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 Reply Brief

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INTRODUCTION

The Missouri Ethics Commission's ("MEC" or "Commission") argument in this case takes us through the looking glass. According to the Commission, a citizen activist, acting at his own initiative and expense, who shares ideas about public policy with his elected representatives is not an example of democracy at its best. Rather, the MEC asserts that unpaid citizen activists such as the Appellant, Ron Calzone, pose such a danger to our system of government that they must be threatened with fines, prosecution, and imprisonment if they dare to share policy ideas with lawmakers without first registering with the government and submitting regular reports. This contention is bizarre and unsupported by any evidence whatsoever.

To be sure, courts have previously found that the influence of money in politics can present such a concrete threat of "corruption or the appearance of corruption" that the First Amendment would allow the government to require professional lobbyists to register and file regular reports. But in this case both Parties agree that Calzone is neither compensated for his civic activities nor spends any money to influence legislation in any way, and no other federal appellate court appears to have ever considered whether unpaid citizen activists exercising their First Amendment rights of speech and petition might pose such a threat of

"corruption or the appearance of corruption" that the government may intrude upon those freedoms. Indeed, both parties agree that this is a question of first impression.

Yet, despite the novelty of its position, the Commission contends that this case presents no serious constitutional controversy and may be easily resolved by applying existing precedent. But nearly the entirety of the Commission's argument relies upon the application of campaign finance decisions, which by definition involve the receipt or spending of money. This case is unique precisely because there is not even a suggestion that Calzone gives gifts to legislators or receives payment for speaking to them. Importantly, the MEC has offered no evidence whatsoever to support its suggestion that unpaid citizen activists sharing political ideas with government officials raise any legitimate corruption concerns. Instead, it has made the hyperbolic claim that unless the Commission can force unpaid citizen activists to register and report like professional lobbyists, "the democratic government structure would not exist." JA 373.

The Commission's position represents a radical, previously-unthinkable expansion of governmental control over citizens' core political speech and civic engagement. Its effort to justify this position conjures out of thin air an alleged governmental interest that courts have never before recognized and dramatically misconstrues the holdings of prior cases. In the process, the Commission reveals just how dangerous it would be for this Court to rule in its favor.

ARGUMENT

I. Strict scrutiny is the proper standard of review in this case.

The Supreme Court and this Court have required, in similar cases, that the government demonstrate that its statutes are tailored to "safeguard a vital national interest," *United States v. Harriss*, 347 U.S. 612, 626 (1954), or "serve a compelling state interest," *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509, 511 (8th Cir. 1985). This requirement is the hallmark of strict scrutiny. *Minn. State Ethical Practices Bd.*, 761 F.2d at 512 (finding "a vital national interest" is a "compelling interest" and applying strict scrutiny) (quotation marks and citation omitted); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003) (referring to strict scrutiny as the "compelling interest test"); *Sossamon v. Tex.*, 563 U.S. 277, 281 (2011) (same).

Moreover, the U.S. Supreme Court has clarified that when the government provides a "novel []or implausible" justification for its regulation, scrutiny tightens further. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (finding that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible" and thus relaxing the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny"). Here, the MEC has focused primarily on suggesting that a single unpaid citizen activist sharing with lawmakers various ideas about public policy poses the threat of "public corruption"

or "the appearance of corruption." *See, e.g.*, Brief of Appelles ("MEC Br.") at 18; *id*. at 3 ("The State of Missouri takes public corruption very seriously"); *id*. at 20 ("'disclosure offers much more robust protections against corruption'") (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. __; 134 S. Ct. 1434, 1459-60 (2014)); *id*. at 28 ("…interest in preventing the fact or appearance of corruption that may result from unreported lobbyist interactions"); *id*. at 30 ("interest in transparency applies equally in the lobbying context…'avoiding even the appearance of corruption.'") (quoting *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005)); *id*. at 33 ("…transparency in lobbyist interactions prevents the fact and appearance of corruption…"); *id*. at 34 ("…the public's interest in deterring corruption by promoting transparency…"); *id*. at 43 ("…the public interest in averting the fact or appearance of corruption by providing lobbying transparency"); *id*. at 45 ("…deter the fact or appearance of corruption"); *id*. at 49 ("…averts the specter of corruption"). In the campaign finance context, upon which the MEC principally relies, courts have emphasized that the "hallmark of corruption" is a financial *quid pro quo*, in which money is exchanged for political favors. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1441.

