *Davis v. FEC*, 554 U.S. 724, 740–41, 128 S. Ct. 2759, 2773 (2008). But this case concerns speech about ballot issues, not political candidates, and the Supreme Court has repeatedly recognized that "[t]he risk of corruption perceived in cases involving candidate elections . . . *simply is not present* in a popular vote on a public issue." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790, 98 S. Ct. 1407, 1423 (1978) (emphasis added). Indeed, in the three cases in which the Supreme Court has considered the constitutionality of laws that burden independent speech about ballot issues, it has held those burdens unconstitutional. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 1524 (1995) (disclaimer requirements); *Citizens Against Rent Control*, 454 U.S. at 298–99, 102 S. Ct. at 438–39 (1981) (contribution limits); *Bellotti*, 435 U.S. at 789–92, 98 S. Ct. at 1422–24 (spending limits).

The district court's opinion never specifically identifies the interest that the court believed was advanced by Florida's law, but the court presumably accepted the supposed "informational interest" articulated by the State in its summary judgment briefing. The theory, as expressed by the State's expert witness, Dr. Daniel Smith of the University of Florida, is that the disclosure of donor identities can provide voters with "cues" about the interests on either side of a ballot issue. R-2-40-27 at 296–97. Smith argues that these cues serve as a cognitive shortcut or

"heuristic[]" that can improve "voter competence" by helping otherwise ill-informed voters cast ballots consistent with their preferences. *Id.*

Neither the Supreme Court nor this Circuit has ever held that the State's alleged informational interest is compelling.[8] Indeed, the Supreme Court recently declined an opportunity to hold that this interest was even "sufficiently important." In *Doe v. Reed*, the Supreme Court considered the constitutionality of applying Washington's public-records law to ballot-issue petitions, the disclosure of which would reveal the identities of the individuals who had signed the petition. 130 S. Ct. 2811, 2816 (2010). Although the government defended the disclosures as a means of both combating fraud and providing the electorate with information, the Court relied entirely on the anti-fraud interest, stating "we need not, and do not, address the State's 'informational' interest." *Id.* at 2819.

Writing separately, Justice Alito argued that the informational interest was both limitless and contrary to First Amendment values. As he said, "[t]he implications of accepting such an argument are breathtaking" and "paint[] . . . a chilling picture of the role of government in our lives." *Id.* at 2824–25 (Alito, J., concurring). Accepting the "informational interest" would leave the State "free to

[8] As discussed in section I.C., *infra*, the First, Seventh, and Ninth Circuits have found that this interest is "sufficiently important" to satisfy exacting scrutiny, but that conclusion is dubious and, in any event, those cases are distinguishable from this case.

require [disclosure of] all kinds of demographic information, including . . . race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships."[9] *Id.* at 2824. But as Justice Alito also noted, "Requiring such disclosures . . . runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association." *Id.* (collecting cases).

Justice Alito's skepticism of the informational interest is not merely one Justice's view. None of the separate opinions in *Doe* adopted the State's asserted informational interest—all relied instead on the government interest in detecting fraudulent petition signatures. This is entirely consistent with the Supreme Court's ruling in *McIntyre v. Ohio Elections Commission*, in which the Court held that the "simple interest in providing voters with additional relevant information" was "plainly insufficient to support the constitutionality" of a disclaimer requirement that applied to speech about ballot issues. 514 U.S. at 348–49, 115 S. Ct. at 1519–20.

The Tenth Circuit has also expressed skepticism about the supposed "informational interest," noting that it is "not obvious that there is such a public

[9] Dr. Smith confirmed Justice Alito's fear that the informational interest has no limiting principle when he admitted that the sexual orientation of a campaign contributor could be "a huge cue" to voters and that the race of a contributor could "absolutely" serve as a valuable cue. R-1-40-20 at 95:7–16.

interest." *Sampson*, 625 F.3d at 1256. Indeed, that court recognized that disclosing the identities of ballot-issue proponents could actually harm public discourse:

> When many complain about the deterioration of public discourse—in particular, the inability or unwillingness of citizens to listen to proposals made by particular people or by members of particular groups—one could wonder about the utility of ad hominem arguments in evaluating ballot issues. Nondisclosure could require the debate to actually be about the merits of the proposition on the ballot.

Id. at 1257.

