No. 19-767

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS, INC.,
Petitioner,
v.
JEFF MANGAN, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF POLITICAL PRACTICES FOR THE STATE OF MONTANA, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, The National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, Patriotic Veterans, Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, American Target Advertising, and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Free Speech Coalition, Gun Owners of America, Inc., The National Right to Work Committee, Patriotic Veterans, Public Advocate of the United States, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Free Speech Defense and Education Fund, Gun Owners Foundation, U.S. Constitutional Rights Legal Defense Fund, Downsize DC Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). American Target Advertising is a for-profit corporation headquartered in Manassas, Virginia. Restoring Liberty Action Committee is an educational organization.

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Some of these *amici* were plaintiffs in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), and many have filed *amicus* briefs in other cases in this Court involving election law, including:

- Nixon v. Shrink PAC, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (U.S. Supreme Court) (June 7, 1999);
- Federal Election Commission v. Beaumont, Brief *Amicus Curiae* of Real Campaign Reform.org, *et al.* (U.S. Supreme Court) (Feb. 10, 2003);
- Federal Election Commission v. Wisconsin Right to Life, Brief *Amicus Curiae* of Citizens United, *et al.* (U.S. Supreme Court) (Mar. 23, 2007);
- Citizens United v. Federal Election Commission, Brief *Amicus Curiae* of Free Speech Defense and Education fund, *et al.* (U.S. Supreme Court) (June 31, 2009);
- McCutcheon v. Federal Election Commission, Brief *Amicus Curiae* of Downsize DC Foundation, *et al.* (U.S. Supreme Court) (May 13, 2013); and
- Independence Institute v. Federal Election Commission, Brief *Amicus Curiae* of Free Speech Defense and Education Fund, *et al.* (U.S. Supreme Court) (Jan. 9, 2017).

SUMMARY OF ARGUMENT

In 2015, the Montana legislature enacted a law governing "electioneering communications" — borrowing a term which Congress had employed in the

Bipartisan Campaign Reform Act of 2002 to require reporting of a narrow category of broadcast advertisements mentioning a candidate, which are made shortly before an election. However, Montana legislators chose to infuse that term with such extraordinary breadth that it applies to virtually any type of communication whatsoever to more than 100 persons, which even mentions a Montana elected official seeking re-election, and which are made during six months of every election year. Under the Montana definition, virtually any criticism of state officeholders seeking re-election is at least heavily regulated, if not suppressed.

Moreover, Montana treats as "electioneering communications" those communications traditionally understood to be pure "issue advocacy." While the purpose of the law was said to increase public knowledge about election-related communications, the Chapter title of the Montana Code encompassing these restrictions reveals the legislature's incumbent-protection goal — to exercise state "**Control** of Campaign Practices." Montana Code Annotated, Title 11, Chapter 37 (emphasis added).

In 2012, the Montana Supreme Court refused to apply this Court's Citizens United decision to its state law banning corporations from making "expenditures" with respect to elections, requiring this Court to act summarily to restore order. Now, with the challenged law, the Montana legislature has developed a more devious way to suppress such expenditures, and the Ninth Circuit has approved that restriction, requiring further action by this Court. The burdens imposed on

nonprofit corporations by this 2015 law will cause many, if not most, to withdraw from the public square not just to avoid the need to report the expenditure once as required under federal law, but also to reconstitute themselves as a "political committee," designating a treasurer, using an in-state bank, complying with recordkeeping requirements, making multiple filings, and disclosing the names, addresses, and occupations of donors of over $35 to the nonprofit organization with respect to such activities.

Through the challenged law, Montana seeks to suppress the exercise by Montanans and others of the rights of assembly and petition. The Ninth Circuit viewed the numerous restrictions and requirements imposed on those wanting to communicate with Montanans as a "minimal burden," but nothing could be farther from the truth. Any "electioneering communication" may be challenged by the "Commissioner of Political Practices," acting on behalf of the legislators, who is empowered with vast powers of investigation and enforcement — and even the power to declare some communications completely exempt from the act. By suppressing communications, the Montana legislature also has abridged Freedom of the Press by usurping the inalienable right of the people to be their own editors in America's free marketplace of ideas. The challenged statute even regulates the distribution of books which have any reference to any person seeking office in Montana. Lastly, the challenged statute would compel charities exempt from federal income taxation under IRC § 501(c)(3) to declare themselves to be "political committees," opening them to unjust criticism for

engaging in electioneering activities, even when they were pursuing their permissible, non-electoral, charitable, and educational activities.