In the instant case, however, there is not even any suggestion that Calzone is receiving money in exchange for advocating a particular policy or expending money for politicians' benefit in connection with his political activism. The MEC is making

the entirely novel argument that pure political speech completely separate from any financial considerations somehow poses a threat of "the fact or appearance of corruption." Consequently, the Commission's asserted justification for restricting unpaid citizen activists' speech depends on a theory whose "novelty and plausibility" requires the most exacting review. *Shrink Mo. Gov't PAC*, 528 U.S. at 391.

A. *Harriss* provides the framework for analyzing lobbyist regulations.

In *Harriss* the Supreme Court considered a First Amendment challenge to the validity of the Federal Regulation of Lobbying Act ("Lobbying Act"), which imposed disclosure requirements on persons who sought or received money in exchange for trying to influence the passage or defeat of any legislation being considered in Congress. *Harriss*, 347 U.S. at 619. The government argued that the Lobbying Act should be interpreted to include even citizens who had ***not*** sought or received money in exchange for their efforts to influence federal legislation, *id.*, but the majority rejected the invitation to construe the act so broadly. Instead, the *Harriss* Court upheld the disclosure requirement only because it was limited to a "vital national interest" in revealing "who is being hired [to influence federal legislation], who is putting up the money, and how much." *Id*. at 625.

This precise interest has guided virtually all subsequent efforts to regulate lobbying. *E.g.* 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…"). Because the Commission has broken with a half century of history, it must now seek a new, unrecognized governmental interest that can somehow reach uncompensated persons.

No reasonable reading of *Harriss* would extend the government's "vital national interest" in regulating lobbying beyond disclosure of monetary arrangements; this Court is not at liberty to extend the reasoning applied in *Harriss* to allow regulation of citizen activists whose political statements are completely unrelated to monetary expenditures. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

B. This Court is bound by its prior decisions in which it applied strict scrutiny to lobbying regulations.

"It is a cardinal rule in [this] circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002); *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997) ("…one panel is not at liberty to overrule a decision of another panel"). Twice since the Supreme Court handed down *United States v. Harriss*, panels of this Court have applied strict scrutiny to lobbyist disclosure regimes. *Minn. State Ethical Practices Bd.*, 761 F.2d at 511 (disclosure law must "serve a compelling state interest"); *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) ("compelling interest") (citation

and quotation marks omitted). And there has been no "intervening Supreme Court decision" regarding lobbying disclosure to cast "doubt" on this Court's rulings. *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014); *see Rodriguez de Quijas*, 490 U.S. at 484 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions").

United States v. Harriss held that Congress is "not constitutionally forbidden to require the disclosure of lobbying activities" where its efforts are "designed to safeguard a vital national interest." 347 U.S. at 626. Citing *Harriss*, this Court has applied the "compelling state interest" test in the context of challenges to lobbyist registration and reporting requirements. *Minn. State Ethical Practices Bd.*, 761 F.2d at 511; *id*. at 512 ("In light of *Harriss*, we think the State…has a compelling interest in requiring lobbyists to register their activities"). Nevertheless, the Commission suggests that in *Minnesota State Ethical Practices Board*, "this Court applied the disclosure scrutiny set forth in *Buckley v. Valeo*, 424 U.S. 1 (1975) [*sic*]." MEC Br. at 23. That is incorrect.

