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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

ILLINOIS OPPORTUNITY PROJECT, Plaintiff, v. **STEVE BULLOCK**, in his official capacity as governor of Montana, and **MEGHAN HOLMLUND**, in her official capacity as chief of the State Procurement Bureau, Defendants.	Case No. CV 19-00056-H-CCL ***AMICI CURIAE* BRIEF OF CAMPAIGN LEGAL CENTER, COMMON CAUSE, AND THE NATIONAL INSTITUTE ON MONEY IN POLITICS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The constitutionality of transparency requirements for pre-election advertisements that mention candidates or ballot measures is well settled. The Supreme Court and Ninth Circuit have repeatedly upheld requirements to disclose the sources of money used to pay for election-related spending, including "electioneering communications" like the ones plaintiff Illinois Opportunity Project ("plaintiff") intends to disseminate. Both courts have also explicitly rejected the argument, which plaintiff attempts to relitigate here, that the First Amendment categorically exempts advocacy about "issues" from transparency requirements. It does not.

Plaintiff urges this Court to disregard binding Supreme Court and Ninth Circuit decisions, ostensibly so plaintiff can "promise privacy" to any donors who may wish to help pay for plaintiff's electioneering communications in Montana elections. Although plaintiff's lawsuit challenges the constitutionality of Montana Executive Order No. 15-2018 (June 8, 2018) ("Order"), its real pursuit appears to be the reversal of decades of Supreme Court and lower court precedent upholding the First Amendment values of election-spending transparency. Indeed, it is far from clear that plaintiff's donors are even subject to the Order it challenges here.

[1] No party's counsel or person except *amici* and their counsel authored this brief or contributed money to fund its preparation or submission.

Plaintiff's facial challenge is based on arguments that courts have clearly and repeatedly rejected. And its summary judgment brief barely attempts to satisfy its burden of demonstrating entitlement to an as-applied exemption. Indeed, plaintiff's request for as-applied relief, which is omitted from its Amended Complaint, appears to be an afterthought, tacked on as three paragraphs near the end of its summary judgment brief.

The Order plaintiff challenges carries out Montana's valid and important interests in minimizing actual and apparent corruption in the government contracting process and promoting transparency about political spending by entities seeking large contracts with the state of Montana. The Court should reject plaintiff's attempt to rewrite decades of First Amendment jurisprudence. Plaintiff's challenge should be dismissed and summary judgment should be granted to the state defendants.

ARGUMENT

I. TRANSPARENCY LAWS PROMOTE FIRST AMENDMENT INTERESTS.

Plaintiff's facial challenge depends on its flawed, categorical argument that "[d]isclosure burdens [First Amendment] rights." (Pl.'s Mem. of Law in Supp. of 3d Mot. for Summ. J. ("Pl.'s S.J. Mem.") 2.) That argument disregards the First Amendment interests that political transparency requirements advance and protect.

As the Supreme Court has repeatedly recognized, disclosure requirements, like the Order, "do not prevent anyone from speaking," *Citizens United v. FEC*, 558

U.S. 310, 369 (2010), and they promote the right to self-government and ensure that officeholders remain publicly accountable—core First Amendment values. The Supreme Court has thus criticized plaintiffs challenging a federal disclosure law for "'ignor[ing] the competing First Amendment interests of individual citizens seeking to make *informed* choices in the political marketplace.'" *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (emphasis added), *abrogated in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

To fully participate in the political process, voters need information to determine who supports which positions and why. Therefore, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. The Ninth Circuit, too, has recognized that "[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).

The Order protects Montanans' right to know when entities seeking substantial contracts with the State are also financing Montana electioneering communications. It protects against actual and apparent corruption and also promotes core First Amendment values, thus "increasing, not limiting, the flow of

information. The [F]irst [A]mendment profits from this sort of governmental activity." *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975).

II. THE ORDER IS FACIALLY CONSTITUTIONAL.

As the Supreme Court has recognized, "[c]laims of facial invalidity often rest on speculation" and "run contrary to the fundamental principle of judicial restraint." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Facial challenges are thus largely "disfavored." *Id.* In the First Amendment context, a facial challenge must fail unless a plaintiff demonstrates "*from actual fact* that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (emphasis added); *see United States v. Stevens*, 559 U.S. 460, 472-73 (2010). Plaintiff cannot meet that heavy burden.

