No. 19-2260

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PEGGY JONES,

Plaintiff-Appellee,

v.

LARRY JEGLEY, ET AL.,

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of Arkansas,
No. 9:19-cv-00234

Brief of Amicus Curiae Institute for Free Speech

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DISCLOSURE STATEMENT

Counsel for *Amicus Curiae* certify that the Institute for Free Speech is a nonprofit corporation, has no parent companies, subsidiaries, or affiliates, and that no publicly held company owns more than 10 percent of their stock.

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INTERESTS OF *AMICUS CURIAE*

Founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, pro bono, in cases raising First Amendment objections to the regulation of core political activity. It also files amicus briefs in cases affecting First Amendment rights.

In accordance with Fed. R. App. P. 29(a)(4)(E)(i)-(iii), *Amicus* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Counsel for all parties have consented to participation by the Institute as *Amicus Curiae*.

INTRODUCTION

The matter before the Court concerns the constitutionality of an Arkansas statute that prohibits contributions to state political candidates or campaigns more than two years prior to an election. Ark. Code Ann. § 7-6-203(e) (the "statute").[1] As the district court noted below, the statute's blanket two-year prohibition, when considered alongside Arkansas's existing campaign contribution caps, is not related to the goal of curbing political corruption. (Hr'g Tr. at 21:7-10.) Given the $2,700 cap on contributions to any single candidate, the two-year prohibition does not meet any standard of scrutiny because there is no additional evidentiary basis to support the conclusion that the prohibition is tailored to meet any state interest, as the law requires. (Hr'g Tr. at 21:7-10; 32: 17-22.) Thus, while the merits of the case before the Court are certainly important, they are relatively straightforward.

Amicus writes to highlight additional issues that only exacerbate the constitutional harm caused by the statute, but first addresses the prerequisite issue of

[1] The statute provides that citizens who make campaign contributions earlier than that statute permits may cause the prosecution of those they seek to support. Ark. Code Ann. §§ 7-6-203(e), 202 (Class A Misdemeanor). Arkansas law also provides that the Arkansas Ethics Commission may levy fines pursuant to Ark. Code Ann. § 7-6-218 against candidates who accept contributions outside the time limit prescribed by the statute.

While the language of the statute clearly makes candidates—or those acting on behalf of candidates—subject to criminal liability, the State maintains that donating citizens would also face criminal sanction, a circumstance that makes Ms. Jones's standing to bring this suit even more clear. *See* Pet. Br. at 1 (stating "[c]itizens who make campaign contributions earlier [than the statute] permits may be prosecuted for a Class A misdemeanor").

standing raised by the State. *Amicus* then covers two topics at the core of exacting scrutiny analysis, but only briefly or confusingly addressed in the district court proceedings. First, the brief addresses the State's burden to demonstrate that each incremental legal requirement the government imposes is independently justified in accordance with exacting scrutiny. And finally, this brief focuses on the Supreme Court's very different treatment of campaign issues involving an elected judiciary, as opposed to elections for legislative or executive positions, as that issue was addressed hurriedly below.

ARGUMENT

I. Ms. Jones has Standing and the State Misapplies the Law Regarding Standing in First Amendment Cases.[2]

After recounting general standards for standing for two and a half pages, the State's brief eventually mentions the relevant issue regarding standing here: that in the First Amendment context, plaintiffs need not await prosecution. *See* Pet. Br. at 8 (citing *Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir. 2009)). But the State then turns around and argues that a party has standing *only* if he or she is prosecuted. *Id.*

[2] As the state has never moved for dismissal of this claim, *Amicus* assumes the state's standing argument constitutes a suggestion of lack of jurisdiction under Rule 12(h)(3) of the Federal Rules of Civil Procedure. Fed R. Civ. P. 12(h)(3); *accord Doe v. School Bd. of Ouachita Par.*, 274 F.3d 289 (5th Cir. 2001) (citing *Flast v. Cohen*, 392 U.S. 83, 94–101 (1968)).

at 11-12. The State's position is not only incorrect, in the First Amendment context it raises the specter of a significant and therefore unconstitutional chilling effect.[3]

In general, the State claims that Ms. Jones does not meet even the relaxed standards for standing in the context of First Amendment facial challenges because: 1) Ms. Jones "never alleged or demonstrated" she was subject to prosecution for making a campaign contribution outside the period proscribed by the statute, *id*. at 9; 2) Ms. Jones never "alleged or demonstrated" she was under threat of prosecution for violating the statute, *id*. at 10; and 3) Ms. Jones alleged she refrained from conduct prohibited by the statute (presumably presently donating to Senator Johnson's 2022 campaign) and therefore was in "no realistic danger" of sustaining actual or threatened injury because the statute would not apply to her absent a donation. *Id*. The State's assertions are mistaken both in analysis of the pleadings and application of the law.

