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## Dark "Oro y Plata" in Montana: The Green Amendment's Defense of Campaign Finance Transparency

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# DARK “ORO Y PLATA” IN MONTANA: THE GREEN AMENDMENT’S DEFENSE OF CAMPAIGN FINANCE TRANSPARENCY

LUCAS DELLA VENTURA\*

## ABSTRACT

In the post-*Citizens United* dark money age, state disclosure regulations are the last line of defense for citizens to learn who is behind unlimited independent expenditures and electioneering communications flooding their states. Underpinning the ability of state governments to promulgate such transparency measures are the informational benefits provided to the public. However, the Supreme Court’s decision in *Americans for Prosperity Foundation v. Bonta* to invalidate a California disclosure regulation on dark money groups, marks disclosure regulations—the Court’s repeated fallback when striking down more robust campaign finance regulations—with a bull’s-eye. In the face of repeated legal challenges to disclosure regulations, advocates for transparency should conceptualize the scope of the informational interest more broadly to encompass not only the interests of voters, but also the interests of states in upholding state constitutional rights dependent on disclosure information. States like Montana, which have affirmative duties under their constitutions to protect the right to a clean and healthful environment, also known as “green amendments,” have a compelling interest in upholding disclosure provisions because such protection hinges on the information provided by campaign finance disclosures.

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\* JD Candidate, William & Mary Law School, 2024; Notes Editor, *William & Mary Environmental Law and Policy Review*. This Note is dedicated to the public servants monitoring and administering campaign finance regulations and elections nationwide, who have sought to ensure the integrity of American democracy and the peaceful transfer of power under mounting threats and violence. I want to thank the campaign finance research community, the Montanan legal community, including John Heenan, the office of the Montana Commissioner of Political Practices, and especially former Commissioner Jon Motl, for the warmth and expertise provided that enabled this author to research and understand complex dark money structures and their effect on local and state politics. Thank you to Professor Rebecca Green for opening up the world of election law to me. Thank you to the *ELPR* Board, including Articles Editor Jim Davidson and staff, for their diligent edits. Lastly, I’d like to thank my grandparents and parents for the countless hours you worked and sacrificed, whether in the fields, on construction sites, or in the kitchen, so that your grandkids and children could pursue their wildest dreams.

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## INTRODUCTION

The abundant streams of Montana—twisting, turning, and flowing throughout the fourth largest state—are open to the enjoyment of all

Montanans, thanks to the state’s Stream Access Law.<sup>1</sup> However, public access to streams for recreational use, such as fishing, floating, or just swimming along, does not please all. A group of property owners, including billionaires with vacation homes in the state of “Oro y Plata,”<sup>2</sup> continuously challenge the state’s public access law but have thus far failed to convince Montana’s Supreme Court their claims have sufficient merit. Dammed from achieving their objective, a new stream is formed, only this one does not burble or ripple. This stream cannot be heard or seen. Rather, it remains in the dark and flows with funds spent on elections—in this instance, the next election for a seat on the Montana Supreme Court. From the billionaires’ resources, the money trickled in and pooled into the coffers of an organization called the “Montana Growth Network.”<sup>3</sup> Inundating the airwaves with advertisements attacking the sitting justice who ruled against them while supporting their favored candidate, the group’s funding sources remained undisclosed until after their preferred candidate won the election. Only years later would an investigation by Montana’s chief campaign finance regulator reveal the true sources.<sup>4</sup>

In the post-*Citizens United* dark money age,<sup>5</sup> state disclosure regulations are the last line of defense for citizens to learn who is behind unlimited independent expenditures and electioneering communications in their state.<sup>6</sup> The last standing compelling interest that upholds disclosures of such communications is the people’s informational interest.<sup>7</sup> Propping up disclosure regulations in the face of repeated First Amendment challenges, courts hold that the informational benefits provided to the public by disclosures outweigh individual privacy concerns in most cases. However, the Supreme Court’s decision in *Americans for Prosperity*

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<sup>1</sup> MONT. CODE ANN. § 23-2-302 (2023).

<sup>2</sup> “Oro y Plata”, BILLINGS GAZETTE (Apr. 6, 2015), [https://billingsgazette.com/oro-y-plata/image\\_90b6f413-0430-5be6-bd94-1b1b81dbe5fc.html](https://billingsgazette.com/oro-y-plata/image_90b6f413-0430-5be6-bd94-1b1b81dbe5fc.html) [https://perma.cc/P9DE-YS29] (Montana’s state motto, Oro y Plata, is Spanish for “gold and silver.”).

<sup>3</sup> Paul Blumenthal, *Two of America’s Richest Men Secretly Tried to Sway Montana’s Judicial Elections*, HUFFPOST (May 10, 2016), [https://www.huffpost.com/entry/montana-dark-money-judicial-race\\_n\\_572b9f4ce4b016f378951c8f](https://www.huffpost.com/entry/montana-dark-money-judicial-race_n_572b9f4ce4b016f378951c8f) [https://perma.cc/SA88-PW4V].

<sup>4</sup> See *infra* Section IV.B.1.

<sup>5</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010). The Court’s controversial decision “reversed century-old campaign finance restrictions and enabled corporations and other outside groups to spend unlimited funds on elections.” Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [https://perma.cc/9RYE-576U].

<sup>6</sup> See *infra* Section III.A.

<sup>7</sup> See *infra* Section I.F.

*Foundation v. Bonta*<sup>8</sup> to strike down a California disclosure regulation on dark money groups,<sup>9</sup> signals that disclosure regulations—the fallback provisions the Court has repeatedly assured will remain available when striking down more robust campaign finance regulations like limitations—will come under heightened scrutiny in courts around the nation. In addition to the many compelling reasons the informational interest provides for upholding disclosure regulations, an additional reason could bolster this interest in the face of impending legal challenges: “green amendments” in state constitutions.

Green amendments, such as those adopted by states like Montana and Pennsylvania,<sup>10</sup> ensure citizens of the state a fundamental right to a “clean and healthful environment,” which in turn imposes an affirmative duty on the state to “maintain and improve” that environment.<sup>11</sup> This right is impossible to ensure without publicly available information about the funds that shape the government, courts, and ballot issues guiding environmental policies and upholding environmental and constitutional rights. Thus, green amendments, and the rights afforded by them, depend in part on the informational interests advanced by the state’s disclosure laws.<sup>12</sup> Montana, and other green amendment states like it, have a compelling interest in upholding disclosure regulations not only because of the many voter education-based informational benefits provided, but also because portions of their state constitutions are reliant on the information provided by disclosures to meet their affirmative duty to protect the fundamental right to a clean and healthful environment. Therefore, in defending disclosure laws from impending First Amendment challenges, states can assert a compelling governmental interest in safeguarding the information essential to the right to a clean and healthful environment.

This Note approaches the nexus between campaign finance disclosures and the environment through a nonpartisan lens, focused on the information that disclosures can provide related to governance of the environment. First, this Note seeks to clarify the new exacting scrutiny standard from *Bonta* and its application in the campaign finance context.

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<sup>8</sup> 141 S. Ct. 2373 (2021).

<sup>9</sup> See Richard Briffault, *What Is Dark Money? 5 Questions Answered*, COLUM. L. SCH. (Oct. 29, 2019), <https://www.law.columbia.edu/news/archive/what-dark-money-5-questions-answered> [<https://perma.cc/M7ZG-4CB9>] (defining “dark money” as the umbrella term for spending intended to influence political outcomes while obscuring the funding source, and can include independent and issue-advocacy expenditures).

<sup>10</sup> See PA. CONST. art. I, § 27.

<sup>11</sup> See *infra* Section III.A.

<sup>12</sup> See *infra* Section III.B.

Second, this Note suggests that the compelling informational interest is bolstered by green amendments in state constitutions, using Montana as a case study.

Part I seeks to identify the Supreme Court’s new, stricter exacting scrutiny that could be applied to state disclosure regulations on independent expenditures and electioneering communications. Part II briefly describes how disclosure-thwarting groups, known as dark money groups, operate to avoid disclosures nationwide in the post–*Citizens United* campaign finance landscape. Part III explains how green amendments in states like Montana can serve as a compelling interest to uphold state campaign finance disclosures laws. Part IV focuses on Montana’s long history of combating dark money’s influence on its environment. Part V analyzes how the Montana Disclose Act,<sup>13</sup> armed with a more robust informational interest, could fare against the Supreme Court’s heightened test.

## I. EXACTING SCRUTINY IN CAMPAIGN FINANCE

### A. *Origins of the Modern Campaign Finance Environment*

In terms of the money streams that affect political outcomes, including how funds are raised, spent, and disclosed, there is generally a pre– and post–*Citizens United* campaign finance world. The Supreme Court struck down provisions of the federal Bipartisan Campaign Reform Act (“BCRA”), which prohibited corporations and unions from using general treasury funds on independent expenditures within election windows.<sup>14</sup> The Court’s decision opened the floodgates to unlimited and uncappable “independent” corporate expenditures in elections, with the caveat that they could be subject to disclosure regulations.<sup>15</sup>

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<sup>13</sup> Montana Disclose Act, 2015 Mont. Laws 1030 (codified as amended in scattered sections of MONT. CODE ANN. §§ 2-, 13-).