This Court should reject the State's logically limitless informational interest. Preventing *quid pro quo* corruption is the only state interest that the Supreme Court has ever found sufficiently compelling to justify the significant burdens that Florida imposes on ballot-issue speech, and the State can demonstrate no such interest here.

2. Florida's PAC requirements are not narrowly tailored.

Even if the State's alleged informational interest were compelling—which it is not—Florida's PAC requirements are not narrowly tailored to serve that interest. First, Florida's PAC requirements impose burdens that go far beyond simple disclosure. PACs are also subject to registration and administrative requirements. The State presented no evidence that these additional requirements are necessary to advance its alleged informational interest, and any claim that they are is belied by the fact that the limited disclosure laws upheld in *Citizens United* imposed no

similar administrative requirements on speakers. *See* 130 S. Ct. at 913–16 (upholding federal electioneering-communications disclosure, 2 U.S.C. § 434(f)).

Second, because Florida law imposes no minimum threshold on disclosure, it requires the disclosure of a vast amount of unnecessary information. The State's own expert has stated that disclosure of contributions of "$100 or less [is] not well-tailored to an information-driven rationale." R-2-40-28 at 1; *see also Sampson*, 625 F.3d at 1260 ("We agree with the Ninth Circuit that '[a]s a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.'" (quoting *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009))); *Canyon Ferry*, 556 F.3d at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). Instead, Dr. Smith has argued that it would "make sense" to require contributions of "$1,000 to be disclosed, but only if total expenditures are greater than $10k." R-2-40-28 at 1. Elsewhere, Dr. Smith has suggested a de minimis threshold of $200. R-1-40-20 at 80:23–81:11. Notably, both of these thresholds—suggested by the State's retained expert—are higher than the $150 amount each of the Plaintiffs intended to contribute to fund their initial ads against Amendment 4. *See also Sampson*, 625 F.3d at 1250, 1261 (striking down Colorado law that required all groups spending

more than $200 to influence a ballot issue to disclose contributions of $20 or more). The district court ignored these facts entirely.

Third, the State failed to demonstrate that the information disclosed actually contributes to more informed voters or materially advances voter competence at all. To satisfy any level of scrutiny under the First Amendment, government must demonstrate, with actual evidence, that its chosen means directly and materially advance its ends. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 2470 (1994) (plurality opinion) (holding that under intermediate scrutiny, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Edenfield v. Fane*, 507 U.S. 761, 770–771, 113 S. Ct. 1792, 1800–01 (1993) (holding that under intermediate scrutiny, the government's burden "is not satisfied by mere speculation or conjecture; rather, [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392, 120 S. Ct. 897, 907 (2000) (noting that the Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden"). The State, however, failed to do this. Indeed, the State's expert agreed "[m]ore study is required before we can reach conclusions about whether cues actually improve voter competence or work sometimes unexpectedly to undermine it." R-1-

40-20 at 150:25–151:7. And his own scholarly work questions the usefulness of individualized disclosure, stating, "[K]nowing the identity of individuals who are active in direct democracy is not as helpful a voting cue as the group-support heuristic." R-2-40-27 at 325–26.

In fact, as the record before the district court established, only Plaintiffs' expert, Dr. David Primo, has studied the marginal benefits of disclosure laws to voter competence—that is, the increase in voter competence, if any, beyond the levels that would exist without disclosure laws—and he has found no evidence that such benefits exist. R-1-40-8 at 11, 30–31, ¶¶ 28, 72–75; R-1-40-20 at 159:10–160:25 (admission by State's expert, Dr. Smith, that Dr. Primo is the only researcher who has studied the marginal benefits of disclosure in ballot-issue campaigns). To measure the marginal benefits of disclosure laws, Dr. Primo conducted an online survey of 1,066 Florida-registered voters. R-1-40-8 at 12, ¶ 30. He divided the survey participants into three experimental groups, all of which were presented with the text of a hypothetical ballot issue. *Id.* at 13, ¶¶ 32–33. He then attempted to measure the effect, if any, that access to additional information—including information obtained through disclosure laws—had on the ability of participants to accurately identify the positions that interest groups had

taken on that issue.[10] Cues theorists argue that voters who can accurately identify the positions that interest groups have taken on a ballot issue can use that information as a shortcut to help them cast a ballot that reflects their preferences. R-2-40-27 at 297. Therefore, determining whether voters with access to disclosure data performed better at identifying the positions interest groups had taken on the hypothetical ballot issue would tell Dr. Primo whether Florida's laws that compel disclosure of that information have the potential to marginally improve voter competence. R-1-40-8 at 16, ¶ 43.