ARGUMENT

I. THE STATE STATUTE UNDER REVIEW IS MONTANA'S SECOND ATTEMPT TO CIRCUMVENT THIS COURT'S DECISION IN CITIZENS UNITED.

On June 25, 2012, in a one-paragraph opinion, this Court summarily struck down a century-old Montana state law which banned all corporations from making "expenditures" with respect to elections. *See* American Tradition Partnership, Inc. v. Bullock, 567 U.S. 516 (2012). In doing so, this Court gave notice that its decision in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) was not to be trifled with — the First Amendment secures the freedom of all American citizens, including those who employ the corporate form, to exercise their rights.

Undeterred by that judicial setback, the Montana state legislature enacted a second law to achieve much the same purpose, but through an indirect and much more subtle approach. Under the guise of controlling "electioneering communications," the Montana legislature enacted a law designed to severely control, if not eliminate, corporate expenditures in the state's political marketplace. *Certiorari* should be granted to bring to an end this second attempt to end run Citizens United. Indeed, insofar as the Montana legislature enacted this 2015 law in the aftermath of,

and in defiance of, this Court's decision in Citizens United, these *amici* suggest that this case is a candidate for this Court to summarily grant, vacate, and remand the Ninth Circuit's decision which upheld the Montana law.

A. Montana's First Effort to Ban Corporate Expenditures with MCA § 13-35-227 (1912).

Challenged in the earlier litigation was a 1912 Montana law which prohibited corporations from making an expenditure[2] in connection with a candidate or a political committee that supports or opposes a candidate or a political party. *See* § 13-35-227, Montana Code Annotated ("MCA"). Montana law allowed such expenditures to be made only by political committees.

The state district court which heard the challenge readily understood that Citizens United governed it, finding that the statute was "unconstitutional and unenforceable due to the operation of the First Amendment" and that "'*Citizens United* is unequivocal; the government may not prohibit independent and indirect corporate expenditures on political speech.'"

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[2] The 1912 statute equally prohibited corporate "expenditures" and "contributions," which is at fundamental odds with this Court's principled distinction developed in Buckley v. Valeo, 424 U.S. 1 (1976), where greater regulation over contributions (including coordinated expenditures) was allowed, due to the danger of "corruption and the appearance of corruption," than was allowed over expenditures, where there was no such risk. *See id.* at 25.

Western Tradition Part. v. Montana Attorney General, 2010 Mont. Dist. LEXIS 412, *17 (1st Judicial District Court of Montana, Lewis and Clark County, 2010) (citation omitted).

However, on appeal, the Montana Supreme Court reversed, with two strong dissenting opinions. *See* Western Tradition Partnership v. Attorney General, 271 P.3d 1 (Mont. 2011). The Court took the position that the history of political corruption in Montana and aspects of the electorate and campaigns in Montana created a political culture which was unique, resulting in the State legislature being deemed to have a much more compelling state interest to enact and defend its state prohibition than the federal interest deemed insufficient in Citizens United. The two dissenting justices objected to this attempt to distinguish Citizens United, with Justice Nelson rejecting the call by some for Montana "to thumb its nose at the federal government...." *Id*. at 71 (Nelson, J., dissenting). It was this decision of the Montana Supreme Court which was summarily reversed by this Court in 2012.

B. Montana's Second Effort to Ban Corporate Expenditures with MCA § 13-1-101 (2015).

Montana legislators would not relent in their effort to protect themselves from public criticism (*see* Section III, *infra*), going back to their drawing boards to develop another means to achieve their objective. They did so with a vengeance with a new statute in 2015. The method chosen was to define the term "electioneering communication" in the broadest

possible manner and to impose the extraordinary burden of "political committee" status on any corporation daring to make independent expenditures.

The term "electioneering communication" came into the lexicon of election law in Section 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 116 Stat. 89, which created a discrete subset of independent expenditures:

> (i) The term 'electioneering communication' means any **broadcast, cable, or satellite** communication which —
>
> (I) refers to a clearly identified **candidate** for Federal office;
>
> (II) is made within — (aa) **60 days** before a general, special, or runoff election for the office sought by the candidate; or (bb) **30 days** before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is **targeted** to the relevant electorate. [*Id*., § 201(a) (emphasis added).]

