

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**ANONYMOUS DOE; ANONYMOUS
ROE; AND ANONYMOUS COMPANY**

PLAINTIFFS

V.

CIVIL ACTION NO. 3:15-cv-609-CWR-LRA

**PHIL BRYANT, in his Official Capacity as
Governor of the State of Mississippi;
JAMES HOOD, in his Official Capacity as
the Attorney General of the State of
Mississippi; DELBERT HOSEMANN, in his
Official Capacity as the Secretary of State of
the State of Mississippi**

DEFENDANTS

**DEFENDANTS' OPPOSITION TO
MOTION FOR LEAVE TO FILE AMICUS BRIEF**

COME NOW Governor Phil Bryant, Attorney General Jim Hood, and Secretary of State Delbert Hosemann and file this opposition to Robbin Stewart's Motion for Leave to File Amicus Brief.

I. The proposed amicus brief does not meet the criteria established by the Fifth Circuit.

"Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace." *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (denying motion for leave and quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir.2000)). There is no statute or rule addressing amicus briefs at the trial stage, but district courts seek guidance from relevant appellate court decisions. *See Club v. Fed. Emergency Mgmt. Agency*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) (denying motion for leave). A "district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the

amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.’ ” *Id.* (quoting *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir.1970)). The Fifth Circuit has articulated the following test for consideration of a motion for leave to participate as an amicus:

[a]n amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

In re Halo Wireless, Inc., 684 F.3d at 596 (quoting *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir.1997)). Courts do “not grant rote permission” to file amicus briefs as the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation for the court and the parties. *Nat’l Org. for Women, Inc.*, 223 F.3d at 616-617 (denying motion for leave). Mr. Stewart, who seeks leave to file an amicus brief on his own behalf, does not meet the standard articulated by the Fifth Circuit.

II. Plaintiffs Are adequately represented by counsel.

“The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.” *Ryan*, 125 F.3d at 1063 (denying motion for leave). Such is the case at hand. Plaintiffs are represented by competent counsel who have filed extensive briefs on their behalf. Mr. Stewart’s general arguments mostly track those of plaintiffs’ current counsel.

This Court should not conclude that an amicus brief is warranted because plaintiffs are “not represented competently.”

III. Mr. Stewart lacks a tangible interest in the outcome of this case.

Mr. Stewart does not allege that he has an interest in this case or in some other case that may be affected by the decision in the present case. *See* Motion for Leave at 2. The interest of the prospective amicus must be “special” and not that of the general public. *See News & Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 32 (S.D. Fla. 1988). Mr. Stewart’s interest in this case is no greater than that of the general public, which is insufficient to permit participation as an amicus. *See Leal v. Sec’y, U.S. Dep’t of Health & Human Servs.*, 2009 WL 1148633, at *2 (M.D. Fla. Apr. 28, 2009) (denying leave when hospital failed to establish that litigation would materially impact hospital’s litigation pending in another court).

IV. Mr. Stewart impermissibly raises new legal claims.

The plaintiffs have wisely declined to challenge the constitutionality of Mississippi’s disclaimer statute under state law. Mr. Stewart feels this to be a mistake and takes it upon himself to assert such a claim. *See* Amicus Br. at 18-19. This presents an additional basis on which to deny the motion for leave as amici have no authority “to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.” *Lane v. First Nat. Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989).

V. Mr. Stewart does not have “unique information or prospective” and his legal arguments, which track those of plaintiffs, are so gravely flawed as to be unhelpful to this Court

As an initial matter, Mr. Stewart’s role in previous litigation does not provide him with information or prospective which is not shared by the plaintiffs and their current

counsel. In fact, Mr. Stewart's implicit contention is that leave should be granted because he has previously been in this exact posture of plaintiffs and plaintiffs' counsel: litigating a challenge to disclaimer requirements. Mr. Stewart's factual and legal prospective is not unique.

