IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

ANDREW NATHAN WORLEY, et al.
Plaintiffs,

v.

Civil Action No.
4:10-cv-00423-RH/WCS

KURT S. BROWNING, et al.
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs are Florida citizens who joined together in 2010 to speak to other Florida citizens about a political issue of statewide importance. Specifically, they wanted to pool their money to run radio ads urging the public to defeat a proposed amendment to the Florida Constitution. Despite the fact that the U.S. Supreme Court has held that speech like Plaintiffs' is at the core of what the First Amendment was intended to protect, Florida law imposes severe burdens on that speech, requiring groups that spend as little as $500 on political advocacy to register with the government and comply with a host of onerous regulations. While the costs of these laws are real, their supposed benefits are entirely illusory. The one interest that the State has articulated—that Florida's campaign-finance laws improve "voter competence" by providing voters with additional relevant information about a ballot issue's supporters—is unsupported by any empirical evidence and has been expressly rejected by the Supreme Court. Under any level of First

Amendment scrutiny, Florida's campaign-finance laws are unconstitutional as applied to groups, like the Plaintiffs, that merely advocate the passage or defeat of ballot issues.

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[1], wanted to speak out against proposed Amendment 4 to the Florida Constitution during the 2010 election. Decl. of Andrew Nathan Worley in Supp. of Pls.' Mot. for Summ. J. ¶¶ 1–4 (Worley Decl.); Decl. of Pat Wayman in Supp. of Pls.' Mot. for Summ. J. ¶¶ 1–4 (Wayman Decl.); Decl. of John Scolaro in Supp. of Pls.' Mot. for Summ. J. ¶¶ 1–4 (Scolaro Decl.); Decl. of Robin Stublen in Supp. of Pls. Mot. for Summ. J. ¶¶ 1–4 (Stublen Decl.). 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. *See* Decl. of Paul Sherman in Supp. of Pls.' Mot. for Summ. J. Ex. 1 at 1 (Sherman Decl.). Plaintiffs considered Amendment 4 an affront to property rights that would have a devastating effect on Florida's economy. Worley Decl. ¶ 4; Wayman Decl. ¶ 4; Scolaro Decl. ¶ 4; Stublen Decl. ¶ 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

[1] On November 23, 2010, Robin Stublen filed notice that he was voluntarily dismissing his claims against Defendants. This Court entered an order dismissing Mr. Stublen's claims without prejudice on December 1, 2010.

talk-radio station. Worley Decl. ¶ 7; Wayman Decl. ¶ 7; Scolaro Decl. ¶ 7; Stublen Decl. ¶¶ 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. Worley Decl. ¶¶ 7, 12–13; Wayman Decl. ¶¶ 7, 13–14; Scolaro Decl. ¶¶ 7, 12–13; Stublen Decl. ¶¶ 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. Stublen Decl. ¶ 8; Decl. of Ken Lovejoy in Supp. of Pls.' Mot. for Summ. J. ¶ 3 (Lovejoy Decl.).

Plaintiffs prepared a script for their advertisement. Stublen Decl. ¶ 9 & Ex. A. The draft advertisement consisted of what Plaintiffs viewed as the top five reasons why voters should reject Amendment 4. The draft advertisement did not contain the legally required disclaimer discussed in more detail in Part II, below. As written, it took a full 30 seconds to read Plaintiffs' advertisement. Stublen Decl. ¶ 9.

II. Florida's Campaign-Finance Laws.

Had Plaintiffs gone forward with their proposed advertisements, they would have been considered a "political committee." Sherman Decl. Ex. 2 at 1 (Defs.' Resps. to Pls.' Reqs. for Admis. 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).

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 it "anticipates receiving contributions or making expenditures" of more than $500 in a year, 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;[2]
- 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, if a PAC receives a contribution less than five days before an election, it may not obligate or spend that money until after the election has passed. *Id.* § 106.08(4). PACs are also 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;

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

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 May 11, 2011).

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 made by, a PAC.[3] 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. The same is true of expenditures. *Id.* § 106.07(4)(a)6. All of this information is then disclosed on the Florida Division of Elections website. *See* Sherman Decl. Ex. 3 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 requirements, all speakers in Florida who make independent expenditures, including PACs, 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 noted by the State's expert, Dr. Daniel Smith, "Regulation imposes costs of compliance that can be significant for smaller organizations." Sherman Decl. Ex. 4 at

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

78:23–79:3 (Smith Dep.). 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. Worley Decl. ¶¶ 11, 18; Wayman Decl. ¶¶ 12, 19; Scolaro Decl. ¶¶ 11, 18.