Significantly, the BCRA definition of "electioneering communication" does not require the speaker to engage in "express advocacy" (*e.g.*, "vote for" or "vote against" under Buckley at 44, n.52) or even "the functional equivalent of express advocacy" (11 C.F.R. § 109.21(c)(5)). The definition is triggered by a single reference to a candidate — most often an

incumbent officeholder seeking re-election. And there is not even a requirement that the communication refer to an election. Rather, even a pure "issue ad" addressing a public policy matter, that is communicated in the month(s) before an election (when the American people are often paying the most attention to how they have been represented) which deigns to criticize an incumbent by name (such as for a vote taken on an important issue), became heavily regulated. In these two respects, the definition of "electioneering communication" in the Montana statute is the same as the BCRA definition.[3]

In most other respects, however, the Montana statute dramatically expands each of the four criteria under BCRA. While the BCRA definition applies only to "broadcast, cable, or satellite communication[s]" Montana applies its law to almost every type of communication imaginable — "radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials..." MCA § 13-1-101. While the BCRA definition applies only to a communication which references a "candidate," Montana adds any reference to a "political party, ballot issue, or other question submitted to the voters...." While the BCRA definition applies only to communications within 30 days of a primary election or 60 days of a general election, Montana extends the period to 85 days before either a

[3] Additionally, both BCRA and the Montana statutes regulating "electioneering communications" include an exception for the institutional press.

primary or a general election.[4] And while the BCRA definition requires targeting to the relevant electorate, which Federal Election Commission ("FEC") regulations define to mean reaching 50,000 voters (11 C.F.R. § 100.29a(b)(3)), Montana reduces the number of people reached to any number "more than 100." *See* Petition for Certiorari Appendix ("App.") at 61.

This Court approved BCRA's special regulations imposed on "electioneering communications" in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), because the BCRA rules were directed at a specifically defined form of communication — targeted broadcast ads aired in a short window before an election. Because the Montana law is far more expansive, this Court's analysis in McConnell cannot be presumed to sanction Montana's statute simply because the Montana legislators employed the same term — "electioneering communications" — as was used in BCRA. *See id*. at 189-94.

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[4] The 2020 Montana primary date is June 2, 2020, and 85 days before then is March 9, 2020. The 2020 Montana general election is November 2, 2020, and 85 days prior is August 9, 2020. Thus, the period during which Montana's "electioneering communication" rules apply is March 9, 2020 through June 2, 2020, and August 9, 2020 through November 2, 2020 — about half of the year.

C. Montana Law Even Regulates Distribution of Books Mentioning Candidates.

The Petition for Certiorari ("Pet. Cert.") provides an illustration of how Petitioner National Association for Gun Rights ("NAGR") would be constrained if it sought to mail a book to just 100 persons in the months before an election. *See* Pet. Cert at 24. This scenario is entirely plausible. Indeed, the Montana definition of "electioneering communication" includes "any other distribution of printed materials," which would certainly include books. MCA § 13-1-101(16)(a).

This is very similar to the type of campaign finance restriction which caused this Court to express great concern during the first argument before this Court in Citizens United. Deputy Solicitor General Malcolm L. Stewart adopted the position that the FEC "could prohibit the publication of [a] book using the corporate treasury funds," on a service such as Kindle employing satellites before an election. *See* Citizens United oral argument (Mar. 24, 2009) at 27-30. During re-argument after supplemental briefing, then-Solicitor General Kagan, for the United States, withdrew that extremely controversial position. *See* Citizens United oral argument (Sept. 9, 2009) at 64-68. Now, with its 2015 law, Montana has reverted to a position similar to that repudiated by General Kagan, *i.e.*, that a state may regulate the distribution of a book before an election.

