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.

Appeal from the United States District Court
for the Western District of Missouri, No. 2:16-cv-4278
The Honorable Nanette K. Laughrey

RESPONSE BRIEF OF APPELLEES TO PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not warrant panel rehearing or en banc consideration because it does not meet the criteria set forth in Federal Rules of Appellate Procedure 35 and 40. First, en banc consideration is not "necessary to secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1), because the petition concedes that the case presents "a question of first impression." Pet. at 1.

Second, the proceeding does not "involve[] a question of exceptional importance," Fed. R. App. P. 35(a)(2), because the case arises from the unique circumstances of Mr. Calzone's and Missouri First's lobbying activities, which are non-recurring. As the panel opinion noted, several other States in the Eighth Circuit, and undoubtedly elsewhere, have long imposed similar definitions of lobbying and disclosure requirements. *See* Slip op. 7 n.4. Yet this case evidently presents the only instance in which anyone situated like Mr. Calzone has credibly feared enforcement and brought a challenge to such regulations. *See* Pet. at 1; Slip op. 10 (describing the issue as one "of first impression in the federal courts"). Though the questions presented are admittedly important, their

importance is not "exceptional," Fed. R. App. P. 35(a)(2), because they appear to have little impact beyond Mr. Calzone himself.

Panel rehearing under Rule 40 is also unwarranted. The petition's main contention is that the panel "overlooked or misapprehended" a point of "law or fact," Fed. R. App. P. 40, by concluding that Mr. Calzone waived reliance on his argument that he makes no expenditures to influence legislation. *See* Pet. at 2-10. This contention does not warrant panel rehearing because the factual dispute does not affect the outcome. The panel's opinion correctly applies the existing precedent of the Supreme Court and this Court, regardless of whether Mr. Calzone makes expenditures to influence legislation.

Under Supreme Court precedent, Missouri may require lobbyists to register and disclose their activities—whether or not the lobbyists are paid or they expend funds. The First Amendment subjects registration and disclosure requirements to intermediate or "exacting" scrutiny, not strict scrutiny. *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010); Slip. op. 7. Missouri's law satisfies this level of scrutiny because the public has an interest in averting the fact or appearance of public corruption and in promoting transparency in lobbying activities—whether or not the

lobbyist is paid or expends funds. Disclosure of each lobbyist's identity and advocacy directly achieves this transparency.

Missouri's lobbyist disclosure law is also not unconstitutionally vague. The average person can easily understand what the term "designated lobbyist" means: that a lobbyist was authorized or directed to lobby on behalf of another person or group.

BACKGROUND

To deter and discover improper acts and to promote transparency in government, Missouri requires lobbyists to disclose their activities to the Missouri Ethics Commission, which posts lobbyists' reports online. Mo. Rev. Stat. § 105.470; JA 362. Missouri defines a lobbyist as any natural person trying to influence official action who is "designated to act as a lobbyist" for a third party. Mo. Rev. Stat. § 105.470.

This lobbyist disclosure statute makes no distinction between lobbyists who are paid and unpaid, or between lobbyists who expend funds and do not expend funds. This equal treatment is in keeping with the broader First Amendment principle that, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,

692 F.3d 864, 871 (8th Cir. 2012) (en banc) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

The district court held that Missouri's lobbying law is constitutional on its face and as applied to Mr. Calzone, an unpaid lobbyist who expends no funds. *Calzone v. Hagan*, No. 2:16-CV-04278-NKL, 2017 WL 2772129 (W.D. Mo. June 26, 2017) (JA 361).

This Court affirmed the district court. Ruling on this "issue of first impression in the federal courts," this Court held that, under Supreme Court and circuit precedent, "the government retains a sufficiently important governmental interest in registering lobbyists whether the lobbyist is paid or unpaid." *Calzone v. Summers*, 909 F.3d 940, 948 (8th Cir. 2018) (Slip op. 10).

ARGUMENT

I. Missouri's lobbyist disclosure law passes intermediate, exacting scrutiny as applied to Mr. Calzone.

A. Registration and reporting requirements are subject to exacting scrutiny.

Under the First Amendment, Missouri's lobbyist disclosure law is subject to exacting scrutiny—not strict scrutiny. Slip op. 6-7.

