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.

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

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

This appeal raises the question whether Missouri's lobbyist disclosure law comports with the First Amendment to the U.S. Constitution. By statute, Missouri requires any lobbyist designated to lobby on behalf of another person to disclose the representation to the public. In this case, a lobbyist who lobbies without pay on behalf of his non-profit group has brought a First Amendment challenge to this law, claiming that it is fatally vague on its face and that it is unconstitutional as applied to unpaid lobbyists.

Below, the district court held that Missouri's lobbyist disclosure law is not fatally vague, because the average person would understand what it means to be designated to lobby on behalf of other person; and that the law passes intermediate, exacting scrutiny, because it directly advances the important public interest in transparency.

Because this appeal concerns two questions of first impression in this Circuit about the constitutionality of a state statute, this Court should hold oral argument with 15 minutes per side.

Appellate Case: 17-2654 Page: 2 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

TABLE OF CONTENTS

SUMMARY OF THE CASE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

I. Statutory Background 3

II. Factual Background 8

III. Procedural Background 13

STANDARD OF REVIEW 16

SUMMARY OF THE ARGUMENT 18

ARGUMENT 19

I. Missouri's lobbyist disclosure law is subject to intermediate, exacting scrutiny. 19

A. Registration and reporting requirements are subject to exacting scrutiny. 20

B. Exacting scrutiny is less rigorous than strict scrutiny. 26

Appellate Case: 17-2654 Page: 3 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

II. Missouri's lobbyist disclosure law satisfies any level of scrutiny because it ensures lobbying transparency. 28

A. The public has an important interest in lobbying transparency. 28

B. The public interest in lobbying transparency extends to unpaid lobbyists. 33

C. *United States v. Harriss* is not to the contrary. 39

D. Missouri's registration and reporting requirements are a direct means of ensuring lobbying transparency. 43

III. Missouri's lobbyist disclosure law is not unconstitutionally vague. 53

A. A law is fatally vague only if a reasonable person would not understand what the law requires. 53

B. A reasonable person would understand what it means to be "designated" to lobby for a third party. 58

IV. The equities disfavor an injunction. 66

CONCLUSION 68

CERTIFICATE OF COMPLIANCE AND OF SERVICE 69

Appellate Case: 17-2654 Page: 4 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

TABLE OF AUTHORITIES

CASES

Ala. Democratic Conference v. Attorney General of Ala.,

838 F.3d 1057 (11th Cir. 2016) 27, 67

Alaska Right to Life Comm. v. Miles,

441 F.3d 773 (9th Cir. 2006) 44

American Civil Liberties Union v. N.J. Election Law Enforcement

Commission, 509 F. Supp. 1123 (D.N.J. 1981) 23, 26, 31

Associated Indus. of Kentucky v. Com.,

912 S.W.2d 947 (Ky. 1995) 36

Bank One v. Gatthau,

190 F.3d 844 (8th Cir. 1999) 16, 66

Barker v. State of Wis. Ethics Bd.,

841 F. Supp. 255 (W.D. Wis. 1993) 42

Blount v. SEC,

61 F.3d 938 (D.C. App. 1995) 51

Brinkman v. Budish,

692 F. Supp. 2d 855 (S.D. Ohio 2010) 24–25, 42

Appellate Case: 17-2654 Page: 5 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Buckley v. Valeo,

424 U.S. 1 (1976) .... *passim*

Calzone v. Hagan,

2017 WL 2772129 (W.D. Mo. June 26, 2017) 13

Catholic Leadership Coal. of Texas v. Reisman,

764 F.3d 409 (5th Cir. 2014) .... *passim*

Citizens United v. FEC,

558 U.S. 310 (2010) .... *passim*

Craig v. Boren,

429 U.S. 190 (1976) 25

CSC v. Letter Carriers,

413 U.S. 548 (1973) 55

Delaware Strong Families v. Attorney Gen. of Delaware,

793 F.3d 304 (3d Cir. 2015)..20

Drakes Bay Oyster Co. v. Jewell,

747 F.3d 1073 (9th Cir. 2014) 67

F.T.C. v. Superior Court Trial Lawyers Ass'n,

493 U.S. 411 (1990) 19

Appellate Case: 17-2654 Page: 6 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Families Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs., 111 F.3d 1408 (8th Cir. 1997) 54

Florida Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Florida Office of Legislative Servs., 431 F. Supp. 2d 1228 (N.D. Fla. 2006)...36

Florida Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Florida Office of Legislative Servs., 525 F.3d 1073 (11th Cir. 2008) 57

Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974) 36

Grayned v. City of Rockford, 408 U.S. 104 (1972) 55

Human Life of Washington Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010) 21

Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016) 22

Libertarian Party of Ohio v. Husted, 751 F.3d 403 (6th Cir. 2014) 21

Maryland Right to Life State PAC v. Weathersbee,

975 F. Supp. 791 (D. Md. 1997) 23, 26

Maryland v. King,

133 S. Ct. 1 (2012) 66

McConnell v. FEC,

540 U.S. 93 (2003) 27, 67

McCutcheon v. Federal Election Comm'n,

134 S. Ct. 1434 (2014) .... *passim*

McGowan v. Maryland,

366 U.S. 420 (1961) 56

McIntyre v. Ohio Elections Comm'n,

514 U.S. 334 (1995) 32

Minnesota Citizens Concerned for Life, Inc. v. Kelley,

427 F.3d 1106 (8th Cir. 2005) .... *passim*

Minnesota Citizens Concerned for Life, Inc. v. Swanson,

692 F.3d 864 (8th Cir. 2012) .... *passim*

Minnesota State Ethical Practices Bd. v. National Rifle Ass'n,

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

National Association of Manufacturers v. Taylor,

582 F.3d 1 (D.C. Cir. 2009) .... *passim*

National Organization for Marriage v. McKee,

649 F.3d 34 (1st Cir. 2011)... 20, 54

Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958) 48

Nat'l Cable & Telecomms. Ass'n v. FCC,

555 F.3d 996 (D.C. Cir. 2009).. 38

New Jersey State Chamber of Commerce v. New Jersey Election Law Enf't Comm'n, 82 N.J. 57, 411 A.2d 168 (1980)..................... 36

Nichols v. Prudential Ins. Co. of Am.,

851 S.W.2d 657 (Mo. App. E.D. 1993).................................... 63–64

Nken v. Holder,

556 U.S. 418 (2009) 67

Paris Adult Theatre I v. Slaton,

413 U.S. 49 (1973) 39

Planned Parenthood Minn., N.D., S.D. v. Rounds,

530 F.3d 724 (8th Cir. 2008) 16

Appellate Case: 17-2654 Page: 9 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Qwest v. Scott,

380 F.3d 367 (8th Cir. 2004) 16

Real Truth About Abortion, Inc. v. FEC,

681 F.3d 544 (4th Cir. 2012) 21

Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 428 F.3d 1139 (8th Cir. 2005) 53

Ridley v. Mass. Bay Transp. Auth.,

390 F.3d 65 (1st Cir. 2004) 55

Rosenberger v. Rector and Visitors of Univ. of Va.,

515 U.S. 819 (1995) 8–10

Shelby v. Slepekis,

687 S.W.2d 231 (Mo. App. W.D. 1985) 62

Smith v. City of San Jose,

2013 WL 6665712 (Cal. Ct. App. Dec. 17, 2013) 34–35

Smith v. Goguen,

415 U.S. 566 (1974) 54–55

SpeechNow.org v. FEC,

599 F.3d 686 (D.C. Cir. 2010) .... *passim*

Appellate Case: 17-2654 Page: 10 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

State ex rel. Calzone v. Missouri Ethics Comm'n,

2017 WL 3026755 (Mo. App. W.D. July 18, 2017) 12

Stram v. Miller,

663 S.W.2d 269 (Mo. App. W.D. 1983) 62–63

Turner Broadcasting System, Inc. v. F.C.C.,

520 U.S. 180 (1997) 38–39

United States v. Harriss,

347 U.S. 612 (1954) .... *passim*

United States v. Nat'l Treasury Emps. Union,

513 U.S. 454 (1995) 38

United States v. Oakland Cannabis Buyers' Coop.,

532 U.S. 483 (2001) 67

United States v. Petrovic,

701 F.3d 849 (8th Cir. 2012) 16

United States v. Reese,

92 U.S. 214 (1875) 54

Virginian Ry. Co. v. Sys. Fed'n No. 40,

300 U.S. 515 (1937) 67

Appellate Case: 17-2654 Page: 11 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Vt. Right to Life Comm., Inc. v. Sorrell,

758 F.3d 118 (2d Cir. 2014) 20, 43

Wagner v. Fed. Election Comm'n,

793 F.3d 1 (D.C. Cir. 2015) 50–51

Ward v. Rock Against Racism,

491 U.S. 781 (1989) 54

Williams-Yulee v. Florida Bar,

135 S. Ct. 1656 (2015) 50–52

Wisconsin Right to Life, Inc. v. Barland,

751 F.3d 804 (7th Cir. 2014) 21

Worley v. Florida Sec'y of State,

717 F.3d 1238 (11th Cir. 2013) 22

STATUTES

Mo. Rev. Stat. § 105.452 3

Mo. Rev. Stat. § 105.470 .... 1, 5, 58

Mo. Rev. Stat. § 105.472 7

Mo. Rev. Stat. § 105.473 .... *passim*

Mo. Rev. Stat. § 105.478 7

U.S. Const. amend. I 1, 16, 19

Appellate Case: 17-2654 Page: 12 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

OTHER AUTHORITIES

Samuel A. Terilli, *Inartful Drafting Does Not Necessarily A Void, As Opposed to A Vague, Statute Make-Even Under the First Amendment: The Eleventh Circuit Applies Common Sense to "Common Understanding" in Void-for-Vagueness Challenges to Lobbying Regulations*, 63 U. Miami L. Rev. 793, 801, 811 (2009) 56

Appellate Case: 17-2654 Page: 13 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

STATEMENT OF THE ISSUES

Under the First Amendment to the U.S. Constitution, political registration and disclosure requirements are subject to intermediate or "exacting" scrutiny, while laws that more seriously burden political speech are subject to strict scrutiny. U.S. Const. amend. I; *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010).