More importantly, Mr. Stewart's legal arguments – which he shares with plaintiffs' counsel – are wrong and rely on cases which are no longer good law. The error committed by plaintiffs – and now repeated by Mr. Stewart – is the reliance on *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *Talley v. California*, 362 U.S. 60 (1960), rather than *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Doe v. Reed*, 561 U.S. 186 (2010). Mr. Stewart and plaintiffs contend that *McIntyre* and *Talley* require the application of strict scrutiny to Mississippi's campaign disclaimer law and result in a declaration that the law violates the First Amendment. The State contends that Supreme Court in *Doe* and *Citizens United* held that campaign-related disclosure and disclaimer requirements are subject only to exacting scrutiny. More specifically, *Citizens United* explicitly addressed whether campaign-related disclaimer requirements violate the First Amendment. Disclaimer requirements, which exist in federal and state election law, require that materials which seek to influence citizens to vote for or against a candidate for election must contain a “disclaimer” declaring who paid for the material.¹ *Citizens United* noted that disclaimer requirements were found to be facially constitutional by the Supreme Court in *McConnell*. See *Citizens United*, 558 U.S. at 367 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93

¹ Mr. Stewart recognizes this the argument he and plaintiffs share would, if true, render the federal disclaimer statutes unconstitutional as well. See Amicus Br. at 13.

(2003)). The *Citizens United* decision confirmed the constitutionality of disclaimer requirements as-applied to campaign advertisements which referenced candidate Hillary Clinton “by name shortly before a primary and contained pejorative references to her candidacy.” 558 U.S. at 368. As discussed below, since *Citizens United*, the First, Second, Ninth and Eleventh Circuits have heard challenges to campaign-related disclaimer laws. In each such instance, the circuit court applied exacting scrutiny to the facial or as-applied challenge and affirmed the constitutionality of disclaimer laws.

Mr. Stewart’s arguments, perhaps unwittingly, underscore that the 2010 *Citizens United* decision ended any argument about the inapplicability of *McIntyre* to campaign-related disclaimer requirements. Specifically, Mr. Stewart cites, among other cases, the Second Circuit and Ninth Circuit’s decisions in 2000 and 2004 respectively as evidence of “the strong trend [] to follow *Talley* and *McIntyre*” to strike down disclaimer requirements. *See* Amicus Br. at 16 (citing *Vt. Right to Life Comm., Inc. v. Sorrell* [*VRLC I*], 221 F.3d 376 (2nd Cir. 2000); *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004)). While Mr. Stewart felt at ease to cast aspersions about the State’s briefing,² Mr. Stewart evidently overlooked the “yellow flags” and subsequent negative treatment associated with each case. It is true that the Ninth Circuit in *Heller*, citing *McIntyre* and *Talley*, struck Nevada’s campaign-related disclaimer statute. *Heller*, 378 F.3d at 981-982. However, the Supreme Court decided *Citizen United* after *Heller*. In 2015, the Ninth Circuit revisited this issue when evaluating a similar challenge to Hawaii’s

² It is unfortunate that Mr. Stewart attempts to justify his amicus brief by asserting that the State’s briefs contained “false statements of law” which were intended to mislead this Court “into an erroneous opinion.” *See* Motion for Leave at 1.

disclaimer statute. *See Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015). Hawaii’s disclaimer requirement is materially identical to Mississippi’s³. Unlike Mr. Stewart, the Ninth Circuit recognized that *Heller* was no longer correctly decided in light of *Citizens United*.

We reject [plaintiff’s] comparison to the disclaimer invalidated by the Supreme Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 340, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), which prohibited the distribution of pamphlets without the name and address of the person responsible for the materials, or to the disclosure provision invalidated by this court in *ACLU of Nev. v. Heller*, 378 F.3d 979, 981–82 (9th Cir.2004), which required persons paying for publication of any material “relating to an election” to include their names and addresses. ***Citizens United’s post-McIntyre, post-Heller discussion makes clear that disclaimer laws such as Hawaii’s may be imposed on political advertisements that discuss a candidate shortly before an election.*** *See* 558 U.S. at 368–69, 130 S.Ct. 876; *see also Worley*, 717 F.3d at 1254 (rejecting the argument that *McIntyre* dictated the demise of Florida’s analogous disclaimer requirement). An individual pamphleteer may have an interest in maintaining anonymity, but “[l]eaving aside *McIntyre*-type communications ... there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way.” *Alaska Right to Life*, 441 F.3d at 793.