Dr. Primo's study found that few survey respondents accessed disclosure-related information when given the opportunity to do so, and those respondents who did performed no better at identifying the positions of interest groups than respondents who accessed other publicly available information. *Id.* at 30, ¶ 73. In other words, "respondents [were] not interested in accessing campaign finance disclosure information, and when they [did], it [did] not have a positive marginal effect on their ability to identify the positions of interest groups." *Id.* This led Dr. Primo to conclude that "the *marginal* benefits of campaign finance disclosure in helping voters pin down the positions of interest groups are virtually nonexistent." *Id.* at 30, ¶ 74. Additionally, because survey respondents were provided with information "in an easily accessible format," Dr. Primo concluded that "it is very

[10] The details of Dr. Primo's methodology are set for in R-1-40-8 at 12–16, ¶¶ 30–42.

improbable that voters in a real-world setting would fare much better than the respondents in the survey." *Id.*

Dr. Primo's findings should not be surprising. Voters have a vast amount of information and cues at their disposal to educate themselves about ballot issues before they vote. *See* R-1-40-20 at 68:15–24 (agreement by State's expert, Dr. Smith, that even in a world with no campaign-finance disclosure there would still be "a lot of heuristics out there for voters"); *see also* R-1-40-8 at 9–10, ¶ 25 (testimony by Dr. Primo discussing the current low levels at which news media report on campaign-finance disclosure data). Dr. Primo's findings support the commonsense prediction that adding the identities of ballot-issue speakers to this already rich information environment is unlikely to produce significant marginal benefits. Moreover, there is absolutely no evidence in the record that the extensive administrative requirements imposed on PACs in addition to their disclosure requirements produce significant marginal benefits.[11] Thus, as Dr. Primo

[11] Even if the government had mustered some evidence that Florida's PAC requirements produce marginal benefits for voters, the Supreme Court has recognized that "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011). The requirement that the government be able to demonstrate significant *marginal* benefits from laws that burden speech has been applied to the campaign-finance context. *See Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2827 (2011) ("In the face of [other strict anti-corruption measures], it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.")

concluded, "the benefits of campaign finance disclosure on ballot issues are speculative, while the costs of disclosure rules, which discourage participation in the political process, are very real." R-1-40-8 at 2, ¶ 6.

In sum, the State has not even attempted to narrowly tailor its laws nor can it offer any evidence to show that the PAC burdens it has imposed on groups like Plaintiffs' materially advance the State's alleged informational interest. The district court's ruling upholding these requirements was erroneous.

C. Florida's PAC requirements fail even under exacting scrutiny.

As discussed above, the Supreme Court has held that PAC requirements are subject to strict scrutiny. Recently, however, the Court has clarified that certain disclosure-only statutes—laws that do not impose *ongoing* reporting requirements or registration and administrative requirements—are subject to a form of intermediate scrutiny called "exacting scrutiny." *See Citizens United*, 130 S. Ct. at 914 (applying exacting scrutiny to disclosure-only law applied to ads mentioning federal candidates); *Doe*, 130 S. Ct. at 2818 (applying exacting scrutiny to law requiring the disclosure of petition signatures). Although Florida's PAC requirements, including their disclosure component, should be analyzed under strict scrutiny—as was done in *Citizens United*—Plaintiffs prevail even under exacting scrutiny.

"Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp," and "[t]he Supreme Court has not hesitated to hold laws unconstitutional under this standard." *Swanson*, 2012 U.S. App. LEXIS 18621, at *29 (internal citations omitted). Under exacting scrutiny, the government bears the burden of demonstrating that a disclosure law is substantially related to a sufficiently important government interest, which requires the government to show that the "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Doe*, 130 S. Ct. at 2818. Florida's PAC requirements fail on both counts.

As noted above, the Supreme Court declined to accept the State's alleged informational interest as "sufficiently important" in *Doe v. Reed*. 130 S. Ct. at 2819. Justice Alito's cogent explanation for why the "informational interest" cannot possibly rise to this level, *supra* at 28–29, applies with equal force here. Nor, for the reasons discussed above, is there evidence that Florida's PAC requirements produce *any* informational benefits, let alone sufficient benefits to outweigh the serious burden those requirements impose on speakers.

