No. 17-2654

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RONALD JOHN CALZONE,

Plaintiff-Appellant,

v.

NANCY HAGAN, 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 Opening Brief

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
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
Counsel for Plaintiff-Appellant

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SUMMARY OF THE CASE

This case raises a First Amendment question of first impression: May an individual be regulated as a "lobbyist," and forced to comply with burdensome registration and reporting requirements, even if he acts solely as an unpaid volunteer?

The U.S. Supreme Court last addressed lobbyist reporting requirements in 1954, when it determined that the First Amendment permitted the government to demand information concerning "who is being hired, who is putting up the money, and how much." *United States v. Harriss*, 347 U.S. 612, 625 (1954). This Court has reviewed similar laws involving paid lobbyists and, after apparently applying strict scrutiny, has upheld them under *Harriss*. *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509 (8th Cir. 1985) (*per curiam*).

The district court, however, applied mere exacting scrutiny to hold that Missouri could require unpaid volunteers to carry the same burdens as professional, compensated lobbyists.

This case involves an important national question of first impression. Mr. Calzone requests 20 minutes of oral argument per side.

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JURISDICTIONAL STATEMENT

Appellant brought his First and Fourteenth Amendment challenge pursuant to 42 U.S.C. §§ 1983, 1988 and 22 U.S.C. § 1343(a). JA 11, ¶ 9. Accordingly, the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The court also had jurisdiction to grant a declaratory judgment pursuant to the Declaratory Judgment Act. JA 11, ¶ 10; *see* 28 U.S.C. §§ 2201 and 2202.

The Clerk of the Western District of Missouri filed the Judgment for this case on June 27, 2017. JA 383. Mr. Calzone timely filed the Notice of Appeal on July 25, 2017. JA 7. This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. May the government, consistent with the First and Fourteenth Amendments to the United States Constitution, require unpaid individuals to comply with Missouri's registration and reporting regime for legislative lobbyists?

   U.S. Const. amend. I

   United States v. Harriss, 347 U.S. 612 (1954)

   Minn. State Ethical Practices Bd., v. Nat'l Rifle Ass'n,

   761 F.2d 509 (8th Cir. 1985)

   § 105.470, RSMo.

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STATEMENT OF THE CASE

Ron Calzone is not paid "in exchange for sharing his views on policy with members of the General Assembly," and he "does not make expenditures for the benefit" of public officials or employees "in connection with such activity." JA 343 (Jointly Stipulated Facts 2, 3). Moreover, Missouri First, Inc., of which Mr. Calzone is the president and a board member, "has made no expenditures, nor received any income," in the five years preceding this litigation. JA 343-344 (Jointly Stipulated Facts 4, 7). Nevertheless, two complaints have been filed to stop Mr. Calzone's activities, and the State agrees that Mr. Calzone remains at risk from future complaints. JA 344 (Jointly Stipulated Fact 11). As discussed in greater detail below, the parties have stipulated to these and other relevant facts. *See* Joint Stipulation, JA 343-346.

A. Opposition to Mr. Calzone's Citizen Activism

Ronald John Calzone is a private citizen who cares deeply about how Missouri is governed, not a lobbyist who is paid to represent others' views and advocate their interests. *See* V. Complaint, JA 9 ¶¶ 1-2. He regularly travels to Jefferson City to "speak[] to legislators" and testify before legislative committees about policy and legislation. JA 343 (Jointly Stipulated Fact 1). No one pays him "for sharing his views on policy with members of the General Assembly," and he "does not make

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expenditures for the benefit of . . . public officials . . . in connection with such activity." JA 343 (Jointly Stipulated Facts 2, 3).

Mr. Calzone founded Missouri First and serves as its president, a member of its board of directors, and its registered agent. JA 343 (Jointly Stipulated Fact 4); JA 364. Missouri First seeks to educate the public about Missouri issues and strengthen the voices of individual Missouri citizens. JA 59 (Missouri First Charter, Methods of Operation) *see also* JA 178-183 (Test. before Mo. Ethics Comm'n of Della Lauders, Senior Investigator for Mo. Ethics Comm'n) (describing contents of Missouri First website). Missouri First does not, however, engage in paid lobbying. In fact, Missouri First has no budget at all: "[f]or the past five years, Missouri First, Inc. has made no expenditures, nor received any income." JA 344 (Jointly Stipulated Fact 7).

Legislative witnesses sometimes "identify [themselves] by . . . affiliation [to] indicate [their] acquaintance with the subject." Montana Legis., *Testifying Before a Committee*.[1] Mr. Calzone has noted his affiliation with Missouri First in testifying before the assembly and meeting with legislators. JA 343 (Jointly Stipulated Fact

[1] *Available at*: http://www.leg.mt.gov/css/About-the-Legislature/Lawmaking-Process/testify.asp; *see also* Oregon State Legis., *How to Testify to a Committee*, https://www.oregonlegislature.gov/citizen_engagement/Pages/How-to-Testify.aspx (instructing witnesses to "state your name, city or county, and any other affiliation").

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5).[2] And, at times, Mr. Calzone has used witness forms promoted by Missouri First as a means of supplementing that legislative testimony.[3] But, as the state's investigator stated, at such times Mr. Calzone "felt his hat was to represent the faceless [mass][4] of citizens who did not have a lobbyist." JA182:22-24.

Mr. Calzone's efforts have made him some political enemies. *See, e.g.*, V. Compl. JA 9 ¶ 4. Accordingly, a number of legislators spoke with board members and representatives of the Missouri Society of Governmental Consultants (the "Society") about Mr. Calzone's non-registration as a legislative lobbyist; two explicitly asked that the Society file a complaint against him for not registering as a legislative lobbyist under § 105.470(5), RSMo. JA 152:9-153:19 (Test. Randy Scherr, Secretary of Missouri Society of Governmental Consultants, before Mo. Ethics Comm'n) (discussing those dissatisfied with Mr. Calzone's legislative activity, and naming Missouri State Senator Ron Richard and Missouri State Representative Kevin Engler).

The legislators' requests have already resulted in two complaints against Mr. Calzone. On November 4, 2014, the Society filed a Complaint against Mr. Calzone. V. Compl. JA 15 ¶ 35; JA 35. The Missouri Ethics Commission (the "MEC") found

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[2] It bears notice that legislative testimony is listed as an exception to activity classified as legislative lobbying. § 105.470(5)(d)d, RSMo.

[3] These witness forms were generated using a website, www.libertytools.org, which is not controlled by Missouri First.

[4] The transcript reads "mask of citizens," an obvious error.

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probable cause that Mr. Calzone violated the statute and ordered him to register as a lobbyist and pay a fine. JA 344 (Jointly Stipulated Fact 8); JA 57.[5] On October 11, 2016, Michael C. Reid filed an almost identical complaint with the Ethics Commission. *Compare* JA 29-31 (complaint filed by Mr. Reid), *with* JA 35-38 (complaint filed by Mr. Dallmeyer, on behalf of Mo. Society of Governmental Consultants).[6] While the MEC dismissed that Complaint, the state stipulated "that dismissal does not immunize [Mr. Calzone] from future complaints." JA 344 (Jointly Stipulated Fact 11). Nether complaint alleged that Mr. Calzone is compensated for his civic activities.

