Anita Y. Milanovich (Mt. No. 12176)
THE BOPP LAW FIRM, PC
1627 West Main Street, Suite 294
Bozeman, MT 59715
Phone: (406) 589-6856
Email: aymilanovich@bopplaw.com
Attorney for Plaintiff

James Bopp, Jr. (Ind. No. 2838-84)*
Justin McAdam (Ind. No. 30016-49)*
THE JAMES MADISON CENTER FOR FREE SPEECH
The National Building
1 South Sixth Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685
Email: jboppjr@aol.com
jmcadam@bopplaw.com
Attorneys for Plaintiff

*Pro hac vice application pending.

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

Montanans for Community Development, *Plaintiff*, v. **Jonathan Motl**, *et al.*, *Defendants*.	Case No. 6:14-cv-00055 **Preliminary Injunction Memorandum** **Oral Argument Requested**

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Introduction

> [Montana's] foundational campaign-finance law is in serious need of legislative attention to account for developments in the Supreme Court's jurisprudence protecting political speech.

Wisconsin Right To Life, Inc. v. Barland, 751 F.3d , 804, 842 (7th Cir. 2014) ("*WRTL-III*"). Plaintiff Montanans for Community Development ("MCD") cannot await such legislative attention. It wants to engage in issue advocacy at the beginning of October 2014. But that advocacy is unconstitutionally regulated and chilled by 1) Montana's political committee, expenditure, and contribution definitions; and 2) Montana's investigatory and publication procedures for alleged violations. So it now seeks a preliminary injunction from this Court.

Facts

The facts of this case, verified in MCD's Complaint (Doc. 1, ¶¶ 10-41), are summarized here.

MCD wants to circulate two issue ads on October 3, 2014. (Compl. ¶ 40.) These ads support 21st Century Energy's plan to promote job growth in the energy sector. (Compl. ¶ 27; *2014 Ads*, attached to Compl. as Ex 5.) In doing so, one ad mentions grassroots activist Joshua Sizemore, presently a candidate for House District 47, (*2014 Ads,* attached to Compl. as Ex. 5, at 2), while the other mentions environmentalist and legislative official Mary McNally, presently up for re-election to House District 49, (*id.* at 4).

In 2013, a Montana court fined the 501(c)(4) organization American Tradition Partnership ("ATP") over $260,000 for failing to report expenses associated with an issue ad it circulated. (Compl. ¶ 31.) Since then, Defendant the Commission of Political Practices has investigated and initiated civil actions against candidates who allegedly benefitted from ATP's issue ads for receiving an illegal corporate contribution and for failing to report such contributions. (Compl. ¶ 33.) New complaints against ATP have surfaced, (Compl. ¶ 37), and letters to candidates and other issue advocacy groups warning about such spending have been circulated, (Compl. ¶ 34).

In light of these events, MCD reasonably fears its issue ads will likewise trigger political committee burdens and that its ads will be treated both as reportable expenditures and as contributions to either the individuals it mentions—who also are candidates—or to those candidates' opponent. (Compl. ¶¶ 35-36.) Because it does not know how its ads will be treated and because it cannot constitutionally be treated as a political committee, MCD argues that the three definitions underlying Montana campaign finance regulations—"political committee," MCA § 13-1-101(22), ARM 44.10.327; "expenditure," MCA § 13-1-101(11)(a), ARM 44.10.323; and "contribution," MCA § 13-1-101(7)(a)(i), ARM 44.10.321 —are unconstitutionally vague and overbroad. (Compl. ¶ 3.)

MCD does not intend to comply with campaign finance law that relies on

them. (Compl. ¶ 30.) So it also reasonably fears that if it runs the ads, it and either those it mentions or their opponents will be investigated under MCA § 13-37-111, and that it will be compelled to disclose strategies and associations to defend itself that will be publicly disclosed pursuant to ARM 44.10.307(3) & (4). (Compl. ¶¶ 37-38.) So MCD will not run its issue ads.(Compl. ¶ 39.)[1]

In October 2013, MCD sought an advisory opinion from the Commission regarding its 2013 issue ads to avoid being subject to political committee burdens and investigation for failing to disclose. (Compl. ¶ 32.) Failing to secure the opinion before the November 3, 2013, election, MCD did not run the ads. (Compl. ¶ 32.)[2]

MCD intends to run substantially similar issue ads in the future. (Compl. ¶ 40.) It has no adequate remedy at law. (Compl. ¶ 41.)

