Docket No. 12-35809

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, *et al*.,

Appellees,

v.

JONATHAN MOTL, *et al*.,

Appellants.

On Appeal from the Final Order and Judgment
of the United States District Court for the District of Montana
(Hon. Charles C. Lovell, Presiding)

District of Montana Case No. 6:12-cv-00012-CCL

BRIEF OF FREE SPEECH FOR PEOPLE, THE HONORABLE JAMES C. NELSON, AMERICAN INDEPENDENT BUSINESS ALLIANCE, AND AMERICAN SUSTAINABLE BUSINESS COUNCIL AS AMICI CURIAE SUPPORTING APPELLANTS AND IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

No amicus has a parent corporation or is owned in part by any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of appellants Jonathan Motl *et al.*[1]

Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy in the constitutional law of campaign finance. Free Speech For People's thousands of supporters around the country, including in Montana, engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people. Free Speech For People has a particular history helping to defend Montana's campaign finance laws: Free Speech For People was the only national legal organization to submit an amicus brief to the Montana Supreme Court in support of the state in *Western Tradition Partnership v. Attorney General*, 271 P.3d 1 (Mont. 2011), *rev'd sub nom. American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012), which was a challenge to a Montana law prohibiting corporate expenditures in political

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief. All parties, through counsel, have consented to submission of this brief.

campaigns. Free Speech For People also submitted a brief to the United States Supreme Court in support of Montana in the same case.

The Honorable James C. Nelson is a retired Justice of the Montana Supreme Court. He served in that capacity for nearly twenty years, from 1993 to 2013. While on the Court, Justice Nelson wrote a highly-regarded dissenting opinion in *Western Tradition Partnership* that addressed the dangers of excessive money in our political system. See *W. Tradition P'ship,* 271 P.3d at 34-36 (Nelson, J., dissenting). Justice Nelson has been an outspoken advocate for civil rights, and he continues to write and speak publicly regarding the dangers of unfettered political spending by wealthy and corporate interests, including the effect of such spending on judicial elections. He participates in this matter in his individual capacity only.

The American Independent Business Alliance (AMIBA) is a Bozeman, Montana-based non-profit organization helping communities implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 80 affiliated community organizations across 35 states, including Montana. AMIBA's affiliates represent approximately 26,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations. Leaders

of many of these large corporations have converted their economic power into political favors that disadvantage small business. AMIBA seeks to uphold Montana's campaign contribution limits to help ensure market competition, not political favors, determines the success or failure of businesses. AMIBA joined Free Speech For People's amicus briefs defending Montana campaign finance law in *Western Tradition Partnership* and *American Tradition Partnership*.

The American Sustainable Business Council is a coalition of business organizations and businesses committed to advancing a sustainable economy. The Council and its network represent over 200,000 businesses and more than 350,000 entrepreneurs, owners, executives, investors and business professionals, including in Montana. The Council led the formation of Business for Democracy, an initiative of companies and business leaders who believe that *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is in direct conflict with American principles of republican government, democracy, and a fair economy, and who seek a reversal of the decision. The Council joined Free Speech For People's amicus briefs defending Montana campaign finance law in *Western Tradition Partnership* and *American Tradition Partnership*.

SUMMARY OF ARGUMENT

The Supreme Court's voting rights cases establish a concept of voter equality that prohibits exclusion of less affluent voters, requires that all voters have the opportunity to participate at all stages of the electoral process, and bars weighing some votes more heavily than others. This concept derives from the Voting Amendments (the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments) and is enhanced by the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq*.

A system of unfettered private funding of political candidates threatens to defeat this constitutional and statutory protection of voter equality, because wealthy contributors can effectively "vote" with their dollars, thereby devaluing the actual votes cast by ordinary voters. Montana has a compelling interest in preventing this from happening—that is, in prophylactically protecting voter equality by imposing contribution limits that prevent individual funders from contributing so much that ordinary Montanans' right to vote is abridged.

