No. 15-682

In The

Supreme Court of the United States

GORDON VANCE JUSTICE, JR., ET AL.,

Petitioners,

v.

DELBERT HOSEMANN, ET AL.,

Respondents.

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

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

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
ishapiro@cato.org
(202) 218-4600

ALLEN DICKERSON
Counsel of Record
OWEN YEATES
CENTER FOR COMPETITIVE POLITICS
124 S. West St. Ste. 201
Alexandria, VA 22314
(703) 894-6800
adickerson@campaignfreedom.org

Counsel for Amici Curiae

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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 nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education.

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.

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts.

Amici have participated in many of the notable campaign finance and political speech cases, including *Citizens United v. FEC*, 558 U.S. 310

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[1] Pursuant to Rule 37.6, *Amici* state that no contributions of money were made to fund the preparation or submission of this brief, which was authored entirely by counsel for *Amici*. Pursuant to Rule 37, all parties have consented to the filing of this brief.

(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.

STATEMENT OF THE CASE

Appellants are five friends who were unable to advocate publicly for the passage of a pending ballot initiative because two Mississippi laws prevented them from pooling small contributions without organizing formally as a political committee ("PAC") and submitting to PAC regulations. *See* Pet. for Cert. at 4-6, 7-9; Miss. Code Ann. §§ 23-15-801(c), 23-17-49(1), and 23-17-51(1) (App. 130, 152, and 153).

SUMMARY OF ARGUMENT

This Court has held that no one should have to violate a law and risk prosecution in order to challenge that law's constitutionality. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). The Fifth Circuit, however, declined to credit Petitioners' intentions and demanded a record that few parties can provide in a typical preenforcement challenge. This error resulted in part from a failure to examine ripeness properly, both by failing to consider the hardship imposed on the parties by Mississippi's PAC laws and by failing to apply the proper standards to determine a record's fitness for review. Regardless, though, of the source of its error, the Fifth Circuit has dramatically restricted the ability of small groups of citizens with limited resources to challenge extraordinarily burdensome PAC requirements without adding the burden of a possible prosecution. This Court should grant certiorari to clarify the right to preenforcement review and the standards that courts should apply in reviewing preenforcement cases.

Furthermore, this Court has held that as-applied challenges are the preferred means of attacking a law's constitutionality. But several courts of appeals, including the Fifth Circuit here, are giving short shrift to these challenges. By imposing standards of evidence that are difficult to meet, ignoring or overriding the record before them, or converting as-applied challenges to facial challenges entirely, they are encouraging parties to bring only facial challenges or to give up their speech rights altogether. To preserve the rights of those who are harmed individually by laws, as well as to allow courts to avoid speculation and to act narrowly out of respect for the democratic process, the Court should grant certiorari.

Finally, this Court has held that there must be a substantial relation between laws like Mississippi's and a sufficiently important government interest. The Fifth Circuit, however, failed to fully examine the burdens the State places on Petitioners as individuals or the proper contours of Mississippi's interests. This Court should grant certiorari to clarify that courts must correctly categorize parties, fully weigh the burdens on the parties in their individual situations, and accurately weigh the government's interests as-applied to parties' particular circumstances.

ARGUMENT

The Fifth Circuit's decision denied Petitioners their right to contest the constitutionality of laws without first violating them and, relatedly, of their right to bring an as-applied challenge. The Fifth

Circuit's tailoring analysis also failed to give due weight to the burden on Petitioners and to recognize the minimal government interest in Petitioners' planned activity. The Court should grant the petition for certiorari and address the judiciary's duty to meaningfully review preenforcement and as-applied challenges to laws burdening fundamental First Amendment rights.

I. The Fifth Circuit's Decision Prohibited Petitioners from Contesting the Constitutionality of the Laws Without First Violating Them

The Fifth Circuit's decision contravenes this Court's precedent, demanding, in the context of a preenforcement challenge, concrete facts that are often available only after a party has violated the law. Furthermore, the Fifth Circuit erred by, functionally, ruling against Petitioners on ripeness grounds without conducting a proper ripeness analysis. In addition, in reviewing the fitness of the record criterion, the court here failed to credit Petitioners' allegations and failed to review the evidence in the light most favorable to Petitioners.

