No. 17-2654

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RONALD JOHN CALZONE,

Plaintiff-Appellant,

v.

DONALD SUMMERS, ET AL.,

Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Missouri,
No. 2:16-cv-4278 (NKL)

Plaintiff-Appellant's Petition for Rehearing and for Rehearing *En Banc*

David Roland
FREEDOM CENTER OF MISSOURI
Post Office Box 693
Mexico, Missouri 65265
Telephone: 314.604.6621
Facsímile: 573.562.6122
dave@mofreedom.org

Allen Dickerson
Zac Morgan
Owen Yeates
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@ifs.org
Counsel for Plaintiff-Appellant

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FED. R. APP. P. 35(b)(1) STATEMENT

On November 28, 2018, a divided panel of this Court affirmed the district court in the instant matter, holding that the First Amendment allows Defendants ("Commission" or "MEC") to require citizens who merely engage in policy discussions with legislators—without receiving any compensation, or providing anything of value to those legislators or their staffs—to register and report as lobbyists.

The parties and the panel all agree that this is a question of first impression, and that it concerns foundational First Amendment rights. Moreover, the panel's opinion would permit appellate courts to avoid First Amendment questions of this sort by transforming properly pled, as-applied challenges into broader cases, and then ruling on the basis of hypothetical situations outside the record on appeal.

Because these are questions of exceptional importance, Mr. Calzone respectfully petitions for rehearing and reconsideration, Fed. R. App. P. 40, or, in the alternative, rehearing by this Court *en banc*. Fed. R. App. P. 35(b)(1).

CASE BACKGROUND

Mr. Calzone is a citizen who regularly travels to Jefferson City to discuss policy with members of the Missouri General Assembly. He does not accept or receive anything for doing so, nor does he provide anything of value to legislators or legislative staff. Instead, while at times noting his affiliation with a nonprofit

corporation that has no budget and no bank account, he discusses the policies he believes best for the people of Missouri. JA 343-346 (Jointly Stipulated Facts).

Based on these facts, to which it has stipulated, the Commission insists that Mr. Calzone is a "legislative lobbyist" and seeks to enforce § 105.470(5)(c), RSMo. against him.

ARGUMENT

I. The Majority Opinion Mischaracterized The Scope Of Mr. Calzone's As-Applied Challenge.

The panel majority refused to "consider the application of this statute to unpaid lobbyists who make no expenditures related to lobbying efforts." Slip Op. at 8 ("Maj."). By refusing to consider Mr. Calzone's actual circumstances, the Court was able to affirm the district court and hold that "unpaid lobbyists could still offer things of value to legislators, creating a sufficiently important governmental interest in avoiding the fact or appearance of public corruption." *Id*. at 11. This decision was error and merits reconsideration.

A. Mr. Calzone's activities lacked any financial dimension, a fact stipulated below and a core aspect of his as-applied challenge.

The panel majority acknowledged that Mr. "Calzone does not receive any compensation or make any expenditures when lobbying." Maj. at 4. Nevertheless, the panel ducked consideration of the undisputed and stipulated fact that Mr. Calzone "does not provide gifts, meals, or anything of value to legislators or

legislative staff in connection with his activism," Pl. Suggs. in Supp. of Mot. (ECF No. 2-1) at 1, because "Calzone forfeited any such claim in the district court and waived it on appeal." Maj. at 8.

The MEC has never suggested that Mr. Calzone waived consideration of this stipulated fact, and the panel never requested briefing on the subject. Consequently, this petition presents Mr. Calzone's first opportunity to respond to the panel majority's arguments, which rest on an easily correctable misunderstanding of the record and the merits of Mr. Calzone's case.

Mr. Calzone has principally relied upon *United States v. Harriss*, 347 U.S. 612 (1954), which identified "a vital national interest" in knowing "who is being hired [to lobby], who is putting up the money, and how much." *Id*. at 625-626. That decision controls here because Mr. Calzone has neither been hired to lobby, nor has put up any money for legislators' benefit. *Both* Mr. Calzone's lack of compensation and his "lack of expenditures…ha[ve] been a piece of his as-applied challenge to Missouri's lobbying-disclosure all along." Slip. Op. at 17 (Stras, J., dissenting) ("Dissent").[1] From "his complaint in the district court, memorandum in support of his motion for a permanent injunction, stipulation of facts, briefing to this court, and oral argument, the record is stuffed full of references to Calzone's lack of

[1] Nevertheless, the majority argued, without citation, that Mr. Calzone "recast his claim" at oral argument. Maj. at 8. This observation is objectively false, as explained below.

expenditures, leaving no doubt that a key piece of his argument is that he does not give money or gifts to legislators." Dissent at 17; *id.* at 17-18, n.5 (collecting, at length, a sampling of references in the record).

