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 THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICI CURIAE

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

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 in the context of judicial elections. Justice Nelson is also a member of the Board of Directors of Free Speech For People. 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. AMIBA-affiliated organizations represent approximately 28,000 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 250,000 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. FEC*, 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 panel improperly overruled a previous panel's decision, *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), based on an erroneous premise. The panel concluded that *Eddleman*'s "state interest" analysis had been abrogated by *Citizens United v. FEC*, 558 U.S. 310 (2010), because *Citizens United* stated that the acceptable state interest for limiting campaign contributions is "limited to quid pro quo corruption," *id.* at 359, whereas *Eddleman* cited *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000), for the proposition that the acceptable state anticorruption interest was "not confined to bribery of public officials."

This conclusion only makes sense if "quid pro quo corruption" as used in *Citizens United* is coextensive with "bribery." But it is not. Rather, while the Supreme Court's phrase "quid pro quo corruption" certainly *includes* bribery, it is not *confined* to bribery. To the contrary, *Citizens United* emphasized its firm foundations in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which first set forth the Court's concept of quid pro quo corruption, and defined it to extend well beyond bribery. *Shrink Missouri* did not enlarge *Buckley*'s conception of quid pro quo corruption, and *Citizens United* did not shrink it. Since *Citizens United* did not overrule *Shrink*

Missouri, it therefore did not abrogate *Eddleman*. Consequently, the panel lacked the authority to overrule the earlier panel decision in *Eddleman*.

ARGUMENT

I. The panel's decision improperly overruled a previous panel's decision and en banc review is needed to restore uniformity of the court's decisions.

The panel improperly overruled in part *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), based on a perceived conflict with *Citizens United v. FEC*, 558 U.S. 310 (2010). The panel held that "[b]ecause *Eddleman* relied on a state's interest in combating 'influence,' whereas *Citizens United* narrowed the analysis to include quid pro quo corruption but to exclude the state's interest in combating 'influence,' *Citizens United* abrogated *Eddleman*'s 'important state interest' analysis." *Lair v. Bullock*, No. 12-35809, 2015 WL 3377841, at *7 (9th Cir. May 26, 2015). Consequently, the panel overruled *Eddleman* in part. *Id.* at *8.

A panel of this court cannot overrule an earlier panel's decision based on an intervening Supreme Court decision unless that later decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable*." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (emphasis added). While the panel's decision recited this standard, *see Lair*, 2015 WL 3377841, at *5, it made

little effort to ascertain whether *Citizens United* could be reconciled, let alone *clearly could not be reconciled*, with *Eddleman*.

In fact, *Eddleman* is easily reconciled with both *Citizens United* and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The panel's failure to recognize this stems from a misunderstanding of what the Supreme Court meant by "quid pro quo corruption" in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), *Citizens United*, and *McCutcheon*.[2]

The panel's decision was based on the incorrect assumption that "quid pro quo corruption" is limited to bribery. The panel combined that flawed major premise with two correct minor premises—(1) that *Eddleman* described the state's anticorruption interest as "not confined to instances of bribery," 343 F.3d at 1092, and (2) that *Citizens United* emphasized that the state's anticorruption interest is "limited to quid pro quo corruption," 558 U.S. at 359—to find a conflict where none exists.

Laboring under the faulty premise that quid pro quo corruption simply means bribery, the panel misconstrued the import of *Shrink Missouri*: since the panel (correctly) recognized that *Shrink Missouri* defined corruption as more than just *bribery*, the panel (incorrectly) inferred that *Shrink Missouri*

[2] Amici have contended, in other venues, that courts should consider state interests for campaign finance laws besides quid pro quo corruption. Here, amici argue only that the panel erred by overruling circuit precedent based on a nonexistent conflict with intervening Supreme Court authority.

defined corruption as more than just quid pro quo corruption. The panel thus wrongly concluded that *Citizens United* had silently overruled *Shrink Missouri*, and thereby abrogated *Eddleman*'s corruption analysis.