A. The court of appeals demanded a record that cannot be created for the typical preenforcement challenge

The district court below recognized that Mississippi may "regulate individuals and groups attempting to influence constitutional ballot measures." App. 84. But it found that the State's interest did not justify the burdens it placed on

groups, like Petitioners, who wished to raise and spend slightly in excess of Mississippi's $200 regulatory trigger. *Id.* Petitioners had adequately pled their intention to engage in lightly-financed, grass-roots activity, and they submitted supplement briefing saying they would turn away a large-dollar contribution. Nevertheless, the court of appeals refused to consider this case as-applied to Petitioners' small-dollar situation because of their "strongly held political beliefs" and the possibility that they might have had "a rousing fundraising success." *Justice v. Hosemann*, 771 F.3d 285, 293 (5th Cir. 2014).

But, had Petitioners gone ahead and spent just over $200 on political communications without registering as a PAC, it is unlikely that Mississippi authorities would have acted so cautiously or stayed their hands until they saw whether Petitioners did in fact raise substantial sums. In an enforcement action, where Petitioners would probably lack a federal forum, the spending of, say, $300 would be a fact, not a premise. In demanding "concrete facts" of this sort, which a party can introduce only after violating the law, *Justice*, 771 F.3d at 295, the Fifth Circuit vitiated this Court's precedent that allows parties to *allege* circumstances for preenforcement challenges. That ability is central to this Court's repeated decisions holding that a petitioner need not "first expose himself to actual arrest or prosecution . . . to challenge a statute" or its application as unconstitutional. *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); *see Steffel*, 415 U.S. at 459, 473 (not required for as-applied challenge); *see also*

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-129 (2007). Rather, "a plaintiff [can] bring a preenforcement suit when he has *alleged* an intention to engage in a course of [constitutional] conduct . . . proscribed by a statute." *Susan B. Anthony List*, 134 S. Ct. at 2342 (internal quotation marks omitted) (emphasis added); *see Commodity Trend Serv. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 689 (7th Cir. 1998) (holding that allegation sufficient "to ripen . . . as-applied challenge); *cf. Edenfield v. Fane*, 507 U.S. 761, 764, 771, 774 (1993) (overturning speech ban based on allegations for as-applied challenge); *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n.1 (2d Cir. 2003) (holding law unconstitutional where plaintiffs' complaint "allege[d] the ways the ordinance infringed on their rights in their specific circumstances").

In holding that a party may allege an intention to engage in proscribed conduct rather than exposing "himself to actual arrest or prosecution," this Court in *Susan B. Anthony List* responded to and rejected arguments that a case was not justiciable on ripeness grounds. 134 S. Ct. at 2340-42 and 2341 n.5. A suit for preenforcement review will not be premature—it will be ripe for review—as long as two conditions are met. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Namely, a court examines (1) "the hardship to the parties [if it withheld] consideration" and (2) "the fitness of the issues for judicial decision." *Id.* at 149; *see also Commodity Trend Serv.*, 149 F.3d at 689.

As this Court has required, Petitioners "alleged [their] intention to engage in" prohibited conduct. *Susan B. Anthony List*, 134 S. Ct. at 2342 (internal quotation marks omitted). They stated that they would like to spend more than $200 each, combining some of the funds and spending some individually, App. 168-70 (Complaint ¶¶ 8-12), and disclaimed any desire to combine more than $1,000, App. 90, 158-60, 165. The Fifth Circuit nonetheless concluded that there was no evidence of the concrete facts necessary for a case to be ripe for review.

