Justice v. Hosemann: The Fifth Circuit's Devaluation of State Ballot Initiatives and Political Participation

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Kevin Bandy*

"[T]he principle on which this country was founded . . . is that direct participation in political activity is what makes a free society."1

I. INTRODUCTION

The 2012 presidential election cycle set records. The race between President Barack Obama and Governor Mitt Romney was the first billion-dollar campaign, as each candidate raised $1.123 billion and $1.019 billion, respectively.2 This was the first Watergate era campaign in which both candidates turned down public funding, with the President relying on a large number of small donations and the Governor relying on a smaller number of large donations.3

As staggering as these numbers are, the race to support and oppose state ballot initiatives in the 2012 election cycle was just as expensive. Over the course of eighteen months, more than $1 billion was spent on ballot initiative campaigns in eleven states—the most that has ever been spent in an election cycle.4 The ballot initiative spending, largely occurring in West Coast states like California and Washington, came from corporations and wealthy individuals alike.5

In an attempt to rein in campaign spending, and in light of recent United States Supreme Court cases striking down disclosure and campaign spending limit laws as applied to individual candidates,6 states have passed strict disclosure and registration laws for groups wishing to support or oppose ballot initiatives. Individuals and groups alike have

* University of Cincinnati Law Review, Associate Member, 2014-15; Publications Editor, 2015-16. The author would like to thank his parents, Jerry and Kay, for always showing him the importance of voting. The author would also like to thank Professor Ronna Schneider for helping him cultivate his love and interest in the First Amendment.

3. Id.
5. Id.
6. See infra Part II of this Casenote for further discussion of these cases.
challenged these laws as a violation of their First Amendment rights to political expression and association, with mixed results. The Supreme Court, silent on the constitutionality of laws restricting participation in the ballot initiative process, has continuously struck down laws designed to limit donations to individual candidates in the name of free speech and political expression.

Part II of this Casenote examines past Supreme Court decisions involving the First Amendment and campaign finance laws. It also assesses the current circuit split between the Tenth and Fifth Circuit Courts of Appeals, as those courts have struck down and upheld, respectively, strict registration and disclosure laws for political committees supporting and opposing ballot initiatives. Part III of this Casenote analyzes these decisions and argues that the Supreme Court erred in refusing to apply strict scrutiny to disclosure and group registration laws, and that strict scrutiny is especially needed in the ballot initiative process. Part III also discusses the public policy issues behind limiting access and participation in the ballot initiative process—a process originally designed to bring state politics closer to the people. Part IV criticizes the Supreme Court’s refusal to grant certiorari in Justice v. Hosemann and the Court’s failure to take an opportunity to side with the Tenth Circuit in applying strict scrutiny and striking down strict regulations on registration and disclosure laws in the context of ballot initiatives.

II. BACKGROUND

A. The First Amendment and Campaign Disclosure Laws

The connection between the First Amendment and campaign disclosure laws is an intricate web of competing interests and complicated statutory schemes. This Casenote will focus on past Supreme Court decisions that directly implicate the interests involved in justifying disclosure laws as they could be applied to ballot initiatives.

1. Strict Scrutiny and Exacting Scrutiny in Campaign Finance Laws

Campaign finance laws that burden the First Amendment rights of those wishing to contribute to a campaign have traditionally been subject to one of two levels of scrutiny—exacting scrutiny or strict scrutiny. The type of scrutiny refers to the level of review applied by a court to a specific law when determining whether the law is constitutional. Both of these tests require more than a “mere showing of some legitimate governmental interest” and are difficult for the
governments to satisfy.7

Governments will sometimes pass laws that limit political expression by preventing or discouraging a citizen from engaging in a certain type of speech or activity. Examples of such laws are those that limit individual donations to a particular candidate, require disclosure of contributions and expenditures in a campaign, or prevent contributions to certain kinds of campaigns, such as one for a state judge. Laws limiting political expression are subject to strict scrutiny, which requires the government to prove that the law is narrowly tailored to achieve a compelling governmental interest.8 In campaign finance law, there are a limited number of interests that satisfy this test.9

Application of strict scrutiny review is reserved for situations in which a fundamental right, such as free speech, the right to a jury trial, or the right to privacy, is burdened by the government. The Supreme Court, without much discussion or justification, has refused to place participation in an initiative campaign on equal footing with these rights. Laws which burden rights that are not considered fundamental will be subject to either heightened scrutiny, discussed below, or rational basis testing.10

Disclosure requirement laws require citizens that donate to a particular candidate or political committee to report to the government how much they contribute and how often they are spending money. Disclosure requirements in the context of political committees require the committee to report things such as monthly financial statements, identities of donors, and statements of purpose. Disclosure requirements are subject to exacting scrutiny.11 This level of scrutiny requires that there be a substantial relationship between the disclosure laws and the purported governmental interest.12 This governmental interest must be sufficiently important.13 It is easier for the government to meet the sufficiently important prong of the exacting scrutiny standard than it is to meet the compelling interest prong of the strict scrutiny standard.