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[5] The MEC greeted Mr. Calzone's appeal to the Administrative Hearing Commission (the "AHC") with new, extensive discovery requests, including broad and temporally unlimited "any and all" document demands. *Calzone v. Mo. Ethics Comm'n*, No. WD80176, 2017 Mo. App. LEXIS 709, at * 5-6 (Mo. Ct. App. July 18, 2017) (discussing *Calzone v. Admin. Hearing Comm'n*, No. 16AC-CC00155 (Mo. 19th Cir. Sept. 23, 2016)). After the AHC denied Mr. Calzone's motion for a protective order, which would have prohibited merits discovery until jurisdictional questions had been addressed, Mr. Calzone obtained a writ of prohibition from the Missouri Circuit Court, voiding all actions taken on the Society Complaint on the grounds that it was unlawfully filed by a corporation rather than a natural person. *See id*. at * 7. The Missouri Court of Appeals quashed the writ. *Id*. at * 14. Mr. Calzone has asked the Missouri Supreme Court to review the state appellate court's decision.

[6] The two-year statute of limitations restricted the MEC's investigation prompted by the Reid Complaint to the period Mr. Calzone's activities have been stifled by the investigations and proceedings stemming from the Society Complaint. *See* § 105.957(3), RSMo. The MEC ultimately dismissed the Reid Complaint for lack of evidence. JA 344 (Jointly Stipulated Fact 11).

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B. Burdens of Missouri's Lobbyist Registration Laws

Among other requirements, legislative lobbyists must register as such and comply with a regular reporting schedule. "Lobbyists must file standardized registration forms under penalty of perjury within five days after beginning any activities as a lobbyist." JA 345 (Jointly Stipulated Fact 15). Registration requires a written declaration under penalty of perjury, the payment of a $10 fee, and publication of "the lobbyist's name and business address, the name and address of all persons such lobbyist employs for lobbying purposes, [and] the name and address of each lobbyist principal by whom such lobbyist is employed or in whose interest such lobbyist appears or works." § 105.473(1), RSMo.; JA 345 (Jointly Stipulated Fact 16).

Registrants "must file an updating statement under oath within one week of any addition, deletion, or change in the lobbyist's employment or representation." JA 345 (Jointly Stipulated Fact 18); § 105.473(1), RSMo. They "must also file, under penalty of perjury, monthly reports with the Ethics Commission." JA 345 (Jointly Stipulated Fact 20); § 105.473(3)(1), RSMo. These monthly reports must itemize expenditures made on behalf of public officials and their families and staffs, including "printing and publication expenses and travel expenses." JA 345 (Jointly Stipulated Fact 21); § 105.473(3)(2)(a), RSMo. Registrants must also inform the MEC of their "lobbyist principals," defined as "any person, business entity,

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governmental entity, religious organization, nonprofit corporation or association who employs, contracts for pay or otherwise compensates a lobbyist." § 105.473(3)(2)(a), RSMo. (reporting requirement); § 105.470(7), RSMo. (defining "lobbyist principal"). In addition, "[t]wice a year," registrants must report "all proposed legislation or action that [they] supported or opposed." JA 345 (Jointly Stipulated Fact 22; § 105.473(12), RSMo.

Missouri enforces this reporting regime using both civil and criminal penalties. Registrants are fined "ten dollars for every day [a monthly lobbyist disclosure] report is late." JA 346 (Jointly Stipulated Fact 27); § 105.492(5), RSMo. And "[f]ailure to file is punishable by a fine of up to $10,000." JA 346 (Jointly Stipulated Fact 26); § 105.473(7), RSMo. The law also provides that "[a] person who violates, *in any way*, a provision of the lobbyist registration regime *shall* be punished" with "a class B misdemeanor" "for the first offense" and "a class E felony" "for any subsequent offense." JA 346 (Jointly Stipulated Fact 28) (emphasis supplied); § 105.478(1)-(2), RSMo. "A class B misdemeanor may be punished by up to six months in prison," and a "class E felony may be punished by up to four years in prison." JA 346 (Jointly Stipulated Facts 29-30); *cf.* § 558.011(1)(7), RSMo. (imprisonment term for a class B misdemeanor); § 558.011(1)(5), RSMo. (imprisonment term for a class E felony).

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C. Mr. Calzone Seeks Protection in Federal Court

To stop Missouri's continuing attempts to use its lobbying law to harass and silence Mr. Calzone's uncompensated activism, he filed a Verified Complaint in the United States District Court for the Western District of Missouri on October 21, 2016. *See* V. Compl. JA 9-21. Mr. Calzone requested a declaratory judgment that § 105.470(5)(c), RSMo., is unconstitutional as applied to him because Missouri lacked a sufficient interest justifying the burdens it has placed on Mr. Calzone's speech and petition rights, to the extent that he receives no compensation for his activities. V. Compl. JA 10 ¶ 6(a): *id*. at 20 ¶ B. Mr. Calzone also requested a temporary restraining order and that the district court enjoin enforcement, both preliminarily and permanently, of § 105.470(5)(c) against him and similarly situated parties. V. Compl. JA 20 ¶ B; JA 77-79.

The district court denied the motion for a temporary restraining order on March 1, 2017, and Mr. Calzone's request for a permanent injunction on June 26, 2017. JA 342 ("Calzone's Motion for Temporary Restraining Order, [Doc 2], is denied") (brackets in original); JA 382 ("Calzone's Motion for a Permanent Injunction, [Doc. 2], is denied") (brackets in original). Mr. Calzone had pointed to the Supreme Court's holding in *United States v. Harriss*, 347 U.S. at 625, arguing that the limiting construction of the federal lobbying statute to exclude uncompensated lobbying was essential to the holding that the statue "do[es] not

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violate the freedoms guaranteed by the First Amendment -- freedom to speak, publish, and petition the Government." *See* JA 371 (district court noting Mr. Calzone's reliance on *Harriss*). The district court concluded that *Harriss*'s holding was inapposite. JA 372. It then concluded that the state's "interest in transparency is a sufficiently important governmental interest," because "[k]nowing who is operating in the political arena is a valid governmental interest regardless of whether someone volunteers . . . or is paid by the third party." JA 373.

STANDARD OF REVIEW

This Court reviews district court orders on permanent injunctions "for abuse of discretion." *Kittle-Aikeley v. Strong*, 844 F.3d 727, 735 (8th Cir. 2016) (*en banc*). A district court abuses its discretion if it "'reaches its conclusion by applying erroneous legal principles or relying on clearly erroneous factual findings.'" *Id*. (quoting *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 906 (8th Cir. 2012)). On questions of law, this Court's "review is more accurately characterized as *de novo*," *Id*. (quoting *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004)), because "an error of law *is* an abuse of discretion." *Schmidt v. Ramsey*, 860 F.3d 1038, 1043 (8th Cir. 2017) (declining "abuse of discretion" review in context of a denial of a Fed. R. Civ. P. 60(b) motion) (emphasis in original). Consequently, "the result in this case would be the same under either standard." *Id*.

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Likewise, "[a factual] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting and applying *U.S. Gypsum*); *cf. Smith v. AS Am., Inc.*, 829 F.3d 616, 621 (8th Cir. 2016) (quoting and applying *Anderson*). For instance,

> [d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Anderson, 470 U.S. at 575. When determining reasonableness, a district court's findings of fact are not viewed in isolation, but instead examined as a whole. *See Anderson*, 470 U.S. at 574; *U.S. Gypsum*, 333 U.S. at 399.

"The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits." *Bank One, N.A. v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). A preliminary injunction is tested under the four *Dataphase* factors: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public

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interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*).

