No.18-377

In The
Supreme Court of the United States

MONTANANS FOR COMMUNITY DEVELOPMENT,

Petitioner,

v.

JEFFREY A. MANGAN, IN HIS OFFICIAL CAPACITY AS THE MONTANA COMMISSIONER OF POLITICAL PRACTICES, *ET AL.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to the regulation of core political activity.

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SUMMARY OF THE ARGUMENT

In 1976, this Court narrowly construed a federal campaign finance law in order to shield civil society from overregulation. *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). And while *Buckley* remains this Court's cornerstone case governing questions of money and elections, the Court has failed to police one of its core holdings: the requirement that comprehensive regulation may only be imposed upon

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have consented to the filing of this brief.

groups spending a majority of their funds on unambiguous electoral advocacy. This case provides an opportunity for the Court to reassert that standard.

Certiorari would do more than restore foundational case law. Several states, including Montana, have chosen to enforce their campaign finance laws via a single, often politically involved, individual. As Commissioner Mangan's predecessor's experience teaches, such arrangements raise the specter of partisan enforcement of the laws, or at the very least, the appearance of such corrupt enforcement. Because the major purpose requirement is clear and objective, it greatly reduces such risks compared to the vague political committee laws at issue here. Mandating its application can alleviate the appearance of partisan enforcement not only in Montana, but nationwide.

ARGUMENT

I. *Certiorari* Ought To Be Granted To Preserve *Buckley*'s Major Purpose Requirement.

"In the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014). This is especially true in the context of campaign finance laws, where improperly tailored regulatory regimes "impermissibly inject the Government into the debate over who should govern." *McCutcheon*, 572 U.S. at 192 (citation and quotation marks omitted). Because "those who govern should be the *last* people to help decide who *should* govern," *McCutcheon*, 572 U.S. at 192 (emphasis in original),

this Court has strictly limited the tools available to governments wishing to regulate the financial participation of Americans in campaigns. These rules preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). One of these limits on government power is the "major purpose test."

That rule comes from *Buckley v. Valeo*, this Court's "seminal campaign finance case." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting). There, this Court narrowly construed a federal statute that imposed political committee ("PAC") status, which largely consists of registration, reporting, and donor disclosure requirements, on civil society groups. This Court held that such regulations were constitutionally impermissible unless the group was "under the control of a candidate or the major purpose of [the group]…[was] the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.

This rule, designed to save an otherwise overbroad statute from invalidation under the First Amendment, ensures that the registration and disclosure burdens of PAC status fell only upon unambiguously political organizations, those which are "by definition, campaign related." *Buckley*, 424 U.S. at 79; *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016) ("Disclosure chills speech"); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) ("*MCFL*") (O'Connor, J., concurring) ("In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's

contributors, but also the potential burden of disclosure requirements on a group's own speech") (internal citations omitted).

Consequently, the "major purpose" requirement is a crucial limit on a state's capacity to regulate civil society, and at the federal level, thanks to *Buckley* and its progeny, it works to protect issue speakers from the thicket of registration, regulation, filing requirements, contribution limits, and disclosure mandates. *See NAACP v. Ala.*, 357 U.S. 449, 466 (1958) (First Amendment protects "the right" of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing").

It also, if properly applied, is a simple test: if an organization spends more than 50 percent of its expenditures on speech which either expressly advocates an outcome in electoral contests for public office, *Buckley*, 424 U.S. at 44, n. 52,[2] or is the "functional equivalent" of such speech, *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007),[3] the government may impose "a more formalized organizational form," *MCFL*, 479 U.S. at 266 (O'Connor, J., concurring), including the regular filing of disclosure reports. Otherwise, it may not. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (*en banc*) (striking down campaign finance law that imposed repeated

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[2] "[C]ommunications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *See also* 11 C.F.R. § 100.22(a).

[3] "[I]f the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See also* 11 C.F.R. § 100.22(b).

disclosure requirements for making a single election-related communication); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (striking down PAC requirements, including regular filing of disclosure reports, for group spending less than $3,500 on express advocacy).

Nevertheless, other circuit courts of appeal have increasingly refused to apply the *Buckley* major purpose standard, failing to comply with "past judicial efforts to ensure laws imposing PAC status and accompanying burdens are limited in their reach." *Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 872. Despite this Court's instruction that appellate courts should "leav[e] this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), the First, Second, Seventh, and Ninth Circuits "have concluded that the major purpose test is not a constitutional requirement." *Vt. Right to Life, Inc. v. Sorrell*, 758 F.3d 118, 135 (2d Cir. 2014); *accord* App. 7a; *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34 (1st Cir. 2011).