Standard of Review

Plaintiffs seeking preliminary injunctions must demonstrate (1) likely merits

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[1]*See WRTL-III,* 751 F.3d at 840 ("Forced to disclose donors and faced with the complex and formalized requirements of a PAC-like registration and reporting system, some groups might conclude that their 'contemplated political activity [is] simply not worth it' and opt not to speak at all. *Mass. Citizens for Life,* 479 U.S. at 255.").

[2]MCD also sought relief from this Court, but due to the then-ongoing advisory process and the timing of the lawsuit, that case was dismissed on Article III and abstention grounds. *Montanans for Community Development v. Motl,* No. 13-cv-70, 2014 WL 977999 (D. Mont. 2013).

success; (2) irreparable harm; (3) favorable equitable balance; and (4) public interest service. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). In First Amendment challenges, once likely merits success is established, the other elements follow. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973-74 (9th Cir. 2002).

"In the First Amendment context, the . . . party [seeking an injunction] bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer*, 645 F.3d at 1116. Unsupported opinions and "hypothetical situations not derived from any record evidence or governmental findings" are not sufficient to support laws depriving citizens of First Amendment rights. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653-54 (9th Cir. 2007). Rather, the government must prove with evidence that its laws are necessary and satisfy scrutiny. *Id*; *Jacobus v. Alaska*, 338 F.3d 1095, 1109 (9th Cir. 2003). It is reversible error for courts to find the government meets its burden when it does not present evidence of its interest in its law. *Citizens*, 474 F.3d at 653.

Argument

I. MCD Is Likely To Succeed On The Merits.

A. Montana's Political-Committee Definitions Are Unconstitutional.

The Political-Committee Statutory Definition states that:

> "Political committee" means a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure:
> (a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; or
> (b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
> (c) as an earmarked contribution.

MCA § 13-1-101(22). "Person" means "an individual, corporation, association, firm, partnership, cooperative, committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (6)." *Id.* at § 13-1-101(20).

Montana's Political-Committee Regulatory Definition further defines three types of political committees: "(a) principal campaign committee; (b) independent committee; and (c) incidental committee." ARM 44.10.327(1). "Principal campaign committee" means "a political committee that is specifically organized to support or oppose a particular candidate or issue." ARM 44.10.327(2)(a). "Independent committee" means "a political committee that is not specifically organized to support or oppose any particular candidate or issue but one that is organized for the primary purpose of supporting or opposing various candidates

and/or issues." ARM 44.10.327(2)(b). And "incidental committee" means "a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue." ARM 44.10.327(2)(c).

Both the Political-Committee Statutory Definition and the Political-Committee Regulatory Definition are overbroad, vague, and unconstitutional as applied to MCD.

1. The Political-Committee Definitions Are Overbroad.

A law or regulation "is overbroad if it does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Klein v. San Diego County*, 463 F.3d 1029, 1038 (9th Cir. 2006) (internal citations omitted).

That an ad is run near an election or mentions a candidate does not mean it is regulable. *FEC v. Wisconsin Right to Life,* 551 U.S. 449, 472 (2007) ("If this were enough to prove that an ad is the functional equivalent of express advocacy, then [the electioneering-communication prohibition] would be constitutional in all of its applications.") *See also WRTL III*, 751 F.3d at 836-37 ("it's a mistake to read *Citizens United* as giving the government a green light to impose political-

committee status on every person or group that makes a communication about a political issue that also refers to a candidate."). Instead, the United States Supreme Court has established clear parameters for when a government may impose political-committee or political-committee-like burdens on an organization: (1) if it is "under the control of a candidate" or candidates or (2) if "the major purpose" of the organization is "the nomination or election of a candidate" or candidates in the jurisdiction. *Buckley v. Valeo,* 424 U.S. 1, 79 (1976).[3]

Applying *Buckley*, the Ninth Circuit has held that the relevant inquiry is whether the group in question has "a 'primary' purpose of political activity." *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1011 (2010). This "limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." *Id.* If the group had a primary purpose of

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[3] "[O]utside groups—even those whose major purpose is not express advocacy—are not completely immune from disclosure and disclaimer rules for their occasional spending on express election advocacy. *Citizens United,* 558 U.S. at 366–69. Even so, the Court has never endorsed imposing full, formal [political committee]-like burdens on these speakers." *WRTL-III*, 751 F.3d at 839. Montana does not have non-political committee disclosure requirements. Instead:

> ordinary citizens and interest groups are forced into the state [political committee] system—with all its restrictions and registration and reporting requirements—if their advocacy on public issues . . . also mentions a candidate. Failure to organize, register, and report as a [political committee], as required by the rule, carries civil . . . penalties.