Under Missouri law, all lobbyists lobbying on behalf of another person must register and disclose their representation to the public. Mo. Rev. Stat. § 105.473. Missouri defines a lobbyist as any natural person attempting to influence official action who is "designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity." Mo. Rev. Stat. § 105.470. This law applies whether or not the lobbyist is paid.

The questions presented in this appeal are twofold:

I. Whether Missouri's lobbyist disclosure law, as applied to unpaid lobbyists, comports with the First Amendment.

The most apposite authorities on this issue are:

- *United States v. Harriss*, 347 U.S. 612 (1954);
- *Citizens United v. FEC*, 558 U.S. 310 (2010);

- *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc); and
- *National Association of Manufacturers v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009).

II. Whether the definition of lobbyist in Missouri's lobbyist disclosure law is unconstitutionally vague under the First Amendment.

The most apposite authorities on this issue are:

- *United States v. Harriss*, 347 U.S. 612 (1954);
- *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106 (8th Cir. 2005); and
- *National Association of Manufacturers v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009).

STATEMENT OF THE CASE

This case concerns whether Missouri's lobbyist disclosure law comports with the First Amendment to the U.S. Constitution.

I. Statutory Background

The State of Missouri takes public corruption very seriously. To preclude the fact or appearance of corruption, it has enacted a comprehensive set of interrelated ethics requirements for public officials and those who interact with them. These laws rely heavily on the power of public disclosure to deter and discover improper acts.

A. The State prohibits any bribery of public officials. Officials may not exchange official acts or public appointments for personal financial gain. Mo. Rev. Stat. § 105.452. They also may not use confidential government information for personal financial gain. *Id.* § 105.452.

To deter the fact or appearance of corruption, officials must also make detailed financial disclosures. The governor and legislators must publicly disclose any personal interests that they have in pending legislation. *Id.* § 105.461. And all elected officeholders and numerous state employees must also make detailed, general financial disclosures on a regular basis. *Id.* §§ 105.483-105.489.

The State also regulates officials' interactions with lobbyists. Officials and employees may not engage in unscrupulous self-dealing on state contracts, or perform paid lobbying services to influence a state decision under their control. *Id.* §§ 105.454, 105.456, 105.458, 105.462. Officials may not receive any other form of extra pay on the side for their duties. *Id.* No statewide elected official or member of the general assembly may be a paid political consultant. *Id.* § 105.453.

Special regulations also apply to revolving-door interactions between elected officeholders and lobbyists. Officials may not solicit any registered lobbyist for a paid or unpaid position while in office. *Id.* § 105.456. After office, no elected or appointed legislator or officeholder may act as a paid, private lobbyist for six months. *Id.* § 105.455. No lobbyist may maintain a candidate committee, and a lobbyist may not give funds from the committee to legislators. *Id.* § 105.465.

The law also provides whistleblower protections for state employees who report officeholder violations to the Missouri Ethics Commission. *Id.* § 105.467.

B. Missouri furthermore imposes ethical disclosure requirements on lobbyists themselves, chief of which is that any lobbyist designated to

Appellate Case: 17-2654 Page: 17 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

lobby on behalf of another person must disclose his lobbying to the public. Mo. Rev. Stat. § 105.470.

By statute, all lobbyists lobbying on behalf of another person must register and disclose their activities to the Missouri Ethics Commission, which posts all reports online. *Id.* § 105.473; JA 362.[1] Missouri defines a lobbyist as any natural person attempting to influence official action who is "designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity." Mo. Rev. Stat. § 105.470.

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[1] In relevant part, Missouri defines a legislative lobbyist as:

> [A]ny natural person who acts for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any official action on any bill, resolution, amendment, nomination, appointment, report or any other action or any other matter pending or proposed in a legislative committee in either house of the general assembly, or in any matter which may be the subject of action by the general assembly and in connection with such activity" who also:
>
> (c) Is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity.

Mo. Rev. Stat. § 105.470.

Appellate Case: 17-2654 Page: 18 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Lobbyists must also file standardized registration forms under penalty of perjury within five days after beginning as a lobbyist. *Id.* § 105.473; JA 367, 375. They must disclose the lobbyist's name and business address; the name and address of all persons the lobbyist employs for lobbying purposes; and the name and address of each lobbyist principal by whom the lobbyist is employed or in whose interest the lobbyist appears or works. *Id.* § 105.473; JA 367. If any information changes, a lobbyist must file an updating statement under oath within one week. *Id.* § 105.473; JA 367. In addition, the employer of a lobbyist may notify the commission that a legislative lobbyist is no longer authorized to lobby for the principal and should be removed. JA 367. Registration costs $ 10 a year. *Id.* § 105.473; JA 367.

Lobbyists must also file, under penalty of perjury, monthly reports with the Ethics Commission. *Id.* § 105.473; JA 367. These reports must list any lobbying expenditures, including printing and travel expenses, as well as any business relationships with public officials. *Id.* § 105.473; JA 367.

Before giving testimony before any committee of the general assembly, each lobbyist must also disclose to the committee his name,

address and the organization on whose behalf he appears. Mo. Rev. Stat. § 105.473. Twice a year, each legislative lobbyist must report all proposed legislation or action that the lobbyist supported or opposed. JA 367.

C. If a lobbyist does not follow this law, anyone may file a signed complaint against the lobbyist in writing to the Missouri Ethics Commission. Mo. Rev. Stat. § 105.472. The Missouri Ethics Commission is required to investigate the complaint. *Id.* § 105.966. The Missouri Ethics Commission retains its records publicly on the Internet, JA 368, including monthly lobbyist reports, and it makes all records available for public inspection and copying for five years. JA 367; Mo. Rev. Stat. §§ 105.473, 105.477.

A lobbyist who fails to file reports may be fined up to $10,000, and the late fees for filing a monthly lobbyist disclosure report are $ 10 a day. JA 368; Mo. Rev. Stat. § 105.473. Violations of the lobbyist registration regime may be punished as a class B misdemeanor for a first offense, and as a class E felony for repeat offenses. Mo. Rev. Stat. § 105.478. 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. *Id.* The law also contains a severability clause. *Id.* § 105.482.

Appellate Case: 17-2654 Page: 20 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

D. This lobbyist disclosure statute makes no distinction between lobbyists who are paid and unpaid. It places registration and reporting requirements equally upon all lobbyists. This equal treatment is in keeping with the broader First Amendment principle that, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 871 (8th Cir. 2012) (en banc) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

II. Factual Background

A. In this case, an unpaid lobbyist who lobbies the state legislature on behalf of a non-profit group has brought a First Amendment challenge to Missouri's lobbyist disclosure law, claiming that it is fatally vague on its face and that it is unconstitutional as applied to unpaid lobbyists.

Missouri First, Inc. is a not-for-profit corporation formed for public advocacy. JA 362. The charter of Missouri First states that it may use "*legislative lobbying*, and citizen involvement … to teach or to influence public policy." JA 364. Past evidence shows that the group attracts new members on its website by saying: "That old saying, there is strength in numbers, holds true, especially when lobbying Missouri House and

Appellate Case: 17-2654 Page: 21 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

senate members." JA 365, 379 (citations of administrative record omitted). Missouri First promises strong lobbying by "working hard to represent your values in the issues that touch your life." *Id*. The website lets Missourians fill out witness forms about legislation that the group will present to the General Assembly. JA 365.

Mr. Ronald Calzone holds many positions within Missouri First. He is one of the group's three directors and is the group's only officer. JA 362. Mr. Calzone is the group's incorporator, sole officer, president, secretary, and registered agent. JA 364–65, 379–80. As an officer with delegated authority to run the operations of the group, he decides how to present the agenda of Missouri First to the general assembly, as well as who will do so. JA 380–81.

The board of directors of Missouri First, Inc. has never taken official action to name Mr. Calzone as the legislative lobbyist for Missouri First, Inc., and Mr. Calzone is not paid by the group. JA 365–66. Missouri First has no budget, makes no expenditures, and has no income. JA 366.

But, on the group's behalf, past evidence shows that Mr. Calzone frequently meets with legislators, legislative staff, and other legislative groups about potential legislation. JA 365–66. No one else from Missouri

First has ever represented Missouri First before the legislature. JA 365–66.