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[3] *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (first using the term "chilling effect"). Justice Brennan, famously dissenting in *Walker v. City of Birmingham*, summarized the Court's use of the "chilling effect" concept as relevant here:

> To give these [First Amendment] freedoms the necessary "breathing space to survive," . . . the Court has modified traditional rules of standing and prematurity. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting) (citation omitted). This case falls squarely in the heartland of those involving an alleged chilling effect.

Most troubling, the State argues that a person has sufficient alleged harm for standing only if they are "actually . . . charged with a violation of the statute" and that they "may *then* assert a constitutional challenge against the statute in defense of the misdemeanor charge. . . . Only at that point would a person have standing to do so." Pet. Br. at 11-12 (emphasis in original). This is an alarming take on standing law, particularly coming from a state prosecutorial office. Thankfully it is erroneous.

This case centers on the injury-in-fact requirement.[4] Federal courts unambiguously hold that "[t]he leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013); *accord Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, n.5 (8th Cir. 1985).[5] "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not

[4] "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)) (brackets omitted).

[5] For unanimity among the federal courts of appeal, *see Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011); *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 144 (2d Cir. 2000); *The Pitt News v. Fisher*, 215 F.3d 354, 363-64 (3d Cir. 2000); *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 366 (5th Cir. 1998); *Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012); *Shimer v. Wash.*, 100 F.3d 506, 508 (7th Cir. 1996); *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 610 (9th Cir. 2005); *United States v. Platte*, 401 F.3d 1176, 1187-88 (10th Cir. 2005); *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000); *N.Y. Republican State Comm. v. Security & Exchange Comm'n.*, 799 F.3d 1126, 1135-36 (D.C. Cir. 2015).

conjectural or hypothetical. An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a *substantial risk that the harm will occur*." *Susan B. Anthony List v. Driehaus*, ––U.S. ––––, 134 S. Ct. 2334, 2341 (2014) (emphasis added) (internal quotation marks omitted). When a plaintiff alleges injury arising from the potential future enforcement of a criminal statute, "*an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law*." *Id*. at 2342 (emphasis added). Instead, "a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id*. (internal quotation marks omitted); *accord Zanders*, 573 F.3d at 593*; St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006); *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004); *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997). That is particularly true when, as here, a plaintiff seeks a declaratory judgment to prevent exposure to liability:

> Parties need not . . . await the imposition of penalties under an unconstitutional enactment in order to assert their constitutional claim for an injunction in federal court. Once the gun has been cocked and aimed and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act.

United States v. Colo., 87 F.3d 1161, 1166-67 (10th Cir. 1996) (quoting *ANR Pipeline v. Corp. Comm'n of Okla.*, 860 F.2d 1571, 1578 (10th Cir. 1988) (holding federal prosecutors need not risk disbarment before challenging Colorado Bar rules); *accord Stern v. United States Dist. Ct. for Dist. of Mass.*, 214 F.3d 4, 11 (1st Cir. 2000); *Self-Insurance Inst. of Am. v. Korioth*, 993 F.2d 479, 482 (5th Cir. 1993).

Ms. Jones has standing in this case. Her complaint alleges that the blackout period mandated by the statute chills her First Amendment rights to speech as it affects her ability to express support for the candidate of her choice in the manner of her choosing. *See e.g.*, Compl. ¶ 2 (blackout period "is facially invalid insofar as it stifles core political activity"). She alleges harm as the statute: stifles her activity to support the candidates of her choosing; subjects violators of the statute to criminal prosecution; prohibits Ms. Jones from donating funds to candidates of her choosing as they would be subject to prosecution; inhibits her freedom of association by imposing a credible threat of prosecution for those who might accept Ms. Jones's contributions; and impacts Ms. Jones's First Amendment rights by preventing her from hearing views of candidates who cannot raise money with which to disseminate their views two years prior to an election. *Id.* at ¶¶ 6, 7, 14, 27, 35.