The National Rifle Association brought two challenges in *Minnesota State Ethical Practices Board*. One challenge was brought against Minnesota's *lobbyist* disclosure laws; the second challenged Minnesota's *campaign finance* disclosure

laws. In reviewing the challenge to lobbyist registration, this Court relied entirely on *Harriss*. *Minn. State Ethical Practices Bd.*, 761 F.2d at 511-512 ("In light of *Harriss*…we reject the appellants' challenge to this part of the Act"). The Court only relied on *Buckley* when it turned to the campaign finance challenge. Moreover, this Court found Minnesota had a "compelling interest" in its paid lobbyist registration requirement. But in reviewing campaign finance disclosure, it instead quoted the *Buckley* Court's language regarding "sufficiently important" governmental interests. *State Ethical Practices Bd.*, 761 F.2d at 512. In other words, this Court apparently applied exacting scrutiny in the campaign finance context, and strict scrutiny in the lobbying context. *See also Kelley*, 427 F.3d at 1111 (citing *State Ethical Practices Bd.*, 761 F.2d at 512, and *Buckley*, 424 U.S. at 66).[1] In light of this Court's prior application of strict scrutiny in the context of First Amendment challenges to lobbying regulations, it must also apply strict scrutiny in this case.

C. *Citizens United* did not alter the standard of review applicable in Petition Clause cases.

The Commission cites *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-367 (2010), to support its contention that "lobbying disclaimer and disclosure requirements are subject to exacting scrutiny because…'they impose no

[1] *Kelley*, admittedly, is not a case about lobbyist registration and reporting, but rather concerned the imputation of financial contributions to a corporate *employer* of lobbyists. Nevertheless, this Court invoked the compelling interest standard. 427 F.3d at 1111.

ceiling on campaign-related activities and do not prevent anyone from speaking.'" MEC Br. at 20. The quotation from *Citizens United* that the Commission cites arose in a very different context: the regulation of a multi-million dollar corporation broadcasting "critical" and "pejorative" electioneering communications designed to defeat Hillary Clinton's presidential candidacy. *Citizens United*, 558 U.S. at 319-320. That case did not involve—not even implicitly—"lobbying disclaimer and disclosure requirements." Nor did it address "'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed federal legislation," which was the focus of *Harriss*. *See Harriss*, 347 U.S. at 621 (quoting *United States v. Rumely*, 345 U.S. 41, 47 (1946)). As noted above, the Commission's heavy reliance on modern *campaign finance* cases, which by definition involve significant financial expenditures and at least a cognizable concern about potential *quid pro quo* corruption, makes no sense at all in the context of a case about uncompensated citizen activism disconnected from any election.

It is true that *Citizens United* applied exacting scrutiny to the federal electioneering communications reporting regime, with its $10,000 monetary trigger. But the majority opinion in *Citizens United* included no suggestion that it was modifying the strict scrutiny applied in *Harriss* or this Court's lobbying precedents, nor can *Citizens United* reasonably be read to endorse "all sorts of disclosure requirements having to do with politics and government." MEC Br. at 24. To the

contrary, in *Citizens United* the Court merely applied concepts drawn from *Buckley v. Valeo*, the seminal campaign finance opinion. *Citizens United*, 558 U.S. at 366-367 ("…'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest") (quoting *Buckley*, 424 U.S. at 66); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 837 (7th Cir. 2014) (characterizing *Citizens United* as applying in a "specific and narrow context").

In short, the Commission has manufactured out of whole cloth its claim that *Citizens United* ushered in a new line of "modern precedent" applicable to any form of disclosure, even in cases without any financial dimension. While the case was unquestionably important in the campaign finance context, the "finance" element of the analysis is crucial. The Court should reject the MEC's attempt to conflate lobbying disclosure with campaign finance regulation, especially on these facts, and especially where prior rulings of this Court are to the contrary. MEC Br. at 24; *cf.* Calzone Br. at 16 ("The 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" and citing cases).

II. Whatever level of scrutiny this Court applies, the MEC bears the burden of justifying its restriction of First Amendment rights.

The Commission has offered no evidence at all to support its claim that unpaid citizen activists' failure to register and report as lobbyists might destroy "the democratic government structure," nor did it even imply that society will suffer any particular detriment if only professional lobbyists are subject to these regulations. JA 373. The trial court was untroubled by this lack of evidence. It suggested that under exacting scrutiny the government's unsupported assertion of essentially any interest is sufficient to justify its restriction of First Amendment rights. JA 373 n.3.