When lobbying the legislature, past evidence shows that Mr. Calzone has held himself out as the group's representative. He would typically identify himself as "Ron Calzone, Director of Missouri First, or Ron Calzone, a director of Missouri First." JA 365–66, 379 (citations of administrative record omitted). For example, on a witness form in the Missouri Senate, "Mr. Calzone identifie[d] himself as appearing on behalf—not of himself but appearing on behalf of Missouri First, Inc." *Id.*

Mr. Calzone "admits he clearly lobbies" but resists being called a lobbyist because, in his words, he feels "his hat was … to represent the faceless mask of citizens who did not have a lobbyist." JA 365 (quoting Mr. Calzone).

B. Two complaints have been filed against Mr. Calzone before the Missouri Ethics Commission for his failure to register under Missouri's disclosure law, one in 2014 and one in 2016. JA 366. The complaints alleged that he had not registered, paid a lobbying fee, or made regular reports to the state, even though he was designated as a lobbyist for his group. JA 362, 366.

After an evidentiary hearing, the Missouri Ethics Commission sustained the complaint from 2014 and found probable cause to believe that Mr. Calzone had broken the law by lobbying the Missouri Legislature on behalf of Missouri First without registering as a lobbyist in the preceding time period.

The Commission found that Mr. Calzone had been designated by the action of Missouri First, Inc., and its constituent members to lobby on its behalf. JA 363. Mr. Calzone "met with legislators and legislators' staff to support or oppose matters pending before the Missouri Legislature, testified in opposition or support of matters pending before the Missouri Legislature, submitted witness forms as requested by individuals who provided those forms to Respondent Calzone through Missouri First, Inc., and [appeared] as a witness before committees of the Missouri Legislature for the purpose of representing the interests of Missouri First, Inc., and its members." JA 363 (quoting the findings of the Missouri Ethics Commission).

The Commission dismissed the second complaint, which was substantively identical to the sustained complaint but was filed in 2016 for a time period in 2015—a time when Mr. Calzone had ceased to hold

himself out as a lobbyist on behalf of Missouri First. JA 364; *see* Letter from Mo. Ethics Comm'n to Mr. Calzone (Jan. 17, 2017), https://mec.mo.gov/Scanned/CasedocsPDF/CMTS1107.pdf (finding no evidence that Mr. Calzone held himself out as a lobbyist on behalf of anyone except himself during the 2015 legislative session).

Mr. Calzone has appealed the Missouri Ethics Commission's findings to the Missouri Administrative Hearing Commission. Despite a premature attempt by Mr. Calzone to enlist the state courts in issuing a writ of prohibition against his administrative appeal, it remains pending before the Missouri Administrative Hearing Commission today. *State ex rel. Calzone v. Missouri Ethics Comm'n*, No. WD 80176, 2017 WL 3026755 (Mo. App. W.D. July 18, 2017) (reversing circuit court and denying writ on procedural timeliness grounds), *transfer denied by Missouri Supreme Court* (Nov. 21, 2017), *rev'g Calzone v. Admin. Hearing Comm'n*, Case No. 16AC-CC00155 (Mo. 19th Cir. Sept. 23, 2016) (granting writ on procedural grounds).

Because the Administrative Hearing Commission's review is not complete, neither its actions nor the decision of the Missouri Ethics Commission is final for direct judicial review.

III. Procedural Background

A. Rather than wait for the conclusion of the state administrative proceedings, Mr. Calzone filed a First Amendment suit in federal district court to block the enforcement of Missouri's lobbyist disclosure law against him. JA 364. He argued that the law is unconstitutional as applied to unpaid lobbyists, and that the law is fatally vague on its face because the average person would not understand what it means to be "designated" to lobby on behalf of another person.

After initially abstaining, the district court rejected both of Mr. Calzone's First Amendment challenges. Ruling on stipulated facts and on evidence of the administrative record, it denied a temporary restraining order, *Calzone v. Hagan*, No. 2:16-CV-04278-NKL, 2017 WL 2772129, at *1 (W.D. Mo. June 26, 2017) (JA 328), and then denied a permanent injunction. *Calzone v. Hagan*, No. 2:16-CV-04278-NKL, 2017 WL 2772129 (W.D. Mo. June 26, 2017) (JA 361).

B. First, the district court rejected his as-applied challenge because it found that Missouri's lobbyist disclosure law directly advances the important public interest in transparency, and thus passes intermediate, exacting scrutiny. JA 369–78.

The court held that the public interest in lobbying transparency equally extends to paid and unpaid lobbyists. JA 374. The State's interest is "in allowing the public to know who is seeking to influence legislators on behalf of someone else and who might be making expenditures to governmental officials for the benefit of a third party"—and this transparency interest exists whether or not a lobbyist works for pay. JA 374. This disclosure is not a heavy burden, the court noted, because online registration takes only a few minutes and costs only $10, plus most lobbyists often have already made public their names, clients, and causes in the course of lobbying legislators. JA 376–77.

C. Second, the district court rejected his facial challenge because it held that Missouri's lobbyist disclosure law is not fatally vague on its face, because the average person would understand what it means to be "designated" to lobby on behalf of another person. JA 378–82. The normal definition of the term designate is to "'choos[e] ... a person ... for a certain post.'" JA 381 (citing Webster's Third New International Dictionary 612 (1986)). This common understanding of the word provides people of ordinary intelligence a reasonable opportunity to understand what conduct the law prohibits. JA 379–81.

Appellate Case: 17-2654 Page: 27 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

The district court noted, however, that Mr. Calzone's true argument appeared to be that the term "designate" should not have included himself, given that Missouri First, Inc.'s board of directors had never taken official action to name him as the group's legislative lobbyist.

The district court noted that it lacked authority to review the pending state administrative proceedings against Mr. Calzone, JA 379–80, but it also explained that the law was definite enough to permit findings that Mr. Calzone was designated as his group's lobbyist. JA 379. Mr. Calzone is the officer, agent, and representative of his lobbying organization, and he regularly attempts to influence legislation on the group's behalf. JA 379, 381. He had the power to designate himself his group's lobbyist by his actions. JA 381.

D. Mr. Calzone now appeals this final judgment to this Court.

Appellate Case: 17-2654 Page: 28 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

STANDARD OF REVIEW

To win a permanent injunction, the movant must attain success on the merits. *Bank One v. Gatthau*, 190 F.3d 844, 847 (8th Cir. 1999). If a court finds actual success on the merits, it then must consider the following additional factors in deciding whether to grant a permanent injunction: (1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 729 n.3 (8th Cir. 2008).

Although a district court's grant of a permanent injunction typically is reviewed for abuse of discretion, when the determinative question is purely legal, review is conducted de novo. *Qwest v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004). In this case, review is de novo because the determinative questions are the legal questions of whether Missouri's lobbyist disclose law constitutes an impermissible infringement on protected speech and whether it is fatally vague. U.S. Const. amend. I. This Court reviews First Amendment challenges de novo. *United States v. Petrovic*, 701 F.3d 849, 854 (8th Cir. 2012).

Although Mr. Calzone suggests that this Court needs to review this case for credibility determinations or other disputed facts, Calzone Br. at 10, this case concerns no disputed evidence or evidence whose admissibility is disputed. The district court drew on facts stipulated by the parties or available from public records.

Appellate Case: 17-2654 Page: 30 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

SUMMARY OF THE ARGUMENT

Missouri's lobbyist disclosure law comports with the First Amendment.

The First Amendment allows a State to require lobbyists to register and report their lobbying on behalf of others. Under the First Amendment, registration and disclosure requirements are subject to intermediate or "exacting" scrutiny, not strict scrutiny. *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010). In this case, the district court correctly held that Missouri's law satisfies this level of scrutiny because the public has an interest in averting the fact or appearance of public corruption by providing transparency in lobbying activities, whether or not the lobbyist is paid.

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

ARGUMENT

As incorporated against the States by the Fourteenth Amendment, the First Amendment prohibits any law "abridging the freedom of speech" or the right of the people "to petition the Government for a redress of grievances." U.S. Const. amend. I, XIV. Lobbying the government is protected under this amendment. *E.g.*, *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990).

I. Missouri's lobbyist disclosure law is subject to intermediate, exacting scrutiny.

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

As the district court correctly held, under recent First Amendment precedent, registration and disclosure laws like Missouri's are subject to intermediate, or exacting, scrutiny. Under this less rigorous level of scrutiny, "'[e]ven a significant interference with protected rights of political association may be sustained.'" *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

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

1. Under current First Amendment doctrine, lobbying disclaimer and disclosure requirements are subject to exacting scrutiny because, although they "may burden the ability to speak," "they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010). "[W]hen the law at issue is a disclosure law," exacting scrutiny applies, which "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874–75 (8th Cir. 2012) (quoting *Citizens United*, 558 U.S. at 366–67).