The Motion for Preliminary Injunction was supported with a first affidavit of Ms. Jones. App. 55-56. In response to the district court's questioning regarding standing, Ms. Jones filed an additional and supplemental affidavit, where she

specified that she supports a specific candidate for reelection in 2022 whom she has supported in a previous election, Arkansas State Senator Mark Johnson, but has not donated to Senator Johnson's 2022 campaign because Ms. Jones does not wish to subject herself or Senator Johnson to civil or criminal liability. App. 114-15. Ms. Jones has filed a motion with the district court to amend her complaint, and the amended complaint adds the allegations in the supplemental affidavit. Docket, ECF No. 40-1. Curiously, the state never filed a motion to dismiss for lack of standing and has not opposed the motion to amend the compliant. *See* Docket.

The State is incorrect in asserting that the only way to show a reasonable fear of prosecution is to have an actual prosecution. As the authorities above demonstrate, one need not await prosecution to challenge a statute imposing liability. For pleading purposes, Ms. Jones need not allege that she is in fact harmed; she must allege harm in the form of curtailed expressive activity due to the statute's existence. Here she has plainly done so. As noted, the Complaint alleges that the blackout period mandated by the statute chills Ms. Jones's First Amendment rights to speech as it affects her ability to express support for the candidate of her choice in the manner of her choosing. Compl. ¶ 2. The Complaint directly alleges that: Ms. Jones refrained from making a contribution because of the statute's penalties; she worried she or those to whom she would donate would face the statute's penalties; and she therefore feared to act. *Id*. at ¶¶ 6, 7, 14, 27, 35. And, of course, Ms. Jones filed a

supplemental affidavit at the district court's invitation where she specified that she refrained from donating to the 2022 campaign of Senator Johnson because she did not want to subject herself or Senator Johnson to civil or criminal liability. App. 114-15.

Accordingly, Ms. Jones alleges an intention to engage in a course of conduct prohibited by the statute: exercising her First Amendment right to express support for Arkansas politicians. The statute specifies a criminal sanction for that conduct, and the state boldly states that both Ms. Jones and those who receive her donations two or more years before an election would be subject to criminal sanction.[6] She thus credibly alleges fear of state sanction and her allegations plainly meet the pleading standards just outlined.

Importantly, the Supreme Court has explained that standing requirements are somewhat relaxed in First Amendment cases, and here Ms. Jones is a proper party to bring such claims as both she and those to whom she would donate face alleged harm under the statute:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.

[6] *See supra* note 1.

Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956 (1984); *accord Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements[.]" (internal quotation marks and citation omitted)); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing.") (internal quotation marks and citations omitted)). In sum, the Supreme Court has relaxed standing requirements for overbreadth challenges to allow litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973); *accord Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 348 (6th Cir. 2007). Consequently, Ms. Jones is a proper party and her allegations plainly meet the threshold for standing as she brings an overbreadth challenge to the statute.

II. The State Mistakenly Applies Substantive First Amendment Law.

The State makes two additional erroneous arguments related to the substantive First Amendment law applicable in the campaign finance arena. The first is that the

State neglects the settled principle that each additional regulation burdening political speech must pass an appropriate level of constitutional scrutiny. And second, the State erroneously cites principles applicable to campaigns for judicial office, even though such campaigns are not the subject of this lawsuit.

A. *The State's Evidentiary Burden is to Show that Each Restriction on Expressive Activity Passes Constitutional Scrutiny.*

The State cites quid pro quo corruption, or the appearance of corruption, as the justification and legitimate governmental interest supporting the statute's temporal ban. *See, e.g.*, Pet. Br. at 13-14. Yet Arkansas law contains a contribution cap of $2,700, which is already justified by Arkansas as a prophylactic against quid pro quo corruption or its appearance. Ark. Code Ann. § 7-6-203(a)(1)(A). As noted at the hearing on the motion for preliminary injunction below, the State makes no attempt to say that the temporal restriction of the statute is supported by another state interest; nor does it state with specificity how a temporal ban targets quid pro quo corruption or its appearance. (Hearing Transcript at 17-18.)