The Order mandates transparency regarding the political donations of entities who seek large contracts with the state of Montana. When a prospective Montana contractor contributes to a group that finances Montana electioneering communications, the prospective contractor must either agree with the recipient organization that its contribution will not be used to pay for Montana electioneering communications or disclose the contribution. Thus, only those contributions that are not opted out of being used for Montana electioneering communications must be disclosed.

The Order ensures that Montanans have more complete information about the sources of money spent on pre-election political ads, and reduces actual and apparent corruption by requiring those who seek large contracts with the state to disclose their substantial donations to finance Montana electioneering communications. Plaintiff's claim that this tailored disclosure requirement is facially unconstitutional is meritless.

A. The Order requires transparency about prospective Montana contractors' contributions to finance electioneering communications.

Contrary to plaintiff's mischaracterization (Pl.'s S.J. Mem. 4, 5, 8), the Order does not require plaintiff to disclose its membership list, or anything else.[2] Instead, it imposes a targeted requirement on entities seeking large contracts with Montana's executive branch—contracts valued above $25,000 for services or $50,000 for goods—to disclose certain contributions, expenditures, or transfers totaling more than $2,500 to Montana candidates, political parties, and entities that directly or indirectly finance "electioneering communications." Mont. Exec. Order No. 15-2018 (June 8, 2018). The Order defines "electioneering communication" as a paid communication that references a Montana candidate, ballot question, or party and is

[2] Amici do not address the question of whether plaintiff has standing to assert its donors' legal interests but as defendant explains, the Court must resolve that threshold question. (*See* Def.'s Summ. J. Br. 4-12.)

distributed within 60 days of voting in a Montana election to more than 100 recipients in the district voting on the candidate or question. *Id.* § II.1.[3]

The Order ensures Montanans know when those seeking large contracts with the state are also spending money to support candidates and parties, and to help finance pre-election political ads. Importantly, the Order allows a prospective Montana contractor to support non-electioneering activities of a group like plaintiff without disclosing its contribution. Where a donor and recipient agree that the donation will not be used for Montana electioneering or other Montana electoral activities, the donation is exempt from disclosure. *Id.* § II.2.b. The Order's own terms thus negate plaintiff's allegation that it has "no limiting principle" and requires disclosure of donations "give[n] to support issue advocacy in another state, or because of [plaintiff's] work on another issue, or to support general office operations." (Pl.'s S.J. Mem. 10-11.) On the contrary, as long as plaintiff and a donor agree that a donation will not be used for Montana electioneering, the donation is exempt from disclosure. Mont. Exec. Order No. 15-2018 § II.2.b. Here, that means the Order applies only to donations specifically made available to finance plaintiff's Montana electioneering communications.

[3] The Order excludes bona fide news stories, commercial communications, candidate debates, and internal communications to an organization's members, stockholders, or employees. *Id.*

B. Plaintiff's facial challenge is foreclosed by controlling precedent.

The Order easily satisfies the intermediate level of "exacting" constitutional scrutiny that courts apply to political transparency laws. In a series of cases spanning more than 40 years, the Supreme Court has emphasized that disclosure requirements "may burden the ability to speak," but they "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366, 369 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam); *McConnell*, 540 U.S. at 201). Accordingly, disclosure requirements like the Order are "a less restrictive alternative to more comprehensive regulations of speech." *See Citizens United*, 558 U.S. at 369.

The Supreme Court's "series of precedents considering First Amendment challenges to disclosure requirements in the electoral context" establishes that disclosure laws receive intermediate scrutiny and are constitutional so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United*, 558 U.S. at 366-67; *McConnell*, 540 U.S. at 231-32; *Buckley*, 424 U.S. at 64, 66); *see also Human Life of Wash.*, 624 F.3d at 1016 (applying *Citizens United*).[4]

[4] The controlling decisions contradict plaintiff's suggestion (Pl.'s S.J. Mem. 4 n.1) that "strict scrutiny is the appropriate standard" here.

