No. 15-682

IN THE

Supreme Court of the United States

GORDON VANCE JUSTICE, JR., *et al.*

Petitioners,

v.

DELBERT HOSEMANN, Mississippi Secretary of State, *et al.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CA Institute") respectfully submits this *amicus curiae* brief on behalf of itself and in support of Petitioners.[1]

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* CA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CA Institute has a particular interest in opposing governmental overreach, protecting the rule of law, and advocating for both government transparency and citizen privacy. Consequently, it brings a unique perspective on the nature of both transparency and

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[1] In accordance with Supreme Court Rule 37.2(a), notice of the intent of CA Institute to file this *amicus curiae* brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and neither the parties, nor their counsel, nor anyone except CA Institute and its counsel financially contributed to preparing this brief.

[2] Cause of Action Institute, *About*, http://www.causeofaction.org/about (last visited Dec. 21, 2015).

anonymity in relation to political speech, participation, and association, and hence on the issues presented in this case.

SUMMARY OF ARGUMENT

In conflict with precedents from this Court and other circuit court decisions, the Fifth Circuit upheld a state regulatory scheme that burdens and limits the free speech and association rights of citizens who wish to engage in political advocacy.

The state attempts to justify such burdens as necessary to fulfill an "informational interest." But, in non-candidate elections, where no threat of corruption exists, such an interest cannot outweigh the First Amendment rights of individual citizens.

Recent social science research demonstrates that the burden on speech and political activity imposed by statutory schemes such as the one at issue outweigh any purported informational or public benefit. Research demonstrates that almost no marginal information is added to the public debate. Most individuals, faced with the organizational and disclosure requirements imposed by such schemes, will make the same decision made by Petitioners and refrain from or limit their engagement in the political process.

Contrary to the Mississippi desire in this instance to provide relevant information to voters, the restrictive nature of its laws actually compels the reverse—the dissemination of less information and a limitation of the right to engage in political advocacy.

To preserve the First Amendment rights of Petitioners and others in like circumstances, the Court should grant certiorari and reverse the holding below.

ARGUMENT

I. The Informational Interest of The State of Mississippi Does Not Present a Sufficient Rationale for Limiting First Amendment Speech and Association Rights when the Possibility of Corruption Does Not Exist

Mississippi laws at issue regulate activity related to core political speech and association. Any group of two or more people that receives or spends more than $200 in connection with a ballot proposal must register as a political committee and subject itself to a host of reporting and disclosure requirements. Miss. Code Ann. §§ 23-15-801-813, 23-17-1, 23-17-47-53, 23-17-61. Those requirements include provisions mandating the identification of any person making aggregate contributions of more than $200 in the covered period. *Id.* § 23-15-807(d)(ii)(1). In the context of voter-initiated constitutional amendments such as the one at issue, a political committee that either receives contributions or makes expenditures in excess of $200 must file a financial report that includes, *inter alia,* the identification of the name and street address of each person from whom it received a contribution in excess of $200. *Id.* §§ 23-17-51(1), 23-71-53(b)(vii).

The Mississippi regulatory scheme burdens core political speech and the right of association. This Court has stressed that such speech and association burdens are subject to the highest levels of constitutional protection such that restrictions on either are tested under a "strict scrutiny" approach. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958). Strict scrutiny mandates that a burden

on political speech or association is justified only by a compelling state interest and a regulatory scheme narrowly tailored to achieve that interest. *Citizens United,* 558 U.S. at 340; *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) ("MCFL"). Or, under an "exacting scrutiny" approach, the standard mandates a substantial relation between disclosure requirements and a sufficiently important government interest. *Citizens United*, 558 U.S. at 366-67.

In either instance, restrictions on political speech and association can be justified, if at all, only on limited grounds, *e.g.*, to protect against corruption or the appearance of corruption. *See Citizens United*, 558 U.S. at 345, 356-61; *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) ("This Court has long recognized the governmental interest in preventing corruption and the appearance of corruption in election campaigns.") (internal quotation marks omitted); *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976) (upholding a regulatory scheme designed to prevent the "actuality and appearance of corruption resulting from large individual financial contributions").

The anti-corruption rationale applies to candidate elections. Where, as here, only ballot initiatives are at play, a threat of corruption does not exist. *Wis. Right to Life*, 551 U.S. at 478-79 ("Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) ("The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed

'independent expenditures' to mean only those expenditures that 'expressly advocate the election or defeat of a clearly identified candidate.'") (citation omitted); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (citations omitted); *see also Sampson v. Buescher,* 625 F.3d 1247, 1256 (10th Cir. 2010) ("[Q]uid pro quo corruption cannot arise in a ballot-issue campaign.").