D. Montana Law Imposes Burdensome Political Committee Status on Individuals and Corporations.

Not content to expand the term "electioneering communications" to include virtually all forms of communication, the Montana scheme increases the burden on entities conducting electioneering communications in order to discourage their use. Although federal law only requires that the entity making the electioneering communication file a report with the FEC (*see* 52 U.S.C. § 30101(f)(2)(E) & (F)), Montana law requires the entity to reconstitute itself as a political committee, complete with organizational, recordkeeping, reporting, and other requirements. MCA § 13-1-101(a)(31) defines "political committee" to be "a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure: ... (iii) to prepare or disseminate an ... electioneering communication...." Federal law does not convert one corporation or two individuals into a political committee — but Montana law does. By virtue of declaring either one corporation or two persons acting together to be a "political committee," Montana then imposes the continuing burdens of appointing a campaign treasurer,[5] maintaining money in a bank

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[5] The only statutory burden on organizations making electioneering communications that was lifted by the Montana Supreme Court was the requirement that the committee have a treasurer who was a "registered voter" in Montana. *See* NAGR v. Mangan, 933 F.3d 1102, 1120 (9th Cir. 2019) ("NAGR-2").

with branches in Montana, recordkeeping, reporting, etc.

Consider how the Montana definition of a political committee would apply to two neighbors in any town in Montana. Suppose that a member of the legislature had introduced and supported a bill to require grocery stores to collect a non-refundable $1.00 fee on each can of food sold in a grocery store in Montana, ostensibly to pay the cost of disposing of that can. Suppose further that these two neighbors collaborated to create and distribute a pamphlet to more than 100 people costing over $250 containing the name and photo of the legislator sponsoring the bill, and explaining how foolish they believed that bill to be. By operation of Montana law, those two neighbors would have just formed a political committee, and all of the requirements of a political committee status are visited upon them. Any number of other examples can be formulated to show that imposing political committee status on those engaged in "electioneering communications" is a remarkable burden which would discourage most citizens from any involvement in such matters. Of course, that is the precise purpose of enacting such burdensome laws. *See* Section III, *infra*.

E. Montana Law Compels Many Nonprofits to Make Public Disclosure of Donor Lists.

Among the most troublesome of those additional requirements imposed by Montana is that a nonprofit would be compelled to disclose components of its donor list to both the public and the government. Each

nonprofit corporation expending any funds for an electioneering communication would be required to disclose the name, address, and occupation of all donors who contribute $35 or more. MCA § 13-37-229(1). For "incidental committees," such as NAGR, public reports must identify (i) all donors who designated the gift to support a specified electioneering communication, and (ii) all persons contributing in response to a general appeal by such committee to support, *inter alia*, electioneering communications. *See* Pet. Cert. at 9-10.

Since it is a common practice for nonprofit organizations to identify multiple programs in fundraising solicitations, any donor who responds to a solicitation which even mentions such communications in passing, and made a donation of $35 or more, would need to be disclosed. Moreover, Montana law does not distinguish between donors from Montana and donors from some other state, so the nonprofit would be required to disclose the identity of donors nationwide. Once the name, address, and occupation of the donor is put on the public record, that individual could become subject to harassment by those who object to the expenditure. In Citizens United, dissenting from the Court's approval of disclosure of donors, Justice Thomas explained the risk:

> I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech...."

> [Citizens United at 485 (Thomas, J., dissenting).]

Thus, Montana's law, having crushed the distinction been contributions and expenditures established in Buckley, and expanded the meaning of "electioneering communications" in McConnell, goes well beyond anything previously sanctioned by this Court. Its effort to regulate and discourage expenditures which present no risk of corruption or appearance of corruption should be rejected.

II. MONTANA LAW SUBVERTS THE PEOPLE'S RIGHT OF ASSEMBLY AND TO PETITION GOVERNMENT.

Petitioner NAGR is a "'grassroots organization whose mission is to defend the right to keep and bear arms, and advance that God-given Constitutional right by educating the public and urging them to take action in the public policy process.'" Nat'l Ass'n for Gun Rights, Inc. v. Motl, 279 F. Supp. 3d 1100, 1102 (D. Mt. 2017) ("NAGR-1"). By virtue of its exemption from federal income tax under IRC section 501(c)(4), NAGR must have the "primary" purpose of promoting "social welfare," and IRS regulations expressly exclude from the definition of social welfare any "participation or intervention in political campaigns." *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2).[6] Thus, so long as it is not its primary purpose, NAGR may engage in independent

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[6] The Ninth Circuit's complete mischaracterization of the rules governing the nonprofit tax status applicable to Petitioner NAGR is discussed in Section IV, *infra*.

expenditures supporting or opposing candidates; however only issue advocacy is involved in this case.