But the U.S. Supreme Court has established that whether strict or exacting scrutiny applies to a given restriction on speech, "mere conjecture" is not sufficient to carry the government's burden under the First Amendment. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). *See also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012); *281 Care Comm. v. Arneson*, 766 F.3d 774, 790 (8th Cir. 2014). Thus, the lower court's conclusion that the government may satisfy its burden merely by "pointing to" an alleged governmental interest misunderstands the law. Where a government entity asserts the existence of a novel governmental interest that, it contends, is sufficiently weighty to justify restricting citizens' First Amendment rights—or where it urges a court to apply a familiar governmental interest in an unprecedented context—the government must present evidence that supports its positions.

A. The Commission has not demonstrated that citizen activists' uncompensated political speech present any legitimate concerns about corruption.

Both lobbying regulation cases and campaign finance cases have analyzed the First Amendment's protections for citizens' political speech, and addressed circumstances where the government is permitted to burden citizens' political speech and their right to petition those in power for redress of grievances. But campaign finance laws focus primarily on regulating the extent to which citizens may make expenditures of money to support or oppose particular political campaigns. Thus, a campaign finance case necessarily involves expenditures of money which, at least theoretically, introduce the potential for corruption and the appearance of corruption. *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.")

Lobbying regulations, however, involve not only the freedom of speech, but also the freedom to petition those in power for redress of grievances—in other words, a citizen's ability to freely express opinions about what constitutes good policy or bad policy, and to try to persuade government officials to adopt policies

the citizen favors or to discourage policies the citizen disfavors. Most lobbying regulations focus either on "hired guns" paid to advocate their clients' interests (as opposed to their own) or on those who obtain public officials' attention by offering the officials something of monetary value. Courts have also tolerated some regulation of professional lobbyists to the extent that those regulations focus on ferreting out "who is being hired, who is putting up the money, and how much."[2] *Harriss*, 347 U.S. at 625; *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")

Insofar as exchanges of money are central to the work done by professional lobbyists, courts have deemed it reasonable for governments to take precaution against the possibility of "corruption." Indeed, the Commission argues that preventing corruption (not a general interest in "transparency") is the government's actual interest, and the proper interpretation of the district court's opinion below. MEC Br. at 43 ("The district court thus was correct to hold that Missouri's lobbyist disclosure law may be justified by the public interest in averting the fact or appearance of corruption by providing lobbying transparency"). The Commission's brief relies almost exclusively on campaign finance cases to support its position.

[2] This is really just another way of describing concerns about limiting the "appearance of corruption." *See Kelley*, 427 F.3d at 1111.

But in this case there is no suggestion at all that Calzone is paid to advance others' political ideas or that he offers anything of monetary value to obtain public officials' attention. The absence of any financial interests or motivations from this case thoroughly differentiates it from campaign finance cases—and also distinguishes it significantly from lobbyist regulation cases that involve financial interests and motivations. The MEC cannot carry its burden of demonstrating that its restrictions on citizens' First Amendment rights are justified by a government interest in avoiding corruption because, where there is no suggestion that a citizen is receiving or expending money to promote political ideas, there is no legitimate concern about "corruption or the appearance of corruption."

B. The MEC has not shown any legitimate governmental interest in "knowing who is operating in the political arena" where there is no threat of corruption.

The opinion below bypassed *Harriss* and instead endorsed an unprecedented, general government "interest in transparency" regarding "who is operating in the political arena," regardless of whether any money is spent or received. JA 373. In doing so, the district court lumped enthusiastic volunteers in with hired guns, evaporating any distinction between "the voice of the people" and "special interest groups seeking favored treatment by masquerading as proponents of the public weal." *See* 347 U.S. at 625; *see also Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs.*, 431 F. Supp. 2d 1228, 1236 (N.D. Fla. 2006) ("Plaintiffs

cannot reasonably argue 'that those who for hire attempt to influence legislation or who collect or spend funds for that purpose' are similarly situated with other citizens who petition the government") (citation omitted) (quoting *Harriss*, 347 U.S. at 625). This new alleged government interest is not supported by evidence or reason, and it opens the door for extensive regulation of citizens' efforts to discuss policy with public officials. This Court must not endorse it.