One must conclude, therefore, that the Fifth Circuit here required something more than specifically alleged facts, and instead required the "concrete facts" found in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).[2] *Justice*, 771 F.3d at 295. But there, the Tenth Circuit was able to test Colorado's unconstitutional disclosure laws against action that the plaintiffs *had already taken* in potential violation of the law. *Id.* (noting that the disclosure laws as applied to the plaintiffs there "were unconstitutional given how little they *had spent* to oppose the petition" (emphasis added)).

The Fifth Circuit similarly found such "concrete facts" in testimony about money *spent* in *Hatchett v. Barland*, 816 F. Supp. 2d 583 (E.D. Wis.

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[2] The Fifth Circuit's decision cited to one other preenforcement case where the court held that there was an as-applied constitutional violation. *Justice*, 771 F.3d at 295; *see Swaffer v. Cane*, 610 F. Supp. 2d 962, 964-65 (E.D. Wis. 2009). In that case, as here, the plaintiffs estimated the amounts they wanted to spend.

2011). *Justice*, 771 F.3d at 295. But that plaintiff spent that money only after the district court awarded him a preliminary injunction. *Hatchett*, 816 F. Supp. 2d at 589, 594. It is unlikely that a plaintiff will be able to develop the concrete facts necessary for such an injunction in the future, before having undertaken her planned activity, under the standard announced in this case. The Fifth Circuit's decision thus creates a standard under which the typical preenforcement action generally cannot be found ripe. It is not enough under that standard for a party to allege the facts of its proposed actions, as this Court has allowed. Rather, a party must, as in *Sampson*, act in potential violation of the law and then sue for a declaratory judgment before the state brings an enforcement action, hoping that he or she will prevail and be vindicated. Schrodinger's cat has no place in the rule of law, and courts should not require that someone act before they can know whether they will be punished.

Furthermore, in requiring that a party violate the law before testing its constitutionality, the Fifth Circuit's decision risks eliminating federal review of state campaign laws since quick enforcement of those statutes in state courts may lead federal courts to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). *See id.* at 45. At the very least, the precedent created by the Fifth Circuit creates an obstacle to judicial review, which in itself can "constitute[] a severe burden on political speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007). More likely, individuals will simply conclude that federal review of such laws is unavailable, chilling constitutionally protected speech. *See Virginia v.*

Hicks, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech").

The Court should grant the petition to ensure a robust right to contest a law's constitutionality without "expos[ing] [one]self to actual arrest or prosecution." *Susan B. Anthony List*, 134 S. Ct. at 2342.

B. The court of appeals ignored this Court's precedents governing ripeness and failed to conduct a hardship analysis

The Fifth Circuit also ignored this Court's precedents regarding the proper standard of review in First Amendment cases. It conducted what appears to be a ripeness inquiry, but it did not use any of the legal terms of art associated with that standard. Worse, the Fifth Circuit ignored this Court's direct guidance on how to conduct a ripeness inquiry, failing entirely to take into account the hardships imposed upon Petitioners by the State.

There is no question, however, that Petitioners experienced hardship. Mississippi's laws forced them to choose "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[d] to be constitutionally protected activity . . . to avoid" any penalties imposed by the State. *Steffel*, 415 U.S. at 462. That Petitioners suffered the "substantial hardship" of being forced "to choose between refraining from core

political speech" or "risking costly . . . proceedings and criminal prosecution," *Susan B. Anthony List*, 134 S. Ct. at 2347, supports a conclusion that the as-applied challenge was ripe for decision and thus that the Fifth Circuit erred in denying consideration.[3]

C. The Fifth Circuit failed to recognize that the record was fit for review

In concluding that the record was insufficient to fashion an as-applied remedy, the Fifth Circuit failed to credit Petitioners' allegations, as it is required to do in a preenforcement action. The court also manifestly failed to view the evidence in the light most favorable to Petitioners. For these reasons, the court failed to find enough evidence to fashion as as-applied remedy.

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[3] The hardship on Petitioners alone may be enough to demonstrate ripeness.