9. The interests in campaign finance law which qualify as compelling under strict scrutiny will be considered in the discussion of Buckley and Citizens United.
10. Rational basis testing requires a law to be rationally related towards furthering a legitimate governmental interest. It is the easiest level of scrutiny for a government to satisfy.
12. Id.
13. Id.
2. Supreme Court Case Law Leading to the Current Circuit Split on Ballot Initiative Disclosure Laws

The Supreme Court's decision in *Buckley v. Valeo* is a landmark case that acknowledged the government's ability to limit campaign donations and require disclosure of contributions. In *Buckley*, the Supreme Court espoused three interests that justified the restriction on campaign donations—the informational interest, anti-corruption interest, and compliance interest. The informational interest means that the government may provide the voters with information about where donations come from and how the candidate chooses to spend the money, which allows the voters to assess a candidate for office. The anti-corruption interest means that the government may deter corruption and the appearance of corruption by exposing contributions and expenditures. Finally, the compliance interest allows the government to ensure compliance with the contribution limits espoused elsewhere in the Federal Elections Campaign Act of 1971 (FECA). In light of these interests, the Court upheld the disclosure requirements of FECA as constitutional and consistent with the First Amendment.

*Citizens United v. Federal Elections Commission* may be best known for its controversial holding extending First Amendment speech rights to corporations. But in another part of the decision, the Court sharply limited the anti-corruption rationale espoused in *Buckley* in striking down as unconstitutional several provisions of the Bipartisan Campaign Reform Act of 2002. It did not discuss in detail the informational interest. The law at issue prohibited corporations and labor unions "from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication.'" This specific provision had already been upheld by

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15. See id. at 143.
16. See id. at 66-68.
17. Id.
18. Id. at 67.
20. Id. at 61.
23. *Citizens United*, 558 U.S. at 318-19. Electioneering communication was defined as "any broadcast, cable, or satellite communication [that] refers to a clearly identified candidate for Federal office" and ran within thirty days of a primary or sixty days of a general election. 2 U.S.C. § 441b; *Citizens United*, 558 U.S. at 321.
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the Court. The Court rejected Citizens United's contention that the disclosure laws in question were unconstitutional and held that the anti-corruption rationale of Buckley only applied to quid pro quo corruption. That is, "[t]he absence of prearrangement and coordination" with a candidate alleviates any concern that the contribution to the candidate will create corruption, and without evidence that this actually occurred, the anti-corruption rationale cannot justify a disclosure law. A lengthy and passionate dissent by Justice Stevens stressed that "[c]orruption can take many forms" and that Congress has a legitimate interest in preventing corruption "beyond the sphere of quid pro quo."

In Doe v. Reed, the Court upheld a Washington law that required disclosure of the names and demographic information of any person who signed a petition in support of a ballot initiative on the grounds of maintaining the integrity of the electoral process. In doing so, however, at least one justice refused to accept the informational interest set forth by the state. To Justice Alito, there were no circumstances under which the informational interest was sufficient to expose signers of the petition to possible harassment and threats for exercising their First Amendment rights to political speech. The Court also reaffirmed its application of exacting scrutiny to disclosure requirements in the electoral context.

The Court further limited the reach of Congress in regulating campaign contributions and disclosure in McCutcheon v. Federal Elections Commission. McCutcheon dealt with a challenge to the aggregate limits set out in FECA and the Court held that "the Government's stated objective and the means selected to achieve it" fail under exacting scrutiny. The plaintiff in McCutcheon contributed up to the limit, but wanted to contribute beyond it and was prevented from doing so by FECA. He, along with the Republican National

26. Id. at 356.
27. Id.
28. Id. at 448 (Stevens, J., dissenting) (emphasis removed).
30. Id. at 192-93.
31. Id. at 206 (Alito, J., concurring).
32. Id.
33. Id. at 196.
35. Id. at 1446.
36. Id. at 1443.
Committee, sought constitutional review of the aggregate limits.\textsuperscript{37} To the Court, the lack of a proven connection between aggregate limits and the important interest of preventing corruption required the law to be struck down.\textsuperscript{38} The case reaffirmed the proposition that Congress may work to stop quid pro quo corruption and not some sort of undue influence.\textsuperscript{39}

\textit{B. The Tenth And Fifth Circuit Courts of Appeals Have Reached Differing Conclusions on the Constitutionality of Ballot Initiative Disclosure Laws}

1. \textit{Sampson v. Buescher}

\textit{Sampson v. Buescher}\textsuperscript{40} involved a First Amendment challenge to a Colorado disclosure statute. The Colorado law required any political committee raising or spending more than $200 in support or opposition of a ballot initiative to register as an issue committee and report the names and addresses of any person who donated $20 or more.\textsuperscript{41} Before accepting funds, the committee was required to file a statement of registration that included the name of the issue committee; the name of a registered agent; the committee’s address and telephone number; the identities of all affiliated candidates and committees; and the purpose and nature of the committee.\textsuperscript{42}

The law also required political committees to create a separate bank account and report all contributions and expenditures, the occupation of anyone who contributed more than $100, the committee’s fund balance, and the name and address of the bank used by the committee.\textsuperscript{43} Organizations that failed to meet these requirements could be fined $50 per day for each day that a past-due report was not filed.\textsuperscript{44} In addition to the nineteen pages of rules promulgated by the Secretary of State, private citizens could enforce the law by filing a complaint with the Secretary of State alleging violations of the law.\textsuperscript{45}

The plaintiffs in \textit{Sampson} were residents of Parker North and opposed a ballot initiative that would have annexed their neighborhood to the

\begin{itemize}
  \item \textsuperscript{37} Id. at 1444.
  \item \textsuperscript{38} Id. at 1451.
  \item \textsuperscript{39} \textit{McCutcheon}, 134 S. Ct. at 1451.
  \item \textsuperscript{40} 625 F.3d 1247 (10th Cir. 2010).
  \item \textsuperscript{41} Id. at 1249.
  \item \textsuperscript{42} \textit{COLO. REV. STAT.} § 1-45-108(3) (1997).
  \item \textsuperscript{43} Id. §§ 1-45-108(1)(a)-(II), (2)(b).
  \item \textsuperscript{44} \textit{COLO. CONST.} art. XXVIII, § 10(2)(a).
  \item \textsuperscript{45} Id. § 9(2)(a).
\end{itemize}
nearby town of Parker, Colorado. In opposition to the annexation proposal, the plaintiffs purchased and distributed signs, mailed postcards to all residents, and discussed the issue on the Internet. The plaintiffs eventually brought suit against the Secretary of State, alleging that the disclosure laws violated their First Amendment rights to speech, political expression, and association.