The same "series of precedents" makes clear that Montana's interest in providing the public with more information about contributions by prospective Montana contractors for Montana electioneering communications "alone is sufficient" to justify the Order's disclosure requirement. *Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 231. These decisions foreclose plaintiff's misguided argument that the Order must "further a purpose of fighting crime" (Pl.'s S.J. Mem. 4). They also directly reject the contention (*id.* at 9-10) that disclosure requirements cannot apply to electioneering communications. Plaintiff argues that "the informational interest is less applicable in the issue-advocacy context" (*id.* at 9), but plaintiff's ads would "include names and pictures of candidates for governor," urge the candidates to take particular policy positions, and be disseminated to "thousands of Montana voters within 90 days of the 2020 general election" (Am. Compl. ¶ 18). The Supreme Court and Ninth Circuit have repeatedly rejected this issue advocacy argument and upheld transparency requirements for electioneering communications like the ads plaintiff proposes here.

In *McConnell*, eight Justices clarified that there is no "constitutionally mandated line between express advocacy and so-called issue advocacy." 540 U.S. at 190. In "reject[ing] the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy" in the disclosure

context, the Court held that legislatures may extend "disclosure requirements to the entire range of 'electioneering communications.'" *Id.* at 194, 196.

Later, in *Citizens United*, eight Justices reaffirmed *McConnell*'s disclosure holding and again "rejected" the "contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369. The plaintiff disputed the government's informational interest in requiring disclosure for pre-election ads that identified then-candidate Clinton and urged viewers to watch a movie about her. 558 U.S. at 367-68. The Court "disagree[d]," explaining that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369.[5]

The Ninth Circuit has similarly rejected plaintiff's "issue advocacy" argument. First, in *Human Life of Washington*, the court refused to find Washington's disclosure requirements for "political advertising" facially

[5] In 2017, the Supreme Court again signaled its support for transparency regarding the funding of electioneering communications, summarily affirming a decision of the three-judge district court in *Independence Institute v. FEC*, which rejected another challenge to the federal disclosure rules for electioneering communications. *See* 216 F. Supp. 3d 176, 185 (D.D.C.) (three-judge court) ("The Supreme Court has twice considered and twice upheld the Bipartisan Campaign Reform Act's large-donor disclosure provision, and in doing so has rejected the very type of issue-centered exception for which the Institute argues."), *aff'd mem.*, 137 S. Ct. 1204 (2017).

unconstitutional because they "encompass[ed] issue advocacy instead of extending only to express advocacy or its functional equivalent." 624 F.3d at 1014. The court held that plaintiff's facial challenge would fail even if the communications "constitute unadulterated issue advocacy" because *Citizens United* "dispensed with the idea that only express advocacy and its functional equivalent are subject to government regulation." *Id.* at 1016. More recently, in *Montanans for Community Development v. Mangan*, the court upheld Montana's "electioneering communication" definition and related statutory disclosure requirements, finding that "[e]ven if electioneering communications only educate the public about a candidate, Montana still has a substantial interest in disclosing to the public who is doing the educating." 735 Fed. Appx. 280, 284 (9th Cir. May 22, 2018).

As these decisions collectively make clear, plaintiff's facial challenge is meritless. The Supreme Court, Ninth Circuit, and other federal courts have already overwhelmingly rejected plaintiff's fatally flawed argument that the First Amendment shields donations that fund electioneering communications from transparency requirements, instead recognizing that transparency requirements *promote* citizens' First Amendment rights to make "informed choices in the political marketplace." *McConnell*, 540 U.S. at 197.[6]

[6] *See, e.g.*, *Independence Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016) ("It follows from *Citizens United* that disclosure requirements can, if cabined within the bounds of exacting scrutiny, reach beyond express advocacy to at least some forms

C. Montana has a heightened interest in transparency of political spending by corporations seeking large state contracts.

The Order also reduces actual and apparent corruption by shining a light on business entities seeking large contracts with Montana's executive branch agencies while also making contributions that fund electioneering communications in Montana elections. The risk of corruption in the government contracting context is self-evident. *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) (en banc). The unique corruption concerns posed by highly regulated entities like government contractors have led at least seventeen states, the federal government, and various municipalities to enact limits on campaign contributions from those who do business with the government.[7]

Courts recognize these critical concerns and have upheld complete bans on political spending by current and prospective government contractors. In *Yamada v. Snipes*, the Ninth Circuit upheld Hawaii's government contractor contribution ban, both "as a general matter" and as applied to the plaintiff-contractor's contributions

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of issue speech."); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011) ("We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws.").