The panel's error stems from its flawed premise. Ever since *Buckley*, quid pro quo corruption has *always* meant more than just bribery, and thus *Citizens United* is reconcilable, or at the very least *not clearly irreconcilable*, with *Eddleman*. By misconstruing "quid pro quo corruption," the panel overruled past precedent accepting the full spectrum of quid pro quo corruption—which includes bribery, but is not limited to it—as a valid state interest for campaign finance regulation, thus conflicting with directly applicable circuit precedent and potentially binding future panels to its error.

II. *Citizens United* did not abrogate *Eddleman*.

A. *Buckley*'s still-controlling definition of "quid pro quo corruption" included more than just bribery.

The definition of quid pro quo corruption in *Buckley* embraced a variety of practices, of which bribery is only "the most blatant." *Buckley*, 424 U.S. at 27. And that definition still controls, since both *Citizens United* and *McCutcheon* emphasized that they were applying the same definition of quid pro quo corruption as *Buckley*. *See McCutcheon*, 134 S. Ct. at 1450 ("As *Buckley* explained, Congress may permissibly seek to rein in 'large contributions [that] are given to secure a political quid pro quo from current

and potential office holders.'") (quoting *Buckley*, 424 U.S. at 26); *Citizens United*, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

Buckley rejected the argument that "contribution limitations must be invalidated because bribery laws . . . constitute a less restrictive means of dealing with 'proven and suspected quid pro quo arrangements.'" *Buckley*, 424 U.S. at 27. Rather, "laws making criminal the giving and taking of bribes deal with *only the most blatant and specific* attempts of those with money to influence governmental action." *Id.* at 27-28 (emphasis added).

To illustrate its view of quid pro quo corruption, *Buckley* pointed to three specific examples discussed in detail by the D.C. Circuit. *See id.* at 26-27 & n.28 ("To the extent that large contributions are given to secure a *political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.") (emphasis added). "[T]he problem" illustrated by these "deeply disturbing examples" can only mean the phrase's antecedent: the phenomenon where "large contributions are given to secure a

political quid pro quo." *See ibid.* Crucially, *none* of these paradigmatic "deeply disturbing examples" of quid pro quo corruption involved bribery:

1. "[E]xtensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports." *Buckley v. Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975), *aff'd in part, rev'd in part,* 424 U.S. 1 (1976), *modified,* 532 F.2d 187 (D.C. Cir. 1976) ("*Buckley I*"). After this meeting, and another where the president's fundraiser advised the dairymen "to reaffirm their $2 million pledge," the president announced higher price supports for milk producers. *Ibid.*

2. "[L]avish contributions by groups or individuals with special interests to legislators from both parties, e.g., by the American Dental Association . . . and H. Ross Perot." *Id*. at 839 n.37. Donors characterized these both-party contributions as "a 'calling card, something that would get [donors] in the door and make [their] point of view heard' . . . or 'in response to pressure for fear of a competitive disadvantage that might result'" from not contributing. *Ibid*.

3. Appointment of large contributors as ambassadors. The court noted that large contributions were "needed to be actively considered," that six large contributors "appear[ed] to have been actively seeking such

appointment at the time of their contributions," and that 31 others had in fact been appointed. *Id.* at 840 n.38.

Buckley treated *all* of these as species of quid pro quo corruption. Yet *none* of them constituted bribery. In the dairy price support example, not only was there no evidence that the crime of bribery had been committed, but the question was not even considered *relevant*. *See Buckley I*, 519 F.2d at 839 n.36 ("It is not material, for present purposes, to review . . . the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or 'linked' to the reaffirmation of the pledge."). Yet if "only bribery counted [as quid pro quo corruption], the resolution of this issue would have mattered." Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon*,* Citizens United*, and* SpeechNow, 67 Fla. L. Rev. 389, 467 (2015).[3] Similarly, the second and third examples of quid pro quo corruption evince what the court called "improper attempts to obtain governmental favor in return for large campaign contributions," *Buckley I*, 519 F.2d at 839 n.37—but not *bribery*.