ARGUMENT

I. Montana has a compelling interest in protecting voter equality.

Montana has a compelling interest in protecting the right to vote—in particular, the voter equality aspect of that right—as established by the Supreme Court's *voting rights cases* (as opposed to its campaign finance

cases). Voter equality applies at all stages of the electoral process, not just the ballot box. It is endangered by the existence and magnitude of an unofficial, but state-tolerated, parallel electoral system where influence is measured in dollars rather than votes.

A. The voting equality cases prohibit devaluing the vote based on wealth.

Under the Supreme Court's voter equality decisions, low-income and moderate-income citizens cannot be denied the right to vote based on wealth. *See* U.S. Const. amend. XXIV; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (applying same to states through Fourteenth Amendment); *see also Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam) (invalidating law limiting vote to property owners). And screening out *candidates* based on wealth violates the rights of lower-income *voters*:

> To the extent that the system requires candidates to rely on contributions from voters . . . it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor.

Bullock v. Carter, 405 U.S. 134, 143-44 (1972) (invalidating, under Fourteenth Amendment, candidate filing fees ranging from $1,000 to $6,300); *see also Lubin v. Panish*, 415 U.S. 709, 722 (1974) (Douglas, J., concurring) ("California does not satisfy the Equal Protection Clause when it

allows the poor to vote but effectively prevents them from voting for one of their own economic class. Such an election would be a sham . . . .").

Importantly, voter equality also demands that all voters be allowed to participate fully in all relevant steps of a multi-step political process—even steps that occur under "private" auspices. *See Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding Fifteenth Amendment violation where a private political association held an unofficial, whites-only candidate selection process that effectively determined the result of the "official" election, leaving the Democratic primary and general election as "no more than the perfunctory ratifiers of the choice that has already been made in [private] elections"). This principle applies equally to exclusion based on wealth. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 205 (1996) (plurality opinion) (under Voting Rights Act, applying *Terry* rationale to $45 fee for delegates to party nominating convention).

Finally, voter equality requires that all votes be counted equally. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("If a State . . . weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that discrimination was allowable"). Weighing any votes more heavily than others (thereby giving some voters more influence over public policy than others) violates

the Fourteenth Amendment. *See Reynolds v. Sims,* 377 U.S. 533, 566 (1964) (holding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters").[2]

B. Voter equality is endangered by a parallel candidate selection system based on wealth and correlated with race, sex, and age.

The political campaign contribution system operates as a parallel candidate selection process, influencing (and filtering out) political choices well before any votes are cast. Moreover, this system discriminates based on wealth, race and language minority status, sex, and age, as it grants disproportionate selection power to a small subset that is richer, whiter, maler, and older than the voters as a whole. Thus, as in *Terry* and *Morse*, crucial candidate selection processes occur outside of the "official" electoral system; as in *Bullock* and *Lubin*, less affluent voters are denied the opportunity to vote for a candidate of their choosing; and as in *Gray* and *Reynolds*, some (in fact, most) votes matter less than others.

[2] With respect to racial and linguistic minorities in particular, the principle of voter equality is further guaranteed by Section 2 of the Voting Rights Act, which requires that "the political processes leading to nomination or election" must be "equally open to participation" to members of these groups, so that they have no "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See* 42 U.S.C. §§ 1973(b), 1973b(f)(2).

Nationally, the contribution system is dominated by the wealthy. While only 13.4% of American households earn $100,000 or more, 85.7% of contributions over $200 and 93.3% of $1000 contributions come from that elite set. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Pa. L. Rev. 73, 105 (2004). Indeed, over 40% of total contributions come from just 0.01% of the voting age population. Adam Bonica *et al.*, *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. Econ. Perspectives 103, 111-12 (2013), *available at* http://goo.gl/VHWQrr. This donor class is substantially whiter (95.8%), maler (70.2%), and older (70.6% age 50+) than the voting population. *See* Overton, 153 U. Pa. L. Rev. at 102 (data for $200+ donors in federal elections). And its policy (particularly *economic* policy) preferences are quite different from those of most Americans. Adam Lioz*, Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 Seton Hall L. Rev. 1227, 1231-35 (2013) (citing studies on policy preferences of donor class).