As this Court has held en banc, "when the law at issue is a disclosure law," exacting scrutiny applies, which "requires a substantial

relation between the disclosure requirement and a sufficiently important governmental interest." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874–75 (8th Cir. 2012) (en banc) (quoting *Citizens United*, 558 U.S. at 366–67); JA 371. Less rigorous than heightened scrutiny, exacting scrutiny accords the State deference for its choice about how to weigh competing constitutional interests, as well as how to "anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *Ala. Democratic Conference v. Attorney General of Ala.*, 838 F.3d 1057, 1063 (11th Cir. 2016) (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

Exacting scrutiny does not require a "perfect" fit between a law and the State's interests, nor must the State adopt "the least restrictive means" of advancing its stated interest. *McCutcheon v. Federal Election Comm'n,* 572 U.S. 185, 218 (2014). Instead, the fit simply must be "reasonable," and the burden imposed by the limitation must be "in proportion to the interest served." *Id.* Under this less rigorous level of scrutiny, "'[e]ven a significant interference with protected rights of political association may be sustained.'" *Id.* at 197 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

The dissent suggests that *Citizens United* and these other modern campaign finance cases do not displace older lobbying cases applying strict scrutiny, such as *United States v. Harriss*, 347 U.S. 612, 625–26 (1954), Slip op. 20 n.6. But the language in the Supreme Court's recent disclosure cases is general: exacting scrutiny applies to all sorts of disclosure requirements having to do with politics and government. Slip op. 7. *Citizens United*, 558 U.S. at 366–67. Modern cases thus superseded the older cases. Slip op. 6-7. This is why, in modern times, each court of appeals has applied exacting scrutiny to disclosure requirements in campaign finance laws and lobbying laws. Slip op. 7. Nor did *United States v. Harriss*, 347 U.S. 612, 625–26 (1954), or other lobbying cases, concern unpaid lobbyists who make no expenditures. *Harriss* and other cases concerned paid lobbyists who spend money. *Id.* Mr. Calzone in effect asks this Court to extend *Harriss* and other cases beyond their holdings to supersede the general framework for disclosure laws. But, with no controlling precedent about unpaid, expenditure-free lobbying dictating the outcome of this case, this Court was correct to apply the established framework of exacting scrutiny.

B. The public has an important interest in lobbying transparency that extends to unpaid lobbyists who expend no funds.

Missouri's lobbyist disclosure law directly advances the important public interest in transparency, and thus passes intermediate, exacting scrutiny. JA 369–78. As this Court and the district court held, Missouri's law advances the public interest in transparency and in preventing the fact or appearance of corruption that may result from unreported lobbyist interactions. Slip op. 7-8.

Both the Supreme Court and this Court have "upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption." *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005); *see United States v. Harriss*, 347 U.S. 612, 625 (1954). Just as in the campaign finance context, disclosure helps avert the fact or appearance of corruption: the "activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20 (1995). And so, as this Court held, "[i]f the interest in lobbyists registering their activities is a

compelling interest, then it is certainly also a sufficiently important interest." Slip op. 10.

Legislators need to evaluate pressures on them properly, which is why requiring the disclosure of lobbying activities is in large measure "the power of self-protection" for legislators. *United States v. Harriss*, 347 U.S. 612, 625–26 (1954); slip op. 11. Disclosure "permits legislators to identify the source of funds used to influence them, and to discover the particular constituency advocating a particular position on legislation." *Am. Civil Liberties Union of New Jersey v. New Jersey Election Law Enf't Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981).

And, "just as disclosure serves the important informational interest" of "help[ing] voters to define more of the candidates' constituencies," it also helps the public to "understand the constituencies behind legislative or regulatory proposals." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d at 14. (citing *Buckley v. Valeo*, 424 U.S. 1, 81 (1976)).

The State's interest in the timely disclosure of information about lobbyists thus extends equally to paid and unpaid lobbyists, and to lobbyists who do or do not expend funds. Slip op. 11; JA 374. The "public has an interest in knowing who is speaking," not merely "who is funding

that speech." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010). As this Court has long held, the State's interest is in disclosure of all "lobbying activity," not in the disclosure of only some lobbying activities, based on employer, group affiliation, or other quirks of individual lobbyists. *Minnesota State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 513 (8th Cir. 1985); JA 374. The state interest is "in allowing the public to know who is seeking to influence legislators on behalf of someone else and who might be making expenditures to governmental officials for the benefit of a third party." JA 374.

Nor, as the dissent and Mr. Calzone suggest, is evidence required to prove this transparency interest. Slip op. 21; Rehearing Pet. 12-14. As the D.C. Circuit has recognized, the interest in lobbying transparency rests on "a claim that good government requires greater transparency." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15–16 (D.C. Cir. 2009). "That is a value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." *Id.*

In response, the dissent asserts that the public's interest in deterring corruption by promoting transparency does not include an interest in reporting the activities of lobbyists who represent third parties without pay and who make no expenditures. Slip op. 20-24. The dissent does not dispute the existence of a public interest in averting the fact or appearance of corruption, nor in promoting transparency generally. *Id*. Rather, the dissent disagrees that these interests extend to requiring registration from lobbyists like Mr. Calzone. *Id*. In support, the dissent cites older cases in which courts upheld disclosure requirements for paid lobbyists who expend funds. Slip op. 21 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954); *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005)). Mr. Calzone likewise argues that Missouri lacks an important enough "interest in transparency for transparency's sake" to justify applying its law to lobbyists who receive no pay and expend no funds. Rehearing Pet. 10-11.