This court has applied the four-part *Dataphase* test when reviewing a district court's denial of a permanent injunction. *See, e.g.*, *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999) (listing the factors and citing, *inter alia*, *Dataphase*, 640 F.2d at 113). The only difference is that, in reviewing a permanent injunction, the "moving party [must] show actual success on the merits." *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 229 (8th Cir. 2008).

SUMMARY OF THE ARGUMENT

For over half a century, the courts have recognized that professional, paid lobbyists may be required to register with the government and provide certain information about their paymasters. But it has always been understood that such restrictions may only be applied to "those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *United States v. Harriss*, 347 U.S. 612, 625 (1954).

Until now.

The Missouri Ethics Commission ("MEC" or "Ethics Commission") has taken the extraordinary position, seemingly for the first time anywhere, that the receiving or spending of money is completely irrelevant to a person's status as a lobbyist. The Ethics Commission has stipulated that Ron Calzone, Appellant here, is not paid "in

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exchange for sharing his views on policy with members of the General Assembly, and he does not make expenditures for the benefit" of public officials or employees "in connection with such activity." JA 343 (Jointly Stipulated Facts 2, 3). Moreover, Missouri First, Inc., of which Mr. Calzone is the president and a board member, "has made no expenditures, nor received any income," in the five years preceding this litigation. JA 343-344 (Jointly Stipulated Facts 4, 7). Nevertheless, the MEC has found that Mr. Calzone is a lobbyist for Missouri First, and that he must register with the State, file regular reports under penalty of perjury, and submit to the MEC's jurisdiction on pain of criminal penalties.

The MEC's actions violate the First Amendment, which protects both speech and the right "to petition the Government for a redress of grievances." U.S. Const. amend I. Because the MEC's position burdens those fundamental liberties, it must be subjected to strict scrutiny, which it cannot survive. In particular, because the only Supreme Court decision to address lobbying registration requirements limited the government's interest to knowing "who is being hired, who is putting up the money, and how much," *Harriss*, 347 U.S. at 625, the State simply lacks any relevant interest in Mr. Calzone's volunteer activities.

Nevertheless, the district court blessed the MEC's position, holding that "registration," even of unpaid volunteers, "provides the public with transparency as to who is making efforts to influence the legislature." JA 373.

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That broad interest in general "transparency" has never been adopted by any other court, is functionally limitless, and cannot help but chill grassroots speech and petitioning activity at the core of the First Amendment's protections. Consequently, it falls to this Court to restore the universally understood state of the law prior to the MEC's overreach: lobbyist registration is for paid functionaries, not volunteers.

ARGUMENT

I. The district court erred in failing to apply strict scrutiny to Missouri's efforts to regulate uncompensated volunteers as lobbyists.

Lobbying disclosure laws strike at the heart of First Amendment activity: citizens directly petitioning their representatives on matters of public concern. Accordingly, both this Court and the Supreme Court have suggested that strict scrutiny is the appropriate standard when reviewing lobbying rules. Nevertheless, the district court explicitly declined to do so, and instead applied "exacting scrutiny." JA 371. That overly-deferential approach led directly to its extraordinary conclusion that the government may require volunteers like Mr. Calzone to register and report for merely discussing public policy with their elected representatives. JA 371.

Speaking to one's representatives is a fundamental right. The First Amendment protects the right to "petition the Government for a redress of grievances." U.S. Const., amend. I; *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9 (D.C. Cir. 2009) (noting that Petition Clause activities represent a "substantial First Amendment interest[]" implicated by lobbyist registration and reporting statutes).

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An untold number of Americans exercise this right every day, whether by writing letters to members of the state and federal legislatures, calling or emailing a representative, appearing individually or as part of a group visiting a legislative office, testifying before legislative committees, or asking a pointed question at a town hall meeting. In all such cases, the individual citizen is seeking to inform and persuade elected officials concerning public policy.

The only Supreme Court decision addressing the constitutionality of lobbying disclosure laws was decided 63 years ago, before the Court adopted today's familiar tiers of security. *United States v. Harriss* upheld Congress's regulation of lobbyist disclosure because the statute served a "vital national interest" in a "manner restricted to its appropriate end." 347 U.S. at 626. Mr. Calzone believes that because the Supreme Court required a "vital" interest, it was invoking a standard similar to the "compelling" interest needed to survive strict scrutiny.[7] That has also been the approach suggested by the rulings of this Court.

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[7] The D.C. Circuit in *Taylor* noted that there is "vigorous[] debate" as to the level of scrutiny the Supreme Court applies to lobbying registration laws. *Taylor*, 582 F.3d at 10. The Supreme Court and D.C. Circuit have, at times, used the adjectives "'exacting' and 'strict' interchangeably to describe the same First Amendment test." *Id*.; *also compare Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (using phrase "exacting scrutiny" in describing review of compelled disclosure under *NAACP v. Ala.*, 357 U.S. 449, 463 (1958)); *with id*. at 66 (noting that the "*strict* test established by *NAACP vs. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights") (emphasis supplied). The *Taylor* court did not reach the question, instead finding that the law challenged there survived under either test. 582

The district court below, however, applied "exacting scrutiny" based on the campaign finance decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).[8] JA 370-371. This was a legal error. The district court applied *campaign finance* opinions rather than this Court's on-point *lobbying* precedent, which applies strict scrutiny to lobbying disclosure laws. In the lobbying context, "[s]tate laws which inhibit the exercise of [F]irst [A]mendment rights are unconstitutional unless they serve a 'compelling' state interest." *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509, 511 (8th Cir. 1985) (*per curiam*) (quoting *NAACP v. Ala.*, 357 U.S. 449, 463 (1958)); *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) ("this court ha[s] upheld lobbyist-disclosure statutes based on the governments compelling interest in

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F.3d at 11. But even assuming that exacting scrutiny applies, under that test this Court must "insist[] that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (footnotes omitted).

[8] It is sometimes said that the Supreme Court's decision in *Citizens United*, upheld the constitutionality of "disclosure" generally, but, in fact, the Court approved only a particular, narrow type of *campaign finance* disclosure subject to a large array of statutory and regulatory limitations. 558 U.S. at 369-371. At issue in *Citizens United* was a federal report for an electioneering communication, which discloses the *entity* making the expenditure and the purpose of the expenditure. 52 U.S.C. §§ 30104(f)(2)(A)-(D). Additionally, the federal report only discloses contributors giving over $1,000 for the purpose of furthering the communication. *Citizens United*, 558 U.S. at 366-367; 52 U.S.C. §§ 30104(f)(2)(E)-(F). In this way, the disclosure in *Citizens United* is tied to the spending of money, not volunteer speech.

requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption") (quotation marks omitted).

This Court's use of strict scrutiny to review lobbying disclosure statutes is in line with the practice of a number of federal courts across the country. *See*, *e.g.*, *Brinkman v. Budish*, 692 F. Supp. 2d 855, 862 (S.D. Ohio 2010)[9] ("Given that the statute is subject to strict scrutiny, the Court next must determine whether [a lobbying regulation statute] furthers a compelling government interest and is narrowly tailored to achieve that end"); *see also Md. Right to Life State PAC v. Weathersbee*, 975 F. Supp. 791, 797 (D. Md. 1997) (examining whether the government had "a compelling interest" in lobbying disclosure); *id*. at 798 (applying narrow tailoring requirements to state's lobbying regulation); *Am. Civil Liberties Union v. N.J. Election Law Enforcement Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981) (requiring that the state provide "a compelling governmental interest; even then, the state must demonstrate that it has chosen the least restrictive means to further such an interest").