> Some commentators have suggested that ripeness can be found if either [the hardship or fitness of the record criteria] is met. Professor Tribe, for example, states that '[c]ases in which early legal challenges are held to be ripe normally present either or both of two features: significant present injuries . . . or legal questions that do not depend for their resolution on an extensive factual background.

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 112 (3d ed. 2006) (quoting Laurence Tribe, *American Constitutional Law* 80 (3d ed. 2000)). But, even if both criteria must be met, the second criteria—the fitness of the record for review—is also met in this case, as discussed below.

This case presents "a real and substantial controversy admitting of specific relief." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). The five Petitioners alleged that they would spend more than $200 each, combining some of the funds and spending some individually, App. 168-70 (Complaint ¶¶ 8-12), and they have previously represented that they would not combine more than $1,000, App. 90, 158-60, 165. These points answer the only factual issues identified by the Fifth Circuit: whether Petitioners would truly have limited their contributions and, if so, what limit they would have set. *Justice*, 771 F.3d at 293-94.

1. Failure to credit Petitioners' allegations

As this was a preenforcement, as-applied challenge, the Fifth Circuit erred in not "credit[ing] [Petitioners'] allegations" about their intended prohibited conduct. *Commodity Trend Serv.*, 149 F.3d at 687, 690. The Fifth Circuit should have credited the five Petitioners' statements that they intended to spend slightly in excess of $200 each, spending some amounts individually and some in combination, and their representation that this combined spending would amount to less than $1000. *See* App. 168-70 (Complaint ¶¶ 8-12); App. 90, 158-60, 165. Furthermore, the court should have noted that Petitioners in fact capped their combined spending at $200, pursuant to State law. *See* Pet. for Cert. at 6; App. 183. The Fifth Circuit here instead discounted Petitioners' allegations, stating that it could not "assume or find it plausible that [they]

would have capped their spending" and that there was "uncertainty concerning the amount at which" Petitioners would have limited their contributions. *Justice*, 771 F.3d at 293-94.

2. Failure to apply even the standards for ripeness in non-constitutional cases

In examining the jurisdictional question of ripeness, the Fifth Circuit failed to view evidence that went to the merits of the as-applied remedy—evidence of the contribution limit around which that remedy should be tailored—in the light most favorable to Petitioners. *See, e.g.*, *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005) (requiring review in light most favorable to plaintiff where jurisdictional question depends on factual issues going to merits). The Fifth Circuit posited that Petitioners had only asked to spend in excess of $200 and would not, in fact, limit their spending. *Justice*, 771 F.3d at 292-93. In doing so, the Fifth Circuit imposed its own assumptions about human avarice, and it credited other testimony about unrelated individuals in different circumstances raising larger sums. It also ignored Petitioners' consistent representation that they would spend no more than $1,000 in concert. App. 90, 158-60, 165. Based on this erroneous review, the Fifth Circuit stated that it could not "find it plausible that these Plaintiffs . . . would have capped their spending" and that, even if the court "accepted that Plaintiffs want[ed] to limit their contributions," the amount at which Petitioners would have limited themselves was too "uncertain[]."

Justice, 771 F.3d at 293-94. This approach failed to give sufficient deference to the pleadings of the parties.

* * *

Parties have a right to seek preenforcement review rather than violating the law. Nevertheless, the Fifth Circuit vitiated that right by demanding a record that parties cannot supply in advance with the specificity the court of appeals demanded. In addition, the Fifth Circuit erred in not finding the case ripe because the court failed to credit the hardship to the parties.

This Court should grant certiorari to clarify the right to preenforcement review and the standards courts should be applying to evaluate that right.

II. The Fifth Circuit's Decision Continues a Troubling Trend in the Lower Courts: Denying Relief After Improperly Converting As-Applied Challenges Into More Difficult Facial Challenges

The Fifth Circuit's opinion follows those of other courts of appeals in giving short shrift to the as-applied challenges preferred by this Court. Those circuits, like the Fifth Circuit here, err in imposing standards of evidence that are difficult to meet in preenforcement situations, ignoring or overriding the record before them based on hypotheticals asked at oral argument or introduced for the first time in the courts' opinions, or converting as-applied challenges to facial challenges entirely. The courts

are thus encouraging parties to bring only facial challenges or to forego their constitutional rights altogether. This state of affairs requires this Court's intervention.