Organizations like NAGR, exempt under IRC § 501(c)(4), have become the primary vehicle that the American people use to exercise their right to assemble with other like minded citizens, and to monitor and seek to influence the policies of their state and federal governments. Joseph Story believed that the constitution's assembly and petition guarantees

> would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible, that it could be practically denied, until the spirit of liberty had wholly disappeared, and the people had become so servile and debased, as to be unfit to exercise any of the privileges of freemen. [J. Story, II Commentaries on the Constitution § 93-94 (5th ed. 1891).]

However, it is fortunate that this constitutional protection was made express, to be drawn upon when government seeks to use "campaign finance laws" to suppress pesky citizens from assembling together to petition government to advance their views through organizations like NAGR, dissenting from policies preferred by incumbent state legislators.

The current litigation arose out of NAGR's effort to educate the public about a threat to Montana residents posed by legislation introduced into the state legislature, and thereby carry out its mission to

promote social welfare. In response, Montana used its "political practice" regulations to suppress NAGR's educational and assembly activities.

In March 2012, NAGR sent several mailers to the residents of Flathead County, Montana, discussing the actions of a named state senator to kill a bill that, if enacted into law, would have ensured "'the availability of Montana ammunition [and] the manufacture of ammunition components.'" NAGR-1 at 1102. Instead, this same named senator was responsible for the defeat of the bill which, in turn, caused 11 percent unemployment in Flathead County, for which the mailer urged the people to contact the senator "'right away and DEMAND he apologize for killing new manufacturing in Flathead County.'" *Id*. This mailing constituted pure issue advocacy.

Nonetheless, as a result of this mailer, Montana's Commissioner of Political Practices ("COPP") sprang into action, sending letters to NAGR and six other corporate entities advising that they "'failed to meet Montana campaign practice law and standards by failing to register, report and disclose ... illegal corporate contributions for or against a ... primary election candidate.'" NAGR-1 at 1103. Thus, the COPP letter advised that "there was sufficient evidence to show that NAGR 'violated Montana's campaign practices laws ... and that civil adjudication of the violation is warranted.'" *Id.*

In March 2014, NAGR filed suit in federal court, seeking to enjoin COPP "from pursuing civil penalties against the organization based on the [March] 2012

mailer." NAGR-1 at 1103. Additionally, NAGR sought a ruling on whether informing the public "where legislators and governmental officials stand on issues related to the Second Amendment ... [by] mail[ing] educational literature to Montanans [would] subject[] the organization to disclosure requirements under Montana law" governing "electioneering communications." NAGR-2 at 1108.[7]

In justification of its limitation on a discrete "category of speech," the State claimed that its purpose was "increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention' of campaign finance laws." NAGR-2 at 1108.

In order to implement these policies, the State legislature enacted a series of statutory provisions that, if enforced, would virtually transform NAGR from an IRC § 501(c)(4) non-political educational organization into a State-defined "political committee" — the same type of entity which is exclusively designed to raise and spend money in support of or opposition to a candidate for election or nomination to a political office. *See id.* at 1108-1109. Indeed, Montana Code § 13-1-101(31)(a), if applied to NAGR, would require it to register with COPP as a "political committee" if it "makes an expenditure of more than

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[7] Members of the establishment press appear to cause less trouble for legislators than advocacy groups like Petitioner and thus are exempted from compliance electioneering communication rules. *See* MCA § 13-1-101(16)(b).

$250 on a single electioneering communication." NAGR-2 at 1109.

Montana law "distinguishes among several types of political committees" (NAGR-2 at 1109), including, in particular, "'incidental committees'" and "'independent committees.'" *Id.* at 1109-10. An **incidental committee** is one "'not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues....'" *Id.* at 1110. An **independent committee** is "organized for the primary purpose of receiving contributions and making expenditures that is not controlled either directly or indirectly by a candidate and that does not coordinate with a candidate...." *Id.* at 1110. The courts below concluded that NAGR was an **incidental committee** and thus subject to somewhat less intrusive disclosure requirements. *Id.* at 1110-11. The district court ruled that Montana's laws satisfied "constitutional scrutiny because they are tailored to the degree of an organization's political activity and the timing of its communications." NAGR-1 at 1107. The district court found that:

> registering as an **incidental committee** imposes a **minimal burden** on an organization. Indeed, a political committee registers by completing a Form C-2, "Statement of Organization," which can be completed in less than ten minutes.... This form, like all COPP forms, is available online. [*Id.* at 1107 (emphasis added).]