Applying exacting scrutiny, the Tenth Circuit found no justification for the strict disclosure requirements as applied to the plaintiffs. The burden on the plaintiffs was found to be substantial—"the average citizen cannot be expected to master on his or her own the many campaign financial disclosure requirements" of the state of Colorado. The Tenth Circuit found that the only interest to be served by the disclosure laws was an informational interest and that the legislation failed to sufficiently support that interest. While recognizing that there is a "legitimate public interest in financial disclosure from campaign organizations," the court held that "this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." With this in mind, the court found the burdens placed on the plaintiffs weighed heavily in favor of declaring the disclosure law unconstitutional as applied to the plaintiffs.

2. Justice v. Hosemann

Another case, Justice v. Hosemann, dealt with a challenge to Mississippi’s campaign disclosure laws. The plaintiffs in that case wanted to participate in a ballot initiative campaign in 2011, but were prevented from doing so because of the state’s disclosure and group disc
registration laws. The Mississippi statute had specific disclosure requirements for political committees and individuals that wished to receive or spend money "in connection with an 'amendment to the Mississippi Constitution proposed by a petition of qualified electors.'" Under the state statute, any person or individual that contributed or spent more than $200 had to file financial reports with the Mississippi Secretary of State. After a group registered with the Secretary of State, it had to file a one-page statement explaining: "the name and address of the committee; whether it [was] registered with the Federal Elections Commission or authorized by a candidate; its purpose; the names of all officers; and its director and treasurer." These political committees were also required to file monthly reports that disclosed all contributions and expenditures. Moreover, the contributions to the committee had to be itemized for any individuals that gave more than $200 in a month, and also had to include the name and address of the donor along with the date of the donation.

The plaintiffs were five friends that were members of the Young Americans for Liberty and the Lafayette County Libertarian Party. They lacked a formal structure or organization, but decided to campaign together in support of a ballot initiative that would have limited the power of Mississippi to take private property. The plaintiffs contended that they would have used their collective resources to purchase posters, buy newspaper ads, and distribute flyers to potential voters on the issue. The plaintiffs, however, decided not to participate in the election because of Mississippi’s disclosure laws. They sought a preliminary injunction from the District Court for the Northern District of Mississippi but it was ultimately denied. However, the plaintiffs continued their suit after the election. Ultimately, the district court held that the disclosure requirements impermissibly burdened the plaintiffs’ First Amendment rights and the rights of all groups wishing to raise or spend just in excess of $200.

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56. Id. at 290.
57. Id. at 287-88. See also MISS. CODE ANN. § 23-17-1 (1993).
58. MISS. CODE ANN. § 23-17-51(1).
59. Hosemann, 771 F.3d at 288.
60. Id. at 289.
61. Id. at 290.
62. The proposed constitutional amendment, Initiative 31, dealt with the eminent domain powers of the state of Mississippi. The proposal asked whether government should "be prohibited from taking private property by eminent domain and then transferring it to other persons." Id. at 289.
63. Id. at 290.
64. Hosemann, 771 F.3d at 290.
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After dispensing with the plaintiffs' as-applied challenge\(^{66}\) to the statute,\(^{67}\) the Fifth Circuit considered whether the law was unconstitutional in all circumstances.\(^{68}\) The Fifth Circuit Court of Appeals, citing circuit precedent, applied exacting scrutiny\(^{69}\) to the disclosure and organizational requirements. Citing Buckley,\(^{70}\) the Fifth Circuit identified two interests that generally justify disclosure laws: "an interest in rooting out corruption and an interest . . . in providing the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office."\(^{71}\) The court then noted that, while the corruption rationale was not applicable in this case, "the informational interest . . . seems to be at least as strong when it comes to ballot initiatives."\(^{72}\) Because ballot initiatives are "numerous, written in legalese, and subject to the modern penchant for labelling [sic] laws with terms embodying universally-accepted values," the Fifth Circuit held that "[d]isclosure laws can provide some clarity amid [the] murkiness."\(^{73}\) The disclosure information could give voters a general idea of whether they agreed with the initiative.\(^{74}\)

The court then turned to the second inquiry required under the exacting scrutiny standard. Citing a previous Fifth Circuit case,\(^{75}\) the court found that the Mississippi disclosure law did not impermissibly burden the plaintiffs' expression rights because it did not ask them to do anything other than what a reasonable group would have done anyway.\(^{76}\) Specifically, the court presumed that a political issue committee would

\(^{66}\) As-applied challenges are when the plaintiffs in a case believe a law is unconstitutional in light of their specific circumstances. This differs from a facial challenge, in which plaintiffs claim that a law is unconstitutional in all factual circumstances.

\(^{67}\) The Fifth Circuit held that, on the record, there was no evidence that the plaintiffs would have capped their spending at just over $200. Because there was no indication of what kind of remedy the Fifth Circuit could grant on the as-applied challenge, combined with the lack of certainty that plaintiffs would not raise more money than $200, the as-applied challenge was dismissed. Hosemann, 771 F.3d at 294-95.

\(^{68}\) Id. at 296.

