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Via Electronic Filing

United States Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130
Attn: Lyle W. Cayce, Clerk

Re: *Justice, et al. v. Hosemann, et al.*, No. 13-60754

Supplemental Letter Brief of *Amicus Curiae* Campaign Legal Center Urging Reversal and Addressing *Catholic Leadership Coalition of Texas v. Reisman*, 13-50582 (5th Cir. Aug. 12, 2014).

As requested by the Court's directive, dated August 13, 2014, *amicus* Campaign Legal Center files this supplemental letter brief to address the impact of *Catholic Leadership Coalition of Texas v. Reisman*, 13-50582 (5th Cir. Aug. 12, 2014),¹ on the above-referenced case.

Catholic Leadership involved a challenge to Texas campaign finance provisions imposing certain obligations on newly-formed "general-purpose political committees" in Texas, including an outright restriction on such a committee's ability to raise and spend funds within a limited temporal window (*i.e.*, a waiting period), as well a requirement for the committee to appoint a treasurer and register with the State before receiving contributions or making expenditures above a specified threshold (\$500). More specifically, to qualify as a general-purpose political committee in Texas, a group must:

- (1) appoint a committee treasurer ("treasurer-appointment requirement");
- (2) limit its aggregate contributions and expenditures, including independent expenditures, to \$500 for a 60-day window after the treasurer is appointed ("60-day, 500-dollar limit"); and
- (3) receive donations from ten persons ("10-contributor requirement").

¹ Pinpoint citations in this brief are to the manuscript or slip opinion pages.

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See Catholic Leadership, slip op. at 7–8; *see also* Tex. Elec. Code §§ 253.031, .037(a); Tex. Ethics Comm’n, Ethics Advisory Op. No. 161 (1993). The plaintiffs in *Catholic Leadership*, three general-purpose political committees and one nonprofit corporation, challenged all three of these requirements as unconstitutional restrictions on speech, and also challenged Texas’s corporate contribution ban, Tex. Elec. Code § 253.094(a), as applied to the proposed contribution of an email contact list from the nonprofit to one of the general-purpose committees. Slip op. at 2.

In its decision in *Catholic Leadership*, a panel of this Court struck down the 60-day, 500-dollar limit and 10-contributor requirements, reasoning that they imposed substantive—albeit temporary—limits on a nascent committee’s ability to speak. Slip op. at 57. However, the Court upheld the treasurer-appointment requirement, finding it “substantial[ly] relat[ed] to [Texas’s] informational interest in ensuring the smooth functioning of its campaign finance disclosure scheme.” *Id.* at 50. Finally, the Court upheld Texas Election Code § 253.094(a)’s restriction on corporate contributions as applied to the proposed in-kind donation of the nonprofit plaintiff’s email mailing list. *Id.* at 57.

As explained in more detail below, the *Catholic Leadership* decision does not bear directly on the resolution of this case; however, its analysis of Texas’s campaign finance laws is nevertheless instructive in several important respects.

1. Strict Scrutiny Does Not Apply To The Review of Mississippi’s Registration and Reporting Requirements.

First, if there was any doubt about the standard of scrutiny applicable to the Mississippi registration and reporting provisions at issue here,² it has been put to rest: strict scrutiny does not apply. Compared to limitations on expenditures and contributions, which are subject to strict scrutiny and less rigorous “closely drawn” scrutiny, respectively, disclosure requirements receive a “further lessened” level of review. *Catholic Leadership*, slip op. at 21–22 & n.19 (collecting cases). That “further lessened” standard reflects that laws entailing only disclosure obligations “impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.” *Citizens United*, 558 U.S. at 366 (citations and internal quotations marks omitted). Instead, disclosure rules require only “the provision of information”—and they “only incidentally prevent speech when the speaker is unwilling to provide the additional required information.” *Catholic Leadership*, slip op. at 25.

Texas’s treasurer-appointment requirement, unlike the 60-day and 10-contributor restrictions at issue in that case, required only “the provision of information” in order to

² *See, e.g.*, Brief of Plaintiff-Appellee at 45 (requesting strict scrutiny review).

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qualify as a general-purpose committee. Consequently, despite rejecting Texas’s argument that the 60-day, 500-dollar limit and 10-contributor provisions should be seen as disclosure rules, the Court concluded otherwise with respect to the treasurer-appointment requirement: it *was* properly understood as a disclosure requirement. *Id.* at 46 (“First, and foremost, the treasurer-appointment requirement *is* a disclosure requirement: all that the provision requires is that a general-purpose committee take simple steps to formalize its organizational structure and divulge additional information to the government.”). Moreover, the Court highlighted that “general-purpose committees remain fully in control of their compliance,” because “[n]o external factor limits the Committee’s ability to speak,” which was not the case with the 60-day and 10-contributor requirements. *Id.*

Because Texas’s substantive reporting obligations are only triggered once a committee registers with the state and appoints a treasurer, the treasurer-appointment requirement “serves as the cornerstone” of the state’s entire disclosure regime. The panel decision by this Court thus determined that “a lower level of scrutiny is appropriate because any limit on speech created by the requirement arises solely from the committee’s own choice to not provide information to the government.” *Id.* at 47 (citing *Citizens United v. FEC*, 558 U.S. 310, 366; *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548–49); *see also id.* at 50 (noting that the treasurer “serves as the cornerstone of Texas’s entire general-purpose committee campaign-finance disclosure regime”) (citing Tex. Elec. Code §§ 254.153, .154, .1541, .155, .159, .160, .161). As such, the Court applied exacting scrutiny and found that the provision “bears a substantial relationship to [Texas’s] informational interest in ensuring the smooth functioning of its campaign finance disclosure scheme.” *Id.* at 50.

