No. 18-377

In The
Supreme Court of the United States

Montanans for Community Development,
Petitioner

v.

Jeffrey A. Mangan et al., *Respondents*

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

Reply to Brief in Opposition

Anita Y. Milanovich
MILANOVICH LAW, PLLC
100 E. Broadway St.
The Berkeley Room
Butte, MT 59701
406/589-6856
Counsel for Petitioners

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Courtney Turner Milbank
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)
jboppjr@aol.com
Lead Counsel for Petitioners

January 2019

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, Regulations & Rules

Other Authorities

Reasons to Grant the Petition

Montana imposes PAC-status and -burdens for spending merely $251 on political speech, regardless of a group's overall purpose. The group could be a tiny expressive-association (such as MCD), or a church (as in *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009)), or a giant conglomerate. But its overall purpose doesn't matter to Montana. This imposition of PAC-status and -burdens with no purpose test at all is contrary to this Court's major-purpose test in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*").

Montana attempts to belittle MCD with irrelevant facts, e.g., "no members, no website, no email," etc. (Opp'n 6.) But Montana actually highlights two key facts favoring review, given the concern about speech chilled by the PAC-status and -burdens that motivated this Court's major-purpose test in *Buckley* and *MCFL*. (Pet. 6-13.)

First, MCD is a small expressive-association that would be specially burdened by PAC-status and -burdens. Montana implies that the First Amendment only protects large, sophisticated speakers, though it clearly protects the little guy too. *See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Second, because MCD has long been chilled from its planned political speech by PAC-status and -burdens, it has no website, email, etc. to support its chilled message. *Cf. FEC v. Wisc. Right to Life*, 551 U.S. 449, 462 (2007) (issue-advocacy groups can't plan far in advance of actual speech). This chill from PAC-status and -bur-

dens is precisely why this Court established the major-purpose test. (Pet. 6-13.) This case presents a concrete example of what this Court feared would happen absent the major-purpose test for PAC-status and -burdens: a small expressive-association has been crushed from the beginning from speaking and acting because expenditures for political speech trigger PAC-status and -burdens. MCD is ready to promote its message—with concomitant activities—when it can do so without PAC-status and -burdens. But it is chilled because Montana doesn't apply this Court's major-purpose test.

Montana tried this ad-hominem tactic here before, calling American Tradition Partnership ("ATP") "a shell" and a "shell game" that "sold itself to corporate campaign donors as a conduit." Br. in Opp'n at 5, 16-17, *ATP v. Bullock*, 567 U.S. 516 (2012) (No. 11-1179). But undeterred, this Court summarily reversed a holding that Montana need not follow *Citizens United v. FEC*, 558 U.S. 310 (2010). 567 U.S. at 516. Likewise here, Montana's ad-hominem attack doesn't alter the facts that MCD is protected by the First Amendment and Montana must follow *Buckley* and *MCFL*.

I.

This Case Presents the Important Question of Whether PAC-Status and Onerous, Entity-Based Burdens May Be Imposed Absent *Buckley*'s "Major Purpose" in State Elections.

Montana seeks to evade the first issue—whether *states*[1] may impose PAC-status and -burdens absent

[1] *Federal* PACs require the major-purpose test. FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) (Organizations "must ... have *the* major purpose of engaging in Federal campaign activity." (emphasis added)

Buckley's "major purpose"—in several ways. It first ignores this Court's *reason* for establishing the major-purpose test, i.e., to avoid speech being *chilled* by PAC-status and -burdens. (Pet. 6-12.) Then, it makes erroneous, tangential arguments: (**A**) this case is about mere disclosure; (**B**) incidental-political-committee burdens are minimal; and (**C**) exacting scrutiny controls.

(A) The first is that (i) this case is just about "disclosure" (Opp'n 11) and (ii) this Court has recognized "disclosure as a sufficiently important interest" (Opp'n 19), so (iii) disclosure may be compelled under incidental-political-committee requirements (Opp'n 13). This attempt to reframe the issue at a higher level of generality, i.e., whether *disclosure* may be required, fails for two reasons.

First, the issue here is not whether *disclosure* may be required. MCD said "it could constitutionally be required to make activity-based, one-time, event-driven reports of its political speech" such as the independent-expenditure and electioneering-communication reports upheld in *Buckley*, 424 U.S. at 74-84, and *Citizens United*, 558 U.S. at 366-71, respectively. (Pet. 3 n.5.) Rather, the issue is about what *type* of disclosure may imposed, i.e., whether *entity-based* disclosure may be imposed absent *Buckley*'s "major purpose" in lieu of *activity-based* disclosure.[2]

Second, Montana's disclosure interest is fully met

(citing *Buckley*, 424 U.S. 1, and *MCFL*, 479 U.S. 238)).