Id. at 837.

engaging in political activity rather than an incidental one, it is constitutionally subject to political committee burdens. *Id.* at 1012.[4]

The Political-Committee Statutory and Regulatory Definitions are not limited to groups having either the major purpose of nominating or electing candidates under *Buckley* or having the priority of engaging in political advocacy under *HLW*, instead reaching organizations whose priority or major purpose is to support or oppose issues. And in fact, the Political-Committee Regulatory Definition expressly includes those organizations that do not have a major purpose or priority of nominating or electing candidates but who incidentally do so as "incidental committees." ARM 44.10.327(2)(c). These Definitions are "not aim[ed] specifically at evils within the allowable area of State control" but reach substantially into areas expressly prohibited under *Buckley* and *HLW*.

Indeed, there is a substantial mismatch between any informational interest the State may have in expenditure disclosures and the means chosen to achieve it. *See McCutcheon v. FEC,* 134 U.S. 1434, 1446 (2014). Every group that "promotes" or "opposes" a candidate or ballot issue must formally organize, register, and report like a political committee. As *WRTL-III* observes:

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[4]The resulting "priority-incidentally" test is unconstitutionally vague for two reasons: It is based on "political advocacy[,]" 624 F.3d at 1011, so it is vague under *Buckley,* 424 U.S. at 42-43, and the boundary between "priority" and "incidentally" is unclear. But until it is so declared, it remains binding law in this Court.

> A simpler, less burdensome disclosure rule for occasional express-advocacy spending by "nonmajor-purpose groups" would be constitutionally permissible under *Citizens United,* which approved BCRA's one-time, event-driven disclosure requirement for federal electioneering communications . . . . That's a far cry from imposing full PAC-like burdens on all issue-advocacy groups [that mention a candidate].

WRTL-III, 751 F.3d at 841. This substantial overbreadth and mismatch renders both Definitions unconstitutional.

2. The Political-Committee Definitions Are Vague.

Laws regulating speech must sufficiently define their terms so that the boundary between permissible and impermissible speech is clearly marked. *Buckley*, 424 U.S. at 41. Consequently, a statute is void for vagueness when it is not "sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). *See also In re Doser*, 412 F.3d 1056, 1062 (9th Cir. 2005) ("A statute is vague if men of common intelligence must necessarily guess at its meaning and differ as to its application.").

Vague statutes are void for three reasons: "to avoid punishing people for behavior that they could not have known was illegal," *Foti*, 146 F.3d at 638; "to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers," *id*.; and "to avoid any chilling effect on the exercise of First Amendment freedoms," *id*.

As a preliminary matter, both Definitions use the terms "expenditure" and "contribution" to establish the scope of their application. *See* MCA § 13-1-101(22); ARM 44.10.327(1). Because those terms are unconstitutionally vague, *see infra* Part I.B., these Definitions are unconstitutionally vague.

Additionally, both Definitions use the phrase "to support or oppose" to establish the scope of their application. *See* MCA § 13-1-101(22)(a) & (b); ARM 44.10.327(2). This phrase provides very little notice as to when an organization will be treated as a political committee and consequently subject to political-committee burdens.

McConnell v. FEC, 540 U.S. 93 (2003) facially upheld the words "promote," "oppose," "attack," and "support" as sufficiently clear so as to avoid vagueness. However, it did so in accordance with *Buckley*, which held that "a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate' and thus a political committee's expenditures 'are, by definition, campaign related.'" *McConnell,* 540 U.S. at 170, n.64 (*quoting Buckley,* 424 U.S. at 79). So the terms considered in *McConnell* avoided overbreadth because they were limited by the major purpose test. Here, the phrase "supporting or opposing" seek to establish a threshold where

a political committee is created. But unlike the definition in *Buckley* and *McConnell*, it is not cabined by a major purpose test or a "control of a candidate" limitation. This makes the Definitions vague.