On the contrary, as this Court held, the transparency interests identified in older cases also justify disclosure requirements for all lobbyists. Slip op. 11. The "government and the public have a sufficiently important interest in knowing who is pressuring and attempting to

influence legislators, and the ability to pressure and influence legislators is not limited solely to paid lobbyists." *Id.* As the district court held, "[k]nowing who is operating in the political arena is a valid governmental interest regardless of whether someone volunteers on behalf of a third party or is paid by the third party." JA 372-73. The public's informational interest supports disclosure of all attempts to influence the legislature, not merely information about the lobbyists' financial circumstances. *Minnesota State Ethical Practices Bd.*, 761 F.2d 509 at 513; slip op. 11; JA 374.

At bottom, Mr. Calzone's attempt to limit this transparency interest to paid lobbyists or lobbyists who expend funds understates the true scope of the public interest. Rehearing Pet. 13. Even if campaign finance cases cannot restrict speech to deter corruption short of *quid pro quo* corruption, states may enact ethics laws that require disclosure of lobbying activities to promote transparency, which deters corruption and promotes public confidence in democracy.

C. Missouri's lobbyist disclosure law directly advances the public interest in transparency by making all lobbyists disclose their activities.

Missouri's registration and reporting requirements advance—and are carefully tailored to advance—the public interest in lobbying transparency. Slip op. 11-13; JA 373. As this Court held, "the Missouri statute is directly related to Missouri's interest in knowing who is acting as a lobbyist to influence legislators and public policy and to avoid the fact or appearance of corruption." Slip op. 12.

From lobbyist reports, the public learns the lobbyist's name and business address; the name and address of all persons the lobbyist employs for lobbying purposes; and the name and address of each lobbyist principal by whom the lobbyist is employed or in whose interest the lobbyist appears or works. Slip op. 12; JA 367; Mo. Rev. Stat. § 105.473.

Monthly reports list any lobbying expenditures, including printing and travel expenses, as well as any business relationships with public officials. Slip op. 12; JA 367; Mo. Rev. Stat. § 105.473. Twice a year, each legislative lobbyist must report all proposed legislation or action that the lobbyist supported or opposed. Slip op. 12; JA 367. And, before giving testimony before any committee of the General Assembly, each lobbyist

must also disclose to the committee his name, address and the organization on whose behalf he appears. Mo. Rev. Stat. § 105.473.

If there were no requirement to register and file disclosure reports, there would be no transparency benefits to the public. The public cannot assess whether there has been improper influence on behalf of a lobbying principal if the public cannot identity the principal or the lobbyists' expenditures or advocacy.

Missouri's law also avoids unnecessary abridgment of associational freedoms. Slip op. 12-13. Missouri does not prohibit lobbying activity. Nor is this disclosure difficult: online registration takes only a few minutes and costs only $10, plus most lobbyists often have already made public their names, clients, and causes while lobbying legislators. *Id.*; JA 376–77. As the district court held, "[k]nowing the names and addresses of lobbyists is the least intrusive means" of learning who is trying to influence legislation. JA 377. Any hypothetical chill on speech is minimal at most, and, to the extent any chill exists, it is likely because the law shines light on potentially improper forms of lobbying (and thus deters them).

Moreover, as this Court and the district court noted, Missouri's law lacks the temporal overbreadth that has been a problem in previous cases like *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc). Slip op. 12-13. Reports are only necessary when the lobbyist lobbies on behalf of a third party. JA 376. The law does not require registration or reporting when a lobbyist does nothing—or when the lobbyist speaks only as a citizen. JA 377.

The dissent weighs the policies behind the statute differently than this Court and Missouri has, arguing that requiring Mr. Calzone to file reports would disclose nothing, and that "Missouri cannot possibly have a greater interest in receiving blank reports than Calzone has in avoiding unnecessary paperwork." Slip op. 23-24; Rehearing Pet. 13-14.

But as this Court held, any minimal "burden of these requirements does not outweigh Missouri's interest in transparency." Slip op. 12-13. Even the act of registering is informative, apart from any expenditure reports. The voters may infer from the formation of the relationship that the principal has some interest in the legislative session, even when the disclosures of the lobbyist's actual activities remain forthcoming or lack expenditures. Information about bills supported or opposed would also

directly inform the voters about the lobbyists' influence and about the constituencies to which their representatives are responding. For this reason, even if Mr. Calzone himself is not a source of corruption, requiring the disclosure of all lobbyist interests illuminates his actions and confirms to the public that his actions do not pose a risk of corruption.