\(^{69}\) Exacting scrutiny requires courts to determine "whether the government has identified a 'sufficiently important governmental interest' in its disclosure scheme" and whether the disclosure requirements are substantially related to the purported interest. Id. at 297-99.

\(^{70}\) 424 U.S. 1 (1976).

\(^{71}\) Id. at 66-67 (internal quotations omitted).

\(^{72}\) Hosemann, 771 F.3d at 298.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) See generally Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014) (upholding a Texas disclosure law that required general-purpose political committees to appoint a treasurer before it could receive or spend any funds and fill out a three page registration form before spending money). Cf MISS. CODE ANN. § 23-17-49(1) (requiring Mississippi political committees to file a statement of organization within ten days of receipt of or expenditure of over $200).

\(^{76}\) Hosemann, 771 F.3d at 300.
develop a statement of purpose, identify the president and treasurer, and keep track of expenditures. The Fifth Circuit did not decide whether the laws would pass the strict scrutiny standard, because the law passed the exacting scrutiny standard.

III. THE FIFTH CIRCUIT HAS MISAPPLIED SUPREME COURT PRECEDENT, UNDERMINED THE PURPOSE OF BALLOT INITIATIVE AND OTHER PUBLIC POLICY CONSIDERATIONS, AND RESTS ON ERRONEOUS ASSUMPTIONS

Part III of this Casenote will analyze prior Supreme Court precedent in the area of campaign finance law and conclude that the Fifth Circuit Court of Appeals misinterpreted and incorrectly applied this precedent. Specifically, this Casenote argues that the Fifth Circuit adopted a rule that hinders fundamental rights and incorrectly applied Supreme Court precedent in its decision. This Casenote then argues in favor of certain public policy considerations that undermine the conclusion reached by the Fifth Circuit. Specifically, this Casenote argues that the Hosemann decision undermines the original purpose of ballot initiatives. It argues that the decision wrongfully makes it easier for corporations to participate in initiative campaigns than an individual. In another subpart, this Casenote argues that Hosemann inexplicably places a greater emphasis on a voter’s choice of representative than his or her direct involvement in policy-making. Finally, this Casenote argues that Hosemann rests on an erroneous assumption, contradicted by empirical data, that an average voter cannot make a policy decision without knowing what groups support which side.

A. The Fifth Circuit’s Misapplication of Supreme Court Precedent

The Fifth Circuit incorrectly applied Supreme Court precedent in making its decision. With little discussion, the court analogized Buckley and Hosemann, finding an important governmental interest in upholding a law that restricts political participation in Mississippi. The Fifth Circuit also incorrectly relied on dicta and a non-analogous line of decisions to reach its conclusion.

77. Id.
78. Id.
1. The Compelling Governmental Interests Identified in *Buckley* Are Not Applicable to the Ballot Initiative Context, and the Fifth Circuit Erred in Using This Interest to Justify Its Decision

The Fifth Circuit discussed the two purported governmental interests set forth by the Supreme Court in *Buckley* to enforce and uphold disclosure laws. However, in *Hosemann*, Mississippi asserted only one of the two interests from *Buckley*—"an interest . . . in ‘provid[ing] the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office.’" 79 The Fifth Circuit acknowledged that its cases recognized the informational interest only in the context of candidate elections. 80 It then took the drastic step of extending this logic to the context of initiative elections because "the informational interest . . . seems to be at least as strong when it comes to ballot initiatives." 81 The Fifth Circuit erred in making this broad and unsupported statement.

In the context of candidate elections, the application of Supreme Court precedent is perfectly reasonable—the lower courts are bound by such precedent. Knowing what kinds of policy groups and political committees support a candidate can tell a voter what kinds of policy-making to expect from an elected official. Accordingly, the informational interest is served by requiring a group to disclose who it supports. Requiring a group to disclose what it supports is an entirely different matter. The Tenth Circuit in *Sampson* correctly distinguished the context of individual campaigns and initiative campaigns. 82 As the court pointed out, an initiative campaign does not require the evaluation of a person’s character—it simply involves "whether to approve or disapprove of discrete governmental action." 83 Nondisclosure and anonymity in the initiative context “could require debate to actually be about the merits of the proposition on the ballot” and not allow for personal attacks on individual or political issue committees that support or oppose the issue. 84 The Tenth Circuit believes it is absurd that states would pass laws discouraging public discourse and encouraging dependence upon political committees for information on political issues, when there is already criticism of a lack of public debate. 85

79. *Id.* at 297 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976)). The State conceded that the corruption rationale from *Buckley* was not implicated in the case. *Id.*

80. *Id.* at 298.

81. *Hosemann*, 771 F.3d at 298.

82. See *Sampson v. Buescher*, 625 F.3d 1247, 1256-57 (10th Cir. 2010).

83. *Id.*

84. *Id.* at 1257.

85. *Id.*
The Tenth Circuit's focus on the informational interest and its importance in individual campaigns, along with this interest's inapplicability in the initiative context, makes clear the errors of the Fifth Circuit. The Fifth Circuit focused on the legal language of initiatives and the inability of voters to understand this language as a reason to require disclosure of those who support it. The Tenth Circuit focused on a voter's ability to debate the merits of an initiative proposal to the point that he or she can make an informed decision at the ballot box in striking down the disclosure laws of Colorado. The need to evaluate a person, and all of his or her qualities and what can affect his or her decisions in office, justifies disclosure laws because "[c]andidate elections are, by definition, ad hominem affairs." The identity of people who contribute large sums of money is necessary information because it allows voters to anticipate future actions in office. However, initiative campaigns, by definition, are policy-making decisions. Initiatives do not make decisions in office, nor can they be influenced by affluent donors. Knowing who has donated to an initiative—the informational interest approved of by the Fifth Circuit in —is simply inapplicable in the case of initiative campaigns. As the Tenth Circuit points out, the best way to figure out what an initiative means is through public debate—not through knowing who financially supports it.