"Under strict scrutiny, the *Government* must prove that applying" its regulatory regime "furthers a compelling interest and is narrowly tailored to achieve

[9] The *Budish* decision was issued after *Citizens United*, and directly addressed that case. *Compare Budish*, 692 F. Supp. 2d at 855, 863-64 (published Feb. 17, 2010) with *Citizens United*, 558 U.S. at 310 (published Jan. 21, 2010). It nevertheless applied strict scrutiny, unlike the district court below.

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that interest." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Roberts, C.J., controlling opinion) (emphasis in original); *cf. Republican Party v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (*en banc*) (collecting Supreme Court strict scrutiny cases since 1989). Nor can the government "simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) (citation and quotation marks omitted, punctuation altered); *see also Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion…."). The government bears the burden of proving it has a real, concrete, and compelling interest in regulating Mr. Calzone's voluntary speech, and it must further prove that the regulation is "narrowly tailored" to that interest. *See*, *e.g.*, *Taylor*, 582 F.3d at 11 (analyzing governmental interest); *id*. at 16 (applying tailoring analysis). Otherwise Mr. Calzone must prevail.

Instead of applying the proper standard, the district court below applied "exacting scrutiny." JA 371. Even then, it did not do so correctly. The district court cited the statements of Missouri's counsel to identify the state's interest: a generalized concern about "transparency," defined as an "interest in knowing who is influencing the legislature and how that is happening." JA 373 (quoting Trans.

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4/25/2017 Hearing at 16) (statement of Ms. Harrison). Without this "transparency," "the democratic government structure would not exist." *Id*. (quoting statement of Ms. Harrison). The district court saw no issue in blessing a completely unsubstantiated (and hyperbolic) governmental interest, reasoning that because it was applying "exacting scrutiny, not strict scrutiny, Calzone's argument that Defendant must produce 'some sort of evidence that the governmental interest is actually implicated' does not apply." JA at 372 n.3.

That is patently wrong. Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). "[M]ere conjecture" on possible state interests is not enough for exacting scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). To survive exacting scrutiny, the Supreme Court demands careful review of both the asserted governmental interest *and* whether the law is tailored to that interest, because "[i]n the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1456 (2014) (Roberts, C.J., controlling op.).

The correct standard of review in lobbying registration cases in this Circuit is strict scrutiny. But even under exacting scrutiny, Missouri cannot foist its lobbying registration system upon a completely uncompensated volunteer. That is because, regardless of the standard applied, Missouri's interest is limited to "who is being hired, who is putting up the money, and how much," *Harriss*, 347 U.S. at 625. Even

a perfectly-tailored statute could not stretch that interest to reach a volunteer like Mr. Calzone. And Missouri does not have a perfectly-tailored system.

II. The district court erred in finding that Mr. Calzone could be made to register and report pursuant to a general, unarticulated "transparency" interest.

The application of strict scrutiny requires the government to both articulate and demonstrate a compelling government interest. "Such an analysis requires, first, a clear understanding" of whatever interest the government is asserting. *Republican Party*, 416 F.3d at 750. Even when a court is not applying strict scrutiny, "the strength of the governmental interest must reflect the seriousness" of the burden imposed upon First Amendment rights. *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 590 (8th Cir. 2013).

In the past, the courts have found that the government has an interest in regulating the spending of "money in politics" by requiring the disclosure of funds spent to influence legislation or funds received by a lobbyist to petition the government on a for-hire basis. Missouri, however, has become the first state to seek to regulate petitioning activity that the government concedes has no monetary dimension whatsoever. This is unprecedented, as political registration and disclosure regimes, regardless of content, are typically designed to reach only substantial financial transactions that pose a risk of corrupt bargains. *Compare Buckley*, 424 U.S. at 67 ("Congress could reasonably conclude that full disclosure during an

election campaign tends 'to prevent the corrupt use of money to affect elections'…'Publicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'") (quoting, respectively, *Burroughs v. United States*, 290 U.S. 534, 548 (1934) and Louis Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)), *with Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1029-1030 (9th Cir. 2009) (finding that a campaign finance disclosure statute could "not be applied to…conduct [that] neither causes an economic detriment to the [group] nor carries an ascertainable market value").[10]

The district court adopted, wholesale, the Commission's articulation of the state's interest. JA 373. Namely, it held that "registration," even of unpaid volunteers, "provides the public with transparency as to who is making efforts to influence the legislature." *Id*. (quoting Trans. 4/25/2017 Hearing at 16) (statement

[10] Even when the Cold War era Supreme Court upheld, citing *United States v. Harriss*, an application of the Subversive Activities Control Act of 1950, which required the registration of "any organization in the United States…which…is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement" and those groups "giving aid" to such groups, the disclosure regime at issue required "an accounting of all moneys received and expended" by the allegedly Communist entity. *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 8-10 (1961) (quoting § 7 of the Act). Similarly, one of the methods that triggers registration under the Foreign Agents Registration Act is for a person to receive or spend "things of value for or in the interest of [a] foreign principal." 22 U.S.C. § 611(c)(iii). Clearly, petitioning of the government by American citizens cannot remotely be compared to the subversive efforts of foreign governments and their proxies.

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of Ms. Harrison). Without requiring the registration of Mr. Calzone and other volunteers pursuant to this transparency interest, according to the district court, "the democratic government structure" of Missouri "would not exist." *Id*.[11]

Taken literally, this rationale is functionally limitless. Almost any activity may "influence the legislature," *id*.—which is one reason the Supreme Court has already ruled that mere influence upon government cannot constitutionally serve as the trigger for governmental regulation. *Buckley*, 424 U.S. at 77 ("the ambiguity of [the] phrase [for the purpose of influencing] poses constitutional problems"); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65 (1st Cir. 2011) ("Without more context, we believe the intended meaning of 'influence' to be uncertain enough that a person of average intelligence would be forced to guess at its meaning and modes of application") (internal quotation marks omitted). More importantly, the Supreme Court has pointedly declined to permit total disclosure of "who is operating in the political arena," JA 373, even rewriting the federal Lobbying Act in *Harriss* to prevent precisely that outcome. 347 U.S. at 620 ("…we believe this language

[11] Despite quoting and adopting this contention, the district court conceded that "the federal government does not regulate unpaid lobbyists." JA 375, n.5; *compare* 2 U.S.C. § 1601(1) ("[R]esponsible representative [g]overnment requires public awareness of the efforts of *paid* lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the [f]ederal [g]overnment") (emphasis supplied).

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should be construed to refer only to…direct communication with members of Congress on pending or proposed federal legislation").

Applying this boundless interest was error, as the Supreme Court has found that the Petition Clause may only be infringed upon to ensure the legislature and the public are informed about "those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Harriss*, 347 U.S. at 625. That is because the government's interest is only in knowing "who is being hired, who is putting up the money, and how much." *Id*.; *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006-1007 (9th Cir. 2010) ("[I]n the lobbying context, the Supreme Court has upheld disclosure requirements enabling lawmakers 'to know who is being hired, who is putting up the money, and how much'"). *That* information "maintain[s] the integrity of a basic governmental process." *Harriss*, 347 U.S. at 625.