The Commission suggests that the district court's opinion was not the first to embrace a functionally limitless conception of the government's interest in regulating lobbying, citing *Smith v. City of San Jose*, 2013 WL 6665712 (Cal. Ct. App., 6th Dist. 2013) (unpublished). That case involved a facial challenge to a city ordinance that required persons to register as "expenditure lobbyists" if they spent more than $5,000 during any calendar year encouraging others "to communicate directly with any City Official in order to attempt to influence a legislative or administrative action." *Id.* at *2. The plaintiff in *Smith* attempted to argue that a citizen who *expends* their own money to promote a political idea (which he called an "unpaid lobbyist") could not properly be regulated in the same way as a citizen who gets paid by others to promote a political idea (which he called a "paid lobbyist"). *Id.* at 8. The government interest that the California Court of Appeals validated in *Smith* is precisely in line with the interest the Supreme Court condoned in *Harriss*: knowing "who is putting up the money [to influence the political

process], and how much." *Harriss*, 347 U.S. at 625. Consequently, *Smith* does not undermine the broadly-held consensus that regulating uncompensated volunteers would pose serious constitutional concerns. *Cf. Associated Indus. v. Commonwealth*, 912 S.W.2d 947 (Ky. 1995) ("the legislation's narrowing of its scope to the influence of money" saved a lobbyist registration and reporting regime from unconstitutionality); *Fritz v. Gorton*, 517 P.2d 911, 930 (Wash. 1974) (exempting uncompensated activists demonstrated state lobbyist registration and reporting regime was drafted "to avoid impingement upon First Amendment guarantees"); *N.J. State Chamber of Commerce v. N.J. Election Law Enf't Comm'n*, 411 A.2d 168, 181 (N.J. 1980) (unless lobbyist registration and reporting regime is "understood to regulate certain kinds of conduct which involve substantial sums of money" there are "grave doubts as to the constitutionality" of the law).

The Commission had an opportunity to introduce evidence that, at least theoretically, might have supported its alleged interests in treating unpaid citizen activists as though they were professional lobbyists. It made no effort to do so. Consequently, the record is devoid of any support for the Commission's contention that there is any legitimate governmental purpose to be served by infringing upon the First Amendment rights of Calzone and other volunteer citizen activists. Lacking this support, the Commission has failed its responsibility to justify the restrictions

on these citizens' First Amendment rights and the Court must rule that the restrictions are unconstitutional.

III. The restrictions of First Amendment rights at issue in this case are not appropriately tailored to any compelling governmental interest the Court might find.

When a court applies heightened judicial scrutiny, whether strict or exacting, it must ensure that the legislature "has used [its] power in a manner restricted to its appropriate end." *Harriss*, 347 U.S. at 626. Therefore, in order to survive judicial scrutiny the Commission's application of the law against Calzone must "match" whatever interest the Court might find to justify an intrusion into citizen's First Amendment rights. *See Swanson*, 692 F.3d at 876; *also McCutcheon*, 134 S. Ct. at 1446 (finding "a substantial mismatch between the Government's stated objective and the means selected to achieve it").

A. Compulsory registration of unpaid citizen activists as lobbyists cannot combat corruption because there is no evidence that unpaid citizen activists pose any threat of corruption.

While preventing corruption and "avoiding even the appearance of corruption" can in the context of "lobbyist-disclosure statutes" constitute a compelling interest justifying some form of regulation, the Supreme Court has found in the context of campaign finance regulations that this anticorruption interest, by definition, must involve money. *McCutcheon*, 134 S. Ct. at 1441 (to survive First Amendment scrutiny a regulation must target "*quid pro quo*" corruption or its

appearance, "the notion of a direct exchange of an official act for money"). Here, of course, the Commission concedes that Calzone is uncompensated and makes no lobbying expenditures. That stipulation is fatal to the Commission's argument.

Strict scrutiny requires the government to "show that the law that burdens [a] protected right advances a compelling state interest and is narrowly tailored to serve that interest." *Republican Party v. White*, 416 F.3d 738, 749 (8th Cir. 2005). Even assuming the validity of the Commission's asserted anti-corruption interest, however, the lobbying registration and reporting requirements in this case would restrict the speech and petition rights of a huge number of citizens (including Calzone) whose exercise of those rights poses no threat whatsoever of political corruption. Consequently, this Court would be obligated to rule in favor of Calzone under this standard because the restriction of citizen's First Amendment rights is not narrowly tailored to address the asserted government interest.