The Fifth Circuit incorrectly applied Supreme Court precedent in its decision to uphold the Mississippi disclosure laws. While the informational interest from serves a compelling governmental interest in the context of candidate campaigns, it is inapplicable in initiative campaigns. Because the Supreme Court has been silent on initiative campaign laws, the Fifth Circuit relied on its own erroneous analogy to apply the informational interest in the initiative campaign context. There is no precedent to support the Fifth Circuit's holding and because, as discussed below, the decision limits the constitutional rights of citizens, was incorrectly decided. If anything, Supreme Court precedent shows a reluctance to extend the informational interest to the context of ballot initiatives. In , the Court did not accept the informational interest asserted by the state of Washington for its disclosure law, which required the disclosure of demographic information of any person who signed a petition in support of an

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86. , 771 F.3d at 298.
87. , 625 F.3d at 1257.
88. Id. at 1256.
89. Id.
90. 561 U.S. 186 (2010).
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initiative. If the Court had accepted the informational purpose, the state would have run "headfirst into a half-century of our case law, which firmly establishes that individuals have a right to privacy of belief and association."

Without concise and clear Supreme Court precedent on disclosure laws in initiative campaigns, the Tenth Circuit took the route of protecting the privacy and free speech rights of Americans. The Tenth Circuit correctly acknowledged that the Supreme Court has looked favorably upon disclosure laws, but that it has never upheld a ballot initiative disclosure law based on an informational interest asserted by the government. The Fifth Circuit, on the other hand, takes a position that limits the rights of citizens to participate in the policy-making mechanisms that occur in their individual states. The Fifth Circuit should have adopted a view that protected rather than hindered the rights of individuals to participate in the political process.

B. Public Policy Considerations Show that the Fifth Circuit’s Decision Is Incorrect

The Fifth Circuit’s decision in Hosemann was incorrect in light of Supreme Court precedent. Public policy considerations bolster this conclusion. The court’s decision, and Mississippi’s law itself, undermine the very purpose of the ballot initiative. The decision also makes it easier for corporations to participate in an electoral process designed to bring individuals closer to the political process. The decision wrongfully places greater importance on an individual’s right to contribute to a representative—who indirectly represents the interests of his or her constituency—than it does the right to directly affect state policy. Finally, the Fifth Circuit’s decision presumes ignorance of the electorate and an inability of the voters to read and comprehend the laws to be voted on.

1. Mississippi’s Law and the Fifth Circuit’s Decision Upholding It Undermine the Purpose of Ballot Initiatives

The purpose of a ballot initiative is to bring the electorate and average citizen closer to the political process by allowing citizens “[to place] proposed statutes and, in some states, constitutional amendments [directly] on the ballot,” bypassing the state legislature. This purpose

91. Id. at 197.
92. Id. at 207 (Alito, J., concurring).
is especially important in cases where the state legislature refuses to act on a particular issue. While the specific procedure for ballot initiatives varies by state, the same general process is used in all states which have adopted the initiative process—a citizen, by gathering a sufficient number of signatures, can have his or her policy choices placed on the ballot for a statewide vote.

The initiative process, by allowing citizens to directly participate in the political process, leads to greater political awareness and participation. In fact, citizens living in the twenty-four states with ballot initiatives are more involved in the political process, are more likely to vote, have more trust in the government, are more aware of political issues, and have more confidence in the government’s ability to respond to the wishes of the people. The first ballot initiative was placed on the ballot in Oregon in the prime of the Progressive movement in the early 1900s. The goal was to shift political power to the people. The leaders of the Progressive movement used this ballot initiative process to adopt social justice reforms state legislatures were reluctant to move forward on.

While ballot initiatives are no longer the sole province of Progressives, the state of Mississippi and the Fifth Circuit seem to have forgotten the beliefs of President Theodore Roosevelt, Senator Jonathan Bourne, Jr., Governor Hiram Johnson, and the “People’s Rule.” While ballot initiatives are designed to bring people closer to the political process, the Fifth Circuit’s decision will block direct participation in the political process. The Fifth Circuit, in the name of transparency and educating the public, promotes a single interest—limiting direct participation in the legislative process. As discussed in the previous section, the Fifth Circuit incorrectly applied Supreme Court precedent and set forth unpersuasive reasons for its decision.

Hosemann distorts the purpose of the Progressive movement’s ballot initiative process by discouraging people from participating in the political process. The Fifth Circuit’s focus on educating the public at large on the specifics of a ballot initiative is admirable, but it sorely misses the main point of the initiative. The Progressives wanted to

(last visited Nov. 7, 2015).

94. See id.
95. Ballot initiatives, Daniel A. Smith, in 1 ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE A-D 218 (Gary Anderson & Kathryn Herr, 2007).
96. Id.
97. Id. at 217.
98. Id. Examples are “initiatives on the ballot calling for women’s suffrage, the direct primary, the direct election of U.S. senators, the abolition of the poll tax, home rule for cities and towns, 8-hour work days for women and minors, and the regulation of public utility and railroad monopolies.” Id.
99. Id.
bring the people closer to the political process and push through policy preferences state legislatures refused to deal with. The marijuana legalization movement is an example of such a policy issue. Every state that has legalized the drug to this point has done so through the initiative process. Another example of the effectiveness of the ballot initiative process involves the legalization of same-sex marriage across the country. Prior to Obergefell v. Hodges, state legislatures were reluctant to approve of same-sex marriage, and the 2012 election cycle saw three ballot initiatives pass that allowed for gay marriage. Even the Chief Justice acknowledged the power of the initiative in creating the "democratic momentum" that forced the Court to consider the issue.