Although neither this Circuit nor the U.S. Supreme Court have accepted the State's informational interest as sufficiently important to satisfy exacting scrutiny, three circuit courts have done so. *See Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 39–40 (1st Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, No. 11-

3693, 2012 U.S. App. LEXIS 18956, at *25 (7th Cir. Sept. 10, 2012); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005–06 (9th Cir. 2010). All of those cases, however, involved established groups spending lots of money.[12] None of them involved an ad hoc, grassroots group like Plaintiffs, and the Seventh Circuit even recognized that the government's interest would be greatly diminished as applied to such a group. *Ctr. for Individual Freedom*, 2012 U.S. App. LEXIS 18956, at *40–41 ("The burden of public identification may foreclose application of disclosure laws to . . . small neighborhood groups that raise less than $1000, see *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), for in these cases the state's interest in disseminating such information to voters is at a low ebb.")

Far more analogous to this case is the Tenth Circuit's ruling in *Sampson v. Buescher*. In that case, the Tenth Circuit applied exacting scrutiny to invalidate Colorado's PAC requirements as applied to a group that spent $782.02 to influence a local ballot issue. *Sampson*, 625 F.3d at 1252. As the court noted, "There is virtually no proper governmental interest in imposing disclosure requirements on

[12] The National Organization for Marriage, for example, was recently reported to have pledged "millions of dollars to oust legislators" who voted to support New York's recent gay-marriage law. Mike Vilensky, *Marriage Shifts Gay-Rights Debate*, The Wall Street Journal (Apr. 1, 2012), available at http://online.wsj.com/article/SB10001424052702303404704577313960032750628.html. Similarly, the Center for Individual Freedom is reported to have spent over $2.5 million on independent political ads in 2010. *Campaign Cash: Center for Individual Freedom*, http://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/Center-for-Individual-Freedom.html (last visited October 7, 2012).

ballot-initiative committees that raise and expend so little money, and that limited interest cannot justify the burden that those requirements impose on such a committee." *Id.* at 1249. Notably, the plaintiffs in that case spent more money than Plaintiffs in this case planned to spend on their initial advertising purchase.

The *en banc* Eighth Circuit reached a similar conclusion in *Swanson* just last month, concluding that Minnesota's PAC-like requirements for groups that make independent expenditures in candidate races "almost certainly fails this test." 2012 U.S. App. LEXIS 18621, at *31–32. That court recognized that even if the government's informational interest were assumed to be sufficiently important, "Minnesota's ongoing reporting requirements" along with "[o]ther requirements, such as requiring a treasurer, segregated funds, and record-keeping," were either "unrelated" to that interest or only "tangentially related" to it. *Id.* at *26 n.9. Thus, the government's interest could be advanced though "less problematic measures" that did not impose such extensive burdens on independent speakers. *Id.* at *31.

In this case, Florida imposes the full panoply of PAC burdens on groups that spend as little as $500 on political speech. Even the State's own expert recognized that imposing these requirements at such a low level of spending provides no useful information to voters. The State produced no evidence to justify the application of these laws to any group advocating the passage or defeat of ballot issues, let alone ad hoc, grassroots groups like Plaintiffs whose identities will

provide no useful cues to voters. The district court's ruling upholding these requirements under exacting scrutiny was a misapplication of that standard of review and should be reversed.

II. The District Court Erred by Upholding Florida's Advertising-Disclaimer Requirement As Applied to Plaintiffs.

In addition to requiring that Plaintiffs register as a PAC and submit to extensive and burdensome regulation, Florida's campaign-finance laws also compel speech in violation of the First Amendment. Specifically, Florida law unconstitutionally requires that Plaintiffs include a state-mandated disclaimer in their advertisements stating, "Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee)." Fla. Stat. § 106.071(2).[13] As discussed below, this requirement conflicts with the U.S. Supreme Court's ruling in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S. Ct. 1511 (1995), and the district court's attempts to distinguish *McIntyre* have been foreclosed by Supreme Court precedent.

