Docket No. 16-35424

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, INDIAN LAW RESOURCE CENTER, AMERICAN INDEPENDENT BUSINESS ALLIANCE, AND AMERICAN SUSTAINABLE BUSINESS COUNCIL AS AMICI CURIAE SUPPORTING APPELLANTS AND IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW

RONALD A. FEIN*
JOHN C. BONIFAZ
Free Speech For People
1340 Centre St. #209
Newton, MA 02459
Phone: (617) 244-0234
rfein@freespeechforpeople.org
Counsel for amici curiae
**Counsel of record*

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]

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.*

[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.

Bullock, 132 S. Ct. 2490 (2012), which was a challenge to a Montana law prohibiting corporate expenditures in political campaigns. Free Speech For People also submitted a brief to the United States Supreme Court in support of Montana in that 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 Indian Law Resource Center provides legal assistance without charge to indigenous peoples of the Americas to

combat racism and oppression, to protect their lands and environment, to protect their cultures and ways of life, to achieve sustainable economic development and genuine self-government, and to realize their other human rights. The Indian Law Resource Center seeks to overcome the grave problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights, and by challenging the governments of the world to accord justice and equality before the law to all indigenous peoples of the Americas. The Indian Law Resource Center is a non-profit law and advocacy organization established and directed by American Indians. Founded in 1978, the Center has offices in Montana and Washington, D.C. The Center is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, funded by grants and contributions from individuals, foundations, and Indian nations. The Center accepts no government support. The Center has helped to litigate voting rights issues affecting Indians in Montana particularly. The Center continues to work on issues of political and economic marginalization and poverty that affect the

Indian tribes and Indian individuals in Montana. The issues of money and campaign contributions in Montana are a serious concern for the Center.

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 85 affiliated community organizations across 32 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 district court erred by holding that Montana's voter-enacted contribution limits were not closely drawn because the voters were concerned with restoring political equality. *See Lair v. Motl*, 2016 WL 2894861, __ F. Supp. 3d __ (D. Mont. May 17, 2016), at *7-8. As the state notes, the contribution limits are defensible on the basis of the anti-corruption interest, and the court applied the wrong level of scrutiny by "striving to discern the actual purpose of the law from a voter's pamphlet" and then invalidating the law on that basis. *See* State Br. at 38-41. But assuming that Montana's voters *did* consider political equality as an additional goal, and that this is relevant, the district court erred because political equality is not at odds with the Constitution.

To the contrary, the ideal of political equality is built into the Constitution's text, structure, and history. In particular, the Supreme Court's voting rights cases establish a concept of political equality that prohibits the functional exclusion of less affluent

voters, and requires that all voters have the opportunity to participate equally at all stages of the electoral process.

Montana's voters could reasonably conclude, in 1994 and now, that the state's political contribution system tends to operate as an unofficial but exclusionary candidate selection process, influencing and filtering political choices before any votes are cast. Without appropriate limits, this system grants disproportionate selection power to a small subset of the electorate that is wealthier, whiter, older and more disproportionately male than the electorate as a whole. In fact, in Voting Rights Act cases finding abridgments of Native Americans' voting rights in Montana, this court has highlighted as relevant that Native American voters are generally financially unable to make politically relevant campaign contributions.

This court should accept progress toward political equality as a compelling public interest. Alternatively, the court should reject the district court's finding that the contribution limits cannot be closely drawn to the anti-corruption interest simply because the *people* accept political equality as a compelling

interest. Even if Montana must defend its contribution limits based on anti-corruption interests alone, the people, through public deliberative discourse about the nature of their democratic self-government, should not be so limited.

ARGUMENT

I. The district court erred by faulting Montana's voters for seeking to restore political equality.

The district court erred by concluding that Montana's contribution limits are not "closely drawn" to a compelling interest because the voters were attuned to political equality. Yet political equality is a fundamental constitutional value, embedded in the Constitution and established by the Supreme Court's voting rights cases (as opposed to its campaign finance cases). Furthermore, political equality applies at all stages of the electoral process, not just at 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. Political equality is a fundamental constitutional value.

The Declaration of Independence famously proclaims it "self-evident, that all men are created equal"—not, obviously, in wealth

or skills of persuasion, but in their "Right . . . to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." *The Declaration of Independence* ¶ 2 (U.S. 1776). This vision provides interpretive context[2] to the egalitarian threads in the Framers' Constitution, such as equal apportionment, U.S. Const. art. I, § 2; prohibition of titles of nobility, *id.* § 9; guarantee of a republican form of government, *id.* art. IV, § 4; and prohibition of exclusion of religious minorities from power, *id.* art. VI. *See also* Laurence H. Tribe, *Dividing* Citizens United: *The Case v. the Controversy*, 30 Const. Comm. 463, 479 (2015) (describing "principles of civic equality" in Framers' Constitution).[3] In defending the

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[2] While the Declaration is not itself binding law, the Constitution "is but the body and the letter of which the [Declaration] is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence." *Gulf, Colo. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).