[7] *Wagner*, 793 F.3d at 16 & n.18 (surveying laws); *see, e.g.*, 52 U.S.C. § 30119; Cal. Gov't Code § 84308(d); W. Va. Code § 3-8-12(d).

to lawmakers who had no part in awarding or overseeing the plaintiff's contracts with the state. 786 F.3d 1182, 1205-07 (9th Cir. 2015). The strong appearance of a "'financial quid pro quo: dollars for political favors'" alone was sufficient to justify the state's total prohibition on contractor contributions. *Id.* at 1207 (quoting *Citizens United*, 558 U.S. at 359).

Similarly, in *Wagner*, the en banc D.C. Circuit unanimously upheld the federal law prohibiting current and prospective government contractors from making any contributions to federal candidates, political parties, or PACs. The court found government contracting to represent the "heartland" of pay-to-play concerns, because there is a "very specific quo for which the contribution may serve as the quid: the grant or retention of the contract." 793 F.3d at 22.

The Second Circuit, in *Green Party of Connecticut v. Garfield*, sustained Connecticut's broad prohibition on political contributions from current or prospective government contractors, their principals, and the spouses and dependent children of government contractors and their principals. 616 F.3d 189 (2d Cir. 2010). The court concluded that this "drastic measure" was warranted because any contribution from a government contractor "could have still given rise to the appearance that contractors are able to exert improper influence on state officials." *Id.* at 205.

The disclosure requirement challenged here is "a less restrictive alternative" to these bans on contractor contributions. *Citizens United*, 558 U.S. at 369. The Order reduces the appearance of corruption within the government contracting process, which "exists even where there is no actual corruption . . . [and] threatens the public's faith in democracy," *Ognibene v. Parkes*, 671 F.3d 174, 186 (2d Cir. 2011).

D. Plaintiff's authorities fail to support its facial challenge.

Plaintiff simply ignores the Supreme Court and Ninth Circuit decisions directly foreclosing its facial challenge, instead citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *NAACP v. Alabama*, 357 U.S. 449 (1958), which preceded *McConnell* and *Citizens United* and have nothing to do with electioneering communications disclosure. Plaintiff argues that *McIntyre* and *NAACP* support its claim of a broad First Amendment right to "anonymous issue advocacy" and "associational privacy" (Pl.'s S.J. Mem. 9, 13), but it misconstrues both decisions. Even setting aside that *Citizens United* is dispositive here, neither *McIntyre* nor *NAACP* supports plaintiff's facial claim.

In *McIntyre*, an individual was fined for violating Ohio disclosure law by distributing anonymous homemade leaflets opposing a school tax. 514 U.S. at 337-38. The Supreme Court struck down the statute, emphasizing that the leaflets were "a personally crafted statement of a political viewpoint," *id.* at 355, and concluding

that in the case of "a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 349-50. The Court distinguished disclosure of "Mrs. McIntyre's handbills" from disclosure requirements for political contributions and expenditures, which the Court had previously upheld. *Id.* at 355.

McIntyre is both narrow and an outlier. In the more than 25 years since it was decided, the Supreme Court has not extended the decision beyond its facts. The Ninth Circuit has likewise declined to rely on *McIntyre* in First Amendment challenges to political advertising disclaimer laws. *See Yamada*, 786 F.3d at 1203 n.14 ("An individual pamphleteer may have an interest in maintaining anonymity, but 'leaving aside *McIntyre*-type communications . . . there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way.") (quoting *Alaska Right to Life Comm. v. Miles*, 441 F. 3d 773, 793 (9th Cir. 2006)). Other circuit courts have similarly characterized *McIntyre*'s limited precedential value. *See, e.g.*, *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013) (distinguishing *McIntyre* as "narrow" and "limited" to "written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed'" (citation omitted)); *Ctr. for Individual Freedom*, 697 F.3d at 482 (explaining that *McIntyre*'s "broad 'interest in anonymity' does not justify invalidating disclosure

laws in a facial challenge brought by a national political advocacy organization that seeks to use the mass media . . . to spread its political messages on a broad scale").