These wealthy funders' contributions have a substantial effect on candidate selection. "[P]otential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party," and poor voters are "substantially limited

in their choice of candidates" by the fact that viable candidates need to either be themselves wealthy or appeal to the wealthy. *Bullock*, 405 U.S. at 143-44. Campaign contributions affect candidate selection long before Election Day. In early campaign stages, before votes are even cast, candidates must raise a credible threshold level of funding from wealthy donors to be considered viable. *See* Jamin Raskin & John Bonifaz*, Equal Protection and the Wealth Primary,* 11 Yale L. & Pol'y Rev. 273, 287-89 (1993). And in this critical early competition for funds, the policy preferences of wealthy funders dictate which candidates thrive, which survive, and which are relegated to the fringe. *See* Thomas Cmar, *Toward A Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 Fordham Urb. L.J. 443, 445-46 (2005) (citing evidence).

By the time that non-wealthy Americans can exercise their right to vote, crucial candidate-filtering choices have already been made by, and the surviving candidates accord with the policy preferences of, wealthy funders. As in *Terry*, the effect of this system is to "withdraw significance from the State-prescribed primary," 345 U.S. at 474 (Frankfurter, J., concurring), leaving the official election as a mere formality. By the time the voters get to vote, each remaining candidate either is wealthy, or has the support of wealthy donors; voters' choices are thus reduced to a contest between the

favorites of different groups of wealthy donors. Lioz, 43 Seton Hall L. Rev. at 1245-46 (explaining how wealthy donors filter and shape the field of viable primary candidates). While the final vote does not always go to the better-funded candidate,[3] the candidates presented for that vote have already passed a wealth-based filter.

Although this wealth-based system does not actually prevent anyone from voting, it devalues the right to vote, and weakens voter equality. Wealthy donors simply have greater input into policy than ordinary voters, and the larger the contribution, the greater the input. *See* Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 Ind. L.J. 315, 348 (2014). Statistically speaking, "the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy," and "the preferences of economic elites . . . have far more independent impact upon policy change." Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics (forthcoming fall 2014), at 21-22, *available at* http://goo.gl/aTlVlE (discussing multivariate statistical analysis of policy preferences and enacted policies).

[3] That usually happens too. *See id.* at 1251 (citing evidence).

The Montana voters who passed the 1994 reform initiative reasonably feared this phenomenon.[4] Most Montana voters cannot make large contributions, because overall, Montana is relatively poor: its 2010-12 median household income ($43,226) is 44th in the country.[5] Furthermore, as with many states, there is a distinct racial pattern to Montana's income distribution. The median individual income for Montana's American Indian population ($19,216) is just 75% of the median white income ($25,701).[6] And the Indian poverty rate (36.3%), the fourth-highest Indian poverty rate in the nation, is more than double the overall state poverty rate (14.8%).[7] Obviously, people living in poverty—struggling to pay for rent, heat, and food—have little (if any) leftover income for political contributions, and are excluded from the parallel money-based electoral system.

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[4] The historical evidence suggests that the voters who passed the 1994 campaign finance reform initiative perceived the issue, at least partly, in terms of voter equality, with wealthy donors having more influence than ordinary voters. *See Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093 (9th Cir. 2003) (citing 1982 polling data that "78.3% of Montana voters believe money is synonymous with power").

[5] *See* U.S. Census Bureau, http://go.usa.gov/9Szz (Excel file).

[6] The median income of Montana's small black population is even lower: $16,192. *Compare* U.S. Census Bureau, http://go.usa.gov/9584 (Montana median earnings for American Indians in 2012) *and* http://go.usa.gov/95y9 (earnings for blacks) *with* http://go.usa.gov/9ntP (earnings for whites)

[7] *See* U.S. Census Bureau, http://go.usa.gov/95XA, at 15 (Montana and other states' Indian poverty rates); U.S. Census Bureau, http://go.usa.gov/95hY, at 3 (overall Montana poverty rate).