Federal circuit courts—including this Court—thus uniformly apply exacting scrutiny to registration and disclosure requirements. *E.g.*, *National Organization for Marriage v. McK*ee, 649 F.3d 34, 55–56 (1st Cir. 2011) (applying exacting scrutiny to Maine's law defining Political Action Committees); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014) (applying exacting scrutiny to Vermont's PAC definition for disclosure requirements); *Delaware Strong Families v. Attorney Gen. of Delaware*, 793 F.3d 304, 310 (3d Cir. 2015), cert. denied

Appellate Case: 17-2654 Page: 33 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

sub nom. *Delaware Strong Families v. Denn*, 136 S. Ct. 2376 (2016) (applying exacting scrutiny to the Delaware Elections Disclosure Act); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548–49 (4th Cir. 2012) (applying exacting scrutiny to federal disclosure and organizational requirements); *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 424–25 (5th Cir. 2014) ("Disclosure and organizational requirements receive a further lessened level of scrutiny. To defend disclosure and organizational requirements, the government must show a 'sufficiently important governmental interest that bears a substantial relation' to the requirement."(citation omitted)); *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 414 (6th Cir. 2014) (applying exacting scrutiny to disclosure requirements for paid circulators for minor parties); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014) (applying an "intermediate standard of review—called exacting scrutiny" to Wisconsin campaign disclosure requirements); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875–77 (8th Cir. 2012) (en banc) (applying exacting scrutiny to Minnesota's reporting requirements for political funds); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1003–05 (9th Cir. 2010)

(applying exacting scrutiny to Washington's disclosure law for political committees); *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016) (applying exacting scrutiny to reporting and disclosure requirements for issue ads); *Worley v. Florida Sec'y of State*, 717 F.3d 1238, 1243–44 (11th Cir. 2013) (applying exacting scrutiny to Florida's political committee disclosure regulations); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) (applying exacting scrutiny to federal laws imposing disclosure and organizational requirements); JA 370–71.

To be sure, a registration or reporting requirement can impose a burden on speech, *Buckley v. Valeo*, 424 U.S. 1, 64, (1976), but, as the Supreme Court and other courts have recognized, to the extent these laws abridge speech, those concerns are addressed through the exacting scrutiny framework. *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 439 (5th Cir. 2014).

2. Mr. Calzone argues that strict scrutiny applies to Missouri's lobbying laws under the Supreme Court's decision in *United States v. Harriss*, 347 U.S. 612 (1954), under this Court's decision *Minnesota State Ethical Practices Bd. v. National Rifle Ass'n*, 761 F.2d 509, 511 (8th Cir. 1985), and under three older district court cases from other circuits,

Appellate Case: 17-2654 Page: 35 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Maryland Right to Life State PAC v. Weathersbee, 975 F. Supp. 791, 797–98 (D. Md. 1997); *American Civil Liberties Union v. N.J. Election Law Enforcement Commission*, 509 F. Supp. 1123, 1129 (D.N.J. 1981). Calzone Br. at 13–16, 24.

But these cases pre-date modern First Amendment doctrine, and they reflect the state of the law "before the Court adopted today's familiar tiers of security." Calzone Br. at 14.

As the district court correctly recognized, since these decisions, the Supreme Court in *Citizens United* has clarified that, because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," statutes requiring disclosure are subjected to only to '"exacting scrutiny."' JA 370 (citing *Citizens United*, 558 U.S. at 366–69).

Indeed, in *Minnesota State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509 (8th Cir. 1985), this Court applied the disclosure scrutiny set forth in *Buckley v. Valeo*, 424 U.S. 1 (1975), acknowledging the Court's obligation to follow the Supreme Court's intervening cases setting the proper level of scrutiny for reporting and disclosure requirements. *Id*. at 512.

Then, just five years ago, this Court, sitting en banc held in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012), that, under *Citizens United* and other modern cases, strict scrutiny does not apply "when the law at issue is a disclosure law, in which case it is subject to 'exacting scrutiny.'" *Id*. at 874–75; JA 371.

Mr. Calzone argues that *Citizens United* and these other modern campaign finance cases concerned only disclosures "tied to the spending of money, not volunteer speech." Calzone Br. at 14–15. This Court has not had occasion to consider a lobbyist disclosure statute under modern precedent.

But, in modern times, no court of appeals has held that the exacting scrutiny framework for disclosure requirements is limited to campaign finance laws. The language in the Supreme Court's cases is general and clear: this test applies to all sorts of disclosure requirements having to do with politics and government. *Citizens United*, 558 U.S. at 366–67.

As his sole modern case in support of applying strict scrutiny in this case, Mr. Calzone cites a federal district court decision, *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio 2010), which applied strict

Appellate Case: 17-2654 Page: 37 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

scrutiny to a law forbidding any lobbying by certain former officials. Calzone Br. at 16, 30.

But, for three reasons, this district court was correct that this case is different from that case. First, the level of scrutiny was conceded in that case, and here there is no stipulation to strict scrutiny. *Brinkman v. Budish*, 692 F. Supp. 2d 855, 861 (S.D. Ohio 2010). Second, as the district court below held, even if there were a stipulation as to strict scrutiny, the Court still "must apply the correct standard." JA 370 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). And third, that case concerned what Mr. Calzone describes as an admittedly "different context." Calzone Br. at 30. The law in *Budish* imposed a prior restraint on any speech by an uncompensated lobbyist, and prior restraints are subject to strict scrutiny—whereas here, Missouri's law is a mere disclosure requirement, which is subject to different review. *Brinkman v. Budish*, 692 F. Supp. 2d 855, 861 (S.D. Ohio 2010).

The other, older district court cases cited by Mr. Calzone are inapplicable for similar reasons. One case also concerned a prior restraint on speech, and thus was properly subject to strict scrutiny: the law prohibited lobbyists from serving as officers or treasurer of certain

Appellate Case: 17-2654 Page: 38 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

political committees. *Maryland Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 797 (D. Md. 1997). The other case pre-dated modern doctrine, but even so, that court upheld disclosure requirements for financial contributions made expressly for lobbying activities. *Am. Civil Liberties Union of New Jersey v. New Jersey Election Law Enf't Comm'n*, 509 F. Supp. 1123, 1134 (D.N.J. 1981).

In the end, Mr. Calzone is left with his assertion that "it has always been understood" that disclosure requirements may only be applied to paid lobbyists. Calzone Br. at 11, 13, 19–20. But just because past laws did not cover unpaid lobbyists does not mean that the First Amendment prohibits future laws from doing so. Instead, the First Amendment requires the application of the proper level of scrutiny to a new disclosure requirement.

B. Exacting scrutiny is less rigorous than strict scrutiny.

Under exacting scrutiny, a disclosure law is constitutional if there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874–75 (8th Cir. 2012) (citations omitted).

Less rigorous than heightened scrutiny, exacting scrutiny accords the State deference for its choice about how to weigh competing constitutional interests, as well as how to "anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *Ala. Democratic Conference v. Attorney General of Ala.*, 838 F.3d 1057, 1063 (11th Cir. 2016) (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

In assessing whether a disclosure requirement satisfies exacting scrutiny, courts assess the fit between the stated governmental objective and the means selected to achieve that objective. *McCutcheon*, 134 S. Ct. at 1444. "There must be a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion of the interest served." *Id.* at 1456–57 (quotation omitted). Missouri's lobbyist disclosure law satisfies these requirements.

Mr. 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. Calzone Br. at 32. But this Court rejected that contention in

Appellate Case: 17-2654 Page: 40 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874–75 (8th Cir. 2012), where it contrasted exacting scrutiny with strict scrutiny.

II. Missouri's lobbyist disclosure law satisfies any level of scrutiny because it ensures lobbying transparency.

Missouri's lobbyist disclosure satisfies any level of scrutiny because it advances the public interest in preventing the fact or appearance of corruption that may result from unreported lobbyist interactions. *McCutcheon*, 134 S. Ct. at 1459–60.

A. The public has an important interest in lobbying transparency.

1. The State has an important interest in the timely disclosure of information about lobbyists' existence and activities. The need to inform the public is a sufficiently important governmental interest to justify requiring an entity to register and report to the government. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696, 698 (D.C. Cir. 2010). Disclosure laws are "justified based on a governmental interest in 'provid[ing] the electorate with information' about" election-related activity. *Citizens United*, 558 U.S. at 367–69 (quoting *Buckley*, 424 U.S. at 66).

Especially now, with the easy ability to look up lobbying activities online, "disclosure now offers a particularly effective means of arming the voting public with information," and so "disclosure offers much more robust protections against corruption." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1459–60 (2014). "With the advent of the Internet, prompt disclosure" can provide citizens "with the information needed" to hold committees and elected officials "accountable for their positions and supporters." *Citizens United*, 558 U.S. at 370. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. at 371.

True, disclosure requirements can burden speech, but they do not impose a ceiling or prior restraint on speech. *Citizens United*, 558 U.S. at 366. A registration or disclosure requirement requires that an entity take simple steps to formalize its organizational structure and divulge its information to the government; a ceiling or prior restraint on speech, on the other hand, prevents any speech by the entity, however formed and registered. *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 439 (5th Cir. 2014).

Appellate Case: 17-2654 Page: 42 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

For this reason, the "Supreme Court has consistently upheld organizational and reporting requirements against facial challenges." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010).