It is undisputed that when Mr. Calzone "speak[s] to legislators in an effort to persuade members of the General Assembly regarding legislation," JA 343 (Jointly Stipulated Fact 1), he is exercising "one of the freedoms protected by the Bill of Rights." *E. R.R. Presidents Conf v. Noerr Motor Freight, Inc*., 365 U.S. 127, 138 (1961); *also United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S 217, 222 (1967) ("We start with the premise that the right[] to…petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194,

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1201 (D.C. Cir. 1974) ("Lobbying is of course a pejorative term, but another name for it is petitioning for the redress of grievances. It is under the express protection of the First Amendment"); *Kimbell v. Hooper*, 665 A.2d 44, 46 (Vt. 1995) ("Without doubt, lobbying implicates First Amendment guarantees of petition…."). Indeed, the First Amendment is "at its zenith" regarding "core political speech" that is "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988).

The U.S. Supreme Court has issued only one decision discussing lobbying in the last three-quarters of a century. In that case, the aforementioned *United States v. Harriss*, the Court rebuffed the federal government's "urg[ing] for a much broader construction—namely, that under [the Act] a person must report his expenditures to influence legislation even though he does not solicit, collect, or receive contributions." *Harriss*, 347 U.S. at 619; *id.* ("…the solicitation, collection, or receipt of money or other thing of value is a prerequisite to coverage under the Act").

Specifically, the *Harriss* Court reviewed the Federal Regulation of Lobbying Act ("FRLA" or "Lobbying Act"). The Court found that Congress sought to "properly evaluate" the "myriad pressures to which [members of Congress] are regularly subjected" and "[t]oward that end…provided for a modicum of 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. The Court determined

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that the Lobbying Act's paid lobbyist disclosure regime, read in this manner, was "designed to safeguard a vital national interest." *Id*. at 626; *Taylor*, 582 F.3d at 6 ("More than fifty years ago, the Supreme Court held that the public disclosure of 'who is being hired, who is putting up the money, and how much' they are spending to influence legislation is 'a vital national interest'") (citing *Harriss*, 347 U.S. at 625-626). Appellant agrees that disclosure of the amount of money spent to lobby the government is a sufficiently vital governmental interest. But the *Harriss* opinion does not stand for a generalized "interest in transparency" that permits registration of just anyone "who is operating in the political arena." JA 373. By stretching *Harriss* so far, the district court took it beyond its reasoning.

This Court has had little occasion to comment on the application of the Petition Clause. But when it has done so, just like the *Harriss* Court, it has firmly limited the government's legitimate interest. In *Minnesota State Ethical Practices Board*, this Court upheld an order that "Neal Knox…the executive director of the National Rifle Association Institute for Legislative Affairs (NRA-ILA)…the lobbying division of the NRA…register and report as a lobbyist" for orchestrating a mail campaign valued at more than $250. 761 F.2d at 511.[12] That effort targeted

[12] The Minnesota statute at issue defined a lobbyist as "'any individual…[w]ho spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with

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"54,000 persons" and "urg[ed] them to contact their state legislators in support of three pieces of pending legislation." *Id.*; *cf. Harriss*, 347 U.S. at 620 ("Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign"). This Court upheld the Minnesota statute as applied to Mr. Knox because "[i]n light of *Harriss*…the State of Minnesota has a compelling interest in requiring lobbyists to register their activities." *Minn. State Ethical Practices Bd.*, 761 F.2d at 512.

The district court below suggested that because the 54,000 targeted National Rifle Association members were volunteers of an association, that this Court blessed governmental regulations reaching unpaid, undirected citizen activists such as Mr. Calzone. JA 374 ("Just as the State's interest is the same regardless of association, Missouri's interest in transparency is the same whether or not lobbyists are compensated"). To the contrary. Mr. Knox, who was employed in Washington, D.C., as a lobbyist for one of the largest political pressure groups in the United States, was acting pursuant to that employment and likely spent a significant sum sending letters to 54,000 people no fewer than four times.[13] And *he* was the one ordered to

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public officials.'" *Minn. State Ethical Practices Bd.*, 761 F.2d at 510 (quoting Minn. Stat. § 10A.01 subd. 11).

[13] Even assuming that each letter Mr. Knox sent merely cost the 1985 value of a U.S. postage stamp, this campaign would have cost $47,520, exclusive of Mr. Knox's salary (four letters each to 54,000 people at 22 cents a letter). Associated Press, "Postal Rates Go Up Today," Galveston Daily News, Apr. 3, 1988, https://www.newspapers.com/clip/7198254/the_galveston_daily_news/.

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register—not any of the 54,000 people who may have sent a letter to a legislator pursuant to Mr. Knox's repeated, and compensated, prodding.

Put another way, the regulation of lobbying is intended to avoid the "appearance of corruption." *Kelley*, 427 F.3d at 1111. That phrase, often invoked by the Supreme Court in the realm of campaign finance, is shorthand for ferreting out "who is being hired, who is putting up the money, and how much." *Harriss*, 347 U.S. at 625; *see also McCutcheon*, 134 S. Ct. at 1441 ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money") (citations omitted); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n.20 (1995) ("The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption").

By permitting the government to regulate Mr. Calzone—who was not hired, has not put up money, and has spent nothing to petition his government, JA 343 (Jointly Stipulated Facts 2, 3)—the district court thus sidestepped precedent of both the Supreme Court and this Court.

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Moreover, by adopting the generalized transparency interest proffered by the government, the district court permitted the government to invoke a compelling governmental interest by mere incantation. The Commission has yet to demonstrate that the regulation of uncompensated persons does *anything at all* to prevent "fraud, corruption, [and] secrecy." JA 373. *See Nat'l Treasury Emps. Union*, 513 U.S. at 475 ("[W]hen the Government defends a regulation on speech as a means to…prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural…") (internal quotation marks omitted, punctuation altered); *Bates*, 361 U.S. at 525 ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion…."); *Republican Party*, 416 F.3d at 749 ("The strict scrutiny test requires *the state to show* that the law that burdens the protected right advances a compelling state interest....") (emphasis supplied); *see also Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (noting, in *dicta*, that mere suggestion of "a possibility" of fraud with "no proof whatever to warrant such fears of…deceit as those which the [government] now advance[s]" does not rise to a compelling governmental interest).[14]

[14] While *Sherbert v. Verner* discussed the application of strict scrutiny in the free exercise context prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), which limited the application of strict scrutiny in such cases until the passage of the

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The district court suggested that because it determined exacting scrutiny, rather than strict scrutiny, applied, there was no need for the government to actually justify its generalized "transparency" interest. JA 373 n.3. This assertion, however, is mistaken. The Supreme Court "ha[s] *never* accepted mere conjecture as adequate to carry a First Amendment burden.". *Shrink Mo. Gov't PAC*, 528 U.S. at 392 (emphasis supplied); *see also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (*en banc*) (dismissing, in a First Amendment context, "broad, unsupported conjecture").

The district court did not err, however, in finding that the question of whether an unpaid person may be forced to register as a lobbyist has "never been addressed by the Supreme Court or any other court." JA 372. To a certain extent, this likely reflects the fact that unpaid citizen activism does not constitute a danger to the Republic. *Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs.*, 431 F. Supp. 2d 1228, 1236 (N.D. Fla. 2006) ("*Prof'l Lobbyists*") ("Plaintiffs cannot

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Religious Freedom Restoration Act, it still sheds light on the standard governments must meet in proffering a compelling governmental interest. *Christians v. Crystal Evangelical Free Church (*In re *Young*), 141 F.3d 854, 858 (8th Cir. 1998) ("Congress enacted RFRA to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*") (citations and internal quotation marks omitted); *McDonough v. Anoka Cnty.*, 799 F.3d 931, 942 (8th Cir. 2015) ("[F]ederal courts are bound by the Supreme Court's considered *dicta* almost as firmly as by the Court's outright holdings….") (internal quotation marks omitted).