However, completing and filing the required COPP forms is not just a minimal paper transaction. It is an act of submission to the State's Commissioner of Political Practices. It only begins with filing the initial form, the Statement of Organization, including a statement of names and addresses of all officers, appointment of a treasurer, local banking, and recordkeeping of contributions and expenditures. *Id.* at 1109. *See also* Pet. Cert. at 8-10. Indeed, there is an entire chapter of the Montana Code entitled "Control of Campaign Practices," MCA §§ 13-37-101 - 13-37-131, evidencing Montana's desire to "control" the behavior of those involved in Montana politics.

Appointed to a six-year term (MCA § 13-37-103) by the Governor with the consent of the Senate, the Commissioner may be removed only for incompetence, malfeasance, or neglect of duty. MCA § 13-37-102. Among his duties are administrative rule-making (MCA § 13-37-114), inspection , investigation of alleged violations (13-37-111(1)). He is vested with subpoena power and with authority to work with county attorneys to enforce state campaign finance rules. He is authorized to create and to update Forms and edit manuals governing the implementation of policies and practices. *See* MCA § 13-37-117; *see also* NAGR -2 at 1107-08.

In short, Montana gives vast power to the Commissioner to reign as the State's political practices czar, displacing the People of Montana in whom alone is the State's political sovereignty. As this Court proclaimed in 1876, the right of a self-governing people to assemble has "always ... been[] one of the attributes

of citizenship under a free government [and] is found wherever civilization exists. United States v. Cruikshank, 92 U.S. 542, 551 (1876). As the People of Pennsylvania declared in their 1776 constitution, it is the People's "right to assemble" together, to consult for their common good, to instruct their representatives...." Sources of our Liberties at 331 (R. Perry & J. Cooper, eds., ABA Foundation: 1973). Indeed, at the heart of the right of the people to assemble peaceably is the right to choose the subject matter of the assembly and the viewpoints to be presented. As this Court stated in DeJonge v. Oregon, 299 U.S. 353 (1937):

> to maintain the opportunity for free political discussion, to the end that government may be responsive to the **will of the people** and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [*Id.* at 365.]

Rather than allowing a political czar to intervene to protect incumbent elected officials from criticism (here, one of the Senators vested with power to approve the Commissioner's appointment), the People of Montana should have access to information from all sources without the state imposing burdens on that speech.

III. THE FREEDOM OF THE PRESS PROTECTS THE PREROGATIVES OF THE PEOPLE FROM INTRUSION BY POLITICIANS CONTROLLING POLITICAL DISCOURSE.

The Montana legislature has created in MCA sections 13-37-101(1) and 13-37-102 a Commissioner of Political Practices, vesting him with powers that transcend campaign activities, that extend to non-election political activities. Indeed, the state legislature has vested the Commissioner with authority to enforce laws against communications that refer to or depict incumbents who are candidates, even though the communications at issue have no express advocacy or the functional equivalent thereof. Not only that, the Commissioner is empowered by law to investigate whether an "electioneering communication" which is otherwise subject to control by the State is exempt from this law because it appears in a "bona fide news story or commentary" so long as it is distributed by an exempt medium. In short, Montana law vests "editorial control" in the Commissioner. Yet it sanctions the same message published by the "establishment press" that it regulates when published by all others.[8] Such delegation is flatly

[8] During the first Citizens United oral argument (Mar. 24, 2009), Justice Scalia gave a memorable illustration of who owns the press freedom, explaining: "But does 'the press' mean the media in [Freedom of the Press]? You think that in 1791 there were — ... people running around with fedoras that had press — little press tickets in it, 'Press'? Is that what 'press' means in the Constitution? Doesn't it cover the Xerox machine? Doesn't it cover the — the right of any individual to — to write, to publish?...

unconstitutional because it "intru[des] into the function of editors" in violation of the freedom of the press. Miami Herald Publishing Co., Inc. v. Tornillo, 418 U.S. 241, 258 (1974). As the Tornillo Court explained, "the choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment." *Id.* By so ruling, this Court rejected the argument that the Florida right-of-reply statute "furthered the 'broad societal interest in the free flow of information to the public.'" *Id.* at 245. In like manner, and for the same reason, the Ninth Circuit erred when it ruled that NAGR's First Amendment right could be overridden by Montanans' interests in "'increasing transparency, informing Montanans about who is behind the messages vying for their attention.'" *See* NAGR-2 at 1116.