Plaintiffs had only a limited amount of time to devote to their political advocacy. Worley Decl. ¶ 11; Wayman Decl. ¶ 12; Scolaro Decl. ¶ 11. 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 has previously reviewed the laws that apply to political committees. Wayman Decl. ¶ 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.*

Plaintiffs were also afraid that, due to the complexity of Florida's campaign-finance laws, they might inadvertently violate those laws and subject themselves to civil liability. Worley Decl. ¶ 20; Wayman Decl. ¶ 21; Scolaro Decl. ¶ 20. 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, Sherman Decl. Ex. 5 at 2, all of which are subject to civil penalties, Fla. Stat. §§ 106.07(8), .265(1), and many to additional criminal penalties or even jail time, *see, e.g.*, *id.* §§ 106.071, .08(7), .09(2), .19.

The Florida Division of Elections website notes that, "the laws governing campaign finance reporting and campaign financing limitations are complex." Sherman Decl. Ex. 6 at 2. Indeed, even people with years of experience can make mistakes, as the Rule 30(b)(6) deposition of the Division of Elections shows. The designee for that deposition was Kristi Bronson, an attorney who has served as chief of the bureau that manages the Division of Elections helpline for over six years. 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. Sherman Decl. Ex. 7 at 60:2–62:19 (Bronson Dep.); Ex. 8 at 22:21–26:3 (Holland Dep.).

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*." Sherman Decl. Ex. 9 at 1. (emphasis added). During the Rule 30(b)(6) deposition of the Division of Elections, designee Kristi Bronson acknowledged that this guidance is vague. Bronson Dep. 26:21–27:4.

The handbook for Florida's online-reporting system—which Plaintiffs would have to use if they spoke out on a future statewide issue—is 58 pages long. Bronson Dep. 29:12–14. The version of Chapters 97 through 106 of the Florida States available on the

Division of Elections website is 133 pages long. Bronson Dep. 22:2–13. The version of the Constitution of the State of Florida available on the Division of Elections website is 94 pages long. Sherman Decl. ¶ 4. The Division of Elections website currently lists 40 "adopted rules" and 520 advisory opinions (excluding those marked as rescinded or obsolete). Sherman Decl. ¶ 5.

Groups that lack the time to read or ability to comprehend (in their entirety) the sources discussed above can seek formal or informal guidance from the Division of Elections. Formal guidance comes in the form of an advisory opinion. 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). Holland Dep. 7:20–8:2. Speakers can also contact the Division of Elections for informal advice, but the Division routinely refers these questions out to Gary Holland, an Assistant General Counsel at the Florida Department of State. Bronson Dep. 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." Holland Dep. 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, Mr. Holland often 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.

Plaintiffs' fears that they will be subject to civil liability for an inadvertent violation of the law are 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. § 106.26(1); *see also* Worley Decl. ¶ 20; Wayman Decl. ¶ 21; Scolaro Decl. ¶ 20. The Florida Elections Commission estimates that 98% of the complaints it receives are "politically motivated." Sherman Decl. Ex. 10 at 19:6–15 (Flagg Dep.). 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." Flagg Dep. 16:16–18:2. Because of this, Plaintiffs would not feel comfortable running their ads unless they hired a lawyer, which they cannot afford to do. Worley Decl. ¶ 20; Wayman Decl. ¶ 21; Scolaro Decl. ¶ 20.

Finally, in addition to the forgoing 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. Stublen Decl. ¶ 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). Stublen Decl. ¶¶ 17–19; Lovejoy Decl. ¶¶ 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. Stublen Decl. ¶ 18.

IV. Plaintiffs' Lawsuit and Their Future Activities.

Plaintiffs felt unable to speak under the conditions imposed by Florida's campaign-finance law and did not want to run the risk of accidentally violating those laws. Worley Decl. ¶¶ 11, 20–21; Wayman Decl. ¶¶ 12, 21–22; Scolaro Decl. ¶¶ 11, 20–21. Accordingly, Plaintiffs filed suit on September 28, 2010, challenging those laws on First Amendment grounds. On October 4, 2010, Plaintiffs filed a motion seeking to preliminarily enjoin Florida's campaign-finance laws as applied to themselves and other similarly situated groups. After briefing and argument, this Court issued an order denying that motion in substantial part on October 26, 2010.

Amendment 4 was ultimately defeated in the November 2010 election. Sherman Decl. Ex. 1 at 2. Because Plaintiffs are all politically active, they want to engage in similar political activity in the future, particularly if a proposal like Amendment 4 makes it onto the ballot again. Worley Decl. ¶ 19, Wayman Decl. ¶20, Scolaro Decl. ¶ 19. If they do so, however, they will again be subject to the laws described above.

STANDARD OF REVIEW

"Summary judgment is appropriate where 'there is no genuine issue as to any material fact and [] the movant is entitled to judgment as a matter of law.'" *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296 (11th Cir. 2011) (quoting Fed. R. Civ. P. 56(a).