In any event, Defendants must demonstrate that the state interest is of the "'highest order,'" *Republican Party*, 416 F.3d at 749 (quoting *Wis. v. Yoder*, 406 U.S. 205, 215 (1972)).

reasonably argue 'that those who for hire attempt to influence legislation or who collect or spend funds that purpose' are similar similarly situated with other citizens who petition the government.") (citation omitted) (quoting *Harriss*, 347 U.S. at 625); *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973) (finding that "the First Amendment right to petition the government…is applicable to lobbyists, *who by definition receive compensation*") (emphasis supplied); *State v. Petersilie*, 432 S.E.2d 832, 841 (N.C. 1993) ("Thus, a paid lobbyist, a member of a specialized occupation, can be required to disclose his or her contributors.").

Indeed, while Mr. Calzone has been unable to identify a case on all fours with these facts, a number of courts have indicated that the regulation of unpaid citizen activism would go too far. For example, in reviewing Kentucky's lobbyist registration and reporting rules, the Commonwealth's Supreme Court determined that "the legislation's narrowing of its scope to the influence of money upon governmental processes" saved the statute from unconstitutionality. *Associated Indus. v. Commonwealth*, 912 S.W.2d 947, 955 (Ky. 1995); *see also Fritz v. Gorton*, 517 P.2d 911, 930 (Wash. 1974) (upholding Washington State's lobbyist regulation, but noting that an explicit carve-out for uncompensated activism demonstrated that the law was drafted "to avoid impingement upon First Amendment guarantees").

Similarly, the New Jersey Supreme Court relied upon *Harriss* to determine that a lobbyist statute "must be understood to regulate certain kinds of conduct which

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involve substantial sums of money. To conclude otherwise would, to reiterate, raise grave doubts as to the constitutionality of the act and attribute to the Legislature a purpose grossly exceeding any legitimate governmental interest in compelling disclosure of those attempting to influence legislation." *N.J. State Chamber of Commerce v. N.J. Election Law Enf't Comm'n*, 411 A.2d 168, 181 (N.J. 1980).

In a somewhat different context, regarding Ohio's "revolving door" statute, which prohibited former members of the General Assembly from lobbying for one year after leaving their seat, a federal court ruled that even a former legislator could not be prohibited from lobbying for a third party on a voluntary, uncompensated basis during the blackout period. *Budish*, 692 F. Supp. 2d at 862-63 (finding that "bolster[ing] the public's confidence in the integrity of state government" "cannot constitute a compelling interest to prohibit uncompensated lobbying by former members of the General Assembly").

Governments regulate lobbyists because knowing that they are being lobbied by a hired gun provides a legislator with "the power of self-protection." *Harriss*, 347 U.S. at 625. These disclosures help "avoid[] even the appearance of corruption." *Minn. State Ethical Practices Bd.*, 761 F.2d at 512. Without those disclosures, "the opportunity for fraud, corruption, [and] secrecy" would be higher. JA 373 (internal quotation marks omitted). But, precisely because lobbying has been synonymous with "being paid to influence [the] government," *Inst. of Governmental Advocates*

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v. Fair Political Practices Comm'n, 164 F. Supp. 2d 1183, 1195 (E.D. Cal. 2001), courts have upheld bans on political contributions by lobbyists—a fundamental right also protected by the First Amendment. *See, e.g., Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011); *id* at 187 ("The threat of quid pro quo corruption in such cases is common sense and far from illusory."); *see Prof'l Lobbyists*, 431 F. Supp. 2d at 1236 ("The state has a compelling interest in imposing regulations on paid lobbyists which are not imposed on other citizens.").

But that interest is simply not furthered, substantially or otherwise, by making Mr. Calzone—a citizen not paid "in exchange for sharing his views on policy with members of the General Assembly," JA 343 (Jointly Stipulated Fact 2)—register with the State and file fourteen reports a year, twelve of them under penalty of perjury, JA 345 (Jointly Stipulated Facts 20, 22). *Taylor*, 582 F.3d at 6 ("[P]ublic disclosure of 'who is being hired, who is putting up the money, and how much' they are spending to influence legislation is 'a vital national interest.'") (quoting *Harriss*, 347 U.S. at 625-626). Nor does it justify any of the other burdens, including the very real risk of over-enforcement typified by the Ethics Commission's behavior here, imposed by Missouri law.

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III. Even if the district court properly identified a substantial governmental interest, it failed to demonstrate that Missouri law is properly tailored to that interest.

Since the government's interest is limited to the spending of money on lobbying, Mr. Calzone's forced registration as a lobbyist furthers no governmental interest. By contrast, Mr. Calzone's interest in exercising his First Amendment rights is undisputed. The balance clearly tips in his favor. "[S]omething…outweighs nothing every time." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) (internal quotation marks omitted).

But even if the government has an open-ended interest in transparency, Missouri's lobbyist registration regime is not the "least restrictive means of" advancing that interest. *Republican Party*, 416 F.3d at 754. Even under exacting scrutiny, which this Court has determined does "not requir[e] a governmental interest that is narrowly tailored," *Tooker*, 717 F.3d at 591,[15] the government must nevertheless demonstrate "a substantial relation between" its law and the interest at hand, *id.* at 590 (internal quotation marks omitted).

It is worth acknowledging that Mr. Calzone is hardly the only active citizen that speaks with his representatives face-to-face. An untold number of organizations

[15] *But see McCutcheon*, 134 S. Ct. at 1456 ("Even when the Court is not applying strict scrutiny, we still require 'a fit…that employs not necessarily the least restrictive means but…a means narrowly tailored to achieve the desired objective.'") (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

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across the State of Missouri arrange "lobby days" where they "designate" a handful of volunteers to discuss issues and legislation with state representatives.[16] Under the Ethics Commission's construction of Missouri law, these groups run the risk that the MEC will consider their volunteers to be "designated," § 105.470(5)(c), RSMo., as lobbyists and required to file reports with the Commission under penalty of perjury.[17]

Below, the parties jointly stipulated as to the burdens of Missouri's lobbying laws. If he wishes to continue his volunteer activism, Mr. Calzone will be required to pay the government an annual registration fee for the privilege,[18] file a registration report, file monthly reports with his name and address, under penalty of perjury, file updating reports (also under oath) "[i]f any information changes," and twice a year—without any regulatory guidance to assist him—"report all proposed legislation or

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[16] To take only one example, "[o]n Wednesday, April 12, [2017] 125 Sierra Club members and supporters came to the Missouri Capitol in Jefferson City to talk to legislators about urgent environmental issues." Sierra Club, Missouri Chapter, *2017 Missouri Sierra Club Lobby Day* (Apr. 14, 2017), http://www.sierraclub.org/missouri/blog/2017/04/2017-missouri-sierra-club-lobby-day.

[17] Moreover, given that Missouri suggests that it is furthering a generalized transparency interest, the statute may be underinclusive. Lobbying by individuals affiliated with a labor union, as opposed to a nonprofit corporation, is exempted from regulation. § 105.475(2), RSMo

[18] At least one federal district court has found that the requirement that a person pay a fee to the government in order to lobby can, by itself, constitute a violation of the First Amendment if the funds are deposited in the State's general fund in excess of the amounts needed to administer the registration regime. *Moffett*, 360 F. Supp. at 232.