These two movements epitomize the very purpose of ballot initiatives. Legislatures dragging their feet must, eventually, answer to the people, who wish to vindicate their own rights and policy preferences. The ability of citizens to get a government to respond to the will of the people when it refuses to act—the reason the ballot initiative was adopted—is impeded by the Mississippi law because it prevents individuals from campaigning for a political idea and contributing to the larger societal debate about the issue. Without the ability to influence government in such a way, the modern political social movements would have a hard time getting a foothold in the state legislatures. Marijuana legalization, despite majority support, would not have gotten off the ground without ballot initiatives. Without ballot initiatives, the same-sex marriage movement may not have garnered the


101. See O'Donoghue, supra note 100.


103. Gizelle Lugo, Same sex marriage ballot initiatives: voters in strong backing for equality, THE GUARDIAN (Nov. 7, 2012, 1:44 PM), http://www.theguardian.com/world/2012/nov/07/same-sex-marriage-ballot-initiatives. These states were Maine, Maryland, and Washington. Minnesota, in the same election cycle, did not pass an initiative that would have banned same-sex marriage. Id.

104. Obergefell, 135 S. Ct. at 2615 (Roberts, C.J., dissenting) (quoting DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014)).

105. In light of Obergefell, state legislators can also be forced to answer to the people by way of federal court order. While some, like the Chief Justice in his Obergefell dissent, argue that the courts have no right to interfere in the initiative process, the federal courts seem to be one of the few places citizens can make themselves heard on issues the legislature will not deal with.

support of fifty-nine percent of Americans in 2014— it almost certainly would not have reached the Supreme Court in 2015. The ballot initiative is specifically designed to reflect the will of the people and bring quick changes in public policy. Limiting participation in a vital part of American democracy and policy change, as the decision in *Hosemann* will do, undermines the very purpose of the initiative campaign process.

Upholding a law that discourages individuals from participating in the ballot campaigning process will only limit political participation. There is evidence that political participation and political knowledge are already at a higher rate in states with the initiative process. In fact, the decision likely will decrease rates for these two factors. Citizens will be less likely to participate in the political process because of the amount of time, effort, and money it would require to campaign on a ballot initiative. One must look no further than the Fifth Circuit’s recitation of facts in *Hosemann* to see a clear chilling effect of the Mississippi law. The plaintiffs specifically stated that they did not participate in campaigning for a particular ballot initiative because of the administrative and time costs required by the Mississippi law.

The chilling effect of the Fifth Circuit’s decision does not further any governmental interest. It acts only to bottle up debate on political issues. Clearly, the plaintiffs in *Hosemann* felt the eminent domain ballot initiative was important enough to campaign for. They were prevented from expressing their political ideas because of an overly burdensome law that, in practice, undermines the very electoral procedure it was designed to make more transparent. Based on the underlying principles of the First Amendment and the original purpose of the ballot initiative, the Fifth Circuit was wrong in limiting political participation and the dissemination of debate and ideas. The Progressives of the 1900s would be shocked to see a state government, in the name of transparency, limit political expression and direct participation.


108. See id. Only thirty-eight percent of Americans believed same-sex marriage should be legal in 2004, but that number jumped to fifty percent in 2014. *Id.* This increase of support is mirrored in the passage of three ballot initiatives in 2012. *Id.*


110. *Id.* at 290.
2. The Fifth Circuit Wrongfully Made It Easier for a Corporation to Campaign for a Ballot Initiative than the Average Voter—the Very People the Initiative Process Was Designed to Help

As discussed, the ballot initiative was developed to bring the people closer to the political process. Unfortunately, the Fifth Circuit’s decision makes it easier for corporations to influence ballot initiatives while simultaneously inhibiting the ability of individuals to affect the political process. The court’s decision, again, leads to consequences that undermine the purpose of ballot initiatives and direct democracy. In the context discussed below, the Fifth Circuit encourages corporations—with their superior manpower, organization, and resources—to expend more influence in an initiative election than the average citizen—the very type of person an initiative election was designed to get more involved in politics.

With much controversy and passionate dissent, the Supreme Court has already extended many of the civil rights of citizens to corporations. The Fifth Circuit continues this trend by granting corporations greater influence in initiative processes than the average citizen. No matter the merits of these decisions, there seems little policy or legal support for granting corporations an easier time than individuals to comply with disclosure requirements. The Mississippi disclosure requirements burden individuals in a way that will not affect corporations. The requirements for creating and maintaining a group to campaign for a ballot initiative in Mississippi are burdensome to busy individuals, but easily manageable for a corporation desiring to influence voters.

It is burdensome for an individual to fill out the Statement of Purpose, keep track of the political committee’s expenditures on an itemized and monthly basis, and report his or her own expenditures in a monthly report. It takes time and effort that could be spent better elsewhere—such as spending time with family, participating in public forums, or volunteering in the community. For a corporation, it would be exceedingly easy for a low level employee to fill out these reports.