<sup>14</sup> *Citizens United*, 558 U.S. at 318–19.

<sup>15</sup> See *id.* at 365; Anna Massoglia, ‘Dark Money’ Groups Have Poured Billions into Federal Elections Since the Supreme Court’s 2010 *Citizens United* Decision, OPENSECRETS (Jan. 24, 2023), <https://www.opensecrets.org/news/2023/01/dark-money-groups-have-poured-billions-into-federal-elections-since-the-supreme-courts-2010-citizens-united-decision> [https://perma.cc/RC78-2PFZ]; Lear Jiang, Note, *Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 493 (2019).

Today, regulated political speech (i.e., money for political advertisements)<sup>16</sup> is divided into three distinct categories: contributions, independent expenditures, and electioneering communications. Of these, the government has the most power in regulating contributions.<sup>17</sup> Contributions, which come from donors such as individuals or party committees, can be limited to specific dollar amounts and certain classes of donors (e.g., corporations can be excluded).<sup>18</sup> Contributions can be direct and coordinated.<sup>19</sup>

Next, an independent expenditure is defined as an expenditure by a person: “(A) *expressly advocating* the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion” of that candidate or their agents, or a political party committee or its agents.<sup>20</sup> Independent expenditures cannot be limited, but they can be subject to disclosure regulations.<sup>21</sup> There are two ways an independent expenditure can “expressly advocate”: by use of certain “magic words”<sup>22</sup> and by the “only reasonable interpretation” standard.<sup>23</sup>

Lastly, issue advocacy includes advertisements framed around a political issue but avoid the triggers of independent expenditures.<sup>24</sup> Issue

<sup>16</sup> See *Buckley v. Valeo*, 424 U.S. 1, 16–18 (1976) (per curiam).

<sup>17</sup> 11 C.F.R. § 100.52(a) (“A gift, subscription, loan . . . advance, or deposit of money or anything of value made by any person [to influence] any election for Federal office is a contribution.”); *Understanding Ways to Support Federal Candidates*, FEC, <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates> [https://perma.cc/MW5H-6WT5] (last visited Feb. 8, 2024).

<sup>18</sup> See *Understanding Ways to Support Federal Candidates*, *supra* note 17.

<sup>19</sup> *Id.*

<sup>20</sup> 52 U.S.C. § 30101(17) (emphasis added).

<sup>21</sup> *Making Independent Expenditures*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures> [https://perma.cc/4G8M-NZ35] (last visited Feb. 8, 2024).

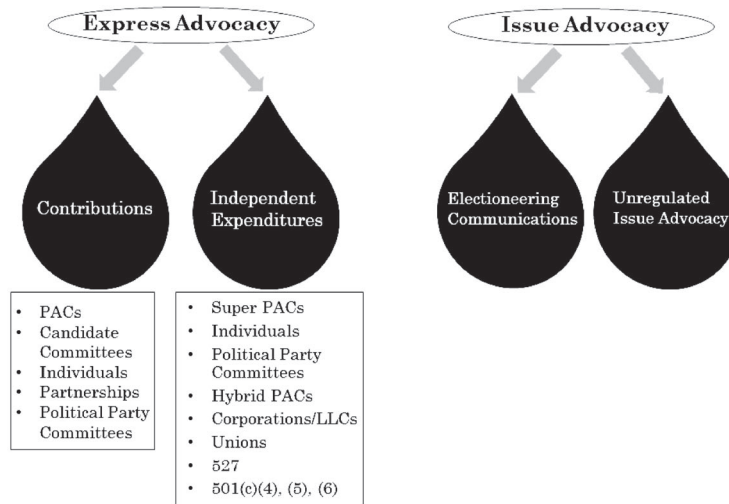
<sup>22</sup> *Buckley*, 424 U.S. at 44 & n.52 (“[T]o preserve the provision against invalidation on vagueness grounds, § 608(e)(1), must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”) The Court then provided examples of “communications containing express words of advocacy of election or defeat,” including “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Id.* n.52.

<sup>23</sup> *Making Independent Expenditures*, *supra* note 21.

<sup>24</sup> Craig B. Holman & Luke McLoughlin, *Buying Time: The Fallacies of Campaign Reform and Our Advertising Laws*, BRENNAN CTR. FOR JUST. (Apr. 1, 2002), <https://www.brennancenter.org/our-work/research-reports/buying-time-fallacies-campaign-reform-and-our-advertising-laws> [https://perma.cc/YF5N-RHFB]; LEAGUE OF WOMEN VOTERS, DEFINITIONS



advocacy can be subject to disclosure through electioneering communications provisions, which cast a wider regulatory net than independent expenditures within a specified election time frame.<sup>25</sup>



**Figure 1. Regulatory Categories of Campaign Finance “Speech”**

A staggering \$9 billion in independent expenditures has been spent since *Citizens United* was decided, of which \$2.6 billion is from unknown sources.<sup>26</sup> Although the *Citizens United* decision was criticized by the dissent as an activist initiative taken up by the majority,<sup>27</sup> the

FOR MONEY IN POLITICS TERMS (2015), [https://www.lwv.org/sites/default/files/2018-05/mip\\_definitions\\_4-19-15\\_final.pdf](https://www.lwv.org/sites/default/files/2018-05/mip_definitions_4-19-15_final.pdf) [<https://perma.cc/89TH-77YC>].

<sup>25</sup> See generally 52 U.S.C. § 30104(f)(3).

<sup>26</sup> See Massoglia, *supra* note 15.

<sup>27</sup> See 558 U.S. 310, 397–414 (2010) (Stevens, J., dissenting in part). The Court turned the *as-applied* challenge into a *facial* challenge, irking Stevens: “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.” *Id.* at 398. The Court disregarded the disfavored status of facial challenges previously emphasized by members of the majority like Justice Thomas, ruled absent a factual record to support its facial finding that BCRA was unconstitutional in all circumstances, and declined to decide the case on narrower grounds or follow *stare decisis*. See *id.* at 399. Facial challenges are disfavored for several reasons, as the Court noted: “‘Claims of facial invalidity often rest on speculation,’ and consequently ‘raise the risk of premature interpretation of statutes on the basis of factually barebones records.’” *Id.* at 399–400 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Most critical in campaign finance, facial challenges “threaten to short circuit the democratic process by preventing laws embodying the will



justices almost unanimously—save Justice Thomas<sup>28</sup>—endorsed disclosure in the election context and rejected the as-applied challenge to the disclaimer regulations the organization was subjected to for its electioneering communications.<sup>29</sup> In his majority opinion, Justice Kennedy attempted to foresee the crucial role disclosure would play in a world of politics without campaign contribution limitations:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.<sup>30</sup>

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of the people from being implemented in a manner consistent with the Constitution." *Id.* at 399 (quoting 552 U.S. at 451).

<sup>28</sup> See *id.* at 480–85 (Thomas, J., concurring in part and dissenting in part). Thomas argued disclosure, disclaimer, and reporting requirements were unconstitutional based on his finding of a "right to anonymous speech," citing primarily cases of harassment to conservative issue donations. *Id.* at 482–83. He urged the Court to "invalidate mandatory disclosure and reporting requirements" due to the threats to public officials that could arise from disclosures and chill speech. *Id.*

<sup>29</sup> *Id.* at 368–69; Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1059 (2011) (highlighting the "180 degree turn" in the law on the "constitutionality of disclosure within the past four years.").

<sup>30</sup> 558 U.S. at 370–71. Chief Justice Roberts essentially reiterated Justice Kennedy's reasoning in *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014) ("[D]isclosure now offers a particularly effective means of arming the voting public with information. . . . Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org.

The majority opinion noted “disclosure is a less restrictive alternative to more comprehensive regulations of speech,”<sup>31</sup> and disclosure “do[es] not prevent anyone from speaking,”<sup>32</sup> expressing deference to regulators by refusing to subject disclosure laws to the more rigorous requirements for expenditure limitations, like requiring different sets of disclosure regulations for express advocacy and issue advocacy.<sup>33</sup> The Court reaffirmed a line of cases showing deference to legal regimes that afforded citizens the informational benefits of disclosure laws.<sup>34</sup> However, Justice Kennedy’s prediction<sup>35</sup> for the internet to facilitate “prompt disclosure of expenditures . . . needed to hold corporations and elected officials accountable”<sup>36</sup> has not held true, as even he conceded five years later that disclosure is “not working the way it should.”<sup>37</sup>

*B. A State’s Attempt to Safeguard Its Campaign Finance Regime*

After *Citizens United*, states grappled with the swaths of campaign finance limitations invalidated or challenged in response to the Supreme Court’s decision.<sup>38</sup> Montana first tried to circumvent *Citizens United* based on its history of fighting corruption from natural resource extractors, arguing it had a compelling interest to limit corporate independent expenditures. In *Western Tradition Partnership v. Attorney General*, the Montana Supreme Court interpreted *Citizens United* as holding “that restrictions upon speech are not per se unlawful, but rather may be upheld if the government demonstrates a sufficiently strong interest.”<sup>39</sup> The

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Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.”).

<sup>31</sup> 558 U.S. at 369.

<sup>32</sup> *Id.* at 366.