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action that the lobbyist supported or opposed." JA 343-346 (Jointly Stipulated Facts 13-24). Such "cumbersome ongoing regulatory burdens" on Mr. Calzone's "core First Amendment activity," *Swanson*, 692 F.3d at 874, cannot be justified given that Mr. Calzone is a volunteer whose ostensible lobbyist principal "has made no expenditures, nor received any income" "[f]or the past five years." JA 344 (Jointly Stipulated Fact 7).

Moreover, "[b]ecause the Missouri Ethics Commission retains its records publicly on the Internet in perpetuity, registration as a legislative lobbyist forever labels that person as a 'lobbyist.'" JA 344 (Jointly Stipulated Fact 12); *see Meese v. Keene*, 481 U.S. 465, 485 n.19 (1987) ("Like 'propaganda,' the word 'lobbying' has negative connotations"). States regulate lobbyists "as a class" because it is assumed that they are more likely "to corrupt the political process than do ordinary citizens." *Barker v. Wis. Ethics Bd.*, 841 F. Supp. 255, 260 (W.D. Wis. 1993); *see also McIntyre*, 514 U.S. at 356 n.20 (noting that association with lobbyists may carry with it "the appearance of corruption"). But Mr. Calzone *is* an ordinary citizen. Putting aside the general burden of having one's personal information on the Internet, forcing Mr. Calzone to accept this designation for life is, in and of itself, a burden, as it slanders him by suggesting he is a danger to good government rather than an engaged citizen. *Finance Comm. to Re-elect the President*, 507 F.2d at 1201 ("Lobbying is of course a pejorative term….").

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Worse, forcing Mr. Calzone to register will place him more firmly under the authority of the Missouri Ethics Commission, which "is required by law to investigate any properly filed complaint." JA 344 (Jointly Stipulated Fact 9). Once a complaint is filed and the individual is charged, the process then advances to a hearing of its own accord, as the Commission is "not authorized to grant motions to dismiss." JA 344 (Jointly Stipulated Fact 10). A brief review of the September 3, 2015, proceedings against Mr. Calzone before the Missouri Ethics Commission, available in the Joint Appendix at pages 87-290, demonstrates that body's casual approach to due process and proper procedure.[19] As Appellant has found through personal experience, when placed under the jurisdiction of the Commission, the process is a substantial part of the penalty.

But of course, Missouri law also threatens real penalties, including significant financial penalties and jail time, even for technical compliance errors. JA 346 (Jointly Stipulated Facts 26-30) ("A person who violates, *in any way*, a provision of the lobbyist registration regime *shall be punished* as follows…") (emphasis supplied). The government of Missouri is not furthering any significant

[19] For instance, the Ethics Commission's special investigator, Ms. Della Luaders, freely conceded that she destroys any notes that she takes during an investigation once she recommends that the Commission formally bring a charge against someone. JA at 196-97. In Mr. Calzone's case, Ms. Luaders' report was finished in January of 2015, JA 197, but Mr. Calzone was not formally charged until April, JA 16.

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"transparency" interest when it threatens to jail its citizens for making mere clerical errors.

These burdens raise a simple question: What is the Missouri statute actually guarding against? Applied against Mr. Calzone, the statute appears to be untailored, indeed staggeringly so. *McCutcheon*, 134 S. Ct. at 1446 (striking statute with "a substantial mismatch between the [g]overnment's stated objective and the means selected to achieve it"). But asking this question provides a ready means to address the fit between Missouri's interest and its means in pursuing that interest.

First, when regulating lobbying, legislators are acting for their own "self-protection." *Harriss*, 347 U.S. at 625. Today just as 1954, "legislative complexities are such that individual members of [the legislature] cannot be expected to explore the myriad pressures to which they are regularly subjected." *Id*. Thus, legislators want to know when the person they are listening to is acting as a functionary for others. Discovering if that person has been paid to do the work of a third party efficiently solves this problem.

For-hire agents are not petitioning for the redress of their own grievances; they are acting on the behalf of another. Enthusiastic volunteers and citizen activists, on the other hand, are expressing their own will. *Prof'l Lobbyists*, 431 F. Supp. 2d at 1236 ("Plaintiffs cannot reasonably argue 'that those who for hire attempt to influence legislation or who collect or spend funds that purpose' are similar similarly

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situated with other citizens who petition the government") (citation omitted) (quoting *Harriss*, 347 U.S. at 625). If a legislator finds that a person is in Missouri's lobbyist registration database, they may assume that individual dances to the tune of another.

Second, the legislature wants to avoid *quid pro quo* corruption or its appearance. They wish to repel "even the appearance," *Kelley*, 427 F.3d at 1111, of "the notion of a direct exchange of an official act for money," *McCutcheon*, 134 S. Ct. at 1441. Accordingly, the law ought to shine a spotlight on the expenditures of interest groups, whether that money flows directly to legislators and legislative staff, or to pay the salary of an agent that lobbies. Doing so allows the public to "follow the money" and determine whether a quiet, cloakroom relationship, greased by special interest dollars, may have affected a legislative outcome. As money is indispensable to the act of making a corrupt bargain under Supreme Court precedent, drawing the line at compensation furthers this interest. *McCutcheon*, 134 S. Ct. at 1441 ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance…That Latin phrase captures the notion of a direct exchange of an official act for money").

By limiting the reach of the statute to compensated persons, this Court would establish a reasonable proxy for determining whether a person is seeking to affect policy on her own behalf, or on behalf of another. And, equally importantly, such

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tailoring provides a safe harbor for engaged citizens who presently operate under the threat of fines and criminal penalties should the Missouri Ethics Commission decide, based upon no standard whatsoever, that they have been "designated" to lobby on behalf of another.[20] "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456, and in this First Amendment context, Mr. Calzone ought to be able to petition his government for a redress of grievances without first obtaining the State's permission and submitting to its convoluted, arbitrary, and invasive disclosure and enforcement regimes.

IV. The Ethics Commission's application of the word "designate" fails to provide fair notice, and is unconstitutionally vague.

Limiting the reach of Missouri's lobbyist registration and reporting law to compensated individuals would provide adequate relief to Mr. Calzone. *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("'[I]f it is not necessary to decide more, it is necessary not to decide more.'") (quoting *PDK Labs., Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment)). Nevertheless, Mr. Calzone's experience demonstrates that the Ethics Commission's interpretation

[20] Equally importantly, as discussed at some length *infra* at 39-44, it also removes existing ambiguity as to when the law applies. Determining the identity of a lobbyist principal, and identifying those who lobby for that principal, is an easy task when the principal pays the lobbyist for her work.

of Missouri law "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Harriss*, 347 U.S. at 617.

Below, the district court posited that "no registration or reporting is necessary when Calzone speaks only as a citizen." JA 377. This is cold comfort to Mr. Calzone—before he was charged with unauthorized lobbying by the Ethics Commission in April of 2015, he had assumed that he was "speak[ing] only as a citizen." *Id.* Instead, the Commission determined that Mr. Calzone had somehow designated *himself* as a lobbyist for Missouri First, Inc., even as it has stipulated that "[t]he board of directors of Missouri First, Inc. has never taken official action to name Plaintiff as the legislative lobbyist for Missouri First, Inc." JA 344 (Jointly Stipulated Fact 6). When a second complaint was filed against Mr. Calzone, alleging the same charges as the first complaint, often in the exact same language, it was investigated and then dismissed. *Id.* (Jointly Stipulated Fact 11). Nevertheless, the Commission has stipulated "that dismissal does not immunize Plaintiff from future complaints." *Id.*

Mr. Calzone is, frankly, at a loss. He is accused of representing a corporation whose Charter—which was introduced before the district court[21]—states that it "will be governed by the Board of Directors within the constraints of this charter…Normal

[21] The district court was mistaken in finding that Mr. Calzone had not "presented evidence…that shows an agent of Missouri First could not designate someone as a lobbyist for the organization." JA 381.