The dissent also raises the concern that Missouri's law chills speech. But, because of the importance of disclosure requirements, under this less rigorous level of scrutiny, "'[e]ven a significant interference with protected rights of political association may be sustained.'" *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 197 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

Mr. Calzone objects to the use of the term "lobbyist," and believes that he is not a lobbyist under his own definition of the term. Calzone Br. at 34; Rehearing Pet. 14-15. But the legislature sets policy, not Mr. Calzone, and the legislature is free to define the term in this common, dictionary-definition way.

Because Missouri's lobbyist disclosure law directly advances the important governmental interest in transparency, and is carefully

tailored to achieve it without stifling political dialogue, the law satisfies constitutional scrutiny under any standard of review.

II. Missouri's lobbyist disclosure law is not vague because a reasonable person understands what it means to be "designated" to lobby for a third party.

Missouri's lobbyist disclosure statute is also not vague on its face. A law is fatally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." Slip op. 12-13 & JA 378 (citing *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1143 (8th Cir. 2005)).

Missouri defines a legislative lobbyist as a person who tries to influence the legislature and who "is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity." Mo. Rev. Stat. § 105.470.*

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* Missouri defines a legislative lobbyist as:

> [A]ny natural person who acts for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any official action on any bill, resolution, amendment, nomination, appointment, report or any other action or any other matter pending or proposed in a legislative committee in either house of the general assembly, or in any matter which may be the subject of

An average person understands what it means to be "designated" to lobby on behalf of another person. Slip op. 14-15; JA 378–82. The ordinary definition of the word "designate" is to "'choos[e] ... a person ... for a certain post.'" JA 381 (citing Webster's Third New International Dictionary 612 (1986)). The legal definition of "designate" is the same: "choos[ing] (someone or something) for a particular job or purpose." Designate, Black's Law Dictionary (10th ed. 2014) (cited at slip op. 12-13). This common understanding of the word provides people of ordinary intelligence a reasonable opportunity to understand what conduct the law prohibits: failing to register when an organization chooses a person to lobby for it. Slip op. 12-13; JA 379–81.

Mr. Calzone argues that the term "designate" should not include himself, given that Missouri First, Inc.'s board of directors never took official action to name him as the group's lobbyist. Calzone Br. at 34, 39–

> action by the general assembly and in connection with such activity" who also:
>
> (c) Is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity.

Mo. Rev. Stat. § 105.470.

40. But "the statute neither requires specific official action," nor "requires evidence of an official action to find that someone has been chosen as a lobbyist." Slip op. 13. Indeed, if a formal act of designation were required, organizations could readily evade the statute by simply designating their lobbyists informally.

In any event, Mr. Calzone *was* designated as a lobbyist. *Id.*; JA 379–81. He was "the sole incorporator, director, president, agent, and board member of an organization whose stated intent is to use legislative lobbying to influence public policy, mobilize the public, and meet their objectives," and "he regularly disclosed his affiliation with Missouri First during meetings with legislators at the capitol." Slip op. 13. He would typically identify himself as "Ron Calzone, Director of Missouri First, or Ron Calzone, a director of Missouri First." JA 379 (citations omitted). For example, on a witness form in the Missouri Senate, "Mr. Calzone identifie[d] himself as appearing on behalf—not of himself but appearing on behalf of Missouri First, Inc." *Id.*

Nor does this law confuse those seeking to avoid registration or permit arbitrary enforcement. Rehearing Pet. 15. No lobbyist speaking in a personal capacity need register. This is why Mr. Calzone has avoided

any more complaints. And this—not caprice—is why the Commission dismissed the second complaint against him. JA 364; Letter from Mo. Ethics Comm'n to Mr. Calzone (Jan. 17, 2017), https://mec.mo.gov/Scanned/CasedocsPDF/CMTS1107.pdf (dismissing complaint for lack of evidence that he held himself out as a lobbyist on behalf of anyone except himself during the 2015 legislative session).

CONCLUSION

The petition for panel rehearing and en banc consideration should be denied.

Respectfully submitted,

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January 7, 2019

CERTIFICATE OF COMPLIANCE AND OF SERVICE

On January 7, 2019, this brief was served electronically through the courts CM/ECF system upon the parties.

This brief complies with the limit of 3,900 words because it contains 3,602 words. The electronically filed brief has been scanned for viruses and is virus-free.

/s/ Julie Marie Blake
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Deputy Solicitor General