Even if exacting scrutiny were to apply in this case, "the government must nevertheless demonstrate a 'substantial relation between' its law and the interest at hand." Calzone Br. at 32 (quoting *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 590, 591 (8th Cir. 2013)).[3] Again, requiring unpaid citizen activists to

[3] In its brief, the Commission accuses Calzone of misstating the standard of review under exacting scrutiny. MEC Br. at 27 ("Calzone argues that exacting scrutiny requires a law to be narrowly tailored and to use the least restrictive means, as opposed to requiring only a substantial relation between the law's end and the means") (citing Calzone Br. at 32). This is incorrect. On that same page, Calzone

register and report as legislative lobbyists bears no relation at all to the Commission's claimed anti-corruption interest because where it is stipulated that an activist is neither receiving money for his speech nor giving public officials anything of value to obtain the official's consideration, there is no suggestion of *quid pro quo* exchange of political favors for money.; *see also Randall v. Sorrell*, 548 U.S. 230 (2006) (finding that capping political contributions at a *de minimis* level did not further the government's interest in deterring corruption or its appearance).

Indeed, Calzone's non-pecuniary activity bears no resemblance to the public corruption that the Commission claims is the driving purpose for the various statutes it invokes in its brief. *See* MEC Br. at 3-4 ("The State prohibits bribery of public officials…[Officials] may not use confidential government information for personal financial gain…officials must also make detailed financial disclosures…officials may not receive any form of extra pay on the side for their duties…After office, no elected or appointed legislator or officeholder may act as a *paid*, private lobbyist for six months") (emphasis supplied).

In sum, "averting the fact or appearance of corruption," MEC Br. at 43, and seeking "to know who is being hired, who is putting the money, and how much," *Harriss*, 347 U.S. at 625, are synonymous interests. As at least one federal court has

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concedes that this Court's precedents hold that exacting scrutiny does not require narrow tailoring. Calzone Br. at 32.

acknowledged, the regulation of "uncompensated lobbying" cannot further a "governmental interest…[which] is limited to *quid pro quo* corruption." *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863 (S.D. Ohio 2010); *see also Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 8 (D.C. Cir. 2016) (*en banc*) ("[E]xchange[s] of an official act for money…undermine the integrity of our system of representative democracy") (citation and quotation marks omitted).

B. The registration and reporting burdens, applied to Calzone, do not "match" any other legitimate governmental interest.

The Commission has stipulated to the various burdens its regime threatens to impose on Calzone. *See* Calzone Br. at 33-34. "Under [Missouri's] regulatory regime" an individual "is compelled to decide whether exercising [her] constitutional right is worth the time and expense of entering a long-term morass of regulatory red tape." *Swanson*, 692 F.3d at 873. The Commission tries to minimize the effect of this regulation, calling it "mere disclosure." MEC Br. at 25. It is not. "[S]imply placing a 'disclosure' label" on Missouri's legislative lobbying registration, reporting, and enforcement regime "risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Swanson*, 692 F.3d at 875.[4]

[4] The Commission's suggestion, for instance, that the Court not consider the additional burden of paying the State to conduct protected First Amendment activity, which at least one federal district court has found unconstitutional, *Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973), is indicative of the Commission's labeling

The Commission counters that "Missouri requires reporting only when he continuing to lobby," JA 376 and Calzone can always stop engaging with members of the General Assembly. While Calzone acknowledges the invitation to forfeit his speech and associational rights, it is an open question as to whether he could ever do so. Calzone Br. at 38-43 (discussing vagueness concerns with the MEC's understanding of the law); *infra* at 21-26. In any event, while Calzone certainly has the option of paying the highwayman and escaping, because the burdens this scheme imposes on Calzone are so disproportionate to any legitimate interest the state might assert, that is not a bargain the government may demand. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[T]he court acknowledged the obvious: enforcement of an unconstitutional law is always contrary to the public interest") (internal citations omitted).