As-applied challenges are the normal rule and preferred to facial challenges because they invalidate a law only under the specific circumstances where a party has proven that she is injured, leaving other potentially constitutional applications in place. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (noting "normal rule"). Accordingly, this Court has forced challengers to "shoulder [a] heavy burden to demonstrate that [a law] is 'facially' unconstitutional," making it "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[4]

On the other hand, in as-applied cases, the government must bear the burden and show that the regulation passes exacting or strict scrutiny. *See Citizens United v. FEC*, 558 U.S. 310, 340, 366 (2010) (applying strict scrutiny to laws that burden

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[4] Facial challenges require that a party demonstrate "that [a] law is unconstitutional in all of its applications," that it lacks "a plainly legitimate sweep," or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449 and n.6 (internal quotation marks omitted); *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (noting second type of facial challenge). In cases raising First Amendment claims, the most lenient of these standards, which is itself exacting, is applied.

speech but exacting scrutiny to one-time, event-driven disclosure requirements); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252, 256, 262, 263 (1986) (applying strict scrutiny to a law that imposed the full panoply of PAC regulations on an entity, including ongoing disclosure requirements); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (holding that laws that burden speech are subject to strict scrutiny). This Court has thus encouraged parties to bring as-applied challenges, allowing the courts to avoid speculation, exercise "the fundamental principle of judicial restraint," and respect the democratic process. *Wash. State Grange*, 552 U.S. at 450-51.

The Fifth Circuit is not alone in limiting this right, as it implicitly acknowledged when it based its decision on similar actions in other circuits. *See Justice*, 771 F.3d at 294-95.

For example, in *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012), the Seventh Circuit held that the plaintiff had failed to sustain its preenforcement, as-applied challenge to Illinois' law because it had not yet "broadcast *any* communications in" that state. *Id.* at 475-76 (emphasis in original). The challenger, however, had broadcast ads elsewhere, stated that it would have used "the typical form of issue ad," and provided examples of its issue ads in the record. *Id.* at 474. Assuming that the specifics of the challenger's advertisements were relevant to the requested as-applied relief—something the Seventh Circuit assumed without justification—a better *preenforcement* record would be hard to develop. The

Seventh Circuit nonetheless refused to rule on that record.

Similarly, in *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013), the Eleventh Circuit converted an as-applied challenge similar to the one here into a facial challenge. *Id.* at 1242 n.2. According to the record before the court, four individuals wanted to contribute $150 each, for a total of $600, to purchase radio ads in opposition to a ballot amendment. *Worley v. Roberts*, 749 F. Supp. 2d 1321, 1323 (N.D. Fla. 2010). Even though this was an action requesting as-applied relief under specific circumstances—$600 in spending on a ballot measure in the 2010 election—the Eleventh Circuit ignored the challengers' specific request. Instead, the court of appeals relied on the fact that those challengers would be involved in future issue speech—unsurprising given the inevitable mootness objections raised in such cases—and a hypothetical posed by the court at oral argument, to which counsel responded that the challengers would be happy to spend a million dollars if someone gave it to them. *Worley*, 717 F.3d at 1242 n.2.

But future elections and a hypothetical and unlikely donation were not before the *Worley* court. The controversy before the court, and the record developed in that case, concerned $600 to be spent on a ballot issue in the 2010 election, and the court refused to address *those* facts and instead "analyzed th[e] case as a facial challenge." *Id.*

The courts of appeals are amending the pleadings of the parties in order to avoid declaring laws unconstitutional in the as-applied context. Instead, they are imposing standards of evidence

that are difficult to meet in preenforcement situations, ignoring or overriding the records before them based upon hypotheticals asked at oral argument or introduced in the opinions themselves, or converting as-applied challenges to facial challenges entirely. This goes against the explicit preference of this Court that the lower courts hear as-applied challenges. Only this Court may step in and correct this practice, which has now spread to at least three circuits hearing First Amendment challenges to campaign finance rules.