NAACP likewise offers no support for plaintiff's facial challenge.[8] Plaintiff's reliance on *NAACP* for its facial challenge hinges on its demonstrably false assertion that the Order requires disclosure of plaintiff's "membership lists." (Pl.'s S.J. Mem. 4-5.) As explained *supra* at 5, the Order does not impose *any* disclosure requirement on plaintiff or organizations like it. In any event, *NAACP* concerned whether requiring the NAACP to publicly identify its members in 1950s Alabama would infringe the organization's First Amendment rights. 357 U.S. at 466. The Supreme Court concluded, on the basis of an extensive factual record, that NAACP members would face severe economic reprisals, violence, and harassment if their names were disclosed, and Alabama's disclosure mandate thus posed "the likelihood of a substantial restraint upon the exercise by [its] members of their right to freedom of association." *Id.* at 462. The Court relatedly found, given the factual record, that requiring the NAACP to disclose its members would likely impede its ability to advocate for its views, because the disclosure would likely "induce members to withdraw from the Association and dissuade others from joining it" out of fear of

[8] *NAACP is* relevant to plaintiff's as-applied challenge. As explained *infra* at 18-19, the decision underscores the deficiency of plaintiff's request for an as-applied exemption from the Order.

"the consequences of . . . exposure." *Id.* at 462-63. That fact-specific determination regarding the NAACP in 1950s Alabama does not support the facial invalidation of a 2018 Order requiring prospective Montana contractors to disclose their contributions to help finance Montana electioneering ads.

Nor is plaintiff correct that *NAACP* requires a governmental "purpose of fighting crime" to justify any law requiring political donor transparency. (Pl.'s S.J. Mem. 4) This argument appears to rely on a short discussion in *NAACP* distinguishing *Bryant v. Zimmerman*, 278 U.S. 63 (1928), in which the Court upheld a New York law requiring the Ku Klux Klan to disclose its membership list. 357 U.S. at 465-66 (discussing *Bryant*). The Court explained that *Bryant* did not support Alabama's position, because it "involved markedly different considerations," including the Klan's "unlawful intimidation and violence." *NAACP*, 357 U.S. at 465. But the Court never stated that addressing such unlawful activities is the "only" interest that "will do," as plaintiff suggests (Pl.'s S.J. Mem. 4). On the contrary, the Court explained that *Bryant* was inapposite for the separate reason that the Klan, unlike the NAACP, had entirely "refused to furnish the State with *any* information as to its local activities." *NAACP*, 357 U.S. at 465-66 (emphasis added).

Buckley, *McConnell*, and *Citizens United* were all decided after *NAACP* and all upheld political disclosure requirements despite spenders' efforts to invoke *NAACP*. These holdings confirm that *NAACP* provides no support for plaintiff's

facial challenge here. *NAACP is* relevant to analyzing plaintiff's as-applied challenge (Pl.'s S.J. Mem. 25), but as explained below, that challenge too is woefully deficient.

III. PLAINTIFF LACKS ANY BASIS FOR AN AS-APPLIED EXEMPTION FROM THE ORDER

Plaintiff's alternative, as-applied challenge appears to be premised entirely on speculation and unsubstantiated assertions. Its Amended Complaint alleges that a single donor and prospective donor who seek large contracts with Montana are "sensitive" to their "public image" and presumes those entities "will be disinclined" to support plaintiff while the Order is in effect. (Am. Compl. ¶¶ 22, 24.) Plaintiff also predicts the Order will cause it to "experience increased difficulty in retaining and recruiting corporate members" and impede its "ability to successfully raise money . . . from Montana-based and multistate corporate donors . . . that are regular government contractors." (*Id.* ¶ 29.)

These speculative allegations are insufficient. Plaintiff is a run-of-the-mill advocacy organization that advocates for mainstream principles, not a vulnerable and pervasively abused group to which the harassment exemption might apply. And plaintiff fails to demonstrate a "reasonable probability" that the Order's transparency requirement will cause its donors to experience *any* threats, harassment, or reprisals, let alone threats or harassment of constitutional significance.

A. The "harassment" exemption was recognized to protect vulnerable and pervasively abused groups.

Plaintiff is attempting to claim a narrow exemption recognized for politically and socially marginalized groups like the NAACP in 1950s Alabama or the Socialist Workers Party of Ohio in the early 1980s. The few cases addressing this exemption make clear that it is reserved for groups facing severe societal hostility, state-sanctioned animus, and the real prospect of physical harm.