ARGUMENT

Plaintiffs want to exercise their First Amendment rights to speak and associate in a context—ballot-issue elections—that the Supreme Court has called "the essence of First

Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Indeed, as the Supreme Court has repeatedly recognized, "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Along with the right to speak about elections, Plaintiffs also enjoy the First Amendment right to associate for that purpose, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."), and the right to speak anonymously if they choose to. *McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.").

Yet Plaintiffs are unable to exercise their First Amendment rights without complying with onerous and intrusive regulations. First, they will have to register and operate as a "political committee," and comply with regulations that the Supreme Court has recognized are "expensive" and "burdensome," even for corporations and unions. *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). Second, they will have to include disclaimers in their advertisements, a form of compelled speech that both requires Plaintiffs to shorten their political message and violates their right to engage in anonymous political advocacy. Neither of these burdens can survive any form of First Amendment scrutiny.

I. Florida's PAC Requirements Are Unconstitutional As Applied to Speech About Ballot Issues.

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*, 130 S. Ct. at 897. 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). But the requirements are unconstitutional whether this Court analyzes Florida's PAC requirements under strict or intermediate scrutiny.

A. *Citizens United* establishes that PAC requirements are subject to strict scrutiny, which Florida's law fails.

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 898. Accordingly, the Supreme Court subjected those burdens to strict scrutiny and held the federal 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, so, too, 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 also file detailed reports with the state, "which are due at different times depending on the type of election that is about to occur." *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). Additionally, while federal law places no restrictions on independent spending by political committees, Florida law actually bans political committees from spending any contributions received in the last five days before an election. *Id.* § 106.08(4).[4]

Accordingly, because Florida's PAC requirements "burden political speech" to an even greater degree than the federal requirements at issue in *Citizens United*, they too are "subject to strict scrutiny, which requires the Government to prove that the restriction[s] further[] a compelling interest and [are] narrowly tailored to achieve that interest." 130 S.

[4] In addition to failing strict scrutiny for the reasons discussed in this section, this specific provision is also in direct conflict with the Supreme Court's holdings in *Mills v. Alabama*, 384 U.S. 214 (1966), and *Buckley v. Valeo*, 424 U.S. 1 (1976).

Ct. at 898 (internal quotation marks omitted). As discussed below, Florida's PAC requirements fail both prongs of this test.

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 (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 (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*, 514 U.S. at 357 (disclaimer requirements); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298–99 (1981) (contribution limits); *Bellotti*, 435 U.S. at 789–92 (spending limits).

The only interest that the state has identified in this case is a supposed "informational interest." 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. Sherman Decl. Ex. 11 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.*

However, neither the Supreme Court nor this Circuit has ever held that this alleged interest is compelling. Indeed, just last term the Supreme Court declined the opportunity to accept the "informational interest" as even a "sufficiently important" state interest, let alone a *compelling* one. *Doe v. Reed*, 130 S. Ct. 2811, 2818–19 (2010). Writing separately, Justice Alito argued that the information 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 require [disclosure of] all kinds of demographic information, including . . . race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships."[5] *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

[5] Dr. Smith confirmed Justice Alito's fear that the informational interest has no limiting principle when he admitted that 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. Smith Dep. 95:7–16.

support the constitutionality" of a disclaimer requirement that applied to speech about ballot issues. 514 U.S. at 348–49.

The Tenth Circuit has also expressed skepticism about the supposed "informational interest," noting that it is "not obvious that there is such a public interest." *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010). 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 novel and logically limitless informational interest. Preventing *quid pro quo* corruption is the only state interest that has ever been 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. As the Ninth Circuit concluded, these additional "Political Action Committee-like requirements" are not

narrowly tailored to the State's asserted informational interest as applied to ballot-issue speech. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007).

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." Sherman Decl. Ex 12; *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 of E. Helena, Inc. 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." Sherman Decl. Ex. 12. Elsewhere, Dr. Smith has suggested a de minimis threshold of $200. Smith Dep. 80:23–81:11. Notably, both of these thresholds—suggested by the State's retained expert—are higher than the amount of money 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).

Third, the State cannot 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 (1994) (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 (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 (2000) (noting that the Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden"). But the State cannot do this. Indeed, the State's expert agreed with the conclusion of his coauthor Elizabeth Garrett that "[m]ore study is required before we can reach conclusions about whether cues actually improve voter competence or work sometimes unexpectedly to undermine it." Smith Dep. 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." Sherman Decl. Ex. 11 at 325–26.