It is the State's burden to demonstrate that each regulation of political speech is independently justified by a legitimate governmental interest that at least meets what the Court has described as exacting scrutiny. *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 197 (2014). And in *McCutcheon*, the Court explained that each layer of regulation must stand or fall because it independently is or is not supported by a legitimate government interest that meets the requisite standard of

scrutiny; thus, the *McCutcheon* Court noted that expenditure limits did not meet the standard while contribution limits did, *id*., and that individual contribution limits to candidates were tailored to meet the interest in curbing quid pro quo corruption or its appearance whereas aggregate limits that prohibited the number of candidates one might support were not. *Id*. at 221 (requiring that courts "be particularly diligent in scrutinizing" a prophylaxis stacked on top of another prophylaxis). The State cannot justify an all-inclusive system supported by an anti-corruption interest; each incremental part of a regime must be justified; each component needs to be independently evaluated. *See id*. at 204-05

The separate evidentiary requirement is well recognized in political speech cases in the campaign finance arena, as should be amply apparent to this Court. *See*, *e.g.*, *Zimmerman v. City of Austin*, 881 F.3d 378, 392 (5th Cir. 2018) (applying separate evidentiary analysis to contribution limit and temporal ban and noting that "following *McCutcheon*, an additional limit on contributions beyond a base contribution limit that is already in place must be justified by evidence that the additional limit serves a distinct interest in preventing corruption that is not already served by the base limit"); *accord Doe v. Reed*, 561 U.S. 186, 196 (2010) (Court noting that exacting scrutiny requires considering "the actual burden" imposed by the law); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (applying *McCutcheon* independent evidentiary analysis to several Wisconsin

campaign regulations and finding them not independently supported); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (finding Colorado's issue-committee registration and disclosure requirements did not satisfy exacting scrutiny because not independently supported by evidence of interest); *Citizens United v. Gessler*, 773 F.3d 200, 210 (10th Cir. 2014) (examining each step of the Colorado Secretary of State's justifications and reasoning for the media exemption in the electioneering communications disclosure regime).

Here, the temporal ban must have an independent evidentiary basis of support because the $2,700 contribution cap in Arkansas law already is intended to stop quid pro quo corruption or its appearance. The State neglects to offer any independent evidentiary justification for the statute's temporal ban. It therefore incorrectly analyzes the burdens applicable to the statute, and its analysis is erroneous for this reason. Consequently, because the statute is not supported by an independent evidentiary basis demonstrating it meets at least exacting scrutiny, this Court should find that it does not accord with First Amendment protections and affirm the district court's grant of preliminary injunction.

B. *The State Erroneously Cites to Rules Only Applicable to Judicial Campaign Cases.*

Finally, this Court should make plain that the governmental interests and appropriate standard of review, as between cases involving judicial elections and other governmental campaign finance cases, are distinct. *Williams-Yullee v. Fla.*

Bar, 135 S. Ct. 1656, 1664-65 (2015) (finding different governmental interest and standard of review implicated where judicial canon affected speech right). This Court should reject the invitation to erroneously import standards expressly reserved for review of judicial campaign issues to the general campaign finance arena.

The State here ignores this distinction and cites *O'Toole v. O'Connor*, 302 F.3d 783 (6th Cir. 2015), for the proposition that the statute is supported by an interest in decreasing the "appearance of impropriety and the risk of actual bias." Pet. Br. at 14 (quoting *O'Toole*). As the forgoing makes plain, and the *O'Toole* court's reliance on *Williams-Yullee* for its entire analysis makes even clearer, analysis of judicial election interests is a distinct area of campaign finance doctrine, with distinct interests, and this Court should avoid the application without warrant in the campaign finance arena where the Supreme Court has been at pains to make plain that the only governmental interest of relevance is quid pro quo corruption or the appearance of such corruption. This Court should therefore reject the State's importation and use of judicial campaign principles into the arena of general campaign finance analysis and make plain that the standard has no application to this case or others involving general campaign finance law and their impact on political speech.[7]

[7] Indeed, if the test from *Williams-Yullee* were applied in this case, this Court would ask whether the statute satisfied strict scrutiny, 135 S. Ct. at 1665, and for the reasons covered above find that it clearly fails that test as well.

CONCLUSION

For the reasons above, this Court should find that Ms. Jones has standing, the Arkansas statute likely violates the First Amendment and that therefore the district court correctly preliminarily enjoined the application of the statute.

Respectfully submitted this 4th day of September 2019,

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) as it contains, exclusive of those provisions exempted by Federal Rule of Appellate Procedure 32(f), 3,681 words. It also complies with the typeface and style requirements of Federal Rules of Appellate Procedure 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.

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/s/ Parker Douglas
Parker Douglas
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I do hereby certify that on September 4, 2019, 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 4, 2019.

/s/ Parker Douglas
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