Yamada, 786 F.3d at 1203 n.14 (emphasis supplied).⁴

³ Hawaii requires “[a]ny advertisement that is broadcast, televised, circulated, published, distributed, or otherwise communicated, including by electronic means, shall: (1) Contain the name and address of the candidate, candidate committee, noncandidate committee, or other person paying for the advertisement; (2) Contain a notice in a prominent location stating either that: (A) The advertisement has the approval and authority of the candidate; provided that an advertisement paid for by a candidate, candidate committee, or ballot issue committee does not need to include the notice; or (B) The advertisement has not been approved by the candidate. . . .” Haw. Rev. Stat. Ann. § 11-391; 786 F.3d at 1201-1201.

⁴ The State’s Supplemental Memorandum in Opposition thoroughly explained that the derogatory “Mayor Mary” postcards mailed to almost 13,000 registered voters by an anonymous corporation at a cost of almost \$10,000 is a quintessential election advertisement and not a “*McIntyre*-type communication” made by an individual pamphleteer. *See* State Supp. Memo. at 23-27 [Docket No. 13].

Similarly, Mr. Stewart touts *Vt. Right to Life Comm., Inc. v. Sorrell* [VRLC I], 221 F.3d 376, 387-389 (2d. Cir. 2000), in which the Second Circuit cited *McIntyre* and *Talley* as relevant to a constitutional challenge to Vermont's disclaimer requirements. However, as was the case with the Ninth Circuit, the Second Circuit later recognized that VRLC I was not correctly decided in light of *Citizens United*.

In a decision that predated *Citizens United*, the Second Circuit stated that “[m]andatory disclosure requirements may represent a greater intrusion into the exercise of First Amendment rights of freedom of speech and association than do reporting provisions....” VRLC I, 221 F.3d at 387 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). This view now appears inconsistent with *Citizens United*.

Vermont Right to Life Comm., Inc. v. Sorrell [VRLC II], 758 F.3d 118, 133 n.13 (2d Cir. 2014) *cert. denied*, 135 S. Ct. 949, 190 L. Ed. 2d 830 (2015). The district court opinion that was affirmed in VRLC II explained *Citizens United*'s impact.

In invalidating the prior version of Vermont's electioneering law, the Second Circuit cited *McIntyre* for the proposition that identification requirements may be a greater intrusion on speech than reporting requirements. VRLC I, 221 F.3d at 387; *see also* VRLC I, 19 F.Supp.2d at 212 (same). However, *Citizens United* upheld the federal disclaimer provision without so much as mentioning *McIntyre*, noting that while disclaimer provisions “burden the ability to speak,” they do not limit speech. 130 S.Ct. at 914; *see also* *McKee*, 649 F.3d at 61 (“‘*Citizens United* has effectively disposed of any attack on Maine's attribution and disclaimer requirements.’”)(quoting *McKee*, 723 F.Supp.2d at 267). VRLC does not make clear why *McIntyre* requires this Court to hold Vermont law unconstitutional but did not even merit a citation in the analogous context in *Citizens United*.

Vermont Right to Life Comm., Inc. v. Sorrell, 875 F. Supp. 2d 376, 399 (D. Vt. 2012) *aff’d*, 758 F.3d 118 (2d Cir. 2014).

While claiming the existence of a “strong trend” of cases following *McIntyre* and

Talley, Mr. Stewart fails to note the First, Sixth, and Eleventh Circuits' similar conclusions regarding the constitutionality of disclaimer requirements and the inapplicability of *McIntyre*. As the First Circuit explained:

Finally, we agree with the district court that "*Citizens United* has effectively disposed of any attack on Maine's attribution and disclaimer requirements." *Nat'l Org. for Marriage*, 723 F.Supp.2d at 267. NOM argues that Maine's "attribution and disclaimer requirements are so great that the government's interest does not reflect the burden on speech," as the required disclosures will "distract readers and listeners from NOM's message." We disagree. The requirements are minimal, calling only for a statement of whether the message was authorized by a candidate and disclosure of the name and address of the person who made or financed the communication. Me.Rev.Stat. tit. 21-A, § 1014(1)–(2). These are precisely the requirements approved in *Citizens United*,³⁶ see 130 S.Ct. at 913–14 (citing 2 U.S.C. § 441d), and they bear a close relation to Maine's interest in dissemination of information regarding the financing of political messages. The disclaimer and attribution requirements are, on their face, unquestionably constitutional.

Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 61 (1st Cir. 2011). The Eleventh Circuit recently reached the same conclusion regarding *McIntyre*, *Citizens United*, and the constitutionality of disclaimer requirements.