[3] To be sure, the Constitution's vision of political equality was marred by its explicit exclusion of slaves and—of special relevance to Montana, *see infra* Part III—Native Americans. *See, e.g.*, U.S. Const. art. I, §§ 2 (Apportionment Clause), 9 (Migration and Importation Clause); *id.* art. IV, § 2 (Fugitive Slave Clause).

Constitution, James Madison, the author of the First Amendment, made an explicitly egalitarian appeal:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune.

The Federalist No. 57, at 348-49 (James Madison) (Clinton Rossiter ed., 1961).

Since then, the Constitution has embraced increasingly broader notions of political equality. Of the 17 amendments ratified since the original Bill of Rights, seven expanded political equality. *See* U.S. Const. amends. XIV (prohibiting denial of equal protection of the laws), XV (prohibiting denial of vote based on race), XVII (providing popular election of Senate), XIX (prohibiting denial of vote based on sex), XXIII (granting the right to vote in presidential elections to residents of the District of Columbia), XXIV (prohibiting denial of vote based on failure to pay poll tax), XXVI (prohibiting denial of vote based on age). By 1963, the Supreme Court derived the “one person, one vote” principle from the forward march of “[t]he conception of political equality from

the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments." *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Political equality is a first-class constitutional value, and the people should not be chided for stating what the Founders held self-evident, nor for stating in a voter pamphlet what the author of the First Amendment wrote in the canonical "voter pamphlet" for the Constitution itself.

B. Political equality is harmed when wealthy funders have disproportionate influence in pre-selecting candidates.

The principle of political equality prohibits denying the vote based on wealth. *See* U.S. Const. amend. XXIV (prohibiting denial of vote in federal elections based on failure to pay poll tax); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding same for state elections under Fourteenth Amendment); *see also Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam) (prohibiting limiting vote to property owners).

Furthermore, screening *candidates* based on wealth violates the rights of low-income *voters*:

> To the extent that the system requires candidates to rely on contributions . . . 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 . . . .").

The principle of political equality is also guaranteed by the Voting Rights Act of 1965, 52 U.S.C. §§ 10101 *et seq*. (VRA). Under Section 2 of the Voting Rights Act, "the political processes leading to nomination or election" must be "equally open to participation" by members of racial and language minority 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." 52 U.S.C. §§ 10301(b), 10303(f)(2). Courts evaluating Section 2 cases must consider not only formal electoral structures,

but also whether those structures "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by [people of color] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In fact, courts have found that people of color were not able to participate fully in the political process *precisely because of* their inability to participate equally in a wealth-based political 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).

II. Nationwide, campaign funding systems are dominated by demographically unrepresentative donor classes with unrepresentative policy preferences.

In general, campaign funding contribution systems are dominated by the wealthy. *See, e.g.,* Adam Bonica *et al.*, *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. Econ. Perspectives 103, 111-12 (2013), http://goo.gl/VHWQrr (over 40% of total money contributed in federal elections comes from 0.01% of voting age population); David Callahan & J. Mijin Cha, Demos, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America*, https://goo.gl/UtCxyO (Feb. 2013) ("*Stacked Deck I*") (over 60% of money contributed to 2012 presidential campaigns came from 0.07% of U.S. population giving $2,500 or more); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Pa. L. Rev. 73, 105 (2004) (in 2000, while only 13.4% of American households earned $100,000 or more,

85.7% of federal contributions over $200 and 93.3% of $1000+ contributions came from that subset).

People of color, young people, and women are significantly underrepresented among the donor class. *See, e.g.,* Adam Lioz, Demos, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, https://goo.gl/TJ2mQX (Dec. 2014) ("*Stacked Deck II*") (90% of $200+ federal contributions came from predominantly white neighborhoods); Overton, 153 U. Pa. L. Rev. at 102 (donors who gave over $200 in 2000 presidential election were 95.8% white, 70.2% male, and 70.6% aged 50 or older). Studies of city-level donor demographics show similar patterns. *See, e.g.,* Sean McElwee, Demos, *Miami-Dade's White Donor Class: How Big Donors Distort Democracy*, https://goo.gl/NuiEpa (Sept. 13, 2016) (finding that large donors to Miami city and county campaigns are disproportionately wealthy, white, and male).