Additionally, the *McConnell* court found support to uphold these terms in the fact that the parties challenging them were "party speakers" whose speech as political parties "are presumed to be in connection with election campaigns." *McConnell,* 540 U.S. at 170, n. 64. Here, MCD is not a political party but a social welfare organization. Its speech cannot be "presumed to be in connection with election campaigns." So without such a presumption and either the major purpose test or even a priority-incidentally test to guide or "graft into" it, the line drawn between speech that "supports or opposes" a candidate become unclear, both on its face and as applied to MCD. *See HLW,* 624 F.3d at 1021 (upholding against a vagueness challenge the term "expectation" because the priority-incidentally test grafted into the word to prevent arbitrary and discriminatory enforcement). Issue advocacy groups like MCD cannot reasonably know if their issue ads will be construed as "supporting or opposing a candidate" and thereby trigger political committee status. As observed in *WRTL-III*:

> ordinary citizens, grass-roots issue-advocacy groups, and § 501(c)(4) social-welfare organizations are exposed to civil . . . penalties for failing to register and report as a [political commitee] if they . . . include the name or likeness of a candidate in a way that could be construed by state regulators as a reference to the candidate's qualifications or as "support"

> or "condemnation" of the candidate's record or positions. Nothing in *McConnell* authorizes this.

WRTL-III, 751 F.3d at 837. The Political-Committee Definitions are unconstitutionally vague.

3. The Political-Committee Definitions Are Unconstitutional As Applied to MCD.

As discussed above, the government may impose political-committee or political-committee-like burdens on an organization in the Ninth Circuit only if *Buckley*'s major purpose test or *HLW*'s priority-incidentally test is satisfied. *See Buckley,* 424 U.S. at 79; *HLW*, 624 F.3d at 1011.

MCD's primary and exclusive purpose is "to promote the social welfare" by "engag[ing] in grassroots advocacy and issues-oriented educational campaigns" that "promote and encourage policies that create jobs and grow local economies throughout Montana." (*MCD Bylaws*, attached to Compl. as Ex. 3, at 1 § 2.) So any political speech MCD engages in, whether issue advocacy or incidental express advocacy, cannot constitutionally be subject to political-committee or political-committee like burdens. *Buckley,* 424 U.S. at 79; *HLW,* 624 F.3d at 1011.

Yet MCD reasonably thinks it could be treated as a political committee. American Tradition Partnership ("ATP"), a Montana 501(c)(4) organization, was treated as one without any analysis of its purposes or priorities because of its issue ad that mentioned a candidate and was fined for failing to report spending related

to that ad. *See Western Tradition Partnership v. Gallik,* No. BDV-2010-1120, slip op. at 12, 16 (Mont. 1st Jud. Dist. 2011)(attached to Compl., Doc. 1, as Ex. 6); *American Tradition Partnership v. Motl,* No. BDV-2010-1120, slip op. at 2-3, 9 (Mont. 1st Jud. Dist. 2013) (attached to Compl., Doc. 1, as Ex. 1). And MCD may well be treated as a political committee because it is "supporting or opposing a candidate" by simply mentioning Montanans who are also candidates in its ads.

The Political-Committee Regulatory Definition also suggests that MCD will likely be treated as a political committee because it expressly includes as political committees those organizations that do not have a major purpose of nominating or electing candidates but who incidentally do so as "incidental committees," ARM 44.10.327(2)(c), a designation that is contrary to *Buckley* and *HLW*.

Because the Political-Committee Statutory and Regulatory Definitions permit Defendants and Montana courts to construe MCD's ad as "supporting or opposing a candidate" and therefore treat MCD as a political committee even though it cannot be constitutionally treated as one under *Buckley* and *HLW*, they are unconstitutional as applied to MCD.

B. The Expenditure and Contribution Definitions Are Unconstitutional.

The Expenditure Statutory Definition states that an "'[e]xpenditure' means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an

election." MCA § 13-1-101(11)(a). Similarly, the Contribution Statutory Definition states that a "contribution" means "an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to influence an election; . . ." MCA § 13-1-101(7)(a)(i).

The Expenditure Regulatory Definition interprets the Expenditure Statutory Definition, stating that "the term 'expenditure' as defined in 13-1-101, MCA, includes, but is not limited to" a list of various expenses, payments, and types of expenditures. ARM 44.10.323. And the Contribution Regulatory Definition interprets the Contribution Statutory Definition, stating that "the term 'contribution' as defined in 13-1-101, MCA, includes, but is not limited to" a list of various purchases, payments, candidate self-funding, and in-kind contributions. ARM 44.10.321. All four definitions are unconstitutional.