Indeed, the parties had stipulated to the lack of a monetary dimension to Mr. Calzone's activities, JA 343 ¶ 2-3, which the district court both acknowledged and fully included in its opinion denying injunctive relief—the opinion giving rise to this appeal. JA 366 ¶ 2-3; *also* Pl. Suggs. in Reply in Supp. of Inj. (ECF No. 33) at 2 ("The parties have jointly stipulated to the relevant facts and admissible evidence…and the Commission has provided no evidence or information outside those stipulations"). The record is replete with evidence that Mr. Calzone neither receives nor spends money, and this "[C]ourt has a duty to measure these allegations in light of the factual claims actually made." *Wilson v. Lincoln Redevelopment Corp.*, 488 F.2d 339, 341 (8th Cir. 1973).

Even if Mr. Calzone had "not pellucidly articulate[d]" this point, the majority ought to have "understood the tenor of the argument," *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000), and engaged with it directly, as the dissenting opinion did.

B. The panel impermissibly contorted the scope of Mr. Calzone's as-applied challenge.

The source of the majority's error appears to be a misunderstanding of Mr. Calzone's properly pled challenge to subsection (c) of § 105.470, RSMo., which

regulates as legislative lobbyists those natural persons who influence legislation after being "designated to act" by a third party. Mr. Calzone did not and does not argue that *all* of § 105.470 is unconstitutional as applied to *all* uncompensated petitioning. Rather, "[t]he meat of Calzone's as-applied challenge has always been, as one might expect, that Missouri cannot constitutionally apply its registration and reporting requirements to *him*." Dissent at 17 (emphasis in original). After all, the inciting incident for this matter was Mr. Calzone's credible fear that *subsection (c)* would be enforced against him. Pl. Suggs. in Supp. (ECF No. 2-1) at 4 ("[A]fter conducting a hearing, the Ethics Commission found probable case that Mr. Calzone was a legislative lobbyist within the meaning § 105.470(5)(c)"). Even a cursory reading of the record demonstrates this. In his complaint, Mr. Calzone expressly argued that "a[s]-applied, § 105.470(5)(c) advances no state interest sufficient to override [his] right to influence legislation as an engaged citizen." JA 10, ¶ 6(a) (Verified Complaint). And Mr. Calzone's motions for injunctive relief were similarly limited to "Missouri Revised Statutes section 105.470(5)(c)." JA 78 (Mot. for TRO and Prelim. Inj.).

There is good reason for this focus. Section 105.470(5)(c) is the only provision the State could leverage against Mr. Calzone because, under the MEC's reading, it regulates an individual who "does not accept money for his activism, nor…spend money on legislators and legislative staff when he communications with them about

his public policy beliefs." Pl. Suggs. in Supp. (ECF No. 2-1) at 11; *see also id*. at 9 ("Defendants have threatened the First Amendment rights of anyone who approaches a Missouri legislator or staffer *to discuss policy* and *does so without pay*") (emphasis supplied).

Mr. Calzone's opening papers in the district court described the other categories of legislative lobbying regulated by Missouri:

> Subpart (a) is for those…"acting in the ordinary course of employment, which primary purpose is to influence legislation on a regular basis, on behalf of or for the benefit of such person's employer." § 105.470(5)(a) RSMo. Subpart (b) are [*sic*] for contracted lobbyists: those who are "engaged for pay or for any valuable consideration." § 105.470(5)(b) RSMo. Subpart (d) kicks in when a person "[m]akes total expenditures of fifty dollars or more" in connection with lobbying. § 105.470(5)(d) RSMo.

Id. at 12, n.3.

Mr. Calzone faces no prospect of enforcement under those subsections, because he was neither acting in the ordinary course of paid employment, nor did he have a paid contract to lobby, nor did he seek to make lobbying expenditures. He could no more bring a claim against those provisions of the law than he could against Missouri's regulation of individuals that lobby the judicial or executive branches of the state. *See, e.g.*, §§ 105.470(2) (defining "executive lobbyist"); 105.470(4), RSMo. (defining "judicial lobbyist"); JA 9 ¶ 1 (Verified Complaint) ("Mr. Calzone…frequently travels to the Missouri State Capitol to share his political views with those who serve in the *General Assembly*") (emphasis supplied).