A. Florida's disclaimer requirements are unconstitutional under *McIntyre v. Ohio Elections Commission.*

McIntyre v. Ohio Elections Commission is the only case in which the U.S. Supreme Court has considered the constitutionality of disclaimer requirements as

[13] The statutory term "political advertisement" means "a paid expression in any communications media," including, specifically, "radio." Fla. Stat. § 106.011(17).

they apply to speech about ballot issues. That case involved a woman, Margaret McIntyre, who along with her son and a friend distributed fliers opposing a local school-tax levy. 514 U.S. at 337, 115 S. Ct. at 1514. Ohio law at the time required that such fliers contain, in a prominent place, the name and address of the person responsible for the speech. 514 U.S. at 338 n.3, 115 S. Ct. at 1514 n.3. Ms. McIntyre's fliers did not contain this disclaimer and she was fined $100 by the Ohio Elections Commission. 514 U.S. at 338, 115 S. Ct. at 1514. The Supreme Court, judging the law under the "strictest standard of review," struck down Ohio's disclaimer requirement as unconstitutional. 514 U.S. at 348, 357, 115 S. Ct. at 1519, 1524.

The Supreme Court based its ruling on the First Amendment right to engage in anonymous speech. As the Court recognized, "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." 514 U.S. at 342, 115 S. Ct. at 1516. The reason a speaker has for choosing to exclude a disclaimer from their communication is irrelevant: "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 341–42, 115 S. Ct. at 1516. Government regulations that interfere with this right will be upheld only if they are

"narrowly tailored to serve an overriding state interest." 514 U.S. at 347, 115 S. Ct. at 1519. Finally, "[t]he simple interest in providing voters with additional relevant information," is not an overriding state interest. 514 U.S. at 348, 115 S. Ct. at 1520.

In this case, just as in *McIntyre*, Florida's disclaimer law requires Plaintiffs to include in their advertisements "disclosures [they] would otherwise omit." *Id.* This is a significant burden on Plaintiffs' speech, not only because it requires them to surrender their anonymity, but also because it takes up a portion of their advertising time that could be spent expressing the reasons for their support or disapproval of a ballot issue. Plaintiffs calculated that during the 2010 election it would have taken at least six seconds, and probably longer, to record the required disclaimer. R-1-40-5 at 5, ¶ 17. And unlike television ads or print ads—in which a silent, printed disclaimer can run alongside other text and audio or in unused white space—disclaimers in radio ads necessarily displace other information. Thus, under Florida law, buying a 30-second radio ad means devoting 20% of that ad to a state-mandated message.

While the burden of Florida's disclaimer law as it applies to Plaintiffs is even more severe than the burden in *McIntyre*, the alleged state interest in this case is no more compelling. The only interest that the State put forward was its supposed "informational interest," but this is nothing more than the "plainly

insufficient" interest in providing the electorate with "additional relevant information." *McIntyre*, 514 U.S. at 348–49, 115 S. Ct. at 1519–20. Thus, because the State has failed to identify an overriding state interest sufficient to justify the burdens Florida's disclaimer requirement imposes on ballot issues speakers, the requirement should be struck down for being inconsistent with the holding of *McIntyre*.

B. The district court's attempt to distinguish *McIntyre* conflicts with established First Amendment principles.

Although the Supreme Court's campaign-finance jurisprudence has changed much in the past few years, it cannot seriously be disputed that *McIntyre* remains good law. The decision has never been overruled and, as recently as 2010, four of the separate opinions in *Doe v. Reed*—representing the views of six Justices—cited *McIntyre* and discussed how (or whether) it applied to that controversy. *See* 130 S. Ct. at 2828 (Sotomayor, Stevens, & Ginsburg, JJ., concurring); *Id.* at 2829, 2831 & n.4 (Stevens & Breyer, JJ., concurring); *Id.* at 2832–33 & n.1 (Scalia, J., concurring); *Id.* at 2842–43 (Thomas, J., dissenting). But despite *McIntyre*'s continued vitality and its strong similarity to this case, the district court attempted to distinguish *McIntyre* on two grounds. First, the court held that *McIntyre* was distinguishable because Ms. McIntyre communicated her views through handbills rather than through radio ads. R-2-59 at 12. Second, the court held that *McIntyre* was distinguishable because Ms. McIntyre acted alone rather than with a group. R-

2-59 at 13. Both of these attempts, however, are foreclosed by Supreme Court precedent.