The Fifth Circuit held that, despite the absence of any corruption threat associated with ballot initiatives, the Mississippi interest in helping inform its citizenry justified its regulatory scheme. App. to Pet. Cert. 25-29. But an informational interest where a threat of corruption does not exist cannot justify the burden imposed by Mississippi on core First Amendment rights. The balance between purported state interests and the constitutional rights of individual citizens must weigh in favor of the individual.

As *McIntyre* explained: "In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." 514 U.S. at 356. Absent such considerations, however, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 348-49 (concluding that

"Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement"); *see also Doe v. Reed*, 561 U.S. 186, 206-08 (2010) (Alito, J., concurring) (commenting that the informational interest "runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association"); *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297-300 (1981) (discussing distinction between limitations on contributions to candidates for political office, allowed to avoid corruption, and limitations on contributions related to ballot measures, in which "there is no significant state or public interest in curtailing debate and discussion").

Social science research further illustrates the inappropriate burdens imposed by the type of compliance requirements at issue. In one study, a research professor asked 255 participants, most of whom were graduate students, to fill out the paperwork required to register as a ballot committee for a hypothetical initiative and to comply with the reporting requirements of three representative states. *See* Dick Carpenter and Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L.J. 603, 626 (2012). Not one participant correctly completed all of the necessary tasks required to comply with existing state law. Every one of them, had the exercise been real, could have been liable for violating the representative states' campaign finance laws. *Id.*

Moreover, when participants were asked if the paperwork burdens alone would deter ordinary

citizens from engaging in independent political activity, 63 percent said they would. This number rose to 89 percent when the participants were asked to factor in the possibility of fines or penalties. *Id.* at 628-29.

The above study also surveyed recent research regarding the information made available as a result of reporting schemes such as those in Mississippi. It concluded that "it is by no means clear that there is any marginal value to be gained from the details of financial activities of groups." *Id.* at 618-23 (discussing studies and concluding that disclosure-related information had virtually no impact on voter knowledge or behavior and that "the marginal social value of current financial disclosure in non-candidate contexts is approximately nil"); *see also* David Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledg*e, 12 Election L.J. 114, 127 (2013) (finding that disclosure information in ballot-issue campaigns has "little marginal effect in helping voters identify the positions of interest groups on ballot issues").[3]

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[3] Much of the anti-corruption rationale itself rests on dubious assumptions. The only valid social scientific research supporting claims about "perception of corruption" is "political efficacy" research designed to determine if campaign spending distorts perceptions and prevents citizens from turning out to vote. *See, e.g.*, William H. Form & Joan Huber, *Income, Race, and the Ideology of Political Efficacy*, 33 J. Pol. 659, 670 (1971); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 144 (2003) ("Take away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.") (internal quotation marks omitted). To advance a counterfactual narrative that more political speech and a more active marketplace of ideas threatens the democratic

The Fifth Circuit decision at issue improperly upheld a state regulatory scheme that burdens free speech and association rights without advancing a compelling or substantial state interest. The Court should therefore grant the petition for writ of certiorari and reverse the holding below.

II. This Case Presents an Efficient Opportunity for this Court to Clarify that State Regulatory Schemes Such as the One at Issue Unconstitutionally Burden Core Speech and Association Rights

Petitioners are prohibited from engaging in core political speech and association where spending exceeds a nominal $200 unless they comply with a host of complicated organizational and reporting requirements. Any noncompliance/errors are subject to criminal penalties, including monetary penalties

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process, the Brennan Center "analyzed" election spending supposedly caused by the decision in *Citizens United*. *See* Ian Vandewalker, Brennan Center for Justice, *Election Spending 2014: Outside Spending in Senate Races Since Citizens United* (2015)*, available at* http://goo.gl/e886nj. Although ideologically-committed law professors and media rely on these results, social scientists do not because the research design fails basic data quality standards. First, the sample size studied was statistically insignificant. *See id.* at 2. Second, the Brennan study claims "[d]ark money in Senate elections has more than doubled since 2010, from $105 million in inflation-adjusted dollars, to $226 million in 2014," *id.*, but does not explore the more statistically relevant question of whether that increase is significant compared to total spending. Further, reliable social science research shows no statistically significant relationship between money in politics and the perception of corruption. *See* Abby K. Blass, Daron Shaw & Brian Roberts, *'Pay to Play' or Money for Nothing? Americans' Assessments of Money and the Efficacy of the Political System*, APSA 2010 Annual Meeting Paper (2010), *available at* http:// goo.gl/enrnNA.

and incarceration. Miss. Code Ann. § 23-17-61; *see also* Miss. Sec'y of State, *Constitutional Initiative in Mississippi: A Citizen's Guide* (rev. date March 1, 2013) ("Engaging in prohibited or illegal campaign practices can lead to criminal prosecution and other liability.").

