No. 13-333

# In The Supreme Court of the United States

ANDREW NATHAN WORLEY,
PATRICIA WAYMAN, JOHN SCOLARO,

*Petitioners,*

v.

FLORIDA SECRETARY OF STATE, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONERS


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Pursuant to Supreme Court Rule 15.8, Petitioners respectfully file this supplemental brief in support of their Petition for Certiorari.

In just the few short weeks since Petitioners filed their Petition for Writ of Certiorari with this Court, there have been three additional court decisions that are directly relevant to the questions presented in this case and that demonstrate the national importance of those questions. *See Galassini v. Town of Fountain Hills*, No. CV-11-02097, 2013 U.S. Dist. LEXIS 142122 (D. Ariz. Sept. 30, 2013); *Justice v. Hosemann*, No. 3:11-CV-138, 2013 U.S. Dist. LEXIS 140666 (N.D. Miss. Sept. 30, 2013); *Vermont v. Green Mountain Future*, No. 12-072, 2013 Vt. LEXIS 85 (Sept. 27, 2013).

As explained below, all three of these decisions continue the trend – highlighted in Petitioners' first question presented and discussed on pages 14-24 of the Petition – of lower courts ignoring this Court's holding in *Citizens United v. FEC*, 558 U.S. 310 (2010), that PAC requirements are subject to strict scrutiny. Second, one of these recent decisions deepens the split between the Tenth and Eleventh Circuits – highlighted in Petitioners' second question presented and discussed on pages 25-29 of the Petition – regarding jurisdictional standards for as-applied claims that are capable of repetition yet evading review. Finally, all three of these cases illustrate the confusion in the lower courts – discussed on pages 22-23 and in footnote 4 of the Petition – about the manner in which intermediate scrutiny applies to

PAC requirements (if, contrary to *Citizens United*, it applies at all). Certiorari is warranted to bring these lower courts in line with this Court's precedent and to resolve the conflicts among these courts. Sup. Ct. R. 10(a), (c).

## I. LOWER COURTS CONTINUE TO IGNORE *CITIZENS UNITED*.

As explained in the Petition, lower courts across the country are consistently ignoring this Court's holding in *Citizens United* that PAC requirements are subject to strict scrutiny and are instead reviewing challenges to PAC requirements with a form of intermediate scrutiny. Petition at 14-24. As a result, burdens on speech by unincorporated political groups – some of which are nothing more than loosely affiliated groups of like-minded people – are routinely reviewed with more deferential scrutiny than would apply to burdens on speech by well-financed corporations and unions. The three recent decisions mentioned above continue this trend and demonstrate that the decision of the Eleventh Circuit below has made matters worse.

In the first, *Vermont v. Green Mountain Future*, No. 12-072, 2013 Vt. LEXIS 85 (Sept. 27, 2013), the Supreme Court of Vermont relied on the Eleventh Circuit's decision below in reviewing the constitutionality of Vermont's PAC requirements as applied to an issue-advocacy group. Although the court in *Green Mountain Future* acknowledged that *Citizens United*

controlled its analysis, it ignored this Court's holding that forcing even well-funded corporations to speak through a PAC amounts to a "ban on speech" that should be reviewed under strict scrutiny. *Citizens United*, 558 U.S. at 339-40. Instead, the Vermont court followed the Eleventh Circuit's ruling that "PAC regulations themselves are not subject to strict scrutiny." *Green Mountain Future*, 2013 Vt. LEXIS 85, at *25 (citing *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1243-45 (11th Cir. 2013)). Accordingly, the court applied intermediate scrutiny and upheld the PAC requirements.

The second decision, *Justice v. Hosemann*, similarly disregarded this Court's ruling in *Citizens United*. Instead, like the Vermont Supreme Court, the District Court for the Northern District of Mississippi cited the decision of the Eleventh Circuit below for the proposition that PAC requirements are subject only to intermediate scrutiny. 2013 U.S. Dist. LEXIS 140666, at *19.

Finally, in *Galassini v. Town of Fountain Hills*, although the District Court for the District of Arizona took note of the Eighth Circuit's admonition that "[a]llowing states to sidestep strict scrutiny by simply placing a 'disclosure' label on laws imposing the substantial and ongoing burdens typically reserved for PACs risks transforming First Amendment jurisprudence into a legislative labeling exercise," it too concluded that PAC requirements should be reviewed with only intermediate scrutiny. 2013 U.S. Dist. LEXIS 142122, at *62 (quoting *Minn. Citizens*

*Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012)).

These three decisions, handed down less than a month after Petitioners filed their Petition for Writ of Certiorari, demonstrate that the divergence between this Court's precedent and the practice of lower courts is growing, and that growth has been driven in part by the decision of the Eleventh Circuit below. This Court should grant review to correct this divergence, and bring lower courts back in line with this Court's holding that PAC requirements are subject to strict scrutiny. *See* Sup. Ct. R. 10(c).