<sup>33</sup> *Id.* at 368–69; *infra* Part II.

<sup>34</sup> 558 U.S. at 366–71 (noting citizens use independent expenditure disclosures to “make informed choices in the political marketplace,” and their right “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.”)

<sup>35</sup> Paul Blumenthal, *Anthony Kennedy’s Citizens United Disclosure Salve ‘Not Working’*, HUFFPOST (Nov. 2, 2015), [https://www.huffpost.com/entry/citizens-united-anthony-kennedy\\_n\\_5637c481e4b0631799134b92](https://www.huffpost.com/entry/citizens-united-anthony-kennedy_n_5637c481e4b0631799134b92) [<https://perma.cc/EZ3Y-NRLF>] (quoting Justice Kennedy from a prior interview).

<sup>36</sup> 558 U.S. at 370.

<sup>37</sup> Blumenthal, *supra* note 35.

<sup>38</sup> 558 U.S. at 399, 462.

<sup>39</sup> 271 P.3d 1, 6 (Mont. 2011), *rev’d sub nom.* *Am. Tradition P’ship v. Bullock*, 567 U.S. 516 (2012) (per curiam).

court found that the state government's regulations limiting independent corporate campaign expenditures passed strict scrutiny because of Montana's "unique" historical context of fighting corruption emanating from the "Copper Kings."<sup>40</sup>

Western Tradition Partnership ("WTP") was a "dark money" group<sup>41</sup> that once argued to "deregulate and disclose" but then sought to strike the disclosure element, making both arguments simultaneously in Montana.<sup>42</sup> According to "unrebutted evidence," the group's mission was to solicit and anonymously spend the funds of other corporations, individuals, and entities to influence the outcome of Montana elections.<sup>43</sup> The court differentiated this case from *Citizens United* as a case concerning "Montana law, Montana elections and [arising] from Montana history."<sup>44</sup> Presented with the opportunity to reconsider its momentous decision in *Citizens United* by a state court defiantly asking it to do so, the Supreme Court doubled down on its *Citizens United* reasoning in a single-paragraph opinion.<sup>45</sup> The law of the land was confirmed: "independent expenditures" could not be limited.<sup>46</sup>

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<sup>40</sup> *Id.* at 8–9, 11.

<sup>41</sup> See *infra* Section IV.A.

<sup>42</sup> See 271 P.3d at 4–5 (noting WTP "appears to be engaged in a multi-front attack on both contribution restrictions and the [disclosure] transparency. . . . [I]t is currently engaged in separate litigation in the same District Court involving the Montana laws on campaign spending disclosures. In another [District Court] action . . . under its new name of American Tradition Partnership, and with others, [it] challenges the constitutionality of most of the limits and disclosure requirements contained in § 13-37-216. Ironically, perhaps, WTP argued in the District Court and in its oral presentation to this Court on appeal that their compliance with these same disclosure laws that it now seeks to invalidate should remedy any concerns regarding the potential corrupting influence of its unlimited corporate expenditures.").

<sup>43</sup> See *id.* at 7.

<sup>44</sup> *Id.* at 6.

<sup>45</sup> *Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012) (5–4 decision) (per curiam). The dissent noted openness to reconsider *Citizens United*, but given its per curiam disposition, there was not a significant opportunity to reconsider and denial was inappropriate. *Id.* at 517–18 (Breyer, J., dissenting). Even if Breyer were to accept *Citizens United*, he believed the Court shouldn't disregard Montana's finding, "on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court [found] a compelling interest in limiting independent expenditures by corporations." *Id.*

<sup>46</sup> *Id.* Rebuking the Court, the state legislature enacted Montana Code § 13-35-503, codifying that the people of Montana regard, *inter alia*,

- (a) . . . money as property, not speech;
- (b) . . . rights under the [U.S.] Constitution as rights of human beings, not rights of corporations;

C. *Exacting Scrutiny in Disclosure Regulations & the Informational Interest*

In striking down many of Congress’s post-Watergate reforms, the Supreme Court consigned disclosure as the linchpin of campaign finance regulations on expenditures, subjecting them to a standard of review below strict scrutiny.<sup>47</sup> Disclosure regulations in state legislatures proliferated and survived First Amendment challenges under the Court’s “less stringent ‘exacting’ scrutiny standard.”<sup>48</sup> *Buckley v. Valeo* established the exacting scrutiny standard, upon which the Court has anchored its review of disclosure laws for almost half a century, both before and after *Citizens United*.<sup>49</sup> Exacting scrutiny requires “a substantial relation between the disclosure requirement and a sufficiently important governmental interest,”<sup>50</sup> and the disclosure regime must be “narrowly tailored to the government’s asserted interest . . . even if it is not the least restrictive means of achieving that end.”<sup>51</sup>

The *Buckley* Court enunciated three governmental interests that justified disclosure’s special treatment and avoidance of strict scrutiny in the election context:

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(c) . . . immense aggregation of wealth that is accumulated by corporations using advantages provided by the government to be corrosive and distorting when used to advance the political interests of corporations . . .

<sup>47</sup> See *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

<sup>48</sup> See Vogel & Goldmacher, *infra* note 135; Jiang, *supra* note 15, at 494.

<sup>49</sup> See 424 U.S. 1, 64–65 (1976) (per curiam); *New Documents Show Charles Koch’s Fortune Subsidizing Attacks on Election Laws Since 1970s*, KOCHDOCS, <https://kochdocs.org/2020/02/06/breaking-new-documents-show-charles-kochs-fortune-subsidizing-attacks-on-election-laws-since-more-than-40-years-ago> [<https://perma.cc/58JU-Q48G>] (last visited Feb. 8, 2024) (explaining newly public documents show Charles Koch, billionaire industrialist and founder of Americans for Prosperity, was closely associated with the effort against the Federal Election Campaign Act, and funds he provided to the Libertarian Party related to the *Buckley* litigation).

<sup>50</sup> *Ams. for Prosperity Found. (“AFP”) v. Bonta*, 141 S. Ct. 2373, 2383–84 (2021) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). The Court added: “A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters.” *Id.* at 2384.

<sup>51</sup> *Id.* at 2383. Exacting scrutiny has been used in campaign finance cases but applied in other contexts as well, regardless of “whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.” *Id.* (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

First, disclosure provides . . . information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.<sup>52</sup>

This first interest is also known as the “informational interest.”<sup>53</sup> The second is “deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”<sup>54</sup> The third purports that disclosure serves an information-gathering purpose, “to detect violations of the contribution limitations.”<sup>55</sup> The second interest has been largely eviscerated by *Citizens United*, which narrowed the definition of “corruption.”<sup>56</sup> The third is limited to contributions, rather than expenditures.<sup>57</sup> Therefore, proponents

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<sup>52</sup> *Buckley*, 424 U.S. at 66–67 (quoting H.R. REP. NO. 92-564, at 4 (1971)); see Abby K. Wood, *Learning from Campaign Finance Information*, 70 EMORY L.J. 1091, 1094 (2021) (“On this one-dimensional understanding of how voters choose a candidate, political scientists have established that, yes, disclosures can help predict how a candidate will vote once in office.”).

<sup>53</sup> Jiang, *supra* note 15, at 496; Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 665–66 (2012) (“Originally, three separate and distinct interests supported [disclosure]. After *Citizens United*, only one, however, the so-called ‘informational interest,’ can. This interest holds that disclosure provides voters information helpful to figuring out where the different candidates stand and to locating them in an otherwise complex and confusing policy space.”); Wood, *supra* note 52, at 1094.

<sup>54</sup> *Buckley*, 424 U.S. at 67.

<sup>55</sup> *Id.* at 68.

<sup>56</sup> See Ortiz, *supra* note 53, at 673–75.

<sup>57</sup> See *id.*; As Richard Hasen detailed in *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 568 (2012):

In *Citizens United*, Justice Kennedy . . . appeared to determine as an empirical matter . . . that spending independent of a candidate cannot corrupt a candidate or be an improper influence on her. . . . [T]his was one of the least persuasive portions of the Court’s controversial opinion. If the Court believes that the government may limit a \$3000 contribution to a candidate because of its corruptive potential, how could it not believe that the government has a similar anticorruption interest in limiting \$3 million contributions to an independent effort to elect that candidate? The government’s anticorruption interest stemming from large contributions to such groups is especially strong because these Super-PACs . . . often have close ties to candidates.

of independent expenditure disclosures are left clinging to the singular compelling informational interest.<sup>58</sup>

In terms of bolstering the informational interest, the Court has recognized that disclosure provides information about the assessments of candidates by groups and individuals aligned with the person’s views, which allows that person to “piggyback” off of the aligned speech.<sup>59</sup> Disclosure is also recognized to signal to voters “which policies a candidate may actually pursue once in office.”<sup>60</sup> These benefits can generally be characterized as voter education and political accountability.<sup>61</sup> Additionally, “[d]isclosure may be particularly valuable in ballot proposition elections, where the voting cues provided by a candidate’s personality, record, or party in an election for public office are missing.”<sup>62</sup>

The Court has conceptualized the First Amendment benefits even further, lauding disclosure for “furthering First Amendment values by opening the basic processes of our federal election system to public view.”<sup>63</sup> However, disclosure advocates should be careful about relying on the Court’s praises of the informational interest alone, in its current state.<sup>64</sup> Instead, the informational interest can be strengthened and broadened to other fundamental rights to solidify its place as the cornerstone of disclosure law, which will stand firm even in the face of a wave of new challenges that seek to crumble what remains of the post-*Citizens* regulatory structure.<sup>65</sup>

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It is not even clear that a majority of the Court (or even Justice Kennedy) actually believes . . . independent spending cannot corrupt. . . . [J]ust a year earlier in *Caperton v. Massey*, [Kennedy] recogniz[ed] that a \$3 million contribution to an independent group supporting the election of a West Virginia Supreme Court Justice required that the Justice recuse himself from a case involving the independent spender supporting his candidacy. The *Caperton* Court pointed to the “disproportionate” influence of that spending on the race and at least an appearance of impropriety.