Buckley's conception of "quid pro quo corruption" thus embraced more than just bribery. Certainly, the concept of quid pro quo corruption

[3] Professor Alschuler's article was instrumental to development of amici's analysis of "quid pro quo corruption" in *Buckley* and its progeny, but for brevity, the article will not be repeatedly cited where a case citation suffices.

implies both a quid and a quo—but the *relation* between them need not rise to the level of criminal bribery. *Cf. United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999) (noting that the offense of bribery requires "a specific intent to give or receive something of value *in exchange* for an official act," while the separate and lesser crime of illegal gratuity may involve "merely a reward for some future act that the public official will take (and *may already have determined to take*), or for a *past act that he has already taken*") (some emphases added). Rather, *Buckley* defined quid pro quo corruption, through examples, to involve not just bribery, but also broader forms of "improper influence." *See* 424 U.S. at 29, 30, 45, 58, 96.[4]

B. *Shrink Missouri*, *Citizens United*, and *McCutcheon* all followed *Buckley*'s conception of corruption.

1. *Shrink Missouri* did not expand *Buckley*'s definition of corruption.

Since *Buckley*'s conception of quid pro quo corruption encompassed more than just bribery, the fact that the *Shrink Missouri* Court *also* defined

[4] Reading *Buckley* otherwise would not only disregard the Court's own paradigms of quid pro quo corruption, but also attribute to the Court an unwarranted naïveté. As the Court later noted, "few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357. Such "arrangements" are rare "both because they are criminal and because they are unnecessary." Alschuler, 67 Fla. L. Rev. at 465. Rather, as Barney Frank learned early in his political career, "[y]ou never write when you can talk, you never talk when you can nod, and you never nod when you can wink." Jordan Weissman, *The Bipartisan Zen of Barney Frank*, The Atlantic, Nov. 14, 2012, *at* http://theatln.tc/1L2NNmo.

corruption to include more than just bribery is unremarkable. In *Shrink Missouri*, the Court emphasized that while bribery was *part* of *Buckley*'s concern, *Buckley*'s quid pro quo corruption definition swept more broadly:

> [In *Buckley*] we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28). *Shrink Missouri*'s observation that *Buckley* recognized a concern broader than bribery was hardly groundbreaking. After all, *Buckley*'s paradigms of "quid pro quo corruption" did not involve bribery either. *See supra* pp. 5-7.

Indeed, the *Shrink Missouri* Court specifically *rejected* the notion that it was broadening *Buckley* and thereby relaxing the level of scrutiny on contribution limits. *See* 528 U.S. at 389 n.4 (emphasizing that "we do not relax *Buckley*'s standard").[5] But the best witness for the fact that *Shrink Missouri*'s definition of corruption is the same as *Buckley*'s quid pro quo corruption was the eventual author of *Citizens United*, who wrote that in

[5] It is implausible that *Shrink Missouri* misstated *Buckley*'s conception of corruption. Chief Justice Rehnquist, the only justice to participate in both *Buckley* and *Shrink Missouri*, was in the majority in both cases with respect to contribution limits. *See Shrink Missouri*, 528 U.S. at 380; *Buckley*, 424 U.S. at 290 (Rehnquist, J., concurring in part and dissenting in part).

Shrink Missouri the Court had "upheld limits on conduct possessing *quid pro quo* dangers, and nothing more." *McConnell v. FEC*, 540 U.S. 93, 293 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

2. *Citizens United* did not narrow the *Buckley*-*Shrink Missouri* definition of quid pro quo corruption.

The *Citizens United* Court emphasized continuity with *Buckley*. *See* 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.").