IV. The Commission's interpretation of the term "designated" renders the statute unconstitutionally vague.

Mo. Rev. Stat. § 105.470 states that a person is subject to the registration and reporting requirements if they are "designated… by any person, business entity, governmental entity, religious organization, nonprofit corporation, association, or

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approach. Unless Calzone files separate counts as to all the burdens the law imposes on him, the MEC suggests that the burdens may be ignored. This is not, however, how courts weigh First Amendment burdens. *Citizens United*, 558 U.S. at 337-338 (noting that "PACs are burdensome alternatives" and listing—together— the numerous burdens PACs must "comply with…just to speak").

other entity" to act on that other entity's behalf "for the purpose of attempting to influence the taking, passage, amendment, delay, or defeat of any official action" on various enumerated matters. In its appellate brief, the Commission invokes two dictionary definitions for the word "designated," both of which suggest the idea of one person or entity choosing, declaring, marking, or otherwise identifying another person or entity for a specified purpose. MEC Br. at 59. Taken in isolation, these definitions do seem to reflect the common understanding of the term "designate," but those definitions *do not* clarify or delimit the sorts of actions that the MEC will consider to be a "designation" within the meaning of § 105.470.

Calzone has pointed out that numerous Missouri organizations promote "Lobby Days" at which they gather members or supporters, provide them with a symbol that will enable legislators to recognize that these persons are affiliated with the organization, and send the members or supporters around to promote policies (or even specific bills) that the organization favors. *See, e.g.*, Tim Curtis, *Sneakers Abound as the American Cancer Society Lobbies the Legislature*, THE MISSOURI TIMES, April 13, 2016, *available at* https://themissouritimes.com/28451/sneakers-abound-american-cancer-society-lobbies-legislature/; Travis Zimpfer, *Heartland Credit Union Association Holds Lobby Day*, THE MISSOURI TIMES, March 8, 2016 *available at* https://themissouritimes.com/27556/heartland-credit-union-association-holds-lobby-day/. Organizations' preparation of citizen activists for

"Lobby Days" can be quite extensive. For example, the Missouri Dental Hygienist Association provided its activists with a 79-slide PowerPoint presentation in anticipation of the event, which included instructions for the check-in process for the day itself, recommendations as to which legislators to target, designation of some activists as "group leaders" who would be assigned "special duties" as "the spokesperson for [their] visit." *See, e.g.*, Diann Bomkamp, "Lobby Day 2017", http://www.mdha.org/images/Lobby_Day_Prep_2017.pdf; *see also* "UMKC Dental Hygiene Attends Annual MDHA Lobby Day," University of Missouri-Kansas City School of Dentistry, Feb. 24, 2017, https://dentistry.umkc.edu/umkc-dental-hygiene-attends-annual-mdha-lobby-day/. A number of other organizations, including Planned Parenthood and the American Civil Liberties Union, just as two more examples, conduct similar activities. *See, e.g.*, Planned Parenthood Advocates in Missouri: Statewide Lobby Day & Day of Action, *available at* http://plannedparenthoodevents.ngpvanhost.com/ngpvanforms/2968; Travis Zimpfer, *ACLU Uses Lobby Day to Advocate for Constitutional Rights*, THE MISSOURI TIMES, March 1, 2017, *available at* https://themissouritimes.com/38415/aclu-uses-lobby-day-advocate-constitutional-rights/.

The Commission might consider citizen activists involved in these sorts of activities to be "designated" lobbyists within the meaning of § 105.470… or it might

not.[5] The Commission initially asserted that Missouri First had designated Calzone as its lobbyist simply because he (truthfully) mentioned that he is "a director of Missouri First," even though the Commission had also stipulated that "Missouri First, Inc., has never taken official action to name" Calzone as its lobbyist. JA 344 (Jointly Stipulated Fact 6). If a citizen activist such as Calzone can "self-designate" without any formal action by his alleged lobbyist principal, it stands to reason that an activist affiliated with some other organization could similarly "self-designate" simply by mentioning membership in an organization (such as Planned Parenthood) whose policies they intend to advance. And it also seems plain that the Commission could conclude that the Missouri Dental Hygenist Association has "designated" as a lobbyist an activist the organization has identified as a "group leader" with the "special duty" to act as "the spokesperson for [their] visit" to lobby legislators in regard to specific bills and policies identified by the Association. If the Commission considers one of these activists to be a "designated" lobbyist and the others not to be, this law is unconstitutionally vague because no person of ordinary intelligence could hope to understand how the Commission is interpreting and applying that term. On the other hand, if the Commission would consider *each* of these activists

[5] The Commission's response to this concern offers no clarity. *See* MEC Br. at 52. The Commission may intend to leave the question open for the complaint, investigation, and enforcement process, but this Court ought to slam that door shut.

to be "designated" lobbyists, the statute subjects to government regulation an unthinkably vast swath of political speech protected by the First Amendment.