2. Under precedent, this interest in transparency applies equally in the lobbying context. Both the Supreme Court and this Court have "upheld lobbyist-disclosure statutes based on the government's 'compelling' interest in requiring lobbyists to register and report their activities, and avoiding even the appearance of corruption." *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005).

In particular, the Supreme Court has held that legislators have a compelling or vital interest in requiring disclosure by lobbyists who are paid to influence legislators. *United States v. Harriss*, 347 U.S. 612, 625 (1954). This informational interest exists because legislators need to be able to properly evaluate all the pressures on officials, and requiring the disclosure of lobbying activities is in large measure "the power of self-protection" for legislators. *Id.* at 625–26. Disclosure "permits legislators to identify the source of funds used to influence them, and to discover the

Appellate Case: 17-2654 Page: 43 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

particular constituency advocating a particular position on legislation," which "thus permits legislators to evaluate whether the interest of a particular constituency is consistent with the interests of other constituencies." *Am. Civil Liberties Union of New Jersey v. New Jersey Election Law Enf't Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981).

This interest is in disclosure of all "lobbying activity," not in the disclosure of only some lobbying activities, based on the particular circumstances, employer, group affiliation, or other quirks of individual lobbyists. *Minnesota State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 513 (8th Cir. 1985); JA 374. After all, "the state has a strong interest in promoting openness in the system by which its laws are created." *Am. Civil Liberties Union of New Jersey v. New Jersey Election Law Enf't Comm'n*, 509 F. Supp. 1123, 1129 (D.N.J. 1981).

Courts have recognized that these interests remain important today. Since *Harriss*, "nothing has transpired in the last half century to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009). To the contrary, the Supreme Court in *Citizens United*

Appellate Case: 17-2654 Page: 44 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

approvingly cited *Harriss*, indicating that it believes *Harriss* to be good law. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010).

The public also has an important interest in lobbying transparency because, just as in the campaign finance context, disclosure helps avert the fact or appearance of corruption. The Supreme Court has commented that the "activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20 (1995). The D.C. Circuit has held that the public's transparency interest applies equally when a candidate runs for office and when a "candidate has attained office and is exposed to the pressures of lobbying." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d at 14. "[J]ust as disclosure serves the important informational interest" of "help[ing] voters to define more of the candidates' constituencies," it also helps the public to "understand the constituencies behind legislative or regulatory proposals." *Id.* (citing *Buckley*, 424 U.S. at 81). And disclosure of lobbying minimizes the potential for abuse of the political system by exposing lobbying activities "to the light of publicity," which deters improper forms of influence and holds elected officials accountable for their actions. *Buckley*, 424 U.S. at

Appellate Case: 17-2654 Page: 45 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

67. Disclosure laws are necessary to achieve these public goals, because the public cannot assess whether there has been improper influence on behalf of a lobbying principal if the public cannot identity the principal.

B. The public interest in lobbying transparency extends to unpaid lobbyists.

1. This public interest in lobbyist disclosure extends equally to paid and unpaid lobbyists. JA 374. The "public has an interest in knowing who is speaking," not merely "who is funding that speech." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010). Providing transparency in lobbyist interactions prevents the fact and the appearance of corruption, whether or not the lobbyist is paid.

In keeping with precedent, the district court below correctly held that the public interest in lobbying transparency equally extends to paid and unpaid lobbyists. JA 374. It recognized that "Missouri's interest in transparency is the same whether or not lobbyists are compensated." JA 374. The State's interest is "in allowing the public to know who is seeking to influence legislators on behalf of someone else and who might be making expenditures to governmental officials for the benefit of a third party"—and this transparency interest exists whether or not a lobbyist works for pay. JA 374.

This holding is in keeping with the conclusion of the only other court to consider this question. In an unpublished and non-precedential decision, the California Court of Appeals held that the interest for officials to know who is lobbying them is the same for paid and unpaid lobbyists. *Smith v. City of San Jose*, No. H037626, 2013 WL 6665712, at 7–8 (Cal. Ct. App. Dec. 17, 2013). Applying exacting scrutiny, that Court held that it failed "to see how there is a clear delineation between the government's interest in disclosure of financial contributions and lobbying activity from paid lobbyists and the financial contributions and lobbying activity from unpaid lobbyists." *Id.* at *8. "The government interest in providing transparency and information to the public and other decisionmaking bodies remains the same for both types of lobbying activity." *Id.*

2. Mr. Calzone alleges that the public's interest in deterring corruption by promoting transparency does not include an interest in reporting the activities of lobbyists who represent third parties without pay. Calzone Br. at 19–21, 26, 28–29, 36–37. He does not dispute the existence of the public interest in transparency generally, only whether it extends to unpaid lobbyists in particular.

But, as the district court held, "Missouri's interest in transparency is a sufficiently important governmental interest to justify this statute, because "[k]nowing who is operating in the political arena is a valid governmental interest regardless of whether someone volunteers on behalf of a third party or is paid by the third party." JA 373.

Mr. Calzone argues that this general interest in transparency has never been adopted by any other court, Calzone Br. at 13, 19–21, but, to the extent that he suggests that this is the first case and first law raising this question, he appears mistaken, *Smith v. City of San Jose*, No. H037626, 2013 WL 6665712, at 7–8 (Cal. Ct. App. Dec. 17, 2013).

Mr. Calzone also argues that this Court rejected this interest in *Minnesota State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509 (8th Cir. 1985), but, in that case, this Court held that the public interest in transparency *was* a broad and "compelling interest in requiring lobbyists to register their activities," Calzone Br. at 24–25 (quoting *Minnesota State Ethical Practices Bd.*, 761 F.2d 509 at 512). True, that case did not concern transparency for unpaid lobbyists or citizen-activists, Calzone Br. at 25–26, which is why this question remains to be decided by this Court, but that case does stand for this

Appellate Case: 17-2654 Page: 48 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Court's refusal to narrow the transparency interest identified in *Harriss*. This Court refused to draw any constitutionally significant distinction among types of lobbyists, *Minnesota State Ethical Practices Bd.*, 761 F.2d 509 at 513, a point understood by the district court, JA 374.

3. Mr. Calzone next argues that the state interest in transparency is "functionally limitless, and cannot help but chill grassroots speech and petitioning activity at the core of the First Amendment's protections," given that lots of people other than paid lobbyists seek to influence the legislature. Calzone Br. at 13, 19–31. In support, he cites various cases where courts, in dicta, noted that limiting lobbyist laws to paid lobbyists (as opposed, presumably to unpaid lobbyists or to members of the general public speaking for themselves) avoided constitutional concerns. Calzone Br. at 28–29 (citing *Associated Indus. of Kentucky v. Com.*, 912 S.W.2d 947, 955 (Ky. 1995); *Fritz v. Gorton*, 83 Wash. 2d 275, 306, 517 P.2d 911, 930 (1974)); *New Jersey State Chamber of Commerce v. New Jersey Election Law Enf't Comm'n*, 82 N.J. 57, 83, 411 A.2d 168, 181 (1980); *Florida Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Florida Office of Legislative Servs.*, 431 F. Supp. 2d 1228, 1236 (N.D. Fla. 2006)).

Appellate Case: 17-2654 Page: 49 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

But, to the extent he disputes that the public interest in transparency applies throughout the governmental sphere, he is mistaken: this interest justifies disclosure requirements for paid and unpaid lobbyists alike, because it relates to the public interest in information about all attempts to influence the legislature, not merely in information about the financial circumstances of the lobbyist. *Minnesota State Ethical Practices Bd.*, 761 F.2d 509 at 513; JA 374.

And, to the extent he claims that the term "influence" in the statute is vague, he fails to raise that point as a vagueness claim, and so it has been forfeited. Calzone Br. at 21.

Of course, he is right that disclosure requirements can burden speech, but disclosure requirements do not impose a ceiling or prior restraint on speech. *Citizens United*, 558 U.S. at 366, which is why under precedent, to the extent these laws burden protected speech, those concerns are addressed through the exacting scrutiny framework in individual cases. *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 439 (5th Cir. 2014).

4. Mr. Calzone also asserts that the public interest in transparency must be supported by evidence. He argues that the government must "do

more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." Calzone Br. at 17–18, 27–28 (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995)).

But, under exacting scrutiny, courts do not require evidence to support the transparency interest justifying disclosure law. JA 373. To survive exacting scrutiny, "the government may point to any 'sufficiently important' governmental interest," *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010), and in the many precedents concerning disclosure laws, transparency in government has been "a matter of such self-evident importance in a democracy, that no statistical or other substantive evidence" has been required. JA 373.

Furthermore, although "in some First Amendment cases the Supreme Court has demanded an evidentiary showing in support of a state's law," *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009) (citing *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,195 (1997)), "[i]t is also true that in other First Amendment cases the Supreme Court has found 'various unprovable assumptions'

sufficient to support the constitutionality of state and federal laws," *id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973)).

And, as the D.C. Circuit has recognized, the interest in lobbying transparency rests not on an economic analysis susceptible to empirical evidence, but on "a claim that good government requires greater transparency." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15–16 (D.C. Cir. 2009). "That is a value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." *Id.* Indeed, the inability to prove this value proposition by evidence "certainly was not a sufficient reason in *Harriss*, in which the Court made no inquiry into whether the legislative record supported the determination that disclosure of who was endeavoring to influence Congress was 'a vital national interest.'" *Id.* (citing *Harriss*, 347 U.S. at 626).