Subsequent circuit court decisions have homed in only on the informational interest. See *Nat’l Ass’n for Gun Rts. v. Mangan*, 933 F.3d 1102, 1108 (9th Cir. 2019).

<sup>58</sup> Ortiz, *supra* note 53, at 666 (“Disclosure now hangs on this single thread.”); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 281 (2010) (“Indeed, voter information provides the real foundation for today’s disclosure requirements.”).

<sup>59</sup> See Jiang, *supra* note 15, at 496.

<sup>60</sup> *Id.* at 496–97.

<sup>61</sup> See *id.*

<sup>62</sup> Briffault, *supra* note 58, at 289.

<sup>63</sup> *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) (per curiam).

<sup>64</sup> Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 441 (2012); Jiang, *supra* note 15, at 500.

<sup>65</sup> See *infra* Part III.



The *Buckley* Court recognized that disclosure laws will “deter some individuals who otherwise might contribute” and “may even expose contributors to harassment or retaliation.”<sup>66</sup> The Court noted that these “burdens . . . must be weighed carefully against the interests which Congress has sought to promote by this legislation [the Federal Election Campaign Act].”<sup>67</sup> The Court was referring in part to its decision in *NAACP v. Alabama*, wherein the NAACP successfully warded off state attempts to compel the disclosure of Association members with the aid of the “record evidence” proffered in the case.<sup>68</sup> In the Jim Crow era, the NAACP “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” while Alabama failed to show a valid interest in obtaining the membership lists that would overcome such burdens.<sup>69</sup> Dark money groups have sought to extend this exception to their political causes, and successfully did so in 2021 in *Americans for Prosperity Foundation v. Bonta*.<sup>70</sup>

#### D. Bonta—A New Exacting Scrutiny in Campaign Finance?

After *Citizens United*, the legal movement to “deregulate and disclose”<sup>71</sup> has abandoned the “disclose” half of the expression,<sup>72</sup> shifting

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<sup>66</sup> 424 U.S. at 68.

<sup>67</sup> *Id.*

<sup>68</sup> 357 U.S. 449, 451 (1958).

<sup>69</sup> *Id.* at 462–65.

<sup>70</sup> 141 S. Ct. 2373. See Stuart McPhail, *Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 PENN ST. L. REV. 1049, 1057 (2017), and Briffault, *supra* note 58, at 290, noting that

for at least some disclosure-only proponents, their endorsement of disclosure was more tactical than sincere. Some of the prominent advocates of the disclosure-only approach . . . are now strong opponents of new disclosure legislation that would respond to the *Citizens United* decision. . . . [L]itigation challenges to campaign finance laws increasingly target disclosure requirements in addition to rules limiting or barring certain finance activities.

<sup>71</sup> Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1700 (2013); Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55 (2022) [hereinafter Kang, *Rightward Lurch*] (“Kathleen Sullivan, who argued *Bonta*, had earlier endorsed ‘deregulate and disclose’ in her scholarship, but undermined constitutional support for mandatory disclosure in her case before the post-Trump Court.”); Wood, *supra* note 52, at 1097; Briffault, *supra* note 58, at 290.

<sup>72</sup> Lee Fang, *Leading Advocates of “Dark Money” Previously Supported Disclosure*,



its attention to challenging mandatory disclosure laws for nonprofits and organizations considered to be dark money groups that absorb and flood elections with hundreds of millions of dollars every campaign cycle.<sup>73</sup> States like California responded by enacting comprehensive disclosure regulatory regimes, which have been systematically challenged on First Amendment grounds by groups seeking to reduce disclosure and maintain anonymity.<sup>74</sup> Federal courts had typically deferred to state interests in similar disclosure cases.<sup>75</sup> However, in 2021, the Supreme Court struck down a California law in a move that, according to the dissent, put a “bull’s-eye” on disclosure regulations.<sup>76</sup>

In *Bonta*, two tax-exempt nonprofits challenged a requirement to disclose IRS-990 forms—not to the public, but to the state attorney general’s office—that contained the names and addresses of their major donors.<sup>77</sup> The nonprofits, relying on *NAACP v. Alabama*, claimed that the disclosure violated their First Amendment associational rights by “mak[ing] their donors less likely to contribute and . . . subject[ing] them to the risk of reprisals.”<sup>78</sup> California asserted its interest was to “police

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INTERCEPT (Apr. 26, 2016), <https://theintercept.com/2016/04/26/dark-money-hypocrisy> [<https://perma.cc/CW89-XPJN>].

<sup>73</sup> Taylor Giorno, “Midterm Spending Spree”: Cost of 2022 Federal Elections Tops \$8.9 Billion, a New Midterm Record, OPENSECRETS (Feb. 7, 2023), <https://www.opensecrets.org/news/2023/02/midterms-spending-spree-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record> [<https://perma.cc/M8DH-54YA>] (Dark money groups steered over “\$295 million from secret donors into 2022 federal elections”).

<sup>74</sup> See Jason Torchinsky & Ezra Reese, *State Legislative “Responses” to Citizens United: Five Years Later*, 66 SYRACUSE L. REV. 273, 277 (2016); BRENNAN CTR. FOR JUST., COMPONENTS OF AN EFFECTIVE DISCLOSURE LAW 2–4 (May 2018), [https://www.brennancenter.org/sites/default/files/stock/2018\\_10\\_MiPToolkit\\_DisclosureLaw.pdf](https://www.brennancenter.org/sites/default/files/stock/2018_10_MiPToolkit_DisclosureLaw.pdf) [<https://perma.cc/Y8MG-XBLX>]; Robert Faturechi, *The Conservative Playbook for Keeping ‘Dark Money’ Dark*, PROPUBLICA (Feb. 4, 2016), <https://www.propublica.org/article/the-conservative-playbook-for-keeping-dark-money-dark> [<https://perma.cc/43TC-3WQX>]; Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 204–05 (2017).

<sup>75</sup> See Lindsay Hemminger, Note, *Americans for Prosperity Foundation v. Bonta: The Dire Consequences of Attacking a Major Solution to Dark Money in Politics*, 81 MD. L. REV. 1007, 1039–40 (2022). While *Bonta* was litigated, *Citizens United* challenged parallel regulations in New York. “[T]he Second Circuit applied exacting scrutiny to a New York disclosure requirement instructing 501(c)(3) and (4) organizations to submit a set of yearly disclosures to the Attorney General.” *Id.* at 1039. The court reached a conclusion opposite the Supreme Court, holding the attorney general had “legitimate interest in collecting Schedule B forms to investigate charitable fraud” because it “facilitate[d] investigative efficiency.” *Id.* (quoting *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2018)).

<sup>76</sup> *AFP v. Bonta*, 141 S. Ct. 2373, 2392 (2021) (Sotomayor, J., dissenting).

<sup>77</sup> *Id.* at 2379 (majority opinion).

<sup>78</sup> *Id.* at 2380; see McPhail, *supra* note 70, at 1064 (“Corporations can’t suffer violence,

misconduct by charities.”<sup>79</sup> The Americans for Prosperity (“AFP”) Foundation<sup>80</sup> and the Thomas More Law Center<sup>81</sup> are tax-exempt charitable organizations under § 501(c)(3) of the Internal Revenue Code.<sup>82</sup> David and Charles Koch,<sup>83</sup> majority co-owners of the energy conglomerate Koch Industries<sup>84</sup> and major financial supporters and fundraisers for libertarian and conservative causes, founded AFP in 2004.<sup>85</sup> AFP is principally

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however, and violence against natural persons shouldn’t be able to justify anonymity for a corporate body.”).

<sup>79</sup> *Bonta*, 141 S. Ct. at 2379.

<sup>80</sup> See Wood, *supra* note 52, at 1109 (“The founders of [political action committees (“PACs”)] and 501(c)(4) groups often give them ambiguous names, increasing the ‘noise’ in the signal, and reducing the heuristic value of their names.”).