This trend will result in parties abandoning as-applied challenges as futile. Plaintiffs may bring facial challenges, despite this Court's preference for as-applied challenges, knowing that the courts of appeals will direct their analyses to the facial remedy anyway. More likely, parties will simply silence themselves, knowing that they have little hope of succeeding in a facial challenge because a particular law has a "plainly legitimate scope" and is unconstitutional principally in their unusual circumstances. This is not the law, and the Court should grant certiorari to emphasize the importance of a robust right to bring a preenforcement, as-applied challenge to unconstitutional burdens on speech and association. After all, "[t]he solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others." *Steffel*, 415 U.S. at 474.

III. The Decision's Tailoring Analysis Failed to Accurately Determine Both the Petitioners' Burdens and the Government's Interest

The Fifth Circuit below failed to recognize that there is no "'substantial relation' between [Mississippi's] requirement[s] and a 'sufficiently important' governmental interest" to justify the burdens placed upon Petitioners. *Citizens United*, 558 U.S. at 366-367. Unlike the Tenth Circuit in *Sampson*, the Fifth Circuit failed to recognize all the burdens imposed by PAC regulations, as opposed to one-off disclosure requirements. It also failed to recognize the added weight of placing such burdens on five friends—not a corporation or political organization. Finally, unlike the *Sampson* Court, the Fifth Circuit here failed to recognize the government's minimal interest given the parties and small contributions involved.

A. Failure to recognize burdens on Plaintiffs

Proceeding correctly, the *Sampson* court looked at all the burdens imposed by Colorado's regulations, not just the burdens related to public disclosure requirements. It examined the complexity of the state's campaign finance laws; the perceived need to hire counsel to ensure compliance with the law, which could have entailed a fee exceeding what the parties would have spent speaking on their selected issue; and the "burden on Plaintiffs of time, energy, and money to review the law themselves." *Sampson*, 625 F.3d at 1260.

The Fifth Circuit, by contrast, never questioned the burden on Petitioners of being forced to become a PAC, just the constitutionality of the disclosure burdens *on* a PAC. That is, the Fifth Circuit simply assumed that a PAC is created whenever five friends act together, without any formal organization, in their spare time. These five friends immediately become equivalent to professional political operatives running multimillion dollar incorporated PACs, and they become subject to the same regulations.

Accordingly, for the Fifth Circuit, the burdens on these five friends are constitutional because they are lighter than those upheld in other states when imposed upon professional, full-time PACS that purposefully organize themselves to influence multiple ballot issues and candidate elections at once. *Justice*, 771 F.3d at 299 (comparing to general-purpose committees). And, according to the Fifth Circuit, because these five friends are comparable to such groups, it is a "simple step[]" for them to organize themselves as a committee and formalize its organizational structure, including the appointment of a treasurer. *Justice*, 771 F.3d at 299. Indeed, the court says that doing so is "little more if anything than" what five "prudent" friends "would do in these circumstances anyway." *Id.* at 300.

Five friends who are wisely managing their affairs and resources are not likely to become a PAC and take on PAC burdens if those requirements will cost them more than they intend to spend in the first place. Thus, the Fifth Circuit's five "prudent" friends will in fact silence themselves, just as happened here. The court failed to recognize this clear

conclusion because it failed to fully examine the burdens placed upon them. It failed to look at the complexity of Mississippi's laws, the need Petitioners would have to hire counsel for compliance, and the burden on Petitioners in reviewing the law. *Cf. Sampson*, 625 F.3d at 1260. It also failed to weigh the continuing burdens imposed by PAC status: to organize, keep records, and regularly report expenditures, contributions, and cash on hand. Finally, it failed to recognize that even minor recordkeeping mistakes or slight reporting errors would create a false report subjecting a PAC to substantial penalties. *See* App. 142.