1. The Expenditure and Contribution Statutory Definitions Are Vague.

As discussed *supra* Part I.A.2, "[a] statute must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti*, 146 F.3d at 638; *WRTL-III*, 751 F.3d at 835. "A statute is vague if men of common intelligence must necessarily guess at its meaning and differ as to its application." *In re Doser*, 412 F.3d at 1062.

a. "Influencing An Election" Is Vague.

A Montana court held in the *ATP* case that the Expenditure Statutory Definition on its face suffers vagueness problems because of the use of the word "influencing." *WTP,* No. BDV-2010-1120, slip op. at 18 (attached to Compl., Doc. 1, as Ex. 6) (*citing Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 65 (1st Cir. 2011)("*NOM*"); *see also WRTL-III*, 751 F.3d at 833 ("The 'influence an election' language in both definitions raises the same vagueness and overbreadth concerns that were present in federal law at the time of *Buckley.*"). The *ATP* court attempted to remedy that vagueness by more narrowly interpreting the Expenditure Statutory Definition. *WTP,* No. BDV-2010-1120, slip op. at 18. The Contribution Statutory Definition, which contains substantially similar language, has not been similarly construed. It is therefore unconstitutionally vague under *NOM* and *WRTL-III*.

b. The *ATP* Interpretation Is Vague.

The *ATP* court interpreted the vague phrase "influence an election" to:

> only include communications and activities that expressly advocate for or against a candidate or ballot issue or that clearly identify a candidate or ballot issue by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate or ballot issue.

WTP, No. BDV-2010-1120 at *18. This "*ATP* interpretation" of the Expenditure Statutory Definition, with its "susceptible of no reasonable interpretation" and

"promote or oppose" criteria, does not alleviate its vagueness. The interpretation's "susceptible of no reasonable interpretation" criterion:

> ultimately depend[s] . . . upon a judicial judgment (or is it—worse still—a jury judgment?) concerning "reasonable" or "plausible" import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. In this critical area of political discourse, the speaker[s] cannot be compelled to risk . . . prosecution with no more assurance of impunity than [their] prediction that what [t]he[y] say[] will be found susceptible of some "reasonable interpretation other than [to promote or oppose] a specific candidate." Under these circumstances, "many persons, rather than undertake the considerable burden (and sometimes risk) vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

WRTL-II, 551 U.S. at 493-94(Scalia, J., concurring in part and concurring in the judgment) (brackets in original omitted).[5] And the interpretation's "promote or oppose" criterion is likewise vague as discussed above, *see supra* Part I.A.2.

Under the *ATP* interpretation, MCD is at the mercy of Defendants' "reasonable interpretation" during any investigation or that of a court's during any civil action. *WRTL-II,* 551 U.S. at 495. Rather than "hedg[ing] and trim[ming]" its

[5]The *ATP* interpretation is not even the "tighter" (though still vague) appeal-to-vote test, which at least cabins the scope of the test to "an exhortation to vote for or against a specific candidate." *Id.* at 493.

speech *id.*, MCD will abstain. (Compl. ¶ 40.) *See WRTL-III*, 751 F.3d at 840. The *ATP* interpretation is unconstitutionally vague.

c. The *ATP* Application Is Vague.

After adopting the *ATP* interpretation, the court then proceeded to evaluate the issue ad[6] before it, repeatedly observing that the ad "could certainly be argued to advocate for the defeat of" the candidate mentioned in the ad, *see, e.g., WTP,* No. BDV-2010-1120 at 19 (attached to Compl. as Ex. 6), and that "it is reasonable to interpret the [] flier as an appeal to vote against" the candidate mentioned, *id.* at 20. Conducting no further fact finding or analysis, the court later imposed substantial penalties against ATP for failing to report its spending on the ad. *ATP,* No. BDV-2010-1120, slip. op. at 9 (attached to Compl. as Ex. 1).

In so doing, the court introduced additional levels of vagueness into the Expenditure Statutory Definition. First, whether an ad can be reasonably interpreted as advocating for the defeat a candidate is a much different inquiry than whether it is reasonably susceptible to *no other interpretation* than advocating for the defeat of that candidate. Issue ads like MCD's and ATP's—which mentions individuals who are also candidates—could on one hand

[6]The *ATP* ad is an issue ad because it "take[s] a position on [an] issue [and] exhort[s] the public to adopt that position," and "lacks indicia of express advocacy [because it does] not mention an election, candidacy, political party, or challenger [or] take a position on a candidate's character, qualifications, or fitness for office." *WRTL-II*, 551 U.S. at 470.

be interpreted to advocate for a candidate (which would satisfy the *ATP* application of the definition), while on the other hand be interpreted as simply what it is: issue advocacy (which would not satisfy the *ATP* interpretation of the definition). The *ATP* court made it unclear whether the test to be applied is that of "no other interpretation" (which the test states on its face) or that of "a reasonable interpretation" (which is what it applied and is itself vague and subjective, *see WRTL-II,* 551 U.S. at 495).