Indeed, at oral argument in this Court, the Commission's counsel admitted that, given Mr. Calzone's particular conduct, only subsection (c) was at issue:

> Just to start by clarifying the issue, uh, if you look at the definition of a legislative lobbyist who's required to register and, uh, report, um, that definition has four sections, A, B, C, and D. C is the one Mr. Calzone is challenging here, whether it's designated. The other sections—A, B, and D—talk about you have to register, uh, if you're giving things of value to the legislator…So I think…that helps explain that he's sort of got two reasons why he thinks he's special compared to other lobbyists. One, is he's not buying lunch and giving money to other legislators. Two, his, uh, organization that, uh, has him in the post of president isn't paying him to be their president, *et cetera*. I understood his brief to say that both of these points were salient to his claim.

Oral Arg., *Calzone v. Summers*, 19:00-19:45.

Mr. Calzone's principal case is, and always has been, that "§ 105.470(5)(c), RSMo., violates the First Amendment freedom of speech and the freedom to assemble and to petition the government for a redress of grievances…as-applied to him," JA 10, ¶ 5 (Verified Complaint), and "*[s]pecifically*, the MEC's efforts to apply § 105.470(5)(c)…to Mr. Calzone's uncompensated policy conversations with those vested with the state's legislative authority." JA 19, ¶ 58 (Verified Complaint) (emphasis supplied). The question placed before the district court and a panel of this Court is not simply one about compensation standing alone. It is, and always has

been, about the State of Missouri applying its lobbying laws to an uncompensated person who engages in "policy conversations"—and not gift giving.[2]

C. The panel's effort to limit the arguments available to support a properly pled First Amendment claim ought to be rebuffed.

But even if the panel majority correctly understood Mr. Calzone's challenge, the Supreme Court has thrice affirmed that "[o]nce a federal claim is properly presented, a party can make *any* argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (emphasis supplied); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (quoting same through *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)). "[T]hroughout the litigation [Mr. Calzone] has asserted a claim that the [MEC] has violated [his] First Amendment right to free speech," assembly, and petition through its enforcement of subsection (c). *Citizens United*, 558 U.S. at 331; JA 10, ¶ 6(a) (Verified Complaint) ("As-applied" to Mr. Calzone "§ 105.470(5)(c) advances no state interest sufficient to override Plaintiff's right to influence legislation as an engaged citizen").

Therefore, even if Mr. Calzone's lack of expenditures was first presented at oral argument, this "contention….is…not a new claim…but a new argument to

[2] For example, Mr. Calzone also does not offer bribes to legislators, nor seek to engage in criminal conspiracies with them. It would have been just as improper for the panel majority to sidestep Mr. Calzone's as-applied challenge simply because Appellant failed to discuss these topics.

support what has been his consistent claim: that [§ 105.470(5)(c)] did not accord him the rights it was obliged to by the First Amendment." *Lebron*, 513 U.S. at 379. The panel erred in failing to address this argument—which was perfectly understood by both the dissent and the Commission.[3]

Indeed, by expanding the scope of Mr. Calzone's as-applied challenge to reach into portions of § 105.470 that he did not challenge, the panel refashioned Appellant's case into one for which the facts provide little support for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating "injury in fact" prerequisite for Article III standing). [4] When asked whether Mr. Calzone thought he could "buy[] lunch for legislators" without registering, Mr. Calzone's counsel affirmatively disclaimed any effort to challenge subsection (d), which regulates

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[3] Moreover, even conceding, *arguendo*, that this point was "raised for the first time on appeal" this "argument…is purely legal and require[d] no additional factual development," and should have been addressed by the panel majority. *Orr v. Wal-Mart Stores*, 297 F.3d 720, 725 (8th Cir. 2002).

[4] The panel majority's suggestion that Mr. Calzone's brief formulation of his argument in the "Statement of the Issues" undoes his properly pled complaint is an odd type of formalism, which seeks to refashion Mr. Calzone's case into a total attack on the statute as a whole. Maj. at 8; *see* Oral Arg. at 31:27-31:47 (MR. DICKERSON: "Well…at this point I think…it's almost a question of standing. The state's theory of enforcement is that he has violated this part of the legislative lobbying law about being selected by someone to lobby for them").

The panel's "overly formalistic argument" should be set aside and "the ultimate question raised in [Calzone's] Statement of the Issue," the one Mr. Calzone has standing to bring, ought to be considered. *McGuire v. Indep. Sch. Dist. No. 833*, 863 F.3d 1030, 1034, n.3 (8th Cir. 2017).

lobbyists that make such expenditures, stating instead that "[o]ur position throughout this…litigation has been if someone is spending money to influence legislation they can be fairly captured as a lobbyist." Oral Arg., *Calzone v. Summers*, 1:57-2:15.