In fact, only Plaintiffs' expert, 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. Decl. of David Primo, Ph.D., in Supp. of Pls.' Mot. for

Summ. J. ¶¶ 28, 72–75 (Primo Decl.); Smith Dep. 159:10–160:25 (admitting 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. Primo Decl. ¶ 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 ¶¶ 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. 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. Sherman Decl. Ex. 11 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. Primo Decl. ¶ 43.

Dr. Primo's three groups were given the opportunity to read various amounts of additional information about the ballot issue. The first group received access to no additional information; the second received access to additional information in the form of a voter guide, newspaper articles, and campaign ads, none of which included disclosure-related information; and the third group received access to all of the information received by the second group, plus additional articles containing disclosure

data. *Id.* at ¶¶ 34–38. All survey participants were then provided with a list of groups that had taken a position for or against the ballot issue in at least one of the additional documents and were asked to identify what position the groups had taken. *Id.* at ¶¶ 40–41.

Dr. Primo's study found that few survey respondents accessed the disclosure-related information when given the opportunity, 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 ¶ 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 ¶ 74. Additionally, because survey respondents were provided with information "in an easily accessible format," Dr. Primo concluded that "it is very 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* Smith Dep. 68:15–24 (agreeing that even in a world no campaign-finance disclosure, there would still be "a lot of heuristics out there for voters"); *see also* Primo Decl. ¶ 25 (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. Thus, as Dr. Primo 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." Primo Decl. ¶ 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. Accordingly, this Court should hold that Florida's PAC requirements are not narrowly tailored.

B. Florida's PAC requirements cannot survive intermediate scrutiny.

As discussed above, the Supreme Court has held that PAC requirements are subject to strict scrutiny. Recently, the Court has clarified that certain disclosure-only statutes are subject to a form of intermediate scrutiny. *See Citizens United*, 130 S. Ct. at 914; *Doe*, 130 S. Ct. at 2818 . 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 intermediate scrutiny.

Under intermediate 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 expressly 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 15–16, 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.

Again, this Court should be guided by the Tenth Circuit's ruling in *Sampson v. Buescher*. In that case, the Tenth Circuit applied intermediate 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 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. Accordingly, this Court should conclude that Florida's PAC requirements for ballot-issue speakers fail intermediate scrutiny.

II. Florida's Disclaimer Requirements Are Unconstitutional As Applied to Ballot Issues.

Florida law requires that Plaintiffs' political advertisements include the message: "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).[6]

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

This provision compels speech, forcing Plaintiffs to change their political message and violating the right to engage in anonymous speech that the Supreme Court announced in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

This case is remarkably similar to *McIntyre*, which also involved speech about ballot issues. Margaret McIntyre, along with her son and a friend, distributed fliers opposing a local school-tax levy. *Id.* at 337. 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. *Id.* at 338 n.3. Ms. McIntyre's fliers did not contain this disclaimer and she was fined $100 by the Ohio Elections Commission. *Id.* at 338. The Supreme Court, judging the law under the "strictest standard of review," struck down Ohio's disclaimer requirement as unconstitutional. *Id.* at 348, 357.

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." *Id.* at 342. 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." *Id.* 341–42. Government regulations that interfere with this right will be upheld only if they are "narrowly tailored to serve an overriding state interest." *Id.* at 347. Finally, "[t]he simple interest in providing voters with additional relevant information," is not an overriding state interest. *Id.* at 348.

In this case, 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. And unlike television ads—in which a silent, printed disclaimer can run alongside other text and audio—or print ads—in which unused white space can be devoted to the disclaimer—disclaimers in radio ads necessarily displace other information. Under Florida law, buying a 30-second radio ad means devoting 20% of that ad to the state-mandated disclaimer.

While the burden of Florida's disclaimer law is at least as severe as the burden in *McIntyre*, the alleged state interest in this case is no more compelling. The State's supposed "informational interest" is, at most, the "plainly insufficient" interest in providing the electorate with "additional relevant information." *McIntyre*, 514 U.S. at 348–49. Indeed, the State's expert, when asked to describe the "informational interest" behind disclosure, agreed that it "gives voters additional relevant information." Smith Dep. 107:22–108:7.

McIntyre remains good law and is not meaningfully distinguishable from this case. It is of no moment that the speakers in this case wanted to spread their message via radio, rather than through pamphlets. As the Supreme Court has held, 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. Similarly, it is irrelevant that Plaintiffs are a group of individuals, rather than a lone speaker. As the Ninth Circuit has recognized, "The 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). Accordingly, this Court should follow the ruling in *McIntyre* and hold that Florida's disclaimer requirement is unconstitutional as applied to speech about ballot issues.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment, declare that Florida's PAC and disclaimer requirements are unconstitutional as applied to independent political speech about ballot issues, and enjoin their future enforcement against Plaintiffs and other similarly situated groups.

Dated: May 11, 2011.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, a true and correct copy of the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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