Indeed, this court has repeatedly recognized poverty as a factor in finding that Montana's state and local political processes have not been equally open to Indian participation. *See United States v. Blaine County*, 363 F.3d 897, 914 (9th Cir. 2004) (affirming finding of violation of Voting Rights Act § 2, and noting that "Blaine County's American Indian families are three times more likely than its white families to live below the poverty line"); *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000) (reversing district court's finding of no Section 2 violation, and noting that "American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.").[8]

The fact that this court has repeatedly found that the right to participate fully in Montana's political processes is impeded by the inability

[8] Nationally, several courts have found that racial minorities were not able to participate fully in the political process because of their inability to participate equally in the wealth-based influence system. *See, e.g., Rural W. Tenn. African Am. Affairs Council, Inc. v. Sundquist*, 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998) ("The economic and educational isolation of African-Americans . . . limits their ability to fund and mount political campaigns. In this sense therefore, blacks are not able to equally participate in the political process."), *aff'd*, 209 F.3d 835 (6th Cir. 2000); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 768 (N.D. Ga. 1997) (noting that "[t]he economic disparity between the races . . . translates into a disparity in the ability to impact the local political process" as white candidates received over three times more contributions than black candidates); *see generally* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 Tex. L. Rev. 987 (2002).

to participate in the wealth-based contribution system demonstrates that this system raises legitimate concerns about voter equality and a meaningful right to vote. And this concern is not just limited to those in poverty; wealth-based threats to voter equality also affect those who could theoretically afford a contribution, but would have to cut a limited budget elsewhere in order to participate in the wealth-based system. *Cf. Harper*, 383 U.S. at 668 ("We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all.")

C. Protecting voter equality from the danger of exclusion from participation is a compelling state interest justifying contribution limits.

Montana has a compelling interest in ameliorating the excesses of the wealth-based financial influence system that, left unchecked, devalues the votes of the non-wealthy, and in particular, minorities, women, and the young, in derogation of the highest constitutional values of the Voting Amendments. While the Supreme Court has recently focused its campaign finance jurisprudence on the public's anti-corruption interest,[9] it has not yet

[9] Much has been written regarding the Court's increasingly narrow conception of the legitimate public interests that can justify campaign finance limits. *See, e.g., Ognibene v. Parkes*, 671 F.3d 174, 201 (2d Cir. 2011) (Calabresi, J., concurring) (predicting reversal of Supreme Court's rejection of anti-distortion interest; "Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen. Rejection of it is as flawed as was the

considered whether protecting voter equality is a legitimate state interest for campaign contribution limits.[10] Since the Court has consistently recognized voter equality as a constitutionally protected interest in the voting rights context, this court should sustain Montana's contribution limits on that basis.

Montana may protect this interest through campaign contribution limits because states may take prophylactic measures to protect voter equality, including by addressing practices that are not *themselves* unconstitutional. *See, e.g., South Carolina v. Katzenbach,* 383 U.S. 301

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rejection of the concept of one-person-one-vote."); *N.Y. Progress & Prot. PAC v. Walsh*, No. 13 Civ. 6769 (PAC), 2014 WL 1641781, at *1 (S.D.N.Y. Apr. 24, 2014) (criticizing recent Supreme Court campaign finance decisions and noting that "large political donations do not inspire confidence that the government in a representative democracy will do the right thing").

[10] Several Supreme Court cases have considered, and rejected, government interests that related to *different* conceptions of equality, but the voter equality interest advanced here was not considered (and therefore not rejected) in those cases, and remains available as an interest in support of contribution limits. The issue here is not that wealthy spenders can buy more advertisements and therefore have more influence *on voters*; the issue here is that wealthy contributors, by giving more to candidates, have more influence *than voters*. *Cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (noting that Court has "consistently rejected attempts to suppress campaign speech based on other legislative objectives" besides corruption, but citing only cases that discuss equality among *candidates*, not equality among *voters,* and do not pertain to contribution limits); *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (per curiam) (holding that voting rights cases do not support restricting *expenditure* limits, but not analyzing voter equality in the context of *contribution* limits). For similar reasons, voter equality as a state interest supporting campaign contribution limits is not foreclosed by *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317 (9th Cir. 1997), which rejected a challenge to California's campaign finance system for judicial elections.