Second, the *ATP* court confuses which analysis applies: that of "promoting or opposing," or that of "appeal to vote." *Compare WTP,* No. BDV-2010-1120 at 18 *with WTP,* No. BDV-2010-1120 at 20. While both tests are vague, *see supra* Parts I.A.2 and I.B.1.b., they are most certainly not the same. Which test is the binding test is unclear. And so MCD will not run its ad.[7] *See WRTL II,* 551 U.S. at 493 (Scalia, J., concurring) ("There is not the slightest doubt that these ads had an issue-advocacy component. . . . The question before us is whether something about them caused them to be the "functional equivalent" of express advocacy. . . . Do[es this test] answer this question with the degree of clarity necessary to avoid the chilling of fundamental political discourse? I think not.").

[7]The Contribution Statutory Definition, if interpreted and applied the same way as the Expenditure Statutory Definition, chills MCD for the same reasons. (Compl. ¶ 39.)

The Expenditure and Contribution Statutory Definitions are unconstitutionally vague on their face, as interpreted, and as applied.[8]

2. The Expenditure and Contribution Regulatory Definitions Should be Struck Down As Unconstitutional.

The Commission does not have the independent authority to make law but rather is only authorized to "adopt rules to carry out the provisions of chapter 35 of this title and this chapter in conformance with the Montana Administrative Procedure Act." MCA § 13-37-114. It is on this rule-adopting authority that the Expenditure and Contribution Regulatory Definitions rest. And it is for this reason that they should be struck down.

The United States Supreme Court in *Davis v. FEC,* 554 U.S. 724 (2008) struck down a reporting requirement because its premise and justification was founded on an asymmetrical contribution limit the *Davis* court struck down as unconstitutional. *Id.* at 744. The same should be done here. Because the Expenditure Regulatory Definition is designed to help carry out and enforce the unconstitutionally vague Expenditure Statutory Definition, *see supra* Part I.B.1., it should be struck down in its entirety as unconstitutional. Likewise, because the Contribution Regulatory Definition is designed to help carry out and enforce the

[8]If the Contribution Statutory Definition is reasonably susceptible to being interpreted the same way the Expenditure Statutory Definition was, MCD asserts all the same vagueness arguments as those lodged against the Expenditure Statutory Definition.

unconstitutionally vague Contribution Statutory Definition, *see supra* Part I.B.1.a, the Contribution Regulatory Definition should be struck down in its entirety as unconstitutional. *See Davis,* 554 U.S. at 744.

C. Montana's Investigatory Procedures and Publication Provisions Unconstitutionally Burden and Chill Protected Speech.

The Investigatory Procedures Provision states that "the commissioner is responsible for investigating all of the alleged violations of the election laws," MCA § 13-37-111(1), and authorizes the commissioner to:

> (a) investigate all statements filed pursuant to the provisions of chapter 35 of this title or this chapter and shall investigate alleged failures to file any statement or the alleged falsification of any statement filed pursuant to the provisions of chapter 35 of this title or this chapter. Upon the submission of a written complaint by any individual, the commissioner shall investigate any other alleged violation of the provisions of chapter 35 of this title, this chapter, or any rule adopted pursuant to chapter 35 of this title or this chapter.
>
> (b) inspect any records, accounts, or books that must be kept pursuant to the provisions of chapter 35 of this title or this chapter that are held by any political committee or candidate, as long as the inspection is made during reasonable office hours; and
>
> (c) administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, bank account statements of a political committee or candidate, or other records that are relevant or material for the purpose of conducting any investigation pursuant to the provisions of chapter 35 of this title or this chapter.

MCA § 13-37-111(2). The Publication Provisions state that "[t]he commissioner, upon completion of the investigation, shall prepare a written summary of facts and

statement of findings, which shall be sent to the complainant and the alleged violator," ARM 44.10.307(3), and that "[a] filed complaint and the summary of facts and statement of findings shall be public record," ARM 44.10.307(4). The Commissioner routinely posts complaints, notices of complaints (often with supporting documentation), as well as sufficiency findings disclosing associations and strategies on the Commission's website. (Compl. ¶ 38.)