Had Mr. Calzone, at oral argument, suggested a desire to make lobbying expenditures, it may have been proper to convert his challenge into a broader attack on the statute and reject it, either on the merits or for lack of standing. *Compare Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251 (11th Cir. 2013) ("Challengers' pleas on behalf of a few people pooling a small amount of money ring a bit hollow to the extent that they refuse to foreclose their option for raising big money…as we noted above, they also acknowledged at oral argument that if they received a $1 million donation, they would happily spend it").

But, in all respects, Mr. Calzone "preserved [his] First Amendment challenge to § [105.470(c)] as applied to the facts of [his] case," *Citizens United*, 558 U.S. at 331, and the Court's decision to treat Mr. Calzone's properly-pled challenge as nothing more than "an interesting academic question" merits reconsideration or, in the alternative, *en banc* review. Maj. at 8.

II. The Majority Erred In Holding Section 105.470(5)(c) Constitutional As-Applied To Mr. Calzone's Conduct.

Mr. Calzone's case, then, is about the enforcement of § 105.470(5)(c) against an individual that seeks, without accepting or expending things of value, to engage in policy discussions with members of the legislature. *Cf. Canyon Ferry Rd. Baptist*

Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1029-1030 (9th Cir. 2009) (striking down disclosure requirement as "applied to…conduct [that] neither causes an economic detriment to the [speaker] nor carries an ascertainable market value"). The panel majority's unprecedented decision ought to be reheard and rejected.

A. The panel majority inappropriately refashioned exacting scrutiny into a rubber stamp.

This Court, *en banc*, has characterized exacting scrutiny as a "'strict test,'" where "'there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed.'" *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) and *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 755 (2008)). Moreover, "'the governmental interest must survive exacting scrutiny'" in and of itself, and "'the burden is on the government to show the existence of such an interest.'" *Id*. (quoting *Davis*, 554 U.S. at 755 and *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (plurality op.)).

In its only case on the question of lobbyist registration and reporting, the U.S. Supreme Court identified a "vital national interest" in revealing "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Harriss*, 347 U.S. at 625-626. But the panel majority did not apply this governmental interest, which could not survive application to Mr. Calzone's nonpecuniary conduct. Maj. at 11. Instead, the panel majority adopted the State's

proffer of a generalized "interest in transparency for transparency's sake." Dissent at 20. The majority failed to review "Missouri's asserted transparency interest," *id*., in the "exacting" manner demanded by this Court. *Swanson*, 692 F.3d at 876 (citation and quotation marks omitted). Instead, it simply accepted the State's interest at face value, finding "that transparency is a sufficiently important governmental interest to satisfy exacting scrutiny." Maj. at 11.

In its sentence describing this new transparency interest, the panel majority announced that it had two components: "knowing who is attempting to influence legislators and public policy" and "avoiding the fact or even the appearance of public corruption." *Id*.

But an interest in "knowing who is attempting to influence legislators and public policy" casts an astoundingly wide net. *Id*. Under such a boundless conception of transparency, governments may regulate anything involving politics even if the activity lacks any nexus to "money in politics," undoing the careful line-drawing undertaken by the Supreme Court in *Harriss*.

Moreover, the majority's conception of a governmental interest in mere "influence" should never have survived review. Almost any activity may "influence" the legislature, which is one reason the Supreme Court has already ruled that mere influence upon government cannot constitutionally serve as the trigger for government regulation, *Buckley*, 424 U.S. at 77, let alone serve as the overarching

interest the State may point to as justification for curtailing "interactive communication concerning political change" between the Government and the governed. *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

Second, given the Supreme Court's emphatic rejection of governmental efforts to extend the anti-corruption interest outside the realm of "'dollars for political favors,'" it was plain error for the majority to find an anti-corruption interest in Mr. Calzone's nonpecuniary conduct. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (quoting *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985)); *McDonnell v. United States*, 579 U.S. __; 136 S. Ct. 2355 (2016).

Exacting scrutiny requires the government to articulate an appropriately narrow interest in restricting constitutionally-protected behavior, and the majority's failure to enforce this requirement demonstrates why. If the asserted interest is expanded so broadly that it swallows up any need for tailoring, heightened judicial scrutiny becomes "a rubber stamp." *Swanson*, 692 F.3d at 876. Under the First Amendment precedents of this Court, that approach is unacceptable.