Challengers also contest the District Court's finding that Florida's advertising disclaimer requirement is constitutional in ballot issue elections. Challengers reference *McIntyre*, in which the Supreme Court explained that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." 514 U.S. at 342, 115 S.Ct. at 1516. In *Citizens United*, however, the Supreme Court expressly rejected the argument that a broadcast advertisement disclaimer requirement was unconstitutional because it "decrease[d] both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer." 558 U.S. at 368, 130 S.Ct. at 915. The Court noted, among other things, that it had explained in *Bellotti* that "[i]dentification of the source of advertising may be required as a means of disclosure." *Id.* (quoting *Bellotti*, 435 U.S. at 792 n. 32, 98 S.Ct. at 1424 n. 32).

Worley v. Florida Sec'y of State, 717 F.3d 1238, 1253 (11th Cir. 2013); see also *Fed.*

Election Comm'n v. Pub. Citizen, 268 F.3d 1283, 1288 (11th Cir. 2001) (affirming constitutionality of disclaimer requirements; “Relying largely on *McIntyre*, Public Citizen argues that the governmental interest in aiding the public in evaluating the candidates cannot withstand constitutional scrutiny. [...] For a number of reasons, however, we disagree.”).

Indeed, prior to *Citizens United* the Sixth Circuit affirmed the constitutionality of Kentucky’s disclaimer statute which is required

All newspaper or magazine advertising posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements with reference to or intended for, the support or defeat of a candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words “paid for by” followed by the name and address of the payer.

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 642 n.9 (6th Cir. 1997) (citing Ky.Rev.Stat.Ann. § 121.190(1) (Banks–Baldwin 1995), amended by Ky.Rev.Stat.Ann. § 121.190(1) (Banks–Baldwin 1996 Acts Issue)). The Sixth Circuit found that the Supreme Court’s embrace of campaign disclosures in *Buckley v. Valeo*, and not *McIntyre*, controlled the relevant analysis. 108 F.3d at 646-648; *see also Gable v. Patton*, 142 F.3d 940, 945 (6th Cir. 1998).

Having accused the State of misleading the Court,⁵ and having cited to this Court decisions which the Ninth and Second Circuit’s have themselves recognized to no longer be properly decided, Mr. Stewart next affirmatively misrepresents the current validity of *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004). Mr. Stewart contends that “*Majors* is no longer good law in the Seventh Circuit or elsewhere, if it ever was.” Motion for Leave at

⁵ See Motion for Leave at 1.

1; *see also* Amicus Br. at 9. Unlike *Heller* and *VRLC I*, *Majors* remains the law of the Seventh Circuit. Decided after *McConnell* but before *Citizens United*, the Seventh Circuit correctly anticipated the Supreme Court's direction when it affirmed the constitutionality of an Indiana statute requiring election advertisements regarding a clearly identified candidate to contain "a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of persons who paid for ... the communication" and made a violation of the statute a misdemeanor crime. *Majors*, 361 F.3d at 350. The correctness of *Majors* has been confirmed by *Citizens United*.

In sum, the First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits have all affirmed the constitutionality of disclaimer requirements in both facial and as-applied challenges. All but one of those decisions occurred after *Citizens United*.⁶

Finally, Mr. Stewart contends that the Fifth Circuit's decision in *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005), controls the outcome of this litigation and mandates a declaration that Mississippi's campaign disclaimer law is unconstitutional.

⁶ It appears that the only case Mr. Stewart cites which was decided after *Citizens United* and which found disclaimer requirements to be unconstitutional is *Hatchett v. Barland*, 816 F. Supp. 2d 583, 599 (E.D. Wis. 2011). That district court opinion drew a distinction between candidate elections and ballot-initiative type of elections. The district court found that the state had little or no interest in anti-corruption or voter education in ballot-initiative elections. *Id.* *Hatchett* is not helpful to Mr. Stewart as plaintiffs distributed their election materials in opposition to a candidate and, more importantly, the Fifth Circuit rejected the distinction between candidate and ballot-initiative elections for purposes of voter education in *Justice*. *See Justice v. Hosemann*, 771 F.3d 285, 297-98 (5th Cir. 2014) ("the informational interest that the Supreme Court described approvingly in *Buckley* seems to be at least as strong when it comes to ballot initiatives. The vast majority of our sister circuits to have considered the issue have so held.")