In reviewing campaign finance laws, courts must always remember that incumbents write the laws, not challengers, and incumbents generally have one overriding objective — re-election. Therefore, no court should presume that campaign finance laws are fair and even-handed to challengers or critics of incumbents. Montana law certainly is not. Montana argues that it is the people who want to know who is supporting the electioneering communications (*see* NAGR-1 at 1107-08), but truthfully, it is incumbents who want to know — sometimes so those contributing

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[T]here's no basis in the text of the Constitution for exempting press in the sense of, what, the Fifth Estate?"

to an effort to criticize an incumbent can be driven away from the publisher.

At the dawn of modern campaign finance legislation, in Buckley, the Court found "[t]here is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents." Buckley at 32. However, much evidence of such discrimination now exists. An economic analysis of the anti-competitive effect of federal campaign finance law was presented in the McConnell litigation by some of these *amici* through the testimony of Dr. James Miller, former Chairman of the Federal Trade Commission, based on his book Monopoly Politics (Hoover Inst. Press: 1999).

The desire of those in office to retain their position of power is not new. As Edmund Burke explained: "Those who have been once intoxicated with power, and have derived any kind of emolument from it, even though for but one year, can never willingly abandon it."[9] There is no reason to believe that much has changed with our modern legislatures.

IV. MONTANA IMPOSES SIGNIFICANT BURDENS ON FIRST AMENDMENT RIGHTS OF CHARITIES.

The Ninth Circuit opinion badly misconstrued federal tax law governing the Petitioner, asserting:

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[9] *See* https://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00002268.

"To retain its federal tax status, NAGR cannot engage in 'direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.' 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii)." NAGR-2 at 1108. This is not, in fact, what that regulation states. Rather, that regulation requires that the promotion of social welfare be the primary purpose of an IRC § 501(c)(4) organization, but allowing campaign activity if it is a secondary purpose of the organization.

Instead, the type of nonprofit organizations barred from any campaign activity are charities exempt under IRC § 501(c)(3). Since the type of activity undertaken by NAGR was not truly campaign-related, it could be and is undertaken even by charities. However, application of the Montana law to charities creates a legal conundrum for those organizations as well. Federal law allows charities to engage in issue advocacy, but not campaign activity. Montana classifies a great swath of issue advocacy as "**electioneering** communications" and requires a charity to register as a **political** committee. Thus, Montana law could give rise to the false impression that any such charity is violating federal tax law by engaging in campaign activity.

Assume, for example, that the American Lung Association, which is tax exempt under IRC § 501(c)(3), opposes vaping and wants to mail its supporters in Montana during the proscribed period to urge them to contact named legislators (who are often candidates for re-election) to regulate vaping. If this mail were sent during the months before an election, Montana would

consider this communication engaging in "electioneering." Pro-vaping groups could be expected to demand that Montana compel this charity to register and report as a political committee, and even file complaints against the American Lung Association with the IRS for electioneering, asking the IRS to revoke its (c)(3) status and requiring the charity to defend itself. To avoid that, charities will be forced to make editorial decisions about their issue advocacy in Montana, to avoid mentioning the names of incumbent officeholders, or to avoid issue advocacy in Montana altogether.

This is not the situation with Petitioner which is exempt under IRC § 501(c)(4), but application of the Montana law to IRC § 501(c)(3) organizations is not an unrealistic hypothetical. A three-judge panel in the U.S. District Court for the District of Columbia upheld the application of BCRA's electioneering communications reporting requirements to IRC § 501(c)(3) charities in Independence Institute v. FEC, 216 F. Supp. 3d 176, 192-93 (D.D.C. 2016), which was affirmed by this Court summarily. Independence Institute v. FEC, 137 S. Ct. 1204 (2017).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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