B. Even under the expansive governmental interest invoked by the majority, Mr. Calzone's nonpecuniary conduct does not sufficiently advance that interest.

Moreover, even accepting the panel majority's novel transparency interest, regulating Mr. Calzone as a legislative lobbyist does not substantially further that

poorly-defined end. Under the panel majority's ruling, Mr. Calzone must either cease petitioning his government, or else file mostly-blank reports under pain of civil or criminal penalties for making even technical errors. Maj. at 13. But "Missouri cannot possibly have a greater interest in receiving blank reports than Calzone has in avoiding unnecessary paperwork, especially because meeting Missouri's technical filing rules is a legal requirement for exercising his First Amendment rights and the penalties for noncompliance are steep." Dissent at 23-24; *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

At bottom, Missouri is engaging in nothing more than a name-calling exercise, where Mr. Calzone is forced to wear the title of "lobbyist" and submit to the regulatory authority of the Missouri Ethics Commission, even though the people of Missouri will learn nothing relevant about him or his activities because there is simply no financial activity to report. *McCutcheon*, 572 U.S. at 199 (striking statute under the First Amendment where there is "a substantial mismatch between the Government's stated objective and the means selected to achieve it").

The State's interest in forcing the "lobbyist" epithet on Mr. Calzone, and on anyone else attending a lobby day or taking "the opportunity to call a legislator," Dissent at 24—without spending or receiving money to do so—is unclear. The panel

majority "like Missouri, fails to explain why compiling a public list of people who are engaging in core political speech is 'important.'" Dissent at 22. Rather, this Court has thus far provided nothing more than a conclusory assertion in "transparency for transparency's sake." Dissent at 20; *see SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("[S]omething outweighs nothing every time") (citation omitted, ellipses and quotation marks removed).

III. Mr. Calzone Cannot Clearly Avoid Regulation, Which Is The Core Of His Vagueness Challenge.

The panel majority rejected Mr. Calzone's vagueness challenge, finding that "people of ordinary intelligence" would find "the plain meaning of 'designated'" in RSMo, § 105.470(5)(c) to be "clear and well understood." Maj. at 15 (citation and quotation marks omitted). Despite this asserted clarity, the state has treated nearly identical complaints against Mr. Calzone in confusingly different ways: the "[s]econd complaint… was substantively identical to the first," but the first remains "pending" while the second was "dismissed." Maj. at 4. The panel majority's description of this disparate treatment highlights the unconstitutional ambiguity raised in Mr. Calzone's vagueness challenge. The Commission may consider the same complaint valid on Monday, but not on Tuesday. "This 'heads I win, tails you lose' approach cannot be correct," and poses a classic trap for the unwary. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (Roberts, C.J., controlling op.).

CONCLUSION

This case ought to be reconsidered, or in the alternative, reheard by the Court sitting *en banc*.

Respectfully submitted,

/s/ Allen Dickerson
Allen Dickerson
Zac Morgan
Owen Yeates
INSTITUTE FOR FREE SPEECH
124 S. West St., Ste. 201
Alexandria, VA 22314
Phone: 703.894.6800
Fax: 703.894.6811
Email: adickerson@ifs.org

David E. Roland Mo. Bar #60548
FREEDOM CENTER OF MISSOURI
P.O. Box 693
Mexico, MO 65265
Phone: 573.567.0307
Fax: 573.562.6122
Email: dave@mofreedom.org

CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Fed. R. App. P. 35(b)(2)(a) and Fed. R. App. P. 40(b)(1) as it contains, exclusive of those provisions exempted by Fed. R. App. P. 32(f), 3,711 words. It also complies with the typeface and style requirements of Fed R. App. P. 32(a)(5) and 32(a)(6), because this document has been prepared using a proportionally spaced typeface in Microsoft Word 2016 in Times New Roman, 14 point font.

Pursuant to 8th Cir. R. 28A(h)(3), Appellant states that electronic copies of this petition were "generated by printing to PDF from the original word processing file."

Pursuant to 8th Cir. R. 28A(h)(2), Appellant also states that this petition has been scanned for viruses using Norton Security Version 22.16.2.22, and the document is virus-free.

/s/ Allen Dickerson
Allen Dickerson
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, Allen Dickerson, do hereby certify that on December 12, 2018, I filed a copy of the foregoing electronically via this Court's CM/ECF, which has served electronic notice all counsel of record on December 12, 2018.

/s/ Allen Dickerson
Allen Dickerson
Counsel for Plaintiff-Appellant