<sup>81</sup> The Center engages in pro bono litigation to “Preserve America’s Judeo-Christian heritage; Defend the religious freedom of Christians; Restore time-honored moral and family values; Protect the sanctity of human life; Promote a strong national defense and a free and sovereign United States of America.” *About Us*, THOMAS MORE L. CTR., <https://www.thomasmore.org/about-the-thomas-more-law-center> [<https://perma.cc/HZ5P-F6UN>] (last visited Feb. 8, 2024). The nonprofit garnered attention for controversial litigation, including former President Trump’s election fraud claims and anti-Islamic suits claiming federal officials engage in shari’a-based religious activities. See Megan O’Matz, *How an Anti-Abortion Law Firm Teamed Up with a Disgraced Kansas Attorney to Dispute the 2020 Election*, PROPUBLICA (Mar. 1, 2023), <https://www.propublica.org/article/anti-abortion-activists-fighting-to-change-election-law> [<https://perma.cc/8QW6-KPR7>]; *Taxpayer Monies Used to Promote Islamic Jihad—Judge Asked to Decide Against AIG Bailout*, THOMAS MORE L. CTR., <https://www.thomasmore.org/news/taxpayer-monies-used-promote-islamic-jihad-judge-asked-decide-against-aig-bailout> [<https://perma.cc/8BAD-Z8RZ>] (last visited Feb. 8, 2024).

<sup>82</sup> *Bonta*, 141 S. Ct. at 2380–81.

<sup>83</sup> The Kochs inherited their wealth from their father, Fred C. Koch, who was an enterprising oil refiner who built refineries worldwide, including 1930s and 40s Germany and the USSR. *‘Hidden History’ of Koch Brothers Traces Their Childhood and Political Rise*, NPR (Jan. 19, 2016), <https://www.npr.org/2016/01/19/463565987/hidden-history-of-koch-brothers-traces-their-childhood-and-political-rise> [<https://perma.cc/S9XD-ARPA>]. Fred Koch was also a founding member of the ultra-conservative, libertarian John Birch Society. Jane Mayer, *The Secrets of Charles Koch’s Political Ascent*, POLITICO (Jan. 18, 2016), <https://www.politico.com/magazine/story/2016/01/charles-koch-political-ascent-jane-mayer-213541> [<https://perma.cc/X4FM-4AP8>]. The Kochs have been criticized for their views on government regulation as serving their business interests. Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/david-koch-dead.html> [<https://perma.cc/5PAX-5MHV>].

<sup>84</sup> Andrea Murphy, *America’s Largest Private Companies*, FORBES (Nov. 14, 2023), <https://www.forbes.com/lists/largest-private-companies> [<https://perma.cc/KCP3-LNEE>] (listing Koch Industries as the second-largest private U.S. corporation in 2023).

<sup>85</sup> See Alexander Hertel-Fernandez, Caroline Tervo & Theda Skocpol, *How the Koch Brothers Built the Most Powerful Rightwing Group You’ve Never Heard Of*, GUARDIAN

known as a 501(c)(4), an IRS designation that allows nonprofits to engage in political lobbying and campaign activities, so long as their primary focus is not dedicated to political activity.<sup>86</sup> AFP also has an affiliate foundation, which operates as a 501(c)(3) and shared the same leadership structure and chair, and was the organizational arm at issue in *Bonta*.<sup>87</sup>

The Court took the nonprofits at their word, holding that “all disclosure requirements impose associational burdens.”<sup>88</sup> The Court found it was not necessary for the appellants to demonstrate that the harms

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(Sept. 26, 2018), <https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group> [<https://perma.cc/P7XA-9TZ3>].

<sup>86</sup> See Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined*, PROPUBLICA (Aug. 13, 2012), <https://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined> [<https://perma.cc/ZV3L-HA5L>]. “Primary focus” has been interpreted as dedicating less than half of funds to political activities. *Dark Money Process*, OPENSECRETS, <https://www.opensecrets.org/dark-money/process> [<https://perma.cc/9XFA-4UBV>] (June 2015). However, 501(c)(4)s can spend almost all funds on political ads by labeling them “educational” and avoiding “magic words.” *Id.* As such, before the FEC can treat issue ads as electioneering communications and require reporting (the reporting window), organizations like AFP can explicitly mention a candidate in all “educational” ads without being considered political. *Id.* Once the reporting window begins, AFP will then advertise using magic words, explicitly calling for a candidate’s election or defeat. Robert McGuire, *As FEC Window Opened, Subjects of Dark Money “Issue Ads” Became Targets for Defeat*, OPENSECRETS (Nov. 3, 2014), <https://www.opensecrets.org/news/2014/11/as-fec-window-opened-subjects-of-dark-money-issue-ads-became-targets-for-defeat> [<https://perma.cc/E6N3-FYBQ>]. In 2014, AFP ran 33,000 ads in electoral races around the country, more than any other outside group. *Id.*; see also Matt Corley & Adam Rappaport, *The IRS Is Not Enforcing the Law on Political Nonprofit Disclosure Violations*, CITIZENS FOR RESP. & ETHICS IN WASH. (Apr. 28, 2022), <https://www.citizensforethics.org/reports-investigations/crew-reports/the-irs-is-not-enforcing-the-law-on-political-nonprofit-disclosure-violations> [<https://perma.cc/8RF4-DDPW>]. In addition, the IRS has not successfully enforced its disclosure and transparency requirements. Heidi Przybyla, *What Ginni Thomas and Leonard Leo Wrought: How a Justice’s Wife and a Key Activist Started a Movement*, POLITICO (Sept. 9, 2023), <https://www.politico.com/news/2023/09/10/ginni-thomas-leonard-leo-citizens-united-00108082> [<https://perma.cc/THA3-93JA>] (explaining the IRS division responsible for nonprofits endured budget cuts after conservative groups alleged unfair targeting).

<sup>87</sup> See *About Us*, AFP, <https://americansforprosperityfoundation.org/about-afp> [<https://perma.cc/M3LJ-X9U5>] (last visited Feb. 8, 2024); David Pozen, *The Tax-Code Shift That’s Changing Liberal Activism*, ATLANTIC (Nov. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/501c3-501c4-activists-and-tax-code/576364> [<https://perma.cc/665R-GC33>]; DAN PETEGORSKY, NAT’L COMM. FOR RESP. PHILANTHR., 8 COMMON SOURCES OF C4 FUNDING FOR NONPROFITS, <https://www.ncrp.org/wp-content/uploads/2019/08/Movement-Investment-Project-c4-brief.pdf> [<https://perma.cc/XN2K-XEJ4>] (explaining organizations often have sister nonprofits to maximize donations related to the full range of the nonprofits’ mission).

<sup>88</sup> *AFP v. Bonta*, 141 S. Ct. 2373, 2395 (2021) (Sotomayor, J., dissenting).

alleged were the result of the disclosure requirement itself, thereby eliminating the need to demonstrate a significant burden from the disclosure to trigger a high-level exacting scrutiny.<sup>89</sup> As such, the Court shifted to a “one size fits all” test “[r]egardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored.”<sup>90</sup> Thus, the Supreme Court’s conservative majority “den[ie]d] deference to state legislatures in enacting laws that protect the public interest.”<sup>91</sup> Instead, the Court decided in favor of AFP and organizations like it that have propelled the careers of judicial nominees, including

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<sup>89</sup> *Id.* at 2392–93.

<sup>90</sup> *Id.* at 2398. See also Kang, *Rightward Lurch*, *supra* note 71, at 64:

Until *Bonta*, courts typically upheld such general disclosure requirements under the First Amendment but entertained as-applied challenges in individual cases where donors would face a “reasonable probability . . . of threats, harassment, or reprisals” as a result of disclosure. The government’s important interests in transparency, oversight, and prevention of fraud justified disclosure requirements, under exacting scrutiny, against generalized worries about chilling donor activity, in the absence of a particularized as-applied concern.

*Bonta* flipped this constitutional framework on its head, holding that even under exacting scrutiny, such disclosure requirements must be narrowly tailored, as they would be under strict scrutiny, and plaintiffs challenging those requirements need not establish that disclosure would likely expose them to objective threats, harassment, or reprisals. As a result, despite minimal objective concerns about harms stemming from the required disclosures in *Bonta*, the Court held the requirements unconstitutional because they were not narrowly tailored to the government’s oversight interests. The State of California could obtain that information for enforcement purposes through other, perhaps more cumbersome and costly means. In other words, *Bonta* significantly increased the burden for the government in terms of the narrow tailoring of government means and ends.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court refined *NAACP v. Alabama* and evaluated the disclosure law’s impairment on teachers’ associational rights and deemed that the burden was significant because the disclosure was public and used to make hiring decisions each year. Because the Court determined that the harms were so substantial in this case, it required the state to prove that the law was narrowly tailored to the interest it sought to promote. The Supreme Court has made clear that an evaluation of the burdens and harms on personal liberties that result from the challenged law is vital to the exacting scrutiny analysis.

Hemminger, *supra* note 75, at 1022. By assuming the burden, the Court eliminates discussion of the balanced interest at hand for society in disclosing funding.