This Court's decision not to intervene and preserve the *Buckley* major purpose test in those cases, and similar cases adjudicated by the states, *e.g. Corsi v. Ohio Elections Comm'n*, 571 U.S. 826 (2013); *Indep. Inst. v. Buescher*, 558 U.S. 1024 (2009), has allowed this wound in a cornerstone precedent to fester. Many States have taken this Court's silence as an invitation to do away with the major purpose requirement and impose PAC status upon the expenditure of an arbitrary, and often low, dollar figure. *See* Mo. Rev. Stat. § 130.011(7)(a) (threshold for PAC registration and reporting is receiving

contributions or making expenditures totaling more than $500 during a calendar year, or receiving contributions totaling more than $250 during a calendar year from a single contributor).

Unless this Court weighs in, the major purpose test risks becoming a dead letter, severely undermining the seminal *Buckley* precedent. Without that protection, many organizations, including small grassroots groups lacking counsel or sophisticated internal procedures, will be thrust into a regulatory structure aimed at groups specifically built for high-dollar electioneering. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) (finding that it would be "abhorrent" to regulate "every little Audubon Society chapter" or "Golden Age Club" as a PAC); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney…or seek declaratory rulings before discussing the most salient political issues of our day"). Because these small groups will, in many cases, have failed to register and comply with PAC status laws, they will invite prosecution and substantial civil and even criminal penalties. *See Sampson v. Buescher*, 625 F.3d 1247, 1251 (10th Cir. 2010) ("To persuade their neighbors to oppose annexation, Plaintiffs," *inter alia,* "purchased and distributed No Annexation signs...On July 3, 2006, Putnam, with Hopkins as her attorney, filed a complaint with the Secretary of State alleging that Plaintiffs had violated the campaign finance law"). Others will unquestionably choose to stay silent. *Van Hollen*, 811 F.3d at 488 (campaign finance regulation "chills speech").

II. The Major Purpose Requirement Can Also Stave Off The Appearance Of Partisan Enforcement In Those States Without A Bipartisan Campaign Finance Commission.

Civil enforcement of federal campaign finance laws is handled by a bipartisan enforcement agency, the Federal Election Commission ("FEC"). It is "worth remembering that the enforcement history of modern campaign finance regulation" pre-FEC "began with the attempted suppression of a small group of ACLU activists who had advocated the impeachment of Richard Nixon." Samuel Issacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," 77 Tex. L. Rev. 1705, 1712 (June 1999).

With this sort of partisan enforcement of the law in mind, Congress designed the current FEC so that it could not "become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate," given that "the FEC has such a potential for abuse." Federal Election Commission, Legislative History of the Federal Election Campaign Act Amendments of 1976 at 89 (written statement of Sen. Alan Cranston of California).[4]

Hence the Commission's present structure, which has gone unchanged since the 1970's: "No more than 3 members" of the six-member Commission "may be affiliated with the same political party," 52 U.S.C. § 30106(a)(1), and the Commission cannot take

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[4] *Available at:* https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf

meaningful action without the votes of four commissioners. 52 U.S.C. § 30109.

In practice, this means that the Commission has two equal blocs—one generally affiliated with the Democratic Party and one with the Republican Party. This "purposefully bipartisan structure…ensures" that the FEC "cannot be abused by one party or the President to hamper political opponents." Luke Wachob, *Bipartisanship works for the FEC*, Washington Examiner (Oct. 19, 2014).[5]

Some States replicate—more or less—the Commission's bipartisan structure. A common arrangement is an odd-numbered, yet still bipartisan commission, akin to the Securities and Exchange Commission or the Federal Communications Commission. Alaska Stat. Ann. § 15.13.020(b-c) ("The governor shall appoint two members of each of the two political parties whose candidate for governor received the highest number of votes in the most recent preceding general election at which a governor was elected," and those members shall "nominate to the governor an individual to serve as the fifth member of the commission"); Cal. Gov. Code § 83100 ("There is hereby established in state government the Fair Political Practices Commission. The Commission shall have five members, including the chairman. No more than three members of the Commission shall be members of the same political party"); Conn. Gen. Stat. § 9-7a(a) ("There is established a State Elections Enforcement Commission to consist of five members,

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[5] *Available at*: https://www.washingtonexaminer.com/bipartisanship-works-for-the-fec

not more than two of whom shall be members of the same political party and at least one of whom shall not be affiliated with any political party").[6]

But many States have chosen to eschew the creation of an independent body, and instead vest enforcement in a single person. *See* Mass. Gen. Laws ch. 55, § 3 (establishing office of "director of campaign and political finance"). Sometimes this person is a political appointee. Mont. Code. Ann. § 13-37-102(1) ("There is a commissioner of political practices who is appointed by the governor, subject to confirmation by a majority of the senate"). Other States vest civil enforcement authority in a partisan, elected official. Colo. Const. art. XXVIII, sec. 9 (vesting enforcement authority in the Secretary of State). Some governments supplement this arrangement by creating a third-party complaint—and even third-party enforcement—process. Prevailing parties in such actions can even collect money for their efforts. *E.g.* Cal. Gov. Code §§ 91004, 91007, 91009.