C. *United States v. Harriss* is not to the contrary.

1. Mr. Calzone also alleges that, in *United States v. Harriss*, 347 U.S. 612 (1954), the Supreme Court decided this question. Calzone Br. at 18, 21–24. He claims that *Harriss* held that the First Amendment

Appellate Case: 17-2654 Page: 52 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

protects unpaid lobbyists from being subjected to lobbying registration and disclosure requirements. Calzone Br. at 18, 21–22; JA 371.

But, in that case, the Supreme Court did not reach this question. The Court was only presented with a statute that, by its plain terms, applied to paid lobbyists, *id.* at 619–20, and, in that pre-defined context, the Court held that legislators had a vital interest in determining "who is being hired, who is putting up the money, and how much," *id.* at 625. Because unpaid lobbyists were not subject to the law or otherwise at issue in the case, the Court in *Harriss* "never found nor implied that the government only had an interest in regulating paid lobbyists." JA 371. "Therefore, a reasonable reading of *Harriss* does not imply, much less direct, that the First Amendment prohibits states from requiring unpaid lobbyists to register and report political expenditures." JA 372.

Indeed, the district court said, the issue of unpaid lobbying "has never been addressed by the Supreme Court or any other court, to the best of this Court's knowledge." *Id.* In the absence of controlling precedent dictating the outcome of this case, the district court was correct to apply the usual framework of exacting scrutiny.

2. As a variant of this argument, Mr. Calzone claims that, because the Supreme Court interpreted the federal statute in *Harriss* not to apply to unpaid lobbyists, all lobbyist statutes must, as a matter of the First Amendment, be construed not to apply to unpaid lobbyists. *Harriss*, 347 U.S. at 619. Calzone Br. at 21–22.

But, again, the Supreme Court in *Harriss* did not state that the government only had an interest in regulating paid lobbyists. As the district court recognized, the *Harriss* court interpreted the federal statute in this way "as a matter of statutory construction not because of any constitutional concern." JA 372. In *Harriss*, the statute's title, language, and legislative history only concerned paid lobbying. *Harriss*, 347 U.S. at 619–20. The Court quite properly rejected the government's attempt to enlarge its scope, because, under our democratic system of government, if an expanded version of the statute is to become law, "that is for Congress to accomplish by further legislation." *Harriss*, 347 U.S. at 620.

Furthermore, when the Supreme Court in *Harriss* did adopt a limiting construction of the statute to avoid constitutional concerns, it was to give definiteness to the required target of a lobbyist's activities,

Appellate Case: 17-2654 Page: 54 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

not to carve out special protections for unpaid lobbyists. To ensure that the word "lobbying" is not vague, the Court "gave the word lobbying, which is the title of the Act, its ordinary meaning—communicating with members of Congress." JA 372.

3. Mr. Calzone's only other authority is a district court case in which the court found that the government lacks a compelling government interest to prohibit all lobbying by certain uncompensated lobbyists. *Brinkman v. Budish*, 692 F. Supp. 2d 855, 864 (S.D. Ohio 2010).

Of course, as he admits, that case occurred in a "different context." Calzone Br. at 30. In that case, the legislature imposed a total prior restraint on speech by unpaid lobbyists, raising much graver constitutional concerns than Mr. Calzone raises here. *Id.*; *see also Barker v. State of Wis. Ethics Bd.*, 841 F. Supp. 255, 260 (W.D. Wis. 1993) (considering a total restraint on volunteer campaign activities by lobbyists). But, the Supreme Court has made clear that, given the public interest in transparency, the government may impose "registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010) (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

Appellate Case: 17-2654 Page: 55 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Mr. Calzone cites no case in which any court has found a lobbyist disclosure law unconstitutional. 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. JA 372–74.

D. Missouri's registration and reporting requirements are a direct means of ensuring lobbying transparency.

Missouri's lobbyist disclosure law directly advances—and is carefully tailored to advance—the public interest in transparency. JA 373. Indeed, a disclosure regime is a "reasonable and minimally restrictive method of furthering First Amendment values." *Buckley*, 424 U.S. at 81.

1. Registration and reporting requirements, like Missouri's, are the standard and approved means of establishing a disclosure regime. *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137 (2d Cir. 2014). These requirements let the public know "knowing who is speaking" and "who is funding that speech." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010). A disclosure regime also usually involves several detailed sub-provisions that provide timeframes for registration, recordkeeping, and reporting. *E.g., Vermont Right to Life*

Appellate Case: 17-2654 Page: 56 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Comm., 758 F.3d at 137; *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 439 (5th Cir. 2014). These "registration, reporting and disclosure requirements" for political committees are not "significantly burdensome" or "particularly onerous," which is why they satisfy any level of scrutiny. *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 789–92 (9th Cir. 2006).

Here, Missouri's lobbyist registration and reporting requirements are the straightforward means chosen to obtain lobbyist disclosures. If there were no requirement that a lobbyist register with the Commission and disclose his activities to the public, there would be no transparency benefits to the public. If no lobbyist need register before lobbying officials, and if no lobbyist need report his or her lobbying activity contemporaneously, voters would not receive the information they need at the time when they need it most: during the period of legislative activity when the lobbyist is lobbying the legislature. What is more, even when the disclosures of the lobbyist's actual activities remain forthcoming, the fact that a representative relationship exists is important information, because the voters may infer from the formation of the relationship that the principal has some interest in the legislative

session. Plus, if the existence of a lobbying relationship cannot be required to be disclosed, it is hard to see how the State could later require reports of the lobbyist's activities.

The information gained from lobbyist reports helps deter the fact or appearance of corruption. From lobbyist reports, the public learns the lobbyist's name and business address; the name and address of all persons the lobbyist employs for lobbying purposes; and the name and address of each lobbyist principal by whom the lobbyist is employed or in whose interest the lobbyist appears or works. JA 367; Mo. Rev. Stat. § 105.473. Monthly reports list any lobbying expenditures, including printing and travel expenses, as well as any business relationships with public officials. JA 367; Mo. Rev. Stat. § 105.473. Twice a year, each legislative lobbyist must report all proposed legislation or action that the lobbyist supported or opposed. JA 367. And, before giving testimony before any committee of the General Assembly, each lobbyist must also disclose to the committee his name, address and the organization on whose behalf he appears. Mo. Rev. Stat. § 105.473.

As the district court correctly held, this law "is directly correlated to the harms" that the State of Missouri seeks to avoid. JA 377.

Appellate Case: 17-2654 Page: 58 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

2. Missouri's law also avoids unnecessary abridgment of associational freedoms. As the district court said, "[k]nowing the names and addresses of lobbyists is the least intrusive means" of learning who is attempting to influence legislation. JA 377.

Unlike direct limits on the spoken or written word, a disclosure law "often represents a less restrictive alternative to flat bans on certain types or quantities of speech." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014). Here, Missouri's law does not prohibit lobbying activity. Instead, it merely requires that, when a lobbyist is designated to lobby on behalf of a group, the lobbyist allow the public to know of the representation. The law does not operate as a prior restraint: it even gives a grace period of five days to complete registration, so, if necessity required it, an organization could theoretically retain the services of a lobbyist right away to respond to a bill moving through the legislative process, so long as the registration occurs within 5 days of the beginning of the lobbyist activities. Mo. Rev. Stat. § 105.473.1. More importantly, the law does not limit the number, nature, or extent of the lobbyist's interactions with officials, and the law does not prevent the lobbyist from making gifts or contributing to campaigns. Indeed, the law does not even

prevent an unregistered lobbyist from lobbying; it merely subjects him to after-the-fact penalties for the failure to register or file reports.

Further, the burden of registration is relatively light, especially compared to the more difficult reporting requirements in the campaign-finance context. JA 377. Missouri has a streamlined online process for registration that takes only a few minutes. JA 376–77. The State charges a nominal registration fee of only $10. JA 376–77. And most lobbyists often have already made public their names, clients, and causes in the course of lobbying legislators, so disclosing this information online rarely discloses any undisclosed information. JA 376–77.

Any hypothetical chill on speech is thus light, and, to the extent any chill exists, it is likely because the law shines light on potentially improper forms of lobbying (and thus deters them). Here, as in *Harriss*, without any evidence of speech being chilled, "[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *United States v. Harriss*, 347 U.S. 612, 626 (1954).

Appellate Case: 17-2654 Page: 60 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Nor has Mr. Calzone tendered record evidence that this law particularly burdens or chills his speech more than it does to any other lobbyist's speech. Calzone Br. at 34–35. Where there is a reasonable probability that disclosing an individual's name will subject the individual to threats, harassment, or reprisals from either government officials or private parties, precedent allows for individualized recourse in the form of particularized as-applied challenges. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010). But here, Mr. Calzone has not shown that he has some personal fear of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" if his lobbying activities are disclosed, and so he had not made out a claim for a special exemption for himself from the law. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

And, although he claims 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

Appellate Case: 17-2654 Page: 61 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

registration regime," he does not actually claim in this case that the nominal $10 fee per lobbyist is excessive. Calzone Br. at 33.