It is impossible to say for certain exactly how the Commission would handle these situations, in no small part because even in the context of this specific case the Commission never settled on one clear theory of how Missouri First "designated" Calzone as its legislative lobbyist. It has argued that Calzone's designation as a legislative lobbyist stemmed from his testimony before the committee hearings of the Missouri General Assembly, where he noted his affiliation with Missouri First, JA 105, *l* 17-21 (statement of Mr. Stokes, MEC counsel) ("That's designating"); JA 51 ¶ 15 (MEC Order of Sept. 11, 2015) ("Respondent Calzone appeared before legislative committees of the Missouri House and the Missouri Senate, identifying himself as appearing on behalf of Missouri First, Inc."). But this rationale directly conflicts with Missouri law, which expressly exempts from the definition of "legislative lobbyist" testimony "as a witness before the general assembly or any committee thereof." Mo. Rev. Stat. § 105.470(5)(d)d; *see also* Calzone Br. at 4, n.2. The Commission's dismissal of the second complaint against Calzone suggested that he might be "designated" as a lobbyist simply because he sometimes delivered other citizens' written witness forms at the same time he offered his own testimony at a

legislative hearing.[6] *See* JA 83 ("…no evidence you provided witness forms…[t]here is insufficient evidence that you were acting as a lobbyist"); *cf.* § 105.470(5)(d)d. Conversely, at the Commission's urging, the district court found that it was "[c]rucial" to the question of "designation" that "Calzone is the registered agent of Missouri First," JA 381. But here, the Commission foreswears reliance on this point and instead asserts that Calzone's status as "president" is paramount, arguing (with no reference whatsoever to Missouri First's charter or bylaws) that his "delegated authority to run the operations of the group" must be assumed.[7] MEC Br. at 62. In sum, the Commission's understanding of how Calzone was "designated" has shifted as the case moved from one tribunal to the next—a classic trap for the unwary.

[6] As Calzone noted in his opening brief, the witness forms he occasionally delivered to legislative committee hearings were generated using a website that is not controlled by Missouri First and which simply enabled other citizens to share their own perspectives on any given bill. Calzone Br. at 4, n.2. Indeed, some of the witness forms Calzone delivered expressed opposing views in regard to measures before the General Assembly. JA 110, *l* 1-2 (statement of Mr. Dickerson) ("How can you be designated by people taking different positions on the same legislative issue?").

[7] Missouri First's charter and bylaws do not vest the organization's president with the authority to designate a lobbyist; all "normal operational decisions" of Missouri First are to be made by a majority vote of its board of directors. JA 61.

V. This Court could eliminate the statute's unconstitutional vagueness by adopting a limiting construction.

As Calzone discussed at some length in his opening brief, reading Mo. Rev. Stat. § 105.470(5)(c) to say that a legislative lobbyist must be designated by a "lobbyist principal" neatly resolves this case in favor of Calzone and avoids the constitutional question presented here. Calzone Br. at 42-44. This is not only a non-vague reading of the statute, it is the best one. Calzone Br. at 43-44. And because the Missouri Constitution bars its Supreme Court from answering certified questions, it is left to this Court to impose such a reading.[8]

CONCLUSION

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

Respectfully submitted,

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[8] *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 109 (8th Cir. 1990) ("…the Missouri Supreme Court held that, notwithstanding the certification statute, the Missouri constitution did not grant the Missouri Supreme Court original jurisdiction to render opinions on questions of law certified by federal courts and declined to answer the certified question" sent by this Court).

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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), 6,295 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 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.

CERTIFICATE OF SERVICE

I, David E. Roland, do hereby certify that on December 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 December 21, 2017.

/s/ David E. Roland