112. Under Mississippi law, a group that raises or spends more than $200 on an initiative campaign must file financial reports with the Secretary of State. Hosemann, 771 F.3d at 288. When a group registers, it must file a Statement of Organization listing the name and address of the committee; whether it is registered by the FEC or authorized by a candidate; the committee’s purpose; the names of all officers; and its director and treasurer. Id. at 288-89. The committees must also file monthly itemized reports detailing all donors’ names, addresses, and the dates of the donation. Id. at 289. Finally, individuals themselves must report on a monthly basis any contributions over $200. Id.
without impeding the function and business of a corporation that has formed its own political committee. The corporation is, simply put, unaffected by the disclosure requirements because of the ease with which a lower member of the corporate entity can comply with the disclosure requirements.

Moreover, an average citizen must balance these monthly requirements with the other challenges of life. One must only consider the following question: is it more burdensome for a secretary at the corporate office of Hobby Lobby to maintain financial records and expenditure reports on a monthly basis than it is for a working member of a family with multiple children? The ease of this answer shows the error in the Fifth Circuit's decision. By upholding the Mississippi disclosure requirements, the Fifth Circuit removed initiative power from the people—burdened by the disclosure and reporting requirements—and gave it to corporations—which can easily comply with the reporting requirements. Simply put, the Fifth Circuit gave corporations more rights than the average citizen working with friends to create a political issue committee.

3. A Citizen's Right to Campaign for Changes to His or Her Own State's Law Should Not Be Viewed as Less Important than a Citizen's Right to Campaign for a Particular Candidate

Without much discussion, both the Fifth and Tenth Circuits found that reporting and disclosure requirements in the context of ballot initiatives were subject to only exacting scrutiny, a lesser form of scrutiny than that applied to laws restricting donations to individual candidates. It is unclear why a citizen's right to participate in direct democracy, free from burdens imposed by the state, is less important to these courts than the right of a person to donate to individual candidates. This position is counterintuitive. Donating to an individual politician is not a contribution made in support of a policy decision. It will not have a direct effect on the laws of an individual state. This much is clear, as elected candidates have no obligation to directly follow the wishes of their constituents. Laws restricting donations to these individuals, who do not directly represent voters, are subject to the highest level of scrutiny.

To the contrary, laws that burden the direct involvement and influence on state policy are subject to a lesser form of scrutiny, giving the government more leeway in limiting political expression. It is unclear why burdens on direct influence of state policy receive more deference than indirect influence on individuals with no obligation to follow the will of voters. The purpose of the ballot initiative is to
encourage direct political participation on issues upon which legislatures refuse to act. Why, one has to wonder, is participating in this process less important than simply writing a check to a senate campaign? The difference in application of scrutiny testing levels seems like an arbitrary decision that places one fundamental right on a different level of importance than another. The Supreme Court already has required the government to show a compelling interest before a law can limit how much money someone gives to a candidate. It would not be an outlier to require the showing of a compelling interest before allowing a law that hindered direct participation in democracy.

This lack of strict scrutiny in the context of initiatives, discussed further in Part IV, undermines the very purpose of the initiative process by allowing state governments to chill participation in the adoption of statewide policy. There is not a policy rationale that justifies the use of strict scrutiny in cases of disclosure requirements in individual campaigns but a lesser standard for ballot initiatives.

4. In Hosemann, the Fifth Circuit Refused to Put Faith in the Intelligence of Average Voters and Their Ability to Educate Themselves. Empirical Data Shows There is a Connection Between Ballot Initiatives and Increased Voter Awareness.

The Fifth Circuit’s decision takes a paternalistic view. It also calls into doubt the ability of the electorate to educate itself on complex political issues. Blaming a “modern penchant for labelling [sic] laws with terms embodying universally-accepted values” and initiatives “written in legalese,” the Fifth Circuit holds itself out as superior to the average voter. The court further bolsters its position that a voter is unable to make his or her own decision freely, stating that “[c]itizens rely ever more on a message’s source as a proxy for reliability and a barometer of political spin.”

The position that a voter cannot read and understand a ballot initiative on his or her own without knowing what group has supported or opposed it is one that should be insulting to voters. While the informational interest may be advanced in the context of individual candidates, the interest can be advanced in the initiative context only under the assumption that a voter cannot understand the words in front

113. Id. at 298.
114. Hosemann, 771 F.3d at 298 (quoting Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 57 (1st Cir. 2011)).
115. Politicians, after all, have always been thought of as less than transparent on their views. Knowing who supports a candidate provides guidance to voters on people that are, simply put, difficult to read and understand.
of him or her. This assumption should be shocking to the average voter. It should be insulting to the voters living in the Fifth Circuit that its Court of Appeals based a decision entirely on an assumption that they cannot read and understand the complex legal words before them or become politically aware through public debate. The Fifth Circuit should have encouraged robust public debate on the initiatives rather than simply assuming that citizens could not speak about or understand legal and policy issues that affect the state.

In addition, empirical evidence contradicts this assumption and shows that participation in ballot initiative campaigns should actually be encouraged. Using data from the 2002 midterm elections, at least one researcher found that ballot initiatives increase voter interest and voter awareness. In addition, the same researcher suggested that “ballot measures provide alternative sources of information about politics that make democracy possible” as well as “emotional content” in a way similar to newspapers, TV, and radio. Specifically, political interest and awareness increased with the number of ballot initiatives up for a vote. This increased interest, in turn, led to higher participation and voter turnout. In light of this empirical data, the Fifth Circuit’s decision seems all the more incorrect. Voters are actually more aware as a result of ballot initiatives, and this awareness increases as the number of initiatives increases in a state. In another study, different researchers reached a similar conclusion. The authors acknowledged that there was a distinct correlation between states with ballot initiatives and more civic engagement, higher voter turnout, and greater political awareness. The decision in Hosemann to limit participation in the initiative process, therefore, may actually end up hurting political awareness and interest. Although it has not been proven that there is a causal link between participation in ballot initiatives and political awareness, researchers have found, at the least, a correlation. There is no reason to limit participation in initiative campaigns when initiative


117. Id. at 25.

118. Id.

119. Id. at 21.

120. Id.

121. Tolbert, supra note 116, at 21.

122. Todd Rogers & Joel A. Middleton, Are ballot initiative outcomes influenced by the campaigns of independent groups? A Precinct-Randomized Field Experiment Showing That They Are, 37 POL. BEHAVIOR 567, 568 (2014).