<sup>91</sup> Hemminger, *supra* note 75, at 1027.

sitting Justices of the Court,<sup>92</sup> their spouses,<sup>93</sup> and justices across state supreme courts.<sup>94</sup>

Although the substantial state interest at issue in *Bonta* was investigating charitable misconduct rather than the compelling informational interest in disclosures in the elections sphere, the dissents from Justices Sotomayor and Breyer demonstrated a concern for the direction of the majority’s doctrine. Justice Sotomayor bluntly stated, “[t]oday’s analysis marks reporting and disclosure requirements with a bull’s-eye,”<sup>95</sup> while Justice Breyer questioned the majority’s strong endorsement of anonymity at oral argument, asking “can we distinguish campaign finance laws, where the interest is even stronger in people being able to give anonymously?”<sup>96</sup>

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<sup>92</sup> See Michelle Ye Hee Lee, *Koch Network Gears Up for the Next Supreme Court Vacancy*, WASH. POST. (Jan. 28, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/01/28/koch-network-is-gearing-up-for-the-next-supreme-court-vacancy> [<https://perma.cc/RL4D-VQJM>].

<sup>93</sup> Przybyla, *supra* note 86.

<sup>94</sup> See *infra* Section IV.B.1; Billy Corriher, *Koch Brothers and D.C. Conservatives Spending Big on Nonpartisan State Supreme Court Races*, CTR. FOR AM. PROGRESS (Aug. 11, 2014), <https://www.americanprogress.org/article/koch-brothers-and-d-c-conservatives-spending-big-on-nonpartisan-state-supreme-court-races> [<https://perma.cc/3P7Z-J38L>] (“The [Republican State Leadership Committee] tried unsuccessfully to unseat three Tennessee Justices . . . aided by its ‘strategic partner’ group, the State Government Leadership Foundation . . . and the Koch brothers-affiliated [AFP].”).

The top contributor to the RSLC in recent years has been the Judicial Crisis Network, a 501(c)(4) led by Leo. And the leading funder of the Judicial Crisis Network was . . . another 501(c)(4) tied to Leo along with [the Kochs].

. . . .

Despite the solid conservative hold on the state’s politics, entities tied to Leo have spent more than \$7 million on judicial races in Arkansas since 2014 amid a yearslong battle over the state cap on punitive damages in civil litigation.

Koch Industries . . . has an active business presence in Arkansas including a large paper mill in Crossett, Arkansas, that has faced scrutiny and agreed to pay civil penalties totaling \$600,000 under an agreement in which it did not admit fault, in connection with allegations that the plant unleashed pollutants in the community.

Steve Reilly, *Leonard Leo Is Quietly Remaking State High Courts in His Conservative Image*, MESSENGER (Dec. 20, 2022), <https://www.themessenger.com/grid/leonard-leo-is-quietly-remaking-state-high-courts-in-his-conservative-image> [<https://perma.cc/J4JL-GRSP>].

<sup>95</sup> AFP v. Bonta, 141 S. Ct. 2373, 2392 (2021).

<sup>96</sup> Transcript of Oral Argument at 12, AFP v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251);



In sum, in a case that required no public disclosure and little demonstrated burden or harm, the Court decided to elevate the exacting scrutiny standard for all disclosure regimes. How the Court will next interpret state disclosure regulations in elections, like the Montana Disclose Act which requires public disclosures,<sup>97</sup> remains unknown. Yet the inevitable burden of any organization or individual having a political presence on the internet subject to public debate would seemingly trigger the protections afforded to organizations like AFP and strike down what is left of state regulations on unlimited independent expenditures and electioneering communications.<sup>98</sup>

*E. Gaspee Project & the Current Clash of Heightened Exacting Scrutiny and the Informational Interest*

A notable distinction between the *Bonta* and *Buckley* disclosure cases is that the *Bonta* disclosures were not public or campaign finance specific.<sup>99</sup> Those disclosures were only shared with the California attorney general, and so they did not trigger the informational interest defense that shields public disclosures in the campaign finance setting.<sup>100</sup> Many federal courts note this distinction when confronted with the post-*Bonta* wave of disclosure challenges.<sup>101</sup> However, other courts, like the Tenth

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see also Kang, *Rightward Lurch*, *supra* note 71, at 65, noting:

Transferred to campaign-finance law, *Bonta* will raise the burden for the government to defend disclosure requirements against First Amendment challenges, even if the government's antifraud interests are arguably stronger in campaign finance. As Justice Breyer suggested, even if the government's interests are stronger in campaign finance, it may also be true that the individual's First Amendment interest in anonymous participation is stronger as well.

<sup>97</sup> See *infra* Section V.A.

<sup>98</sup> See *John Doe No. 1 v. Reed*, 561 U.S. 186, 244 (2010) (Thomas, J., dissenting) ("The difficulty in predicting which referendum measures will prove controversial—combined with Washington's default position that signed referendum petitions will be disclosed on-demand, . . . plac[ing] this information on the Internet for broad dissemination—raises the significant probability that today's decision will 'inhibit the exercise of legitimate First Amendment activity' with respect to referendum and initiative petitions."); *but see* Hasen, *supra* note 57, at 559 ("Even in the Internet age, in which the costs of . . . data about small-scale contributions by individual donors often have fallen to near zero, there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak.").

<sup>99</sup> See Kang, *Rightward Lurch*, *supra* note 71, at 57, 62.

<sup>100</sup> *Bonta*, 141 S. Ct. at 2379–80.

<sup>101</sup> See *Gaspee Project v. Mederos*, 13 F.4th 79, 85 (1st Cir. 2021); *San Franciscans Supporting Prop B v. Chiu*, 604 F. Supp. 3d 903, 906–10 (N.D. Cal. 2022); *Smith v. Helzer*,

Circuit, have refused to distinguish *Bonta*’s context (as the Wyoming U.S. District Court did) and have already heightened the scrutiny applied to some campaign finance disclosure.<sup>102</sup>

The First Circuit considered the new, post-*Bonta* standard for exacting scrutiny when it heard a facial challenge to Rhode Island’s statutory scheme that required disclosure for certain independent expenditures and electioneering communications in *Gaspee Project v. Mederos*.<sup>103</sup> Senior Judge Selya noted that the Supreme Court had heightened the standard in *Bonta* by emphasizing that “fit matters,” and exacting scrutiny “require[s] a fit that is not necessarily perfect, but reasonable.”<sup>104</sup>

Judge Selya differentiated the case from *Bonta* by first noting the context of the challenges.<sup>105</sup> In *Gaspee Project*, the disclosure regime targeted election-related spending for independent expenditures and electioneering communications.<sup>106</sup> The statute was narrowly tailored by

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614 F. Supp. 3d 668, 679 (D. Alaska 2022) (“In contrast, here, the donor disclosure requirement . . . is directly related to the State’s important interest in promptly *providing voters with information* about the source of funding of political ad[s] by independent expenditure entities.”) (emphasis added); *VoteAm. v. Raffensperger*, 609 F. Supp. 3d 1341, 1359 (N.D. Ga. 2022) (stating the *Bonta* Court “recently confirmed that the exacting scrutiny standard is applicable in election-related cases outside the campaign finance disclosure context”).

In *Wyoming Gun Owners v. Buchanon*, the Wyoming District Court noted [*Bonta*] did not discuss election disclosure laws, but rather focused on disclosure of charity information . . . for purposes of supervision and regulation of charitable fundraising.

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Additionally, it is worth repeating that while [*Bonta*] clarified exacting scrutiny and emphasized the importance of donor privacy in disclosure schemes, it was not a case about electioneering statutes.

592 F. Supp. 3d 1014, 1027, 1030 (2022). Other courts have applied *Bonta*’s exacting scrutiny to independent expenditures and electioneering communications without explicitly distinguishing elections from the charity-investigation context in *Bonta*, invalidating disclosure regulations on electioneering speech. *E.g.*, *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630 at \*13 (D. Colo. Sept. 7, 2021); *New Ga. Project, v. Carr*, No. 1:22-CV-03533-VMC, 2022 WL 17667828 at \*20 (N.D. Ga. Dec. 14, 2022).

<sup>102</sup> See *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1250 (10th Cir. 2023).

<sup>103</sup> *Gaspee Project*, 13 F.4th at 88, 89.

<sup>104</sup> *Id.* at 85; Andrew Jensen Kerr, *The Perfect Opinion*, 12 WASH. U. JURIS. REV. 221, 256 (2020) (“Judge Selya is idiosyncratic, but is he an icon? It appears that other federal judges think he might be. According to one empirical study . . . Selya was the fourth most-cited federal appellate judge outside [his] home circuit from 1998–2000 (behind only Richard Posner, Frank Easterbrook and Sandra Lynch).”).

<sup>105</sup> *Gaspee Project*, 13 F.4th at 85, 86.