Yet these disparities of race, sex, and age tend to shrink or disappear among donors at low levels, such as $50 or below. Nationally, more than half of $50-or-below 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). And state and local data indicates that the donor pool at these lower levels is far more reflective of the voting population.[4] While Montana-specific data has not been analyzed, amici know no reason to suggest that Montana would not follow the established pattern—i.e., that as the contribution level increases, the donor pool becomes increasingly unrepresentative of the electorate with respect to wealth, race, sex, and age. Few Montana voters can make large contributions, because overall, Montana is relatively poor: its 2015 median household income ($51,395) is 37th in the country. *See*

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[4] *See, e.g.*, *Stacked Deck II*, *supra*, https://goo.gl/TJ2mQX (finding inverse relationship between contribution level and donor diversity); Sean McElwee, Demos, *D.C.'s White Donor Class: Outsized Influence in a Diverse City*, https://goo.gl/x8uLd7 (June 23, 2016) (finding that, in D.C. city elections, large donor pool is disproportionately wealthy, white, and male, but small donor pool is considerably more diverse); Sean McElwee, Demos, *How Chicago's White Donor Class Distorts City Policy*, https://goo.gl/QIEFfU (Apr. 28, 2016) (similar); Alex Kotch, Inst. for Southern Studies, *The Face of Election Money in North Carolina: The Disconnect Between Changing Demographics and the Political Donor Class in a Battleground State*, https://goo.gl/z2Usvx (Oct. 15, 2015) (similar findings for North Carolina donors in federal races).

U.S. Census Bureau, Historical Income Tables: Households, Table H-8, http://go.usa.gov/xKzCX (Excel file).

As a practical matter, "[t]he donor class effectively selects which candidates will be viable through large hard money contributions." Overton, 153 U. Pa. L. Rev. at 77. Thus, campaign contributions affect candidate selection long before Election Day. In the early stages of a campaign cycle, long before votes are 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. "[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 appeal to the wealthy or be wealthy themselves. *Bullock*, 405 U.S. at 143-44.

Consequently, wealthy donors 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 564, 575-76 (Sept. 2014), https://goo.gl/5IBn68 (multivariate statistical analysis of policy preferences and enacted policies). By the time that non-wealthy Americans can exercise their right to vote, crucial candidate-filtering choices have already been made by wealthy funders, and the remaining candidates generally accord with those funders' policy preferences.

Though this "wealth primary" consists of private conduct, it is analogous to the private "white primary" invalidated by the Supreme Court. *See Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding Fifteenth Amendment violation where private political association held unofficial, whites-only candidate selection process that effectively determined the result of "official" election, leaving primary and general elections as "no more than the perfunctory ratifiers of the choice that has already been made in [private] elections"); *see also 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).

As in *Terry*, the effect of donor pre-selection of candidates 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, most remaining candidates either are wealthy, or have the support of wealthy donors; voters' choices are thus reduced to a contest among the wealthy. *See* 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, the candidates presented for that vote have already passed a wealth-based filter.

This money-driven political inequality skews policy toward the preferences of the unrepresentative donor class. Crucially, the donor class's policy preferences (particularly its *economic* policy preferences) are quite different from those of most Americans. *See Stacked Deck I*, *supra*, https://goo.gl/UtCxyO (citing studies revealing that policy preferences of wealthy "vary widely from those of the general public"); 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) (similar); *see also Stacked Deck II, supra*, https://goo.gl/TJ2mQX (citing studies demonstrating that policy preferences of people of color are underrepresented because of absence from donor class).

III. This wealth-based campaign funding system particularly limits the political influence of Montana's Native American community.

As with many states, there is a distinct racial pattern to Montana's income distribution. The median individual income for Montana's Native American population ($20,074) is just 76.5% of the median white income ($26,240).[5] And the Native American poverty rate (36.6%), for years the fourth-highest Native American poverty rate in the nation, is more than double the overall state poverty rate (15.3%).[6]

This court has recognized Native American poverty as a factor in finding under the Voting Rights Act that Montana's state and local political processes have not been equally open to Native

[5] *Compare* U.S. Census Bureau, http://go.usa.gov/xkar5 (Montana median earnings for Native Americans in 2014) *with* U.S. Census Bureau, http://go.usa.gov/xkarh (earnings for whites).

[6] *See* U.S. Census Bureau, http://go.usa.gov/xkagn (Montana's 2014 poverty rates by race); Suzanne Macartney *et al.*, U.S. Census Bureau, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011*, http://go.usa.gov/95XA (Feb. 2013), at 15 (listing all states' Native American poverty rates).

American voters' participation.[7] *See United States v. Blaine County*, 363 F.3d 897, 914 (9th Cir. 2004) (affirming finding of Section 2 violation; 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; 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]

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[7] Under Section 2, courts consider "the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206. Wealth-based threats to political equality affect not only those in poverty, but also those who could theoretically afford a contribution but would have to cut their limited budgets 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.").