123. Id.
campaigns have been shown to increase knowledge. Because initiatives increase political participation and awareness on their own, without the help of disclosure requirements, the informational interest stressed by the court in *Hosemann* rings empty.

The Fifth Circuit’s decision in *Hosemann* rests on an assumption that the average voter needs help in interpreting and understanding ballot initiative issues, and that requiring disclosure of expenditures on initiatives is a way to help voters make up their minds. The Fifth Circuit’s decision also ignores empirical data that the existence of the ballot initiative encourages voter turnout and participation, and that the existence of a strong initiative campaign increases voter knowledge and interest in state politics. Because of this assumption and data to the contrary, the Fifth Circuit’s decision is incorrect.

IV. THE SUPREME COURT SHOULD HAVE GRANTED CERTIORARI IN *Hosemann* AND USED STRICT SCRUTINY TO REVIEW MISSISSIPPI’S BALLOT INITIATIVE DISCLOSURE LAW

On April 4, 2016, the Supreme Court denied the plaintiffs’ petition for a writ of certiorari in *Hosemann*. In doing so, the Court missed an opportunity to resolve a circuit split that will continue to deprive citizens of the Fifth Circuit of their rights to participate in the ballot initiative process. Moving forward, should any other Circuit Courts of Appeals face a law similar to the one in *Hosemann*, these sister circuits should adopt the view taken by the Tenth Circuit in *Sampson*.

However, a simple adoption of the Tenth Circuit’s view will not go far enough. While reaching the correct outcome in *Sampson* and dutifully applying Supreme Court precedent, the Tenth Circuit should have applied strict scrutiny rather than exacting scrutiny. Obviously, this court cannot overrule Supreme Court precedent. That being said, *Hosemann* was an opportunity for the Supreme Court to protect the rights of citizens to the fullest extent possible—a step it has been unwilling to take in the context of ballot initiative campaigns. By adopting the *Sampson* rationale, other Courts of Appeals will force the Supreme Court to again consider a writ of certiorari, as the circuit split will continue to deepen.

While *Sampson* is a step in the right direction, it simply does not go far enough in protecting the rights of individuals to engage in political speech. The role of the courts is to protect citizens from overreaching laws that abridge the freedom of speech—the Supreme Court should, can, and must go further than the Tenth Circuit did in its decision. An

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application of strict scrutiny to disclosure laws in the ballot initiative context would not necessarily condemn these laws to findings of unconstitutionality. If, for example, a law required disclosure with fewer hoops to jump through than the Mississippi law, it would be more permissible for the court to uphold the law. Under such a scheme, the interests of the state and the citizens would be balanced. The state would be able to further its compelling interest in keeping track of where money is being spent in politics, and individuals would be able to participate in the political process with fewer burdens. If a state were to relax its regulations on disclosures in initiative campaigns, it would strike the perfect balance. It may also pass, in the eyes of a court, strict judicial scrutiny.

Because the Supreme Court refused to take the case and resolve the circuit split, the states themselves can and should alter their own laws to strike a balance between the states’ interest in keeping track of campaign expenditures and the rights of the people to participate in the political process. A state could, for example, raise the amount of expenditures required before a committee must register; roll back the strict monthly reporting requirements when the committee is run by individuals rather than a corporation; or simply articulate, in the law, the interest the legislatures are attempting to further through the law. While it is unclear how a court would rule on a different set of facts from *Hosemann* or *Sampson*, the states could act as laboratories for reform and test the limits of how few—or, in the case of Mississippi, how many—regulations the state can impose upon an individual in an initiative campaign. If the judicial system refuses to step in and protect the rights of citizens to participate in initiative campaigns, the states should move to protect this right by deregulating and rolling back any strict disclosure requirements as applied to individuals wishing to form a political issue committee.

V. CONCLUSION

The Fifth Circuit incorrectly upheld Mississippi’s initiative disclosure laws because its decision takes a step towards limiting political participation by individuals and undermines the original reason for the ballot initiative—bringing citizens closer to the political process. The Supreme Court has been silent on the issue of initiative campaign disclosure laws, and the Fifth Circuit, as is its right, selected a test it saw fit. However, it selected the rule that restricts political speech and makes it more difficult for citizens to become involved in policy-making. It incorrectly analogized initiative campaigns to individual campaigns and failed to sufficiently explain its analogy—because its
analogy rested on the assumption that the average American voter is unable to read and comprehend legal language. The decision also makes it easier for corporations to participate than people in the initiative process and, without explanation, places the right of a citizen to directly influence state policy at a lower level of importance than a citizen’s right to select a representative.

The Supreme Court should have reviewed *Hosemann* and reversed the Fifth Circuit. By rejecting review, the Supreme Court missed an opportunity to adopt the strict scrutiny test for all laws that restrict the ability of a person to participate in a ballot initiative campaign. In both *Sampson* and *Hosemann*, the Courts of Appeals did not fulfill its duty to protect the rights of American citizens to speak freely and participate directly in the political process.