In the same way, although he objects to the penalties for non-compliance with the disclosure law, Calzone Br. at 35–36, he does not raise any freestanding claim that the penalties in general or in his ongoing case are excessive under some other constitutional doctrine.

All that is left, then, is Mr. Calzone's dislike of the term "lobbyist." Calzone Br. at 34. But the legislature is free to define the term in this way, and, even if he himself is not a source of corruption, requiring the disclosure of all lobbyist interests averts the specter of corruption.

3. Moreover, as the district court noted, Missouri's law lacks the temporal overbreadth that has been a problem in previous cases like *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc). JA 376. In that case, a disclosure law requiring reporting in perpetuity, as opposed to whenever money is spent, was thus "untethered from continued speech." *Minnesota Citizens Concerned for Life, Inc.*, 692 F.3d at 876–77. But, "in this case the ongoing reporting requirement is absolutely tethered to continuing speech," because a lobbyist need register only "after beginning any activities as a lobbyist,"

Appellate Case: 17-2654 Page: 62 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Mo. Rev. Stat. § 105.473.1, and need file monthly reports only for "any period of time in which a lobbyist continues to act as a ... legislative lobbyist," Mo. Rev. Stat. § 105.473.3(1). JA 376. This law is thus appropriately tailored to the public's informational interest, because reports are only necessary when the lobbyist lobbies on behalf of a third party. JA 376. The law does not require any registration or reporting when a lobbyist does nothing—or when the lobbyist speaks only for himself or herself as a citizen. JA 377.

4. Mr. Calzone alleges that Missouri's law is underinclusive in its enforcement, which he says raises doubts about whether the law actually furthers anti-corruption or transparency interests. Calzone Br. at 32–33. According to his brief, the Missouri Ethics Commission leaves many other sources of lobbying unreported, including many other grassroots lobbyists. *Id.*

But "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 27 (D.C. Cir. 2015), cert. denied sub nom. *Miller v. F.E.C.*, 136 S. Ct. 895, 193 L. Ed. 2d 789 (2016) (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015)). The First Amendment requires the State

Appellate Case: 17-2654 Page: 63 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

to avoid unnecessary abridgement of free speech, not to "curtail as much speech as may conceivably serve its goals." *Wagner*, 793 F.3d at 27 (citing *Blount v. SEC*, 61 F.3d 938, 946 (D.C. App. 1995)). A law need not "restrict more speech or the speech of more people" just to "be more effective." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995).

What is more, exacting scrutiny does not require a "perfect" fit between a campaign-finance law and the State's interests, nor must the State adopt "the least restrictive means" of advancing its stated interest. *McCutcheon*, 134 S. Ct. at 1456–57. Instead, the fit simply must be "reasonable," and the burden imposed by the limitation must be "in proportion to the interest served." *Id.* For this reason, a "State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yule*e, 135 S. Ct. at 1668. A State may target a single, known historical problem without sweeping in all possible forms of speech. *Id.*

After all, a "statute that does not go as far as it might to cut off campaign contributions can hardly be said to constitute an 'unnecessary abridgment' of the freedom to" speak. *Wagner*, 793 F.3d at 27 (citing *McCutcheon*, 134 S. Ct. at 1444).

As a result, the Supreme Court has "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 135 S. Ct. at 1668. Here, the perfect is not the enemy of the good, especially not under the intermediate level of scrutiny known as exacting scrutiny.

In addition, it is far from clear that Mr. Calzone identifies any true examples of other unregistered lobbyists against whom the Commission has not enforced the state disclosure law. Calzone Br. at 32–33. In the sole example that he cites, it is possible that the grassroots members of the Sierra Club meeting the legislature have not been designated by the group to speak on its behalf, but rather that they came to speak only in their private capacities, while arriving with fellow members and noting membership in their group.

In any event, some under-enforcement is a necessary consequence of any narrowly tailored law as well as any complaint-based enforcement system, and both are preferable to a broader law that could have a far greater chill on speech.

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Appellate Case: 17-2654 Page: 65 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Because Missouri's lobbyist disclosure law directly advances the important governmental interest in transparency, and is carefully tailored to achieve it without stifling political dialogue, the law satisfies constitutional scrutiny under any standard of review.

III. Missouri's lobbyist disclosure law is not unconstitutionally vague.

Missouri's lobbyist disclosure statute is also not vague on its face.

A. A law is fatally vague only if a reasonable person would not understand what the law requires.

1. A law is fatally vague on its face if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." JA 378 (citing *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1143 (8th Cir. 2005)). As the Supreme Court has said, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618 (1954). "And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *Id.*

Appellate Case: 17-2654 Page: 66 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

This void-for-vagueness doctrine stems from the requirements of fair notice and the separation of powers. As the Supreme Court explained, "If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." *United States v. Reese*, 92 U.S. 214, 220 (1875). The legislature must "set reasonably clear guidelines for law enforcement officials and triers of fact," and it cannot use "wholly open-ended language." *Smith v. Goguen*, 415 U.S. 566, 572–73, 581 (1974) (citations omitted).

But, even "under the heightened standard for First Amendment cases," "not all vagueness rises to the level of constitutional concern." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011). Given the limits of language, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Given the limits of language, courts can "never expect mathematical certainty," especially not when laws also need to be manageably brief, *Families Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1415

Appellate Case: 17-2654 Page: 67 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

(8th Cir. 1997) (en banc) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 578–79 (1973)). There will always be laws that will not "satisfy those intent on finding fault at any cost," but these laws are not fatally vague so long as "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Id.*

Moreover, "[t]he mere fact that a regulation requires interpretation does not make it vague." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004). The Supreme Court has recognized that "areas of human conduct" exist "where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision," and in which officials must have the discretion to make an on-the-spot assessment of the applicability of the law. *Smith v. Goguen*, 415 U.S. 566, 581 (1974). Leaving flexibility in the laws to encompass varying factual scenarios is only problematic if the legislature has failed make it clear what the law as a whole prohibits. *Id.* Experience has thus shown that legislatures are fully capable of employing words of flexibility and reasonable breadth while still not being unduly vague. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

2. What is more, context is key.

"When a statute applies to the general population, it should be judged by its common meaning, but statutes relevant to a particular subset of the general population should be judged, however, according to the understanding common of members of that subset (e.g., profession or trade) because it is the meaning understood by those persons that will be relevant." Samuel A. Terilli, *Inartful Drafting Does Not Necessarily A Void, As Opposed to A Vague, Statute Make-Even Under the First Amendment: The Eleventh Circuit Applies Common Sense to "Common Understanding" in Void-for-Vagueness Challenges to Lobbying Regulations*, 63 U. Miami L. Rev. 793, 801, 811 (2009).

This is why, for example, when the Supreme Court considered a law applying to commercial business, the test was whether "business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation." *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

In the lobbying sphere, both the Supreme Court and circuit courts have upheld broad and general terms in lobbying statutes, when, in context, it was clear what the law required of the lobbyist. The Eleventh Circuit, for example, has upheld the term "indirect expenditure" from a vagueness challenge, because even though it is a broad term, in statutory context, a person of common intelligence would understand that it applies to expenditures or compensation paid through third parties. *Florida Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. of the Florida Office of Legislative Servs.*, 525 F.3d 1073, 1078–79 (11th Cir. 2008). Likewise, the D.C. Circuit has held that it is not vague to require disclosure of any organization that funds lobbying activities and that actively participates in the planning, supervision, or control of lobbying activities. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 23 (D.C. Cir. 2009). This Court, too, has upheld even very technical financial lobbying standards from vagueness challenges, when the standards were "easily understood and objectively determinable," by a person of common intelligence based on publicly available information. *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1112 (8th Cir. 2005).

B. A reasonable person would understand what it means to be "designated" to lobby for a third party.

1. Because a reasonable lobbyist would understand what it means to be "designated" as someone's lobbyist, Missouri's lobbyist disclosure statute is not fatally vague.

Missouri defines a legislative lobbyist as a person who attempts to influence the legislature and who "is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity." Mo. Rev. Stat. § 105.470.[2]

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[2] In relevant part, Missouri defines a legislative lobbyist as:

> [A]ny natural person who acts for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any official action on any bill, resolution, amendment, nomination, appointment, report or any other action or any other matter pending or proposed in a legislative committee in either house of the general assembly, or in any matter which may be the subject of action by the general assembly and in connection with such activity" who also:
>
> (c) Is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity.

Mo. Rev. Stat. § 105.470.

Appellate Case: 17-2654 Page: 71 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

As the district court explained, relying on Webster's Third New International Dictionary, the plain meaning of the term "designate" is to "'choos[e] ... a person ... for a certain post.'" JA 381 (citing Webster's Third New International Dictionary 612 (1986)). To designate means "'to make known directly as if by sign; to distinguish as to class; Specify, stipulate; to declare to be; to name esp. to a post or function.'" JA 379 (quoting Webster's Third New International Dictionary 612 (1986)). "'Designate may apply to choosing or detailing a person or group for a certain post by a person or group having power or right to choose.'" *Id.*

Black's Law Dictionary defines the term in the same way: to "choose (someone or something) for a particular job or purpose," for example, "the forest was designated a conservation area," or to "represent or refer to (something) using a particular symbol, sign, name, etc., for example, "lakes are designated by blue spaces on the map." Black's Law Dictionary (10th ed. 2014).