[2] *Entity-based* disclosure imposes administrative and organizational burdens, reporting beyond political spending, ongoing reporting (even absent activity), and the need to terminate to avoid PAC duties, while *activity-based* disclosure is one-time, event-driven reporting of an expenditure for political speech. (Pet. 6-8, 11, 14-17.)

by activity-based disclosure of the sort federal law requires for independent expenditures and electioneering communications. In *MCFL*, this Court expressly rejected FEC's argument that MCFL must bear PAC-status and -burdens under the "disclosure" interest" or the disclosure interest would not be adequately met: "there is *no need [to impose PAC-status and -burdens] for the sake of disclosure*," *MCFL*, 479 U.S. at 262 (emphasis added). Rather, activity-based reports sufficed unless and until MCFL's independent expenditures became its major purpose. *Id.* Montana's attempt to revive FEC's failed argument must likewise fail.

(B) Montana's second tangential argument is that incidental-political-committee burdens are "minimal," requiring registration on a "two-page form" that "takes about 10 minutes to complete," and if the PAC makes a single expenditure it might register, report, and terminate "in a single filing." (Opp'n 1, 4-6.) But though Montana briefly notes the contents of the registration report (Opp'n 4), it fails to address what lies behind the information required on that report or otherwise respond to MCD's detailed refutation of such a reductionist description of incidental-political-committee burdens. (Pet. 14-17.) For example, Montana says to just list your treasurer and bank, ignoring the onerous burdens on treasurers that make it hard to find one (Pet. 14-15) and the need to establish a separate bank account for which a separate EIN must first be obtained (Pet. 15). And of course, if a PAC wants to retain its free-speech right it must file detailed, ongoing reports of *all* expenditures and other entity-based information and not terminate PAC-status. So Montana fails to refute MCD's showing that incidental-political-committee disclosure is entity-based, not activity-based, disclosure. Consequently, the burden is neither minimal nor

of the permissible type absent *Buckley*'s "major purpose." Reciting "minimal" is tangential because it does not address what *type* the disclosure is.

(C) Montana's third tangential argument is that exacting scrutiny controls, with the PAC burdens being substantially related to a disclosure interest. (Opp'n 11-22.) Of course, *Citizens United did* apply "exacting scrutiny" to *activity-based* electioneering-communication reports, 558 U.S. at 366-71, *but* it deemed the requirement that (non-major-purpose) corporations speak through a PAC both an impermissible burden[3] and an impermissible substitute for corporations' own speech, *id.* at 337-40, and such a *PAC requirement* is a"[l]aw[] that burden[s] political speech" and so is "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest,'" *id.* at 340. And of course, non-major-purpose entities

---

[3] Those PAC restrictions—declared "onerous," *id.* at 339—are like Montana's incidental-political-committee burdens, which thus may not be deemed "minimal":

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

Id. at 337-38 (citations omitted). Notably these burdens are "onerous" entirely aside from source-and-amount restrictions on contributions to PACs, so no distinction on such grounds is permissible. (*Cf.* Opp'n 18 (attempting to distinguish *MCFL*'s PAC-burden description on such grounds).)

freed in *Citizens United* from the requirement of *having* a PAC can't then be forced to *be* a PAC because they engage in incidental political speech. (Pet. 22.) So imposing PAC-status on non-major-purpose groups triggers strict scrutiny, not exacting scrutiny. Montana relies on the wrong part of *Citizens United*.

But regardless of the scrutiny level, this case presents the issue of what *type* of disclosure is permissible, i.e., whether entity-based disclosure may be imposed on groups lacking *Buckley*'s "major purpose," given that the major-purpose test was imposed to prevent chill on free speech by the very sort of entity-based burdens at issue here. (Pet. 6-19.) So Montana's claim that exacting scrutiny applies and is satisfied is tangential for not addressing the actual issue.

In sum, Montana's three tangential arguments fail to show that the present issue is not a vitally important issue that this Court should decide. And this Court should grant certiorari for three other reasons.

First, this Court should grant review to reaffirm its holdings in *Buckley*, 424 U.S. 1, and *MCFL*, 479 U.S. 238, which clearly established the major-purpose test to prevent chilled speech by entity-based disclosure of the sort at issue here. MCD detailed *Buckley*'s and *MCFL*'s analysis on this point (Pet. 6-19), but though Montana cites *Buckley* five times (Opp'n iii), it never discusses its holding that the major-purpose test is required to prevent chilling speech. And Montana's effort to distinguish *MCFL*, does so on irrelevant grounds (Opp'n 18), ignoring the relevant fact that MCFL rejected FEC's argument that entity-based regulation was required to prevent "undisclosed political spending," 479 U.S. at 262.

Second, this Court should grant review to resolve the circuit-split over whether the major-purpose test

applies to the states (or even exists). (Pet. 19-22.) The splits identified are over the present issue—whether the analysis of *Buckley* and *MCFL* (requiring the major-purpose test for imposed entity-based disclosure) applies to state political-committee laws. Montana again seeks to evade the specific issue by moving to a higher level of generality, claiming that no split exists because the courts all applied "exacting scrutiny." (Opp'n 11.) That fails to address the issue. Montana also tries to reduce the major-purpose test to a "relevant factor" some courts considered (Opp'n 12), but only given "full-fledged PAC status and burdens" (Opp'n 13). Montana fails to refute MCD's demonstration that entity-based disclosure includes a full range of burdens beyond activity-based disclosure and why incidental-political-committee burdens fit within the scope of entity-based activity (Pet. 6-8, 14-17), so its full-fledged versus lesser-fledged argument fails. And this Court's major-purpose test is more than some mere "factor" involved in permissible regulation to advance a disclosure interest. (Pet. 6-13.)[4]