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operational decisions will be decided upon by a simple majority vote." JA 61 (Missouri First Charter). The Commission has conceded that the Missouri First board of directors has "never taken official action to name Plaintiff as the legislative lobbyist for Missouri First." JA 344 (Jointly Stipulated Fact 6). But that same Commission contends he is Missouri First's lobbyist, and the district court posited that he could be so under "the theory of express agency." JA 381. Oddly, the court did so upon finding, "[c]rucially," *id.*, that Mr. Calzone served as Missouri First's registered agent. In other words, because Mr. Calzone served as "the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation," § 355.176(1), RSMo. (Missouri Nonprofit Corporation Act), the district court believed that he was also the corporation's lobbyist.

No reasonable person would believe that agreeing to accept process on behalf of a corporation, or accepting membership on a board of directors of a nonprofit corporation, is tantamount to designating oneself as that group's lobbyist. This twists the "power or right to choose," JA 379 (internal quotation marks omitted), from the control group of a corporation and hands it (unknowingly) to a politically active fellow traveler. As such, it poses a trap for the unwary. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning"); *compare* JA 381-382 ("[T]he Court rejects Calzone's argument that the

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use of the term self-designate demonstrates that the term 'designate' as used in the statute or as found by the Commission, makes the term vague").

The state's novel theory of self-designation functions as "a content-based regulation of speech" which is "of special concern" because "[t]he vagueness of...a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-872 (1997); *cf. Fed. Communications Comm'n v. Fox TV Stations, Inc.*, 567 U.S. 239, 254-255 (2012) (applying *Reno*). Vagueness is especially dangerous in the First Amendment context. *Buckley*, 424 U.S. at 77 ("[A]n even 'greater degree of specificity' is required" when "First Amendment rights are involved….") (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

The remedy for vagueness is, of course, facial relief. *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). But given that the Ethics Commission has contorted the word "designate" to go after anyone that seeks to talk policy with a legislator while holding out an affiliation with a group, the Commission has expanded the law well beyond its "plainly legitimate sweep," *Wash State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

Mr. Calzone is, for now, the only person that has yet been caught in this net. But that is only a result of the Ethics Commission's process, which turns upon the filing of a complaint. That fact actually compounds the harm, as it all but guarantees

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the inconsistent enforcement of the laws, and that they will be used disproportionately against disfavored groups or individuals espousing unpopular or dissident causes.

In such circumstances, courts are required to apply narrowing constructions "'to avoid constitutional difficulties.'" *Skilling v. United States*, 561 U.S. 358, 406 (2010) (quoting *Boos v. Barry*, 485 U.S. 312, 331 (1988) and citing *Harriss*, 347 U.S. at 618). Here, a narrowing construction is readily available. Section 105.470 states that a lobbyist ""[i]s designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity"—a definition that happens to be identical to that of a "lobbyist principal," which is "any person, business entity, governmental entity, religious organization, nonprofit corporation or association who employs, contracts for pay or otherwise compensates a lobbyist." §§ 105.470(5)(c), 105.470(7), RSMo. *See Crum v. Vincent*, 493 F.3d 988, 996 (8th Cir. 2007) ("Missouri law requires courts to read statutes *in pari materia*, harmonizing sections covering the same subject matter if possible"). In other words, the statute can be read to reach only individuals compensated by a "lobbyist principal."

Appellant acknowledges that such a reading provides precisely the same relief that Mr. Calzone's as-applied claim seeks. But, when narrowly construing a statute, courts are obligated to ensure that the construction is "fairly possible," *Boos*, 485

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U.S. at 331, and "consistent with the legislature's purpose," *Buckley*, 424 U.S. at 78. Mr. Calzone's preferred construction has the benefit of using language already provided by the legislature, thus avoiding a situation where the statute must be directly rewritten by this Court.

Indeed, Mr. Calzone's construction was quite possibly the original intention of the General Assembly. Under § 105.470(5) RSMo., which defines "legislative lobbyist," three of the four "classes" under which an individual becomes a legislative lobbyist involve receiving or expending money to lobby. Subpart (a) reaches 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) reaches contracted lobbyists: those who are "engaged for pay or for any valuable consideration." § 105.470(5)(b), RSMo. Likewise, subpart (d) only kicks in when a person "[m]akes total expenditures of fifty dollars or more" in connection with lobbying. § 105.470(5)(d), RSMo.

If Appellant's proposed narrowing construction is adopted, (a) covers organizations with a full-time, in-house lobbyist, (b) covers hiring a lobbyist on a contractual basis, (c) will be limited to compensated persons whose primary purpose is not to lobby, but who do so regularly (e.g., a corporate vice president spending 10 percent of her working hours lobbying), and (d) covers gifts that may improperly

influence a legislator. This neatly captures the universe of relevant financial transactions, thus serving the government's interest in "know[ing] who is being hired, who is putting up the money, and how much." *Harriss*, 347 U.S. at 625.

V. The Ethics Commission's ability to enforce the law would not be hamstrung by exempting unpaid volunteers.

Below, the Ethics Commission suggested that exempting unpaid volunteers from the lobbyist registration and reporting regime would impede its ability to investigate complaints of unauthorized lobbying. This is not so. Missouri law already prohibits the Commission from opening an investigation "unless the complaint alleges facts which, if true, fall within the jurisdiction of the commission." § 105.957(2), RSMo. To trigger future investigations, complaints would merely have to allege that an accused legislative lobbyist is paid for her work. *Cf.* JA 29-32 (Complaint of Mr. Michael C. Reed) ("When testifying he consistently indentifies [*sic*] himself as a director of Missouri First, and then declares that he is not a registered lobbyist, and doesn't need to be <u>because he does not get paid</u>.") (emphasis in original). The rest of the Commission's business would proceed unhindered.[22]

[22] In the future, should the need arise, Mr. Calzone would be happy to rebut any allegation that he is being paid for his activism—as he has already done to the State's satisfaction here. JA 343 (Jointly Stipulated Fact 2).

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CONCLUSION

For the foregoing reasons, the district court ought to be reversed.

Respectfully submitted,

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

Allen Dickerson
Zac Morgan
Owen Yeates
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Ste. 201
Alexandria, VA 22314
Phone: 703.894.6800
Fax: 703.894.6811
Email: zmorgan@campaignfreedom.org

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Fed. R. App. P. 32 (a)(7)(B)(i) as it contains, exclusive of those provisions exempted by Fed. R. App. P. 32(f), 11,066 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 brief and addendum were "generated by printing to PDF from the original word processing file."

Pursuant to 8th Cir. R. 28A(h)(2), Appellant also states that the brief and addendum have been scanned for viruses using Norton Security Version 22.10.1.10, and both documents are virus-free.

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CERTIFICATE OF SERVICE

I, David E. Roland, do hereby certify that on September 21, 2017, I filed a copy of the foregoing electronically via this Court's CM/ECF, which has served electronic notice all counsel of record on September 21, 2016.

/s/ David E. Roland

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