Such requirements have the effect of chilling or limiting speech and association, thereby discouraging citizen engagement in the political process. Faced with the burden of these requirements and the consequences of a failure to comply, most individuals in Mississippi, and in other states with similar laws, are likely to make the same decision made by Petitioners—refrain from or limit their engagement in the political advocacy and association covered by the regulatory scheme. *See MCFL*, 479 U.S at 255 ("Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports[,] . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it."); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873-74 (8th Cir. 2012) (en banc) ("[T]hese regulatory burdens—or even just the daunting task of deciphering what is required under the law—" means that small groups and individuals "reasonably could decide the exercise is simply not worth the trouble. And who would blame them?") (citations omitted); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) (campaign finance regulation has become "an area in which speakers are now increasingly forced to navigate a maze of rules, sub-rules, and cross-references in order to do nothing more than project a basic political message. . . . The Supreme Court has warned against exactly this.") (citations omitted).

Contrary to the Mississippi desire to provide relevant information to voters, the restrictive nature of its laws actually promotes the reverse—the dissemination of less information and fewer opportunities to make informed choices. This result ultimately leaves voters in a worse position informationally than they otherwise would be absent such laws.[4]

Perhaps even more concerning is the fact that regulatory schemes such as these in Mississippi, because they mandate disclosure at such low levels of financial participation, infringe the right to anonymous speech and associations. Inviolability of privacy in group association often is indispensable to preserve free association, particularly where a group espouses unpopular beliefs. *NAACP,* 357 U.S. at 462 (recognizing "the vital relationship between freedom to associate and privacy in one's associations"); *see also* David Lourie, *Note: Rethinking Donor Disclosure After*

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[4] The Mississippi scheme and similar laws in other states also end up favoring powerful and wealthy interests, who have the resources to hire legal counsel to ensure compliance with the burdensome requirements, over small groups and individuals, most of whom will not be able to afford the costs associated with compliance. As one commentator has observed:

> Campaign finance laws established to control the influence of great wealth have been aimed, on this theory, at what is basically pocket change. This 'circumvention' has been a large cause of the woes of the campaign finance laws, because in this application, the essential purpose of those laws have been turned upside down. On hypotheticals about the evasive stratagems of big guys, the little guy gets caught up in a complicated system.

Bob Bauer, *Progressive Commitments and the "Little Guy" in Campaign Finance Regulation*, More Soft Money Hard Law (Nov. 1, 2013), http://bit.ly/1OTULuo.

The Proposition 8 Campaign, 83 S. Cal. L. Rev. 133, 154 (2009) (concluding that donors should not be disclosed in either candidate or issue elections because "[t]hey do not provide an effective voting cue . . . . Further, the likelihood of privacy costs to donors is higher in direct democracy because ballot measures deal with specific issues, whereas in candidate elections, it is less clear what caused the donor to contribute to the campaign").

The First Amendment also bars disclosure when there is a "reasonable probability" that it will lead to "threats, harassment, or reprisal from either Government officials or private parties." *Citizens United,* 558 U.S. at 367 (internal quotation marks omitted); *see also id.* at 480-85 (Thomas, J., dissenting) (highlighting the threats, intimidations, and reprisals taken against donors to committees formed in opposition to California's Proposition 8 and the documented chilling effect on potential donors to a candidate challenging an incumbent state attorney general); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100-02 (1982) (prohibiting compelled disclosure of members and donors who were subject to threats, harassment, and reprisals); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 498 (1975) (quoting lower court that "[t]he right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times").[5]

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[5] *See also McIntyre*, 514 U.S. at 342 ("Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."). Although *McIntyre* suggests

The holding of the Fifth Circuit cannot be squared with First Amendment decisions from this Court. This case therefore presents an appropriate opportunity for this Court to clarify how state election laws should be structured so as to protect the core political speech and association rights of individuals under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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monetary donations deserve less protection because "when money supports an unpopular viewpoint it is less likely to precipitate retaliation," 514 U.S. at 355, that notion does not stand up to later Supreme Court cases requiring only a "reasonable probability" that disclosure will lead to threats or retaliation. *Citizens United,* 558 U.S. at 367; *see also Buckley*, 424 U.S. at 66 (Court has not "drawn fine lines between contributors and members but [has] treated them interchangeably").