As to the first point, it is true that the Court in *McIntyre* reserved the question of whether the First Amendment would provide similar protection to ballot-issue speech communicated through means other than handbills. 514 U.S. at 338 n.3, 115 S. Ct. at 1514 n.3. But this fact alone cannot be dispositive. As the Supreme Court has recently made clear, courts "must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Citizens United*, 130 S. Ct. at 891.

Equally unpersuasive is the district court's conclusion that Plaintiffs' speech should be unprotected because it is the product of group collaboration. The First Amendment, after all, protects both the right to speak and the right to associate to make that speech more effective. *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 632–33 (1976). Ms. McIntyre herself collaborated with others in distributing her fliers. *McIntyre*, 514 U.S. at 337, 115 S. Ct. at 1514 (noting that Ms. McIntyre was assisted by "her son and a friend"). Further, as the Ninth Circuit has recognized, "[t]he reasons given by *McIntyre* for protecting anonymous speech apply regardless of whether an individual [or] a group of individuals . . . is speaking." *ACLU of Nev. v. Heller*, 378 F.3d 979, 989 (9th Cir. 2004). This is particularly true

where, as here, the Plaintiffs all contributed to drafting their proposed advertisement. *See McIntyre*, 514 U.S. at 355, 115 S. Ct. at 1523 (noting that disclaimers are particularly burdensome when applied to a "personally crafted statement of a political viewpoint").

The district court dismissed the notion that Plaintiffs have a right to speak collectively by recasting it as a right to receive contributions, stating that, "[u]nder repeated decisions of the Supreme Court, an individual has no right to receive an anonymous contribution to fund a radio advertisement addressing a ballot issue, nor a right to make an anonymous contribution to fund someone else's radio advertisement." R-2-59 at 13. But this claim is factually incorrect. As discussed in the previous section, the Supreme Court simply has not addressed the constitutionality of disclosure for contributions related to ballot measures. Rather, the Supreme Court has upheld mandatory political disclaimers only as applied to speech about political candidates, *Citizens United*, 130 S. Ct. at 914–15, which raises concerns about corruption or favoritism that are simply absent in ballot-issue campaigns, *Bellotti*, 435 U.S. at 790, 98 S. Ct. at 1423. Moreover, the existence or nonexistence of a right to make anonymous contributions to fund ballot-issue speech is irrelevant to the constitutional questions surrounding compelled disclaimers because Florida's disclaimer law does not require the disclosure of contributor names. Rather, the only name required to be disclosed by Florida's

disclaimer law is the name of the political committee funding the ad—information that the Supreme Court itself has recognized does little to inform voters about the interests funding the ad. *McConnell v. FEC*, 540 U.S. 93, 128, 124 S. Ct. 619, 651 (2003). Thus, even if the State did have an interest in mandating disclosure of contributors to ballot-issue speech, Florida's disclaimer law does not advance that interest.

Ultimately, though, even if *McIntyre* had no relevance to this case—which it surely does—and even if the candidate-disclaimer holdings of *McConnell* and *Citizens United* provided the appropriate standard of review, that would only mean that Florida's disclaimer requirement is subject to intermediate scrutiny; it would not mean that the State had satisfied that burden.

As noted earlier, even under intermediate scrutiny, the State is required to produce *actual evidence* to justify its burdens on speech. Here, however, the State conceded that it had no such evidence. Specifically, the state admitted that it was "unaware of any documents reflecting a study, analysis, investigation, or other facts, information, or evidence regarding whether and how voters in ballot-issue elections benefit from campaign-finance disclosure *or disclaimers*." R-1-40-18 at 4 (Defs.' Resp. to Pls.' Req. for Admis. No. 12) (emphasis added). Because the State wholly defaulted on its obligation to justify its disclaimer requirement as applied to ballot-issue speakers generally, it necessarily failed to justify these requirements as

applied to small grassroots groups like Plaintiffs. This is critical because small groups have less ability to mitigate the effects of the disclaimer by running more ads, while at the same time their identities are less useful to voters than the identities of large, well-known groups with established positions on the issues. Thus, because the State failed to bring forward any evidence on a matter for which it bore the burden of proof, the district court's ruling upholding the application of Florida's disclaimer law to ballot-issue speech was erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, the district court's ruling upholding the application of Florida's PAC requirements and advertising-disclaimer requirements to Plaintiff-Appellants was erroneous and should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of October, 2012, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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