In *Buckley*, the Supreme Court first acknowledged an as-applied exemption from electoral disclosure where "the type of chill and harassment identified in *NAACP v. Alabama* can be shown." 424 U.S. at 74. The harassment documented in *NAACP* included the organization's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462-63. The NAACP's brief cited bombings and shootings of African-American leaders, bombings of African-American churches and taxi stands, and threats directed at schools where African-American students were enrolling. *See* Br. for Pet'r, *NAACP v. Alabama*, No. 91, 1957 WL 55387, at *16 n.12 (U.S. Sept. 21, 1957) (citations omitted). The Court found that under those circumstances, compulsory disclosure of the NAACP's members would likely interfere with the First Amendment freedom of association of the NAACP and its members by "induc[ing] members to withdraw from the

Association and dissuading others from joining" because of fear of the consequences of being publicly associated with it. *NAACP*, 357 U.S. at 462-63.

The Supreme Court invoked *NAACP* in *Buckley*, refusing to create a blanket disclosure exemption for all "minor political parties" but holding that as-applied relief is available where a minor party demonstrates "injury of the sort at stake in *NAACP*." 424 U.S. at 69-71. The Court focused particularly on how a group's minority status could leave it existentially vulnerable to loss of revenue or membership because small, independent movements are "less likely to have a sound financial base" and "more vulnerable to falloffs in contributions." *Id.* at 71. For these vulnerable groups, "fears of reprisal may deter contributions to the point where the movement cannot survive." *Id.*

Applying these principles, the Court subsequently relied on a substantial record of pervasive and "ingrained" hostility from government and private sources to exempt the Socialist Workers Party ("SWP") from Ohio's campaign reporting law. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101 (1982). That record included evidence of FBI surveillance and disruption, "destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office," as well as evidence that SWP members "were fired because of their party membership." *Id.* at 99. The Court found such substantial threats and harassment outweighed Ohio's limited interest in disclosure from SWP, a minor

political party with limited membership and "little success at the polls." *Id.* at 88-89. It further found an exemption was warranted to ensure the party's "dissident" viewpoint was not driven from "the free circulation of ideas." *Id.* at 91, 93.[9]

Aside from these extreme cases, courts have generally declined to recognize as-applied exemptions from election disclosure requirements, as described below.

B. Plaintiff's circumstances are incomparable to the "historically ostracized groups" that have qualified for an as-applied disclosure exemption.

There is no serious comparison between plaintiff and the "historically ostracized groups" groups that have qualified for an as-applied exemption in the past. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1219 (E.D. Cal. 2009). Plaintiff cannot "in good conscience analogize [its] current circumstances to those of either the SWP or the Alabama NAACP circa 1950." *Id.* at 1214.

First, plaintiff is not a "minor" or "fringe" organization seeking "to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens." *Id.* at 1215 (explaining that representing a "minority" or marginalized viewpoint is "a necessary element of a successful as-applied claim"). Plaintiff's mission is "driven by the principles of liberty and free enterprise"

[9] *See also FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 420 (2d Cir. 1982) (granting an exemption to the Communist Party under similar circumstances); *1980 Ill. Socialist Workers Campaign v. Ill. Bd. of Elections*, 531 F. Supp. 915, 921-22 (N.D. Ill. 1981) (granting exemption to Illinois Socialist Workers party).

(Am. Comp. at ¶ 7) — "a concept entirely devoid of governmental hostility." *ProtectMarriage.com*, 599 F. Supp. 2d at 1217.

Second, plaintiff has failed to demonstrate that the Order would subject it or its donors to a reasonable probability of threats or harassment. Indeed, although plaintiff claims that it "will be unable to promise privacy" to corporate donors who pursue large contracts with Montana, plaintiff can avoid its donors' disclosure entirely by agreeing not to use their donations for its Montana electioneering communications. *Compare* Am. Compl. ¶¶ 22, 24, 26, *with* Mont. Exec. Order No. 15-2018 § II.2 (exempting contributions opted out from use for Montana electioneering communications); *cf. Independence Inst.*, 216 F. Supp. 3d at 187 (explaining that plaintiff challenging electioneering communication disclosure could avoid disclosure, *inter alia*, by financing communications with funds "specifically dedicated to running that candidate-referencing advertisement").