See *Amicus Br.* at 8. This orange does not belong in the basket of apples discussed above. *Faulkner* was a challenge to the University of Texas' "Literature Policy" which required that "all printed materials distributed on campus bear the name of a university-affiliated person or organization responsible for their distribution." *Id.* at 763. The Fifth Circuit, applying strict scrutiny to this non-campaign related restriction, declared the policy to violate the First Amendment. *Id.* at 769-770. Thus, Mr. Stewart contends that this Court must apply strict scrutiny to Mississippi's disclaimer requirement and find it to be constitutionally wanting. Here, he errs again.

After *Faulkner* was decided in 2005, the Supreme Court reaffirmed that First Amendment challenges to disclosure and disclaimer requirements "in the electoral context" are reviewed under exacting scrutiny and not strict scrutiny. *Doe*, 561 U.S. at 196; *Citizens United*, 558 U.S. at 366 ("Disclaimer and disclosure requirements" are subject to exacting scrutiny). Exacting scrutiny requires a "substantial relation" between the disclaimer requirement and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67. Thus, *Faulkner* is easily distinguishable both by its use of strict scrutiny and for the government interest advanced by the defendant. The University argued that its policy served the government interest of "prevent[ing] littering on campus" and "ensures that literature is not distributed by non-affiliated individuals or groups, thus preserving the campus for use by students, faculty, and staff." 410 F.3d at 764. Not surprisingly, the Fifth Circuit found those interests to be less than persuasive.

In contrast, the Supreme Court and numerous circuit courts have recognized that the government's interest in: (a) educating voters about those seeking to influence their

votes, (b) combating the appearance of political corruption by identifying monetary supporters, (c) detecting secondary violations of campaign finance laws, and (d) ensuring that voters can distinguish between advertisements paid for by a candidate and those run on behalf of a candidate by third-parties are all “sufficiently important” interests in the context of elections such that disclaimer requirements are constitutional under exacting scrutiny review. *See Citizens United*, 558 U.S. at 367, 368 (disclaimers provide “electorate with information” so that voters “make informed choices in the political marketplace”; “disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party”); *Yamada*, 786 F.3d at 1203; *VRLC II*, 758 F.3d at 133; *Nat’l Org. for Marriage*, 649 F.3d at 61; *Kentucky Right to Life, Inc.*, 108 F.3d at 648 (disclaimers serve “Kentucky’s substantial interests in notifying the public of the source of campaign expenditures, along with preventing actual and perceived corruption in the political process”).

While the Fifth Circuit has not directly addressed the constitutionality of campaign-related disclaimer requirements, the Fifth Circuit has recently and on two occasions rejected First Amendment challenges to campaign-related disclosure requirements. In doing so, the Fifth Circuit found that the “public has an interest in knowing who is speaking about a candidate and who is funding that speech.” *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 440 (5th Cir. 2014) (quoting *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 698 (D.C. Cir. 2010)); *Justice v. Hosemann*, 771 F.3d 285, 297 (5th Cir. 2014) (“our cases recognizing a governmental interest in disclosure did so in the context of candidate elections”).

Conclusion

In addition to those parts of *Citizens United* which have been criticized for opening wide the spigot of dark and anonymous money in politics, *Citizens United* has been lauded for its full-throated embrace of disclaimer and disclosure requirements as the sunshine which exposes dark and anonymous money. For the system to properly function, “the public has an interest in knowing who is speaking about a candidate shortly before an election.” *Citizens United*, 558 U.S. at 369. In that respect, it is neither controversial or surprising that “disclaimer and attribution requirements are, on their face, unquestionably constitutional.” *Nat’l Org. for Marriage*, 649 F.3d at 61. Mr. Stewart does not meet the criteria to participate in this matter as an amicus. For the reasons set forth above, the motion for leave should be denied.

Respectfully submitted, this the 11th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically with the Clerk of Court using the Court's ECF system and thereby served on the following persons:

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I certify that I have hereby mailed, via United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing in the above-styled and numbered cause to the following non-ECF participant:

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THIS the 11th day of March, 2016.

S/Harold E. Pizzetta, III
Harold E. Pizzetta, III