This common understanding of the word provides people of ordinary intelligence a reasonable opportunity to understand what conduct the law prohibits. JA 379–81. As a result, although Mr. Calzone

contends that the word “designate” is vague, as the district court correctly held, regular people can easily define the word. JA 379–80.

Mr. Calzone asks this Court to read the term “designate” out of the text, under the guise of giving the statute a limiting construction. Calzone Br. at 41–44.

But a limiting construction is only permissible (1) when the text is reasonably susceptible of that construction--and here, the term designate is in the text; and (2) when the construction avoids a constitutional problem--and here, there is no problem.

2. In reality, Mr. Calzone contests not the specificity of the term “designate” but the Missouri Ethics Commission’s application of this law to himself, mainly on the grounds that Missouri First, Inc.’s board of directors has never taken official action to name him as the group’s legislative lobbyist, and that, because he viewed his activities to be in the public interest, he does not consider himself a lobbyist (a pejorative term in his mind). Calzone Br. at 34, 39–40.

But this claim is not cognizable in this case because the Commission’s action against Mr. Calzone remains pending in state administrative proceedings, and thus it is not final for judicial review. JA

Appellate Case: 17-2654 Page: 73 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

379–80. For this reason, this is not the forum to consider the evidence in that administrative proceeding, nor to consider Mr. Calzone's many disagreements with the Missouri Ethics Commission and the Missouri Administrative Hearing Commission about their procedural and discovery requirements. *See, e.g.*, Calzone Br. at 5, 35.

Setting that aside, the question for this Court is whether Missouri's law is specific enough that a regular person could understand that Mr. Calzone would have to comply with the law, and here, a reasonable person could understand that, because Mr. Calzone *was* designated as his group's lobbyist, even without formal action from Missouri First's board of directors, because of his role as president. JA 379.

First, his group was formed as a lobbying organization. The Missouri First charter states that legislative lobbying is a key purpose and a method of operation. JA 379 (citations to administrative record omitted). Past evidence shows that the group attracts new members by saying: "That old saying, there is strength in numbers, holds true, especially when lobbying Missouri House and Senate Members." *Id.* Missouri First promises strong lobbying by "working hard to represent your values in the issues that touch your life." *Id.*

Appellate Case: 17-2654 Page: 74 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

Second, the evidence shows that Mr. Calzone was authorized to be Missouri First, Inc.'s representative to the legislature. As the district court noted, under Missouri law, "it is well established that a principal may be bound by the actions of its agent." JA 381 (citing *Shelby v. Slepekis*, 687 S.W.2d 231, 234 (Mo. App. W.D. 1985); *Stram v. Miller*, 663 S.W.2d 269, 274 (Mo. App. W.D. 1983)).

Here, Missouri First, Inc. is virtually Mr. Calzone's alter ego. Mr. Calzone is its incorporator, sole officer, president, secretary, and registered agent at Missouri First, as well as one of its three board members. JA 379–80. As an officer with delegated authority to run the operations of the group, he decides how to present the agenda of Missouri First to the General Assembly, as well as who will do so. JA 380–81. He had the power to appoint himself lobbyist.

This is only to be expected: in the corporate world, "most decisions to retain a lobbyist are not made by a board of directors," but by "agents of the corporation, such as a CEO or HR Department or Government Relations Department that make such day to day decisions." JA 381. Nor is there any evidence here, of corporate bylaws or anything else, that would "prevent an agent of Missouri First from designating someone as

a lobbyist for the organization." JA 381. Under the principles of actual agency, therefore, Mr. Calzone's "authority extends to designating himself to be the lobbyist." *Id.*

Mr. Calzone argues that he was merely the group's registered agent, and that no person agreeing to accept process thereby gains the power to appoint lobbyists. Calzone Br. at 40. But here, he was also the president, and a president does have this power.

Third, Mr. Calzone's designated representation of the organization is also shown by his apparent authority to do so, taken with the tacit consent of his organization. Under Missouri law, a principal "is responsible for the acts and agreements of its agents which are within their actual or apparent authority," and apparent authority is "created by the conduct of the principal which causes a third person reasonably to believe that another has the authority to act for the principal," such as that the principal "has knowingly permitted its agent to exercise authority." *Nichols v. Prudential Ins. Co. of Am.*, 851 S.W.2d 657, 661–62 (Mo. App. E.D. 1993). Mr. Calzone is the sole member of Missouri First, Inc. to interact with the legislature on behalf of the organization. Past evidence shows that he held himself out to legislators, legislative

Appellate Case: 17-2654 Page: 76 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

staff, and other groups as the group's representative when he regularly attempted to influence legislation. JA 381. He would typically identify himself as "Ron Calzone, Director of Missouri First, or Ron Calzone, a director of Missouri First." JA 379 (citations of administrative record omitted). For example, on a witness form in the Missouri Senate, "Mr. Calzone identifie[d] himself as appearing on behalf—not of himself but appearing on behalf of Missouri First, Inc." *Id.*

For these three reasons, under theories of express, apparent, and implied agency, Mr. Calzone had the authority, in his official capacity as an officer of Missouri First, to name himself as a lobbyist for Missouri First—and he unquestionably did so in practice.

More importantly, in context, it is clear that Missouri's lobbyist disclosure law applies to a person like Mr. Calzone who was designated to lobby on behalf of his organization. On the whole, any ordinary person of common sense can tell which type of lobbyists the law covers. The law is not fatally vague just because it does not spell out the term "designate" in mathematical specificity, and it leaves some flexibility for unusual factual scenarios, like Mr. Calzone's.

True, Mr. Calzone's case is probably not the typical case, but this statute is not impermissibly vague "even though marginal cases could be put where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618 (1954). And, even if the application of the statute to Mr. Calzone were debatable, which it is not, if the statute "can be made constitutionally definite by a reasonable construction of the statute," "this Court is under a duty to give the statute that construction," such as an ordinary definition under regular agency principles, as given by the district court. *Id.*

What is more, under these principles, it is possible for a lobbyist like Mr. Calzone to avoid registering. All grassroots citizen-activists have a simple and easy way to avoid having to register and report their activity. They need not register at all if they speak only in their personal capacity and if no organizations designate them as lobbyists on their behalf. In fact, that appears to be what Mr. Calzone has done in the time period since his earlier activity drew the first complaint. JA 364; *see* Letter from Mo. Ethics Comm'n to Mr. Calzone (Jan. 17, 2017), https://mec.mo.gov/Scanned/CasedocsPDF/CMTS1107.pdf (finding no

Appellate Case: 17-2654 Page: 78 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

evidence that he held himself out as a lobbyist on behalf of anyone except himself during the 2015 legislative session).

Finally, Mr. Calzone argues in passing that this law is a content-based restriction on speech, Calzone Br. at 41, but this does not alter the analysis. A statute is not vague if it can be easily understood, and the substantive test for exacting scrutiny factors in that disclosure laws only apply to certain forms of speech.

IV. The equities disfavor an injunction.

To obtain a permanent injunction, "the movant must attain success on the merits." *Bank One v. Gatthau*, 190 F.3d 844, 847 (8th Cir. 1999). Here, because Missouri's lobbyist disclosure law comports with First Amendment precedent, the challenger has not shown that he is entitled to an injunction by proving his case on the merits.

Moreover, here, the equities also disfavor an injunction. Because Missouri's law comports with the First Amendment, the injunction below intrudes upon the state democratic process and irreparably harms the state without sufficient justification. "Any time a State is enjoined by a court from effectuating" its state constitution, or any other initiative enacted by its people, "it suffers a form of irreparable injury." *Maryland*

Appellate Case: 17-2654 Page: 79 Date Filed: 11/27/2017 Entry ID: 4604095 RESTRICTED

v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). And here, under precedent, it is for the people to decide how to weigh competing constitutional interests and how to anticipate and decide upon the "regulations designed to protect the integrity of the political process." *Alabama Democratic Conference v. Attorney Gen. of Alabama*, 838 F.3d 1057, 1063 (11th Cir. 2016), cert. denied sub nom. *Alabama Democratic Conference v. Marshall*, 137 S. Ct. 1837 (2017) (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)).

Furthermore, a law like Missouri's lobbyist disclosure law "is in itself a declaration of the public interest" and by definition does not support the injunction. *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). The public interest is entirely merged in this case with consideration of harm to the State. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also, e.g., Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The district court below properly respected the judgment of the people of Missouri—a "policy choice, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001). Here, "a high level of deference

is appropriate because this is a duly enacted statute." *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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November 27, 2017

CERTIFICATE OF COMPLIANCE AND OF SERVICE

On November 27, 2017, this brief was served electronically via the courts CM/ECF system upon the parties.

This foregoing brief complies with the limitations contained in Rule 32(a)(5), 32(a)(6), and 32(a)(7)(B) and that the brief contains 12,978 words. The undersigned certifies that the electronically filed brief has been scanned for viruses and is virus-free.

/s/ Julie Marie Blake

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