## II. THE SPLIT BETWEEN THE TENTH AND ELEVENTH CIRCUITS ON STANDING FOR AS-APPLIED CHALLENGES IS GETTING DEEPER.

As further explained in the Petition, the Eleventh Circuit below held that Petitioners had failed to establish their standing to challenge Florida's PAC requirements as applied to small grassroots groups. Instead, that court, *sua sponte*, hypothesized that some as-yet-unknown donor might, in a future election, contribute $1 million to Petitioners' informal political-discussion group, thereby making them no longer a small group. Petition at 24-29. This decision – which forms the basis of Petitioners' second question presented – created a split of authority with the Tenth Circuit, which, when faced with nearly identical facts, refused to engage in this sort of baseless

speculation. *See Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

The Mississippi district court's recent decision in *Justice v. Hosemann* deepens this split and illustrates how out of step the Eleventh Circuit's approach to standing is with that of other courts. The facts in *Justice* are virtually identical to those in the instant case and in *Sampson*. In *Justice*, an informal group of citizens – like-minded neighbors and friends – met regularly to discuss politics. *Id.* at *2. They wanted to speak out on a local ballot issue dealing with the abuse of eminent domain. *Id.* They determined, however, that under Mississippi law their political activity would make them a PAC. *Id.* at *2-3. Unwilling to comply with the heavy burdens Mississippi law imposes on PACs, the group filed suit to challenge the constitutionality of those burdens as applied to small grassroots groups.

In line with the Tenth Circuit, but in conflict with the Eleventh, the district court ruled for the plaintiffs and concluded that, as applied to grassroots speakers, Mississippi's PAC requirements failed even under intermediate scrutiny. *Id.* at *55-56. Moreover, when faced with facts similar to those in the instant case, the district court did not engage in implausible speculation in order to avoid reaching the merits. Instead, the court did exactly what the Tenth Circuit did in *Sampson*: It looked at the regulatory scheme, determined that it was unconstitutionally silencing a grassroots group, and granted that group the constitutional relief to which it was entitled.

These discrepant outcomes mean that, in some states, litigants must anticipate and rebut whatever implausible hypotheticals a court might imagine in order to preserve their standing to raise as-applied claims, while, in other states, litigants can trust that their as-applied claims will be resolved based only on *reasonable* inferences drawn from the actual record. This Court should grant review to resolve these conflicting approaches to this important jurisdictional question. *See* Sup. Ct. R. 10(a).

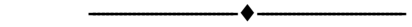
## III. LOWER COURTS APPLYING INTERMEDIATE SCRUTINY ARE REACHING OPPOSITE CONCLUSIONS ON IDENTICAL FACTS.

Finally, these three recent decisions further illustrate the confusion that lower courts experience when they (erroneously) review PAC requirements with intermediate scrutiny. As discussed in the Petition, virtually all courts applying intermediate scrutiny treat it as a rubber stamp, while a handful, including the Eighth and Tenth Circuits, have treated it as a more meaningful standard of review. Petition at 17-24; *see also Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). The result of this disagreement is that grassroots speakers in different parts of the country are subject to radically different levels of First Amendment protection.

These three recent decisions have only added to the confusion that plagues this area of law. The

Vermont Supreme Court, relying on the decision of the Eleventh Circuit below, made no meaningful attempt to assess the burdens or benefits of Vermont's PAC requirements before finding those requirements constitutional. *See Green Mountain Future*, 2013 Vt. LEXIS 85, at *29-30. In *Justice*, by contrast, the Mississippi district court conducted a thorough analysis of the actual burdens that the state's PAC requirements imposed on grassroots political speakers before concluding that those burdens were unconstitutional as applied to the plaintiffs. 2013 U.S. Dist. LEXIS 140666, at *39-42. And in *Galassini*, the Arizona district court – purporting to apply the same level of scrutiny – found Arizona's analogous PAC requirements so burdensome and poorly tailored that it held Arizona's definition of "political committee" *facially* unconstitutional. *See* 2013 U.S. Dist. LEXIS 142122, at *62-74.

Whether or not intermediate scrutiny is a meaningful standard of judicial review is not a matter that should turn on the state in which one lives. This disagreement among federal courts about so fundamental an issue demands resolution by this Court. *See* Sup. Ct. R. 10(a).



## CONCLUSION

Lower courts across the country remain confused about the appropriate standard for resolving challenges to PAC burdens, are increasingly divided on

the jurisdictional standards for as-applied claims that are capable of repetition yet evading review, and are reaching inconsistent conclusions when confronted with identical sets of facts. For these additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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