<sup>106</sup> *Id.* at 82.



only applying in a particular time frame, when reaching specific monetary and audience thresholds, with the ability for donors to opt out of electioneering communications.<sup>107</sup> Therefore, there was not the risk of a “dramatic mismatch.”<sup>108</sup>

Similar to *Bonta*, the plaintiffs in *Gaspee Project* sought to draw an analogy between Rhode Island’s disclosure requirements and compelled disclosure of membership lists invalidated by the Supreme Court in *NAACP v. Alabama*.<sup>109</sup> However, unlike the Court in *Bonta*, Judge Selya noted the stark difference between *NAACP v. Alabama*’s Jim Crow context and *Gaspee Project*’s showing, quipping that “[e]quating the production order invalidated in *NAACP* with the disclosure requirements of the Act is like equating aardvarks with alligators.”<sup>110</sup>

Judge Selya championed the informational interest that supports disclosure regimes, observing that “a well-informed electorate is as vital to the survival of a democracy as air is to the survival of human life.”<sup>111</sup> He emphasized “[d]isclaimers—in the unique election-related context—serve the salutary purpose of helping the public to understand where ‘money comes from.’”<sup>112</sup> And in a nod to the future, Judge Selya argued the “‘compelling interest in identifying the speakers behind politically oriented messages’ . . . is especially true in the age of new media, given the proliferation of speakers in the marketplace of ideas.”<sup>113</sup>

The Tenth Circuit, while recognizing the informational interest, has interpreted *Bonta* as “tighten[ing] our review of disclosure laws,” applying a functionally strict scrutiny analysis of disclosure regimes.<sup>114</sup> In *Wyoming Gun Owners v. Gray*, the court claimed its analysis was not “in tension” with *Gaspee Project*, but proceeded to breeze through the context of *Bonta*, which the court had made special note of,<sup>115</sup> and apply a form

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<sup>107</sup> *Id.* at 88–90.

<sup>108</sup> *Id.* at 93 (quoting *AFP v. Bonta*, 141 S. Ct. 2373, 2386 (2021)).

<sup>109</sup> *Id.* at 94.

<sup>110</sup> *Id.*

<sup>111</sup> *Gaspee Project*, 13 F.4th at 95–96.

<sup>112</sup> *Id.* at 95 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam)).

<sup>113</sup> *Id.* at 87 (quoting *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011)).

<sup>114</sup> *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1244 (10th Cir. 2023); *see id.* at 1247 (“This means that, beyond proving a balanced relationship between the disclosure scheme’s burdens and the government’s interests, the government must ‘demonstrate its need’ for the disclosure regime ‘in light of any less intrusive alternatives.’”) (quoting *AFP v. Bonta*, 141 S. Ct. 2373, 2386 (2021)).

<sup>115</sup> *Wyo. Gun Owners v. Buchanon*, 592 F. Supp. 3d 1014, 1030 (D. Wyo. 2022).

of narrow tailoring that requires earmark or opt-out provisions, and “appropriate and precise guidance, defining how actors—sophisticated or otherwise—should structure internal accounting mechanisms” to pass muster.<sup>116</sup> Rather than putting the onus on organizations and donors to structure their finances to comply with the state’s disclosure regime, the court’s balancing analysis put relatively little weight on the government’s interests, while dropping an elephant on the scale of how narrowly tailored disclosures must be.<sup>117</sup>

*F. The Future for Disclosure Regimes: Anonymity vs. Information*

The Supreme Court has so far refused to hear disclosure cases involving campaign finance disclosures post-*Bonta*, denying the *Gaspee Project* plaintiffs’ petition for writ of certiorari.<sup>118</sup> Nonetheless, Court skepticism of the government’s interest and the heightened tailoring requirement, regardless of burden in *Bonta*, marks not only disclosure requirements with a “bull’s-eye” for future legal challenges<sup>119</sup> but also the informational interest that underpins it.<sup>120</sup>

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<sup>116</sup> *Gray*, 83 F.4th at 1250.

<sup>117</sup> *Id.* at 1251.

<sup>118</sup> See *Gaspee Project v. Mederos*, 142 S. Ct. 2647 (2022) *denying cert. to* 13 F.4th 79 (1st Cir. 2021).

<sup>119</sup> *AFP v. Bonta*, 141 S. Ct. 2373, 2392 (2021) (Sotomayor, J., dissenting).

<sup>120</sup> See Richard L. Hasen, Opinion, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/V8PZ-N5G6>]. Justices’ views on the informational interest do not neatly track partisan or ideological affiliations on the Court. Scalia, Rehnquist, and Kennedy all expressed support for disclosures in *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting) and *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring):

Requiring people to stand up in public for their political acts fosters civic courage . . . . I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

See also *McConnell v. FEC*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part):

The use of corporate wealth (like individual wealth) to speak to the electorate is unlikely to “distort” elections—*especially* if disclosure requirements *tell* the people where the speech is coming from. The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.

Justice Thomas's views, once on the Court's fringe, now sit at its forefront.<sup>121</sup> His theory of a right to anonymity in the political sphere, articulated in *Citizens United* and restated in his *Bonta* concurrence, would invalidate state disclosure regimes that target independent expenditures.<sup>122</sup> Thomas has proposed evaluating disclosure laws under strict scrutiny, arguing the "text and history of the Assembly Clause suggest that [it] includes the right to associate anonymously. . . . Laws directly burdening th[is] right . . . , including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights."<sup>123</sup>

In addition, academics have publicly doubted the value of the information derived from disclosures or the constitutionality of disclosure regulations.<sup>124</sup> Counterarguments in support of the informational interest,

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If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as *too much* speech.

<sup>121</sup> See Kang, *Rightward Lurch*, *supra* note 71, at 65 ("Once the lone dissenter in *Citizens United* on disclosure, [Justice Thomas] now had Justices Alito and Gorsuch signaling their sympathy in their own *Bonta* concurrence.").

<sup>122</sup> *Citizens United v. FEC*, 558 U.S. 310, 480–85 (2010) (Thomas, J., concurring in part and dissenting in part) (quoting *McIntyre*, 514 U.S. at 348) (arguing *McIntyre*'s narrow holding on anonymous pamphleteering should apply to all speech: "Congress may not abridge the 'right to anonymous speech' based on the 'simple interest in providing voters with additional relevant information.'").

<sup>123</sup> *Bonta*, 141 S. Ct. at 2390. Justices Alito and Gorsuch, in concurrence, signaled unwillingness to rule out reviewing disclosure regulations under strict scrutiny. *Id.* at 2390–91. See Jiang, *supra* note 15, at 506 n.118 (explaining fundamentalist views of anonymity treat disclosure not as a speech multiplier or purifier; rather, anonymity is "a principle central to protecting our rich, Western tradition of reasoned, public debate") (quoting Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 255 (2014)); "Lastly, there is the view that administrative burdens of disclosure regulations are too onerous and confusing." *Id.* at 506.

<sup>124</sup> Hasen, *supra* note 57, at 558–59, explaining that attacks on disclosure have come not only from the right. Members of the academy . . . have criticized disclosure laws. Bill McGeveran chides election law scholars for failing to take informational privacy concerns seriously . . . . Richard Briffault, a longtime supporter of reasonable campaign finance regulation, now believes disclosure is inadequate to deter corruption, and that the potential chill of disclosure in the Internet era warrants raising the threshold for disclosure . . . . Lloyd Mayer dismisses the anticorruption interest . . . and expresses considerable skepticism that current disclosure[s] . . . provid[e] valuable information to voters. Bruce Cain believes that many reformers push disclosure to

such as this Note, have also been proposed. They include broadening the interest beyond just the voter to the democratic interests of the citizen at large.<sup>125</sup> Broadening political accountability, disclosure empowers the electorate beyond the ballot box, providing them the ability to monitor the conduct of elected officials to “discern whether their behavior while in office reflects the interests of their donors, rather than the interests of their constituents.”<sup>126</sup>

## II. DARK MONEY POST—*CITIZENS UNITED*

Even with the Court’s endorsement of disclosure for independent expenditures and electioneering communications, *Citizens United* heralded the exact opposite of transparency.<sup>127</sup> The Federal Election Commission

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dissuade . . . giving . . . [and] called for treating campaign finance disclosure information as we do sensitive individual level census data—disclosed to the government but not to the public.

<sup>125</sup> See Jiang, *supra* note 15, at 519–22. See also Johnstone, *supra* note 64, at 442–43:

Two steps can deepen the informational interest as the remaining constitutionally cognizable justification for campaign finance disclosure. First, the informational interest should recognize disclosure as part of the solution to the problem of [Madison’s] factions . . . , which serves as the [First Amendment’s] foundation . . . [and] facilitates the antifactional machinery of the constitutional system. Thus, we should understand disclosure as furthering the broader republican constitutional principles underlying the informational interest, rather than . . . merely needing to be excused from a narrower libertarian reading of the First Amendment alone. Second, this reconceived informational interest should recognize that disclosure . . . serves a core anticorruption function . . . .

<sup>126</sup> Jiang, *supra* note 15, at 523 (explaining *Citizens United* “hinted at such a possibility when it suggested that ‘disclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable’” and “disclosure permits citizens and *shareholders* to react to the speech of corporate entities in a proper way”). Wood, *supra* note 52, at 1116, observing that

respondents evaluate candidates and messages differently when they learn about the candidate’s relationship to nondisclosing groups, and . . . [their] failure to comply with campaign finance laws. Voters are informed about non-policy characteristics of candidates when they learn about the campaign’s transparency and compliance with campaign finance laws. Yet the Court has not taken this non-policy dimension into account . . . .

See also Briffault, *supra* note 58, at 299 (“The real benefit from disclosure may be public education generally rather than voter information specifically.”).