This often means, inevitably, that those complaints will be filed by political opponents or those nursing a grudge. *See, e.g. Coloradans for a Better Future v. Campaign Integrity Watchdog*, 490 P.3d 350, 351 (Colo. 2018) ("[Mr.] Arnold, or his organization Campaign Integrity Watchdog…has since filed a series of campaign-finance complaints against Better Future; this is the fourth…").

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[6] Other States have also, in the interest of balance, included more dubious diversity requirements. Ark. Code Ann. § 7-6-217(b)(1) ("In making appointments to the commission, the appointing officials shall ensure that at least one (1) member of a minority race, one (1) woman, and one (1) member of the minority political party, as defined in § 7-1-101, serves on the commission").

In those jurisdictions, the opportunities for viewpoint suppression, partisan gamesmanship, or both are greater than in those states that have carefully constructed a bipartisan enforcement process. The vaguer the law or the lower the tripwire for regulation, however, the more room available for mischief. *See Minn. Voters Alliance v. Mansk*y, 585 U.S. __; 138 S. Ct. 1876, 1891 (2018) ("It is 'self-evident' that an indeterminate prohibition carries with it '[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation'") (quoting *Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)) (brackets in original). Even where officials act honestly, such arrangements can still create an appearance of partisan enforcement when there is no bright line for the enforcing official to point to for support. *See Minn. Voters Alliance*, 138 S. Ct. at 1891 ("We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards").

This is not an ephemeral concern. A brief review of Respondent Mangan's predecessor, Jonathan Motl, and his tenure as Commissioner of Political Practices is instructive. As a single individual vested with FEC-like authorities, Mr. Motl used "questionable tactics, such as refiling old complaints that had been dismissed and directing investigations to get the results he want[ed]," including "target[ing] specific candidates." Mike Dennison, *'Partisan hack' or 'thorough professional'? Crusading political commissioner has been called*

both, Helena Independent Record (Jan. 26, 2014) (quotation marks omitted).[7] One of Commissioner Motl's predecessors denounced him for "transforming his office and abusing his power." Ed Argenbright, *Guest opinion: Motl misuses power in prosecuting Wittich campaign finance case*, Billings Gazette (May 25, 2016).[8] Commissioner Motl, a Democratic appointee, regularly went "after conservative groups or parties," and in a prosecution against a Republican officeholder, "he filed as the plaintiff party and lawyer and designated himself an expert witness." The Editorial Board, *A Speech Mugging in Montana*, Wall Street Journal (Jan. 8, 2016).[9]

This perceived partisan atmosphere led one Republican officeholder to report that "most Republican[]" legislative candidates "are beyond paranoid about the prospect of making an honest mistake" in a campaign finance report, "and having the commissioner of political practices act against them." Rep. Carl Glimm, *A danger to citizen participation in Montana politics*, Helena Independent Record (May 18, 2016).[10]

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[7] *Available at*:
https://helenair.com/news/local/partisan-hack-or-thorough-professional-crusading-political-commissioner-has-been/article_82f1ad02-8657-11e3-90df-0019bb2963f4.html

[8] *Available at*:
https://billingsgazette.com/news/opinion/guest/guest-opinion-motl-misuses-power-in-prosecuting-wittich-cammpaign-finance/article_ad770737-af0f-58f2-8a10-c4d4ed537e06.html

[9] *Available at:*
https://www.wsj.com/articles/a-speech-mugging-in-montana-1452297515

[10] *Available at:*

Had Montana adopted a bipartisan enforcement agency modeled after the FEC, these concerns would have been more easily dismissed. But in the absence of such an agency, credible fear of selective enforcement can also be cured by bright-line campaign finance rules that are incapable of being blurred or bent by partisan prosecutors. The major purpose requirement, a largely mathematical rule, embodies this approach.

The appearance of corruption is so toxic that it can support governmental limits on core First Amendment activity like contributing to political campaigns. *McCutcheon*, 572 U.S. at 207. To prevent that appearance, this Court should also demand that campaign finance regulations apply "objective, workable standards," *Minn. Voters Alliance*, 138 S. Ct. at 1891. Otherwise, the discretion to apply vague tests will raise legitimate concerns about unfairness, especially when wielded by an unchecked, partisan officer.

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https://helenair.com/news/opinion/guest/a-danger-to-citizen-participation-in-montana-politics/article_c1a7d341-e1b3-5b25-b909-264641cf217e.html

CONCLUSION

For the foregoing reasons, and those given in the Petition, this Court should grant the writ.

Respectfully submitted,

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