1. The Investigatory Procedures and Publication Provisions Chill MCD's Speech.

The First Amendment protects the fundamental right to associate with others. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("*NAACP*"); *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir.1987). Once compelled disclosure occurs, it cannot be undone. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010). Consequently, compelled disclosure of an association's private, internal data, political affiliations, or activities imposes a substantial burden on First Amendment rights, *Buckley*, 424 U.S. at 64-68; *NAACP*, 357 U.S. at 462-63; *Perry*, 591 F.3d at 1159-60.

Moreover, the public disclosure of such confidential internal materials "intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' *Buckley,* 424 U.S. at 64 . . . as well as seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003). "Any interference with the freedom of a party is

simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). "Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters." *Id.* at 250.

For these reasons, those haled before investigative bodies have a "strong confidentiality interest" analogous to those haled before a grand jury in a criminal proceeding. *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001). Compelled disclosure is especially inappropriate in such contexts because "secrecy is needed to protect an innocent accused from damaging publicity." *Id*. at 177.

The Investigatory Procedures Provision provides no safeguards preventing the public disclosure of materials discovered during an investigation, whether acquired by subpoena or voluntarily furnished by political opponents. And the Publication Provisions provide no safeguards preventing the public disclosure of **1)** confidential materials in and attached either to complaints filed with the commissioner or the commissioner's complaint notices, or **2)** confidential materials discovered during an investigation discussed in the commissioner's sufficiency findings.

Without any safeguards, MCD's speech is chilled. MCD will refrain from running its issue ads because any complaint filed against it will be publicly posted

and could subject it to damaging publicity. (Compl. ¶¶ 37, 39.) Any confidential associations or strategies it provides or that are discovered during an investigation can become public knowledge in any sufficiency decisions issued by the Commission. (*See, e.g., Bognogofsky v. Kennedy,* attached to Compl. as Ex 17, at 24-27) (discussing in a publicly-posted, unadjudicated document 1) ATP's alleged strategies derived from materials illegally acquired by third parties, and 2) alleged associations between ATP and other individuals and organizations). And MCD would have to bear the substantial burden of defending its First Amendment confidentiality rights throughout any investigation and risk liability if it is unable to adequately defend those rights.

2. The Investigatory Procedures and Publication Provisions Fail Scrutiny Review.

Because they chill protected speech, the Investigatory Procedures and Publication Provisions are subject to strict scrutiny. *See, e.g., AFL-CIO v. FEC,* 333 F.3d at 176 ("Where a political group demonstrates that the risk of retaliation and harassment is 'likely to affect adversely the ability of ... [the group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate,' for instance, the government may justify the disclosure requirement only by demonstrating that it directly serves a compelling state interest.") (*quoting NAACP,* 357 U.S. at 462–63). But under any level of scrutiny, they fail.

Neither the Investigatory Procedures nor Publications Provisions are tailored to any cognizable state interest. Like the FEC regulations considered in *AFL-CIO*, the Provisions are likely designed to "deter [campaign finance] violations, and [] promote[] the agency's own public accountability." *AFL-CIO v. FEC,* 333 F.3d at 178. And as in *AFL-CIO,* "no doubt . . . these interests are valid. . . ." *Id.* But as in *AFL-CIO,* the Provisions completely fail to even "attempt to [be] tailor[ed] . . . to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." *Id.* Indeed, the breadth of potential disclosure is breathtaking compared to what is necessary to meet these interests.

The filing of a civil action, when appropriate, serves as a reasonable, least restrictive means of achieving public accountability. It lets the public know that Defendants are pursuing alleged violators while also affording the alleged violator due process within which it has the opportunity to 1) protect confidential material until the matter is finally adjudicated and 2) ensure that only proven, relevant material is made public.

Such adjudication also deters future violations.[9] Potential violators see that Defendants are enforcing the law and will pursue legal action. It is unnecessary to disclose to those who would violate the law a complaint that may ultimately be dismissed, or the unproved facts justifying Defendants' decision to move forward with civil action. Disclosures made through due process-protected civil proceedings are sufficiently deterring.