(1966) (upholding ban on literacy tests, as within Congress's power to prevent Fifteenth Amendment violation), *abrogated on other grounds*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *see also Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (Voting Rights Act § 2 "allows States to choose their own method of complying with the Voting Rights Act").

Finally, prophylactic measures to protect the vote may incidentally burden speech, association, or expressive conduct in some form. *See Burson v. Freeman*, 504 U.S. 191 (1992) (holding that states may prohibit electioneering speech in the immediate vicinity of a polling place, even though such speech is at the very core of First Amendment protection); *Brown v. Hartlage*, 456 U.S. 45, 54-56 (1982) (holding that states may prohibit candidates from promising to give things of value in exchange for votes, even though campaign promises, and voter decisions based on those promises, are at the heart of election campaigns). Indeed, in both *Terry* and *Morse*, the Court championed voter equality over the right of association, even though the "right of association of members of a political party 'is a basic constitutional freedom.'" *Morse*, 517 U.S. at 228 (citation omitted).

II. Montana's reforms prevent further voter inequality.

The empirical data indicates that Montana's reform has enjoyed some success in ameliorating the threats to voter equality that come from a parallel

wealth-based influence system.[11] An analysis of Montana campaign contributions from 1990-2006 shows that, since the 1994 reform, the number of contributors *increased* by 51%, and the average contribution is still less than half the maximum limit. *See* Linda Casey, *Lowest Limits in the Land: The Effect of Montana's Campaign-Finance Reforms*, *1990-2006* (Apr. 29, 2008), at http://goo.gl/7SgTdC.

A "minimum support" calculation shows how wealth-based barriers are kept under control in Montana politics. By Montana law, a non-major-party candidate may reach the ballot with signatures equal to "5% or more of the total vote cast for the successful candidate for the same office at the last general election." Mont. Code § 13-10-502(2). For 2014, this requires 129 signatures for the Montana House of Representatives; in essence, Montana has determined that a candidate needs at least 129 supporters to be a minimally viable House candidate.[12] Meanwhile, the *average* amount raised

[11] Of course, Montana's contribution limits need not *completely eliminate* voter inequality in order to be sustained. Rather, given the compelling public interest, the test is whether the limits are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000).

[12] *See* Mont. Office of the Sec'y of State, *Information for Independent, Minor Party and Indigent Candidates*, http://go.usa.gov/9hfQ, at 2.

for a 2012 Montana House race was $6,811.[13] This average fundraising ($6,811) divided by the legal minimum number of supporters (129) yields $52.80. A similar calculation for the Senate yields the remarkably similar figure of $52.73.[14]

In other words, a candidate can run a viable campaign for the legislature by appealing to $50 donors. Nationally, more than half of $50-or-less donors have household incomes below $75,000. *See* Kay Lehman Schlozman *et al.*, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 505-06 (2012). While $75,000 is well above the median household income, candidates can run credible campaigns without needing contributions from even more affluent funders.

But if contribution limits were higher, average campaign costs would likely increase: candidates would feel compelled to seek these higher maximum contributions from those who can afford them. Consequently, the "minimum support" donor level would increase too. Thus, Montana's political process involves substantially less voter inequality than a system with higher contribution limits in which campaigns require the monetary support of wealthy individuals.

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[13] *See* Nat'l Inst. on Money in State Politics, *Montana 2012*, http://goo.gl/Vt6fCV.

[14] *See id.* ($13,552 average funds raised for Senate); Mont. Office of the Sec'y of State, *supra* note 12, at 2 (257 signatures needed).

CONCLUSION

The Court should recognize protection of voter equality as a compelling government interest underlying Montana's contribution limits, and reverse the judgment below.

Respectfully submitted this 1st day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 1, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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July 1, 2014