Even if plaintiff chooses not to opt out of donor disclosure, it also fails to offer any evidence of threats or harassment against itself or any donors. Plaintiff was founded in 2010, and has a sufficient "history upon which to draw" its own "specific evidence" substantiating its concerns about harassment. *Reed*, 561 U.S. at 204 (Alito, J., concurring (quoting *Buckley*, 424 U.S. at 74)). Plaintiff's website includes the names and photos of its officers, and publicizes its address, contact information, and detailed information about its policy positions on numerous issues. *See* The

Illinois Opportunity Project, illinoisopportunity.org. Despite its ten-year existence and public presence, plaintiff has not identified a single instance of harassment or threats directed at the organization or its officers. Instead, plaintiff speculates about government "retaliat[ion]" or "unfavorabl[e]" treatment (Pl.'s S.J. Mem. 17), presumes that donors "will be disinclined" to support plaintiff as a result of the Order (Am. Compl. ¶¶ 22, 24), and predicts that it will "experience increased difficulty in retaining and recruiting corporate members" (*Id.* ¶¶ 22, 24, 29). But plaintiff offers no facts to substantiate its speculation and predictions.

Not only would government retaliation be "improper," as plaintiff acknowledges (Pl.'s S.J. Mem. 17), the very Order plaintiff challenges explicitly prohibits discrimination against a bidding entity because of the contributions it discloses. Mont. Exec. Order No. 15-2018 § III.6.[10] And plaintiff's baseless speculation that Governor Bullock's political positions could lead to official retaliation against plaintiff's donors "is a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Citizens United v.*

[10] Plaintiff's reliance (Pl.'s S.J. Mem. 16) on the unpublished decision in *Nat'l Rifle Ass'n v. City of Los Angeles*, 2:19-cv-03212-SVW-GJS (C.D. Cal. Dec. 11, 2019), is misplaced. The disclosure requirement at issue in that case had nothing to do with political expenditures and, unlike here, "evince[d] a strong intent to suppress the speech of the NRA." Slip op. at 9.

Schneiderman, 882 F.3d 374, 385 (2d Cir. 2018). Plaintiff's conjecture also contravenes the well-settled "presumption of regularity" and good faith to which government officials are entitled in the discharge of their duties where, as here, there is no evidence to support plaintiff's aspersions. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *U.S. v. Chemical Found.*, 272 U.S. 1, 14-15 (1926).

Plaintiff's broader speculation about donor harassment is equally deficient and far short of the evidence proffered by *unsuccessful* plaintiffs in other recent cases. *See ProtectMarriage.com*, 599 F. Supp. 2d 1197; *John Doe No. 1 v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011). In *ProtectMarriage.com*, a California district court rejected an as-applied claim by political committees supporting Proposition 8, a ballot measure to amend California's constitution to define marriage as exclusively between a man and a woman. 599 F. Supp. 2d 1197. Much of the plaintiffs' evidence involved protests and boycotts against Proposition 8 supporters, "a form of civil protest" protected by the First Amendment. *Id.* at 1218 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982)). The court found the record insufficient to warrant a disclosure exemption, rejecting "the concept that individuals should be free from even legal consequences of their speech," *id.* at 1217, and held that the use by opponents of Proposition 8 of "publicly available information as the basis for exercising their own First Amendment rights [did] not

in any way diminish the [s]tate's interest" in transparency for contributions supporting the ballot measure campaign. *Id.* at 1219.

In *Reed*, the district court similarly refused to grant an as-applied exemption for signers of a referendum petition seeking to roll back legislative protections for same-sex couples. 823 F. Supp. 2d 1195.[11] The plaintiffs were neither a "minor party" nor a "fringe organization," *id.* at 1201-04, but rather part of a group that "was able to secure 137,000 signers . . . and obtained nearly half the vote with 838,842 votes," *id.* at 1203. And while they provided "a mountain of anecdotal evidence," that evidence demonstrated "merely a speculative possibility of threats, harassment, or reprisals." *Id.* at 1204. While "'[n]ew parties" with "no history upon which to draw'" could rely to some extent on the experiences of groups with similar views, the court held that the plaintiffs "could [not] be considered new," and they failed to "produce historical evidence from the past few years." *Id.* at 1205 (quoting *Buckley*, 424 U.S. at 74).

Plaintiff's sheer speculation here falls far below the already inadequate records before the courts in *ProtectMarriage.com* and *Reed*. None of plaintiff's examples involve prospective Montana contractors who would be subject to the

[11] The district court's as-applied decision followed a remand from the Supreme Court after it upheld Washington's public records statute as facially constitutional. *Id.* at 1197; *see Reed*, 561 U.S. at 202.