Because they substantially burden—and in this case, completely chill—protected free speech and association and lack adequate tailoring to a cognizable interest, the Investigatory Procedures Provision and the Publication Provisions are unconstitutional.

II. MCD Will Suffer Irreparable Harm.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006). The risk of irreparable harm is magnified when political speech and association are suppressed: "[T]iming is of the essence in politics . . . . [W]hen an event occurs, it

[9]The same is true when settlements for violations are entered and made public. To MCD's knowledge, no statute or regulation authorizes pre-civil action settlements for campaign finance violations. *See* MCA § 13-37-114. Assuming they are authorized, MCD asserts no constitutional objection to them provided confidentiality safeguards govern them, as well, as they, too, are unadjudicated documents.

is often necessary to have one's voice heard promptly, if it is to be considered at all." *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984). "A delay 'of even a day or two' may be intolerable when applied to 'political speech in which the element of timeliness may be important.'" *Id.* at 1356 (*quoting Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968)).

MCD wants to mail out its ads on October 3, 2014, but will not because of the statutes and regulations here challenged. (Compl. ¶ 39.) Because MCD has likely merits success, irreparable injury will inevitably follow. *Sammartano*, 303 F.3d at 973-74 (9th Cir. 2002); *see also Brown v. Cal. Dept. of Transp.*, 321 F.3d 1217, 1226 (9th Cir. 2003) (holding that when plaintiffs state a colorable First Amendment claim, the risk of irreparable injury is to be presumed).

III. The Balance of Hardship Favors MCD.

"[T]he fact that a case raises serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in [the plaintiffs'] favor." *Sammartano*, 303 F.3d at 973 (internal quotations and citations omitted). The only time such a finding is not justified is when the plaintiff cannot establish likely merits success. *Paramount Land Co. LP v. California Pistachio Com'n*, 491 F.3d 1003, 1012 (9th Cir. 2007). Moreover, Defendants cannot claim they suffer harm when an *unconstitutional* law is enjoined. *Joelner v. Village of Washington Park,*

Illinois, 378 F.3d 613, 620 (7th Cir. 2004). Because MCD has demonstrated likely merits success, the balance of hardships is in MCD's favor.

IV. The Public Interest Favors An Injunction.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974. Indeed, "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Id*. So when plaintiffs demonstrate likely merits success on First Amendment claims, it is in the public interest to enjoin the offending statute. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Because MCD established a likelihood of success on the merits of its First Amendment claims, an injunction is in the public interest.

Conclusion

MCD has met the requirements for preliminary injunctive relief. This Court should grant MCD's Preliminary Injunction Motion and enjoin Defendants from 1) enforcing campaign laws that rely on MCA § 13-1-101(22), ARM 44.10.327, MCA § 13-1-101(11)(a), ARM 44.10.323, MCA § 13-1-101(7)(a)(i), and ARM 44.10.321, and 2) conducting investigations and publishing complaints and findings pursuant to MCA § 13-37-111 and ARM 44.10.307(3) & (4).

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Respectfully Submitted,

/s/Anita Y. Milanovich

Anita Y. Milanovich (Mt. No. 12176)
THE BOPP LAW FIRM, PC
1627 West Main Street, Suite 294
Bozeman, MT 59715
Phone: (406) 589-6856
Email: aymilanovich@bopplaw.com
Attorney for Plaintiff

James Bopp, Jr. (Ind. No. 2838-84)*
Justin McAdam (Ind. No. 30016-49)*
THE JAMES MADISON CENTER FOR FREE SPEECH
The National Building
1 South Sixth Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685
Email: jboppjr@aol.com
jmcadam@bopplaw.com
Attorneys for Plaintiff

*Pro hac vice application pending.

Local Rule 7.1(d)(2)(E) Word Verification Certification

I certify that this memorandum of law complies with Local Rule 7.1(d)(2)(A). It contains 6273 words, as verified by the word count feature of WordPerfect X5, the word processor that created it.

/s/ Anita Y. Milanovich
Anita Y. Milanovich

Certificate of Service

I hereby certify that the foregoing document was served by first class U.S. Mail on September 3, 2014, on all defendants:

Jonathan Motl, Commissioner of Political Practices
1205 8th Avenue
Helena, MT 59601

Tim Fox, Attorney General
P.O. Box 201401
Helena, MT 59620

Leo Gallagher, Lewis and Clark County Attorney
228 Broadway Street
Helena, MT 59601

/s/ Anita Y. Milanovich
Anita Y. Milanovich