B. Failure to consider the burden on Petitioners as individuals

The decision here also failed to recognize that this case deals with individuals, suing as such, and not individuals who have formed a corporation or any other entity. They are simply five individuals working together as friends in their free time—not as their career or the primary focus of their time—on an issue important to them. Just as an organization should not have to form a separate PAC to speak, *see Citizens United*, 558 U.S. at 337-39, five friends should not have to turn themselves into a PAC to speak. The Fifth Circuit, however, forced them into a *Catch-22*: a group of friends with relatively small resources cannot pool them without organizing as a political committee, but they also cannot organize as a political committee because they would have to take on expensive PAC burdens that exceed the value of their pooled resources.

By incorrectly treating Petitioners as a professional, corporate PAC rather than five individuals, the Fifth Circuit failed to weigh correctly the burdens placed upon them.

C. Failure to fully analyze the government's interests

The decision here failed to recognize the minimal governmental interests at stake. Furthermore, the Fifth Circuit incorrectly weighed the government's interests by looking only at those supporting regulation. In particular, the court failed to recognize the importance of encouraging behavior like Petitioners'.

As the Ninth and Tenth Circuits have recognized, "the value of . . . *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Sampson*, 625 F.3d at 1260 (quoting *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009)) (emphasis in *Canyon Ferry*). As in *Sampson*, the donations here are "sufficiently small that they say little about the contributors' views of their financial interest." *Id.* at 1261. Concomitantly, the electorate learns little by knowing that each of the Petitioners might engage in advocacy worth slightly more than $200. *See id.* Such information is unlikely to inform a reasonable voter.

Furthermore, the government has an interest in encouraging individual political activity like that of Petitioners. Alexis de Tocqueville, whom this Court has cited for his insights into our system of

government, *see, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 406-407 (1991); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n.80 (1982), explained that allowing citizens to form political associations is critical to self-government as a free people. Forming associations draws individuals out of themselves and their "own circle[s]," despite "differences in age, intelligence, or wealth [that] naturally keep them apart, and teaches them "the value of helping one another even in lesser affairs." Alexis de Tocqueville, *Democracy in America* 521 (George Lawrence trans., J. P. Mayer ed., HarperPerennial 1988). They thus teach citizens how to work together, facilitating private problem-solving as well as improving political cooperation.

In addition, if campaign regulations like Mississippi's are intended to empower individual citizens, Mississippi's laws as-applied to Petitioners are counter-productive. In a democratic society where "citizens are independent and weak," where "[t]hey can do hardly anything" individually, they would "find themselves helpless if they did not learn to help each other voluntarily." *Id.* at 514. Given that Mississippi may wish to empower individual citizens—so that they will be successfully engaged with our democratic republican system rather than wallowing in political apathy—the government has an interest in encouraging Petitioners' activity.

* * *

Thus, the government's net interests here are minimal given the relatively small contributions and expenditures at issue—less than the fees Petitioners would incur in consulting a qualified attorney to

understand the laws at issue and their duties under them—and the interest the government has in increasing civic participation. On the other hand, the burdens imposed on a small group of individuals are great in equating them with a powerful PAC and imposing all the regulations appropriate to the latter. As in *Sampson*, this is "quite unlike [a case] involving the expenditure of tens of millions of dollars," and whatever the dividing line between constitutional and unconstitutional regulations, the "contributions and expenditures [here] are well below the line." 625 F.3d at 1261. Consequently, there is no "'substantial relation' between [these laws] and a governmental interest that is sufficiently important to justify the burden on the freedom of association," and it is "unconstitutional to impose that burden on Plaintiffs." *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Dated: December 23, 2015

Respectfully Submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 218-4600

ALLEN DICKERSON
Counsel of Record
OWEN YEATES
CENTER FOR
COMPETITIVE POLITICS
124 S. West St. Ste. 201
Alexandria, VA 22314
(703) 894-6800