[8] In Voting Rights Act cases, "[o]nce lower socio-economic status . . . has been shown, there is no need to show the causal link of this lower status on political participation." *United States v. Dallas Cty. Comm'n*, 739 F.2d 1529, 1537 (11th Cir. 1984).

Part of the problem is Native American candidates' lack of access to wealthy donor networks. *See* Mark Trahant, *The Hidden History of Why Native Americans Lose Elections (And What to Do About It)*, Indian Country Today, http://ictmn.com/oJAG (Feb. 12, 2016) (describing underrepresentation of Native Americans in political office, and outlining fundraising difficulties Native American candidates face); *see also Stacked Deck II, supra*, https://goo.gl/TJ2mQX (citing evidence that "lack of access to donors is an important reason preventing people of color from being represented in elected office").

In fact, Native Americans' exclusion from private, informal meetings or networks of donors may constitute "the exclusion of members of the minority group from candidate slating processes." S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (suggested factor for Section 2 analysis); *see, e.g., Perez v. Pasadena Indep. Sch. Dist.,* 958 F. Supp. 1196 (S.D. Tex. 1997) (finding that campaign contributors effectively functioned as exclusionary slating committee for school district board); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La.

1986) (finding that private informal meetings constituted exclusionary slating process), *aff'd*, 834 F.2d 496 (5th Cir. 1987).

Despite various barriers, Montana's 1994 campaign finance limits (along with other factors) may have helped Native American candidates approach parity in state representation in Montana:

> Some 20 years ago, Montana was much like any other state with a significant Native American population with only one or two Native Americans serving in the state Legislature. But in 1997, a third Native American candidate won. And again in 2003. . . . Montana's population is 7.4 percent Native American. Today there are three Native Americans in the Montana Senate and five in the Montana House of Representatives, some 5.3 percent of the state Legislature.

Mark Trahant, *A Political Turning Point for Native Americans*, Yes! Magazine, https://goo.gl/iZhcmV (July 26, 2016). That 5.3% "is the highest percentage of Native American representation in the country." *Id.* And as the district court noted, Montana's contribution limits are among the lowest nationwide. *Lair*, 2016 WL 2894861 at *9. If this is coincidence, it is unusually fortuitous.

CONCLUSION

While the Supreme Court and the Ninth Circuit have recently focused campaign finance jurisprudence on corruption

and even just "quid pro quo" corruption, *see McCutcheon v. FEC,* 134 S. Ct. 1434, 1441 (2014); *Lair v. Motl*, 798 F.3d 736, 746 (9th Cir. 2015),[9] the Supreme Court has long recognized political equality as a constitutionally protected interest in the voting rights context. Consequently, this court should acknowledge that in addition to the anti-corruption interest, Montana's contribution limits also serve the compelling interest of ameliorating the excesses of a wealth-based candidate selection system that, left unchecked, devalues the votes of the non-wealthy, and in

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[9] Of course, the Supreme Court's narrow conception of the interests that can justify campaign finance limits may change. *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 rejection of the concept of one-person-one-vote.").

particular, the votes of people of color, women, and the young, in derogation of fundamental constitutional values.[10]

Alternatively, the court should reject the district court's finding that the public's legitimate concern for political equality renders the law's contribution limits *per se* not "closely drawn" to the anti-corruption interest.

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[10] Montana may protect this interest through contribution limits because states may take prophylactic measures to protect political equality, including by regulating practices that are not *themselves* unconstitutional. *See South Carolina v. Katzenbach,* 383 U.S. 301 (1966) (upholding ban on literacy tests as within Congress's power to prevent Fifteenth Amendment violations), *abrogated on other grounds*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *see also Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (Section 2 of Voting Rights Act "allows States to choose their own method of complying with the Voting Rights Act"). Prophylactic measures to protect the political process are permitted to incidentally burden speech, association, or expressive conduct. *See Burson v. Freeman*, 504 U.S. 191 (1992) (upholding prohibition of electioneering speech in immediate vicinity of polling place); *Brown v. Hartlage*, 456 U.S. 45, 54-56 (1982) (upholding prohibition of candidates promising to give things of value in exchange for votes). Indeed, in both *Terry* and *Morse*, the Court championed political equality over freedom 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).

The Court should reverse the judgment below.

Respectfully submitted this 5th day of October, 2016.

RONALD A. FEIN
JOHN C. BONIFAZ
Free Speech For People
1340 Centre St. #209
Newton, MA 02459
Phone: (617) 244-0234
rfein@freespeechforpeople.org

/s/ Ronald A. Fein
Ronald A. Fein
Counsel for amici curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 and set in Century Schoolbook, 14-point.

/s/ Ronald A. Fein
Ronald A. Fein
Counsel for amici curiae

October 5, 2016

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 October 5, 2016.

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/s/ Ronald A. Fein
Ronald A. Fein
Counsel for amici curiae

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