To be sure, *Citizens United* rejected "[r]eliance on a 'generic favoritism or influence theory.'" 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 296). The panel interpreted this rejection of "generic favoritism or influence theory" as a criticism of a "broader 'influence' standard" that it attributed to *Shrink Missouri*. *See Lair*, 2015 WL 3377841, at *7. But it is essential to understand precisely what Justice Kennedy meant by a "generic favoritism or influence theory" in *Citizens United.* Justice Kennedy first used that phrase in *McConnell* to criticize limits on contributions to *parties* for general party-building purposes, and argued that it was central "that in *Buckley* the money at issue was *given to candidates*, creating an obvious *quid pro quo* danger." *Id.* at 295 (emphasis added). Without

"contributions that flowed to a particular candidate's benefit," Justice Kennedy argued, only a "generic favoritism or influence theory" remained. *Id.* at 296. Similarly, in *Citizens United*, Justice Kennedy quoted this phrase in the context of *independent expenditures* that do not link the contributor to the beneficiary. *See* 558 U.S. at 357-60. In short, Justice Kennedy used this phrase to refer to theories of influence that pertain to money that is not *contributed to a candidate*. *Shrink Missouri*, by contrast, involved contribution limits *to candidates*. *See* 528 U.S. at 381. And Justice Kennedy's *McConnell* opinion, the origin of the phrase that the panel quoted, cited *Shrink Missouri* only favorably. *See* 540 U.S. at 293-94.

The panel's conclusion that *Citizens United* silently overruled *Shrink Missouri*, or its definition of corruption, is implausible. The *Citizens United* Court was not afraid to overrule precedent that it deemed incorrect, and both the majority opinion and Chief Justice Roberts' concurrence explained in detail why the Court had decided to overrule both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell*. *See* 558 U.S. at 362-65; *id.* at 372-85 (Roberts, C.J., concurring). If the Court had wished to overrule *Shrink Missouri* too, even in part, it had a perfect opportunity to do so. *See id.* at 385 (Roberts, C.J., concurring) ("We have had two rounds of briefing in this case, two oral arguments, and 54 *amicus*

briefs . . . [and] the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues."). But in fact, the majority opinion mentioned *Shrink Missouri* only once in passing, and the two concurrences not at all. This is far too slender a thread on which to conclude that *Citizens United* is irreconcilable (let alone "clearly irreconcilable") with *Shrink Missouri* or *Eddleman*.[6]

3. *McCutcheon* did not narrow the *Buckley*-*Shrink Missouri* definition of quid pro quo corruption.

McCutcheon, too, emphasized its continuity with *Buckley*, emphasizing that "[t]he definition of corruption that we apply today . . . has firm roots in *Buckley* itself." 134 S. Ct. at 1451. *McCutcheon* explained that *Buckley* had upheld base contribution limits because "[t]he propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions." *Id.* at 1447.

In other words, under *McCutcheon*'s reading of *Buckley,* the propriety of a contribution depends on the donor's subjective intent. But the *McCutcheon* Court accepted that "there was no way to tell" when this intent

[6] Nor do *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011) or *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010), draw such a conclusion. Those cases, like *Citizens United*, involved independent expenditures, not contributions to candidates.

exists. *Ibid.* Consequently, the state can prohibit large contributions without reference to intent—even though intent is the very touchstone of "propriety," *ibid*., and of bribery, *see Sun-Diamond Growers*, 526 U.S. at 405—since "there [is] no way to tell" which donors seek "improper influence."

Wherever *McCutcheon* may draw the "vague at times" boundary "between *quid pro quo* corruption and general influence," 134 S. Ct. at 1451, a conception of quid pro quo corruption that turns on intent, yet acknowledges that intent may be unknowable, embraces more—far more—than the narrow view set forth by the panel.

CONCLUSION

The question presently before the Court is not whether *Citizens United* could *possibly* be interpreted as narrowing the *Buckley-Shrink Missouri* conception of corruption, but whether *Citizens United* and *Eddleman* are "clearly irreconcilable." *See Gammie*, 335 F.3d at 900. Since *Eddleman* (and *Shrink Missouri*, upon which *Eddleman* relied) *can* be reconciled with *Citizens United*, the panel improperly purported to overrule a prior panel decision, and "en banc consideration is necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).

The Court should grant the petition for rehearing en banc.

Respectfully submitted this 19th day of June, 2015.

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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 June 19, 2015.

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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June 19, 2015