---

[4] MCD has already refuted Montana's "perverse results" argument, which Montana ignores. (*Compare* Pet. 22 *with* Opp'n 16.) Moreover, an "'interest in knowing who is speaking about a candidate shortly before an election'" (Opp'n 2 (quoting *Citizens United*, 558 U.S. at 369)), can be met (as in *Citizens United*) by activity-based electioneering-communication reports and doesn't justify entity-based disclosure. A disclosure interest is not an interest in imposing PAC-status. Montana provides *no* activity-based reporting, instead forcing all groups into entity-based disclosure and leaving single individuals free from all reporting. This substantial underinclusion (of individuals) and forcing all others into entity-based disclosure fails exacting-scrutiny's "fit" requirement and strict-scrutiny's "narrow tailoring."

Third, this Court should grant review to protect core political speech and speakers from (i) chill, for reasons stated in *Buckley* and *MCFL*, (ii) "the specter of partisan enforcement of the laws," or its "appearance," due to the sort of "vague political committee laws at issue here," (*Amici Curiae* Brief of the Institute for Free Speech and the Cato Institute in Support of Petitioners 2), and (iii) the erosion of what is required to impose PAC-status evident in the Ninth Circuit's own decisions. The Ninth Circuit went from approving an *a*-primary-purpose test (in lieu of *Buckley*'s *the*-primary-purpose test) in *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010), to approving mere "purpose" in *Yamada v. Snipes*, 786 F.3d 1182, 1198 (9th Cir. 2015), to approving a PAC-status test with no "purpose" requirement in the decision below. (Pet. 29.)

This Court should grant review to decide this vital issue, reaffirm its precedents, resolve a clear circuit-split, and protect speech from chill.

II.
This Case Presents the Important Question of Whether Nonprecedential Decisions Violate Article III or Undermine Judicial Integrity, Requiring this Court to Exercise Its Supervisory Responsibility.

Montana argues that the circuits are not split on the constitutionality of nonprecedential decisions and that the issue is stale. (Opp'n 22, 23, 25.) By nature, the question of nonprecedential decisions has rare opportunity to be asserted because the issue first arises at the conclusion of appellate review. This leaves parties to litigate it through rehearing or United States Supreme Court review, which are rarely granted.

While this inevitably prevents a more robust, traditional circuit-split to develop, an analytical split in the circuits has arisen in the Eighth and Ninth Circuits between *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000) and *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

A split in the circuit rules as to the threshold for issuing decisions also exists, *compare, e.g.,* 9th Cir. R. 36-2 (establishing 7 criteria for publication) *with* 2d I.O.P. 32.1.1 (authorizing nonprecedential summary orders only where a decision "is unanimous and each panel judge believes that no jurisprudential purpose is served by the opinion"), though objective adherence to those criteria is uncertain. *See Developments and Practice Notes: Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish,* 3 J. App. Prac. & Process 325, 329 (2001) (discussing studies showing the decision not to publish to be subjective regardless of the threshold established in the circuit, ideologically-driven, and correlated to "upperdog" (government and corporations) and "underdog" (unions, individuals, minorities) status).

Montana argues that the breadth and scope of MCD's claims,[5] along with Ninth Circuit "well-established precedent," justified treating MCD's case differently. (Opp'n at 23-24.) But the court below was not considering an interlocutory appeal for district court factual errors, *see Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 169 (1984) (Stevens, J., dissenting), but a final, dispositive judgment on issues of con-

[5] MCD's complaint was amended twice to assert colorable claims in direct response to the adoption and revision of Montana's campaign finance statutes and regulations in 2015—111 pages in all—and to evidence found in discovery.

stitutional law. *See Plumbley v. Austin,* 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting) (discussing how three Fourth Circuit publication criteria—establishing a rule of law in the circuit, involving a legal issue of continued public interest, and creating a conflict with another circuit—all warranted a binding, published decision from the lower court). The PAC issue here is not whether MCD is factually subject to PAC-status and -burdens under Montana law, but whether MCD and others like it can constitutionally be subject to PAC-status and -burdens under the First Amendment. The precedent on this legal issue is far from well-established, even in the Ninth Circuit. *See supra* at 6-8. That MCD is a small group raising numerous constitutional claims does not justify denying it equal justice and undermining judicial integrity. MCD is bound by the outcome of this litigation. *See, e.g.,* 9th Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion."). Under the Rule of Law, the court adjudicating it should be, too.

This court should exercise its supervisory role and grant review to address the circuits' disagreement on this important question, to ensure equal justice under the law, and to preserve judicial integrity of the courts.

Conclusion

This Court should grant this petition.

Respectfully submitted,

Anita Y. Milanovich
MILANOVICH LAW, PLLC
100 E. Broadway St.
The Berkeley Room
Butte, MT 59701
406/589-6856
Counsel for Petitioners

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Courtney Turner Milbank
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)
jboppjr@aol.com
Lead Counsel for Petitioners

January 2019