2. The Challenged Registration and Disclosure Provisions, Like Texas’s Treasurer-Appointment Requirement, Impose Only “Exceedingly Minimal”—If Any—Burdens.

In upholding the treasurer-appointment requirement, the Court in *Catholic Leadership* also observed that Texas’s registration requirement is “different from some other committee-treasurer requirements insofar as it requires registration *before* exceeding a certain amount of political spending rather than a certain number of days *after* exceeding a certain amount of political spending.” *Id.* at 44-45 (citations omitted) (emphasis added). Notably, because Texas “requires disclosure of the treasurer *before* a general-purpose committee exceeds \$500,” the Court required the state “to persuasively defend” the law in order to demonstrate appropriate tailoring under the exacting scrutiny standard—but nevertheless upheld the provision. *Id.* at 47 (emphasis added) (calling the burdens of compliance “slight” and characterizing disclosure as “especially valuable”). Ultimately, the Court emphasized that the reporting rules effectuated by the provision imposed only “exceedingly minimal,” if any, burdens. *Id.* at 49 (“[A]ny burden created by the treasurer-

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appointment requirement—essentially filling out and putting a three-page form that asks for basic information in the mail—appears to be *exceedingly minimal*.”) (footnote omitted) (emphasis added) (citing *Worley v. Fla. Sec’y of State*, 717 F.3d 1238, 1250 (noting minimal burden imposed by similar requirements), and *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576, 593–96 (8th Cir. 2013) (same)).

The reporting requirements for general-purpose committees under Texas law are no less “burdensome” than the Mississippi provisions challenged here. In Texas, general-purpose committees—through their campaign treasurers—must file semi-annual reports identifying the names and addresses of contributors who donated more than \$50,³ the candidates and measures supported or opposed by the committee, and the committee’s itemized expenditures. Tex. Elec. Code § 254.031, .151, .153. In addition to its general reporting obligations, a general-purpose committee must also file reports thirty days and eight days before an election if it is active in the election. *Id.* § 254.154. Large contributions or expenditures within nine days of an election trigger next-day reporting. *Id.* § 254.039.

Although the plaintiffs in *Catholic Leadership* did not specifically challenge the reporting regime, neither did the Court express any concerns about its constitutionality. In particular, the Court noted that improvements in technology, such as electronic filing, “are relevant to the analysis of the burden of disclosure requirements insofar as they lessen the difficulty of tracking, compiling, and disclosing the information that a state requests.” Slip op. at 49 n.41. By comparison, the reporting requirements triggered by registering as a political committee in Mississippi are less extensive. Chapter 17 requires only “event-driven” reporting: once a group has collected or spent more than \$200 to influence voters for or against a constitutional ballot measure, the group must register as a political committee by completing a simple one-page form. Miss. Code Ann. §§ 23-17-47; 23-17-49(1).⁴ Moreover, Texas law requires groups to register and appoint a treasurer

³ General purpose committees with less than \$20,000 in total political contributions maintained as of the last day of the preceding reporting period may opt to itemize contributions from one person that exceed \$100, rather than \$50. *Id.* § 254.1541.

⁴ *Amicus* James Madison Center suggests that whether or not a group is willing to be *labeled* a political committee has a constitutional significance apart from the practical implications of being so labeled. *Catholic Leadership* squarely forecloses this argument: the constitutionality of a campaign finance rule is determined by looking to “the effect of the provision”—*i.e.*, whether it requires the mere “provision of information” or acts as a restriction on expenditures or contributions. *See* slip op. at 25.

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before raising or spending more than \$500. Slip op. at 47. In Mississippi, groups need only register *after* they have already collected or spent more than \$200.⁵

In summary, the *Catholic Leadership* decision makes clear that disclosure laws such as those at issue here are “treated more leniently than are other speech regulations” under the First Amendment, *Asgeirsson v. Abbott*, 696 F.3d 454, 463 (5th Cir. 2012), because they require only “the provision of information” to the public, and impose only incidental burdens based on a group’s unwillingness to provide such information. Given the important transparency interests at stake here, these “exceedingly minimal” burdens are more than justified under the deferential exacting scrutiny standard.

Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert

cc: counsel of record via CM/ECF

⁵ Although Texas’s registration threshold, at \$500, is higher than Mississippi’s, that is to be expected given that the population of Texas is roughly eight times that of Mississippi, and overall political spending in Texas is correspondingly much greater. See U.S. Census Bureau: State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/28000.html> (providing population estimates for Texas and Mississippi); see also Nat’l Inst. on Money in State Politics, *National Overview Map: 2012*, <http://followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2012&abbr=0> (last visited August 21, 2014).

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2014, I electronically filed the foregoing Supplemental Brief *Amicus Curiae* with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for the following participants in the case:

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In addition, counsel of record have been served with copies of the foregoing brief via email (where email addresses are available and known).

/s/ J. Gerald Hebert

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