2018 Order. Instead, plaintiff relies heavily on anecdotal evidence involving protests of businesses opposing same-sex marriage (Pl.'s S.J. Mem. 18-19), but fails to explain how those examples indicate a likelihood that its donors will experience harassment because of plaintiff's promotion of "free enterprise" principles.[12] And regardless of plaintiff's poor analogy, the Ninth Circuit has made clear that protests and boycotts against opponents of same-sex marriage are not a basis for as-applied relief from electoral disclosure requirements. *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 840-41 (9th Cir. 2014) (declining to provide Proposition 8 supporters as-applied relief from disclosure requirements).

Plaintiff also cites protests against Wisconsin businesses whose executives supported an anti-collective-bargaining law (Pl.'s S.J. Mem. 20), but its own authorities note that those protests responded in part to a "dubious procedural trick" used to "forc[e] the bill through" the legislature. Lindsay Beyerstein, *Massive Protest in Wisconsin Shows Walker's Overreach*, HUFFINGTON POST (May 25, 2011), https://www.huffpost.com/entry/weekly-auditmassive-prot_b_835966); Pl.'s S.J. Mem. 20 (citing Beyerstein article). These civil, non-violent protests do not

[12] A 2019 Gallup poll found that 87% of Americans view "free enterprise" positively. Jeffrey M. Jones & Lydia Saad, *U.S. Support for More Government Inches Up, but Not for Socialism*, GALLUP (Nov. 18, 2019), https://news.gallup.com/poll/268295/support-government-inches-not-socialism.aspx.

demonstrate plaintiff's entitlement to an as-applied disclosure exemption here. As explained above, courts have already recognized that "civil protest" through "non-violent means" is itself protected by the First Amendment and *not* the kind of harassing or intimidating conduct that warrants an as-applied exemption from political disclosure requirements. *See supra* at 23-24; *see also Claiborne Hardware*, 458 U.S. at 909-10 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

Plaintiff's various examples of vandalism and other crimes committed in connection with hot-button issues, such as abortion and the removal of Confederate monuments (Pl.'s S.J. Mem. 21-22), are unrelated to any disclosures plaintiff's donors might make under the Order, and do not provide any reason for an as-applied exemption here.

C. Plaintiff does not claim that the Order's transparency mandate will impede its ability to conduct its political activities.

In *NAACP*, the Court found Alabama's disclosure mandate would likely "induce members to withdraw from the Association and dissuade others from joining it" out of fear of "the consequences of . . . exposure." 357 U.S. at 462-63. There is no indication a similar outcome is likely here.

Plaintiff presumes some donors "will be disinclined to . . . support" plaintiff if they must comply with the Order. (Amend. Comp. ¶ 22.) But plaintiff, an Illinois-based nonprofit, has identified only one donor and one prospective donor who even

could be subject to the Order's transparency requirements for prospective Montana contractors. And plaintiff conspicuously omits any allegation that the potential loss of those donations will impede its ability to conduct its activities or pursue its mission. Plaintiff's public filings suggest it has a substantial base of public support, receiving private contributions in excess of three million dollars in both 2017 and 2018, and more than $4.3 million in 2016.[13] Plaintiff's "sound financial base" distinguishes it from "minor" groups on the political margins that are especially "vulnerable to falloffs in contributions." *Buckley*, 424 U.S. at 71. Here, as in *ProtectMarriage.com*, "any evidence that th[e] burdens hypothesized by the Supreme Court [in *Buckley*] would befall" plaintiff is "[n]otably absent." 599 F. Supp. 2d at 1215.

[13] Illinois Opportunity Project Form 990, https://projects.propublica.org/nonprofits/organizations/273627386/201901349349304295/IRS990 (last visited May 18, 2020).

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion for summary judgment and deny plaintiff's motion for summary judgment.

Dated this 29th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)

This brief complies with the word limit in Local Rule 7.1(d)(2) because it contains 6,114 words, excluding the caption, certificate of compliance, tables of contents and authorities, and certificate of service.

/s/ Andrew I. Huff
Andrew I. Huff

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing Motion with the Clerk of the Court of the U.S. District Court of the District of Montana by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

/s/ Andrew I. Huff
Andrew I. Huff