<sup>127</sup> Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*,

("FEC") is the administrative agency that enforces all federal campaign finance law,<sup>128</sup> while each state is left to regulate its own offices, like state legislatures, executive officers, and courts.<sup>129</sup> To circumvent disclosure regulations at the federal and state levels, there are several strategies for remaining anonymous.<sup>130</sup>

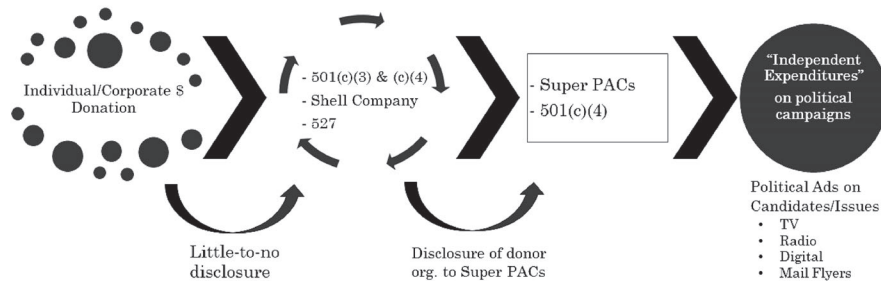
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OPENSECRETS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united> [<https://perma.cc/3TSU-EB3G>].

<sup>128</sup> *Mission and History*, FEC, <https://www.fec.gov/about/mission-and-history> [<https://perma.cc/G7EG-FQAS>] (last visited Feb. 8, 2024); Adav Noti, Erin Chlopak, Catherine Hinckley Kelley, Kevin P. Hancock & Saurov Ghosh, *Why the FEC Is Ineffective*, CAMPAIGN LEGAL CTR. (Aug. 8, 2022), <https://campaignlegal.org/update/why-fec-ineffective> [<https://perma.cc/6E72-FQ6S>] (explaining how partisan deadlock at the FEC hampers its effectiveness of regulating independent expenditures and electioneering communications).

<sup>129</sup> *See Campaign Finance Laws: An Overview*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/campaign-finance-laws-an-overview> [<https://perma.cc/N642-D98Q>] (last visited Feb. 8, 2024).

<sup>130</sup> *See, e.g., 5 Ways Secret Money Makes Its Way into Our Elections*, CAMPAIGN LEGAL CTR. (Oct. 11, 2022), <https://campaignlegal.org/update/5-ways-secret-money-makes-its-way-our-elections> [<https://perma.cc/H8B5-AGAC>]; Wood, *supra* note 52, at 1100 ("A related category of undisclosed political spending is 'gray money,' or the money passed through LLCs and 501(c) org[s] . . . . Even if a group . . . is subject to disclosure laws it can receive money from other sources, like dark money groups. When that happens, the disclosure . . . only contains the dark money group's name, but the money trail goes cold . . ."); Julie Bykowitz, *Supreme Court's 'Dark Money' Rulings Anchor Defense in Ohio Corruption Trial*, WALL ST. J., <https://www.wsj.com/articles/supreme-courts-dark-money-rulings-anchor-defense-in-ohio-corruption-trial-d0f2f045> [<https://perma.cc/V54N-7KDM>] (Mar. 7, 2023) (U.S. Attorney David DeVillers "called politically active nonprofits 'the perfect money-laundering mechanism[,]'" seeing "zero percent chance" an alleged pay-to-play scheme would work "without a 501(c)(4)"); Anna Massoglia, *'Dark Money' Groups Find New Ways to Hide Donors in 2020 Election*, OPENSECRETS (Oct. 30, 2020), <https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors> [<https://perma.cc/J2GK-QWS3>] (Dark money groups contributed some \$430 million to political committees; "[o]nly 30 percent of all outside spending [came] from groups that disclose their donors completely" during the 2020 cycle); Saurav Ghosh & Roger Weiland, *Secret Election Spending Proliferates Through Shell Companies*, CAMPAIGN LEGAL CTR. (Apr. 20, 2022), <https://campaignlegal.org/update/secret-election-spending-proliferates-through-shell-companies> [<https://perma.cc/U928-578V>]; Karl Evers-Hillstrom, *Super PACs Outmaneuver Outdated Rules to Leave Voters in the Dark*, OPENSECRETS (Mar. 18, 2020), <https://www.opensecrets.org/news/2020/03/sunshine-week-2020-super-pacs-loophole> [<https://perma.cc/BV23-DTPD>]; Stan Oklobdzija, *I'll Be Disclosed by Christmas: What 'Pop-up PACs' Can Teach Us About Disclosure and Dark Money* (Dec. 16, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3441922> [<https://perma.cc/9GN2-43LZ>] (explaining super PACs can manipulate spending deadlines and spend unlimited sums without disclosing funding sources until after vote counting; such sources tend to favor more ideologically extreme candidates than those disclosed in the normal course of business).



**Figure 2. Gray Money: Disclosure-less “Independent Expenditures” on Political Campaigns**

“Dark money” is the umbrella term referring to all organizational spending intended to influence political outcomes while obscuring the source of the funding, and it can include both independent expenditures and issue advocacy expenditures.<sup>131</sup> Dark money manifests itself in elections for public offices, judicial appointments, and ballot initiatives.<sup>132</sup> Dark money can be particularly effective in states like Montana with smaller populations and limited campaign dollars raised in-state, which can be quickly overcome by big, out-of-state spenders.<sup>133</sup> Dark money networks now can rival, and at times exceed, the influence and spending exerted by political parties.<sup>134</sup>

<sup>131</sup> See Briffault, *supra* note 9; *Dark Money Process*, *supra* note 86; Sean Sullivan, *What Is a 501(c)(4), Anyway?*, WASH. POST (May 13, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway> [<https://perma.cc/8BSZ-FVQ8>].

<sup>132</sup> See CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER & DOUGLAS KEITH, BRENNAN CTR. FOR JUST., *SECRET SPENDING IN THE STATES* 2–3, 9 (June 26, 2016), <https://www.brennancenter.org/our-work/research-reports/secret-spending-states> [<https://perma.cc/YJE3-U3T9>] (finding in analysis of Alaska, Arizona, California, Colorado, Maine, and Massachusetts from 2006 to 2014, fully transparent outside spending fell from 76% to 29%, while on average dark money surged thirty-eight-fold).

<sup>133</sup> *Id.* at 17 (“[W]here a typical state legislative campaign can cost less than \$20,000 . . . a dark money group could have outspent candidates with amounts in the low \$100,000s or even \$10,000s—a modest business expense for special interests, but a major hurdle for many candidates and community groups.”); see also *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 9–10 (Mont. 2011) (State evidence “affirmed that Montana, with its small population, enjoys political campaigns marked by person-to-person contact and a low cost of advertising . . . with all [candidates] raising a total of around \$7 million in 2008 [and] the average [house and senate] candidate . . . rais[ing] \$7,475 and . . . \$13,299,” respectively.).

<sup>134</sup> Stan Oklobdzija, *Dark Parties: Unveiling Nonparty Communities in American Political Campaigns*, 118 AM. POL. SCI. REV. 401–02, 404 fig.1, 406–07, 411–12 (2024).



Contrary to public perception, dark money does not benefit Republicans over Democrats, or vice versa.<sup>135</sup> The only guaranteed loser with dark money is transparency for the public, regardless of partisan affiliation. Porous federal regulations and Congress' failure to close the aforementioned loopholes<sup>136</sup> leave states to promulgate regulations to ensure some form of transparency.<sup>137</sup>

### III. GREEN AMENDMENTS AS COMPELLING INTERESTS TO UPHOLD DISCLOSURE REGIMES

#### A. *Compelling Interest in Protecting State Constitutional Rights*

Despite disclosure and transparency being widely popular across the political spectrum,<sup>138</sup> dark money continues to flow largely unabated.<sup>139</sup>

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<sup>135</sup> Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money, Then They Won With It in 2020*, N.Y. TIMES (Aug. 21, 2022), <https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html> [<https://perma.cc/6CNX-UMA4>] (explaining fifteen of the most politically active nonprofits generally aligned with Democrats spent over \$1.5 billion in 2020 compared to some \$900 million spent by a comparable sample aligned with Republicans).

<sup>136</sup> See, e.g., Keith Newell, *With Deadlocked Vote on Dark Money, DISCLOSE Act Fails to Clear Senate*, OPENSECRETS (Sep. 22, 2022), <https://www.opensecrets.org/news/2022/09/with-deadlocked-vote-on-dark-money-disclose-act-fails-to-clear-senate> [<https://perma.cc/RZ4P-LR3J>] (detailing the Senate's failure to advance a bill that would "require dark money groups . . . disclose contributions greater than \$10,000").

<sup>137</sup> See ROBERT M. STERN, CORP. REFORM COAL., SUNLIGHT STATE BY STATE AFTER CITIZENS UNITED 1, 4–5 (June 2012), <https://www.demos.org/sites/default/files/publications/sunlight-state-by-state-6.5.2012.pdf> [<https://perma.cc/TY3A-YSEY>]; Torchinsky & Reese, *supra* note 74, at 274.

<sup>138</sup> See Wood, *supra* note 52, at 1129–30. See also LEE ET AL., *supra* note 132, at 23, noting a 2015 Associated Press poll showed

76 percent of respondents agreeing that "all groups that raise and spend unlimited money to support candidates should be required to publicly disclose their contributors," with 87 percent believing that disclosure would be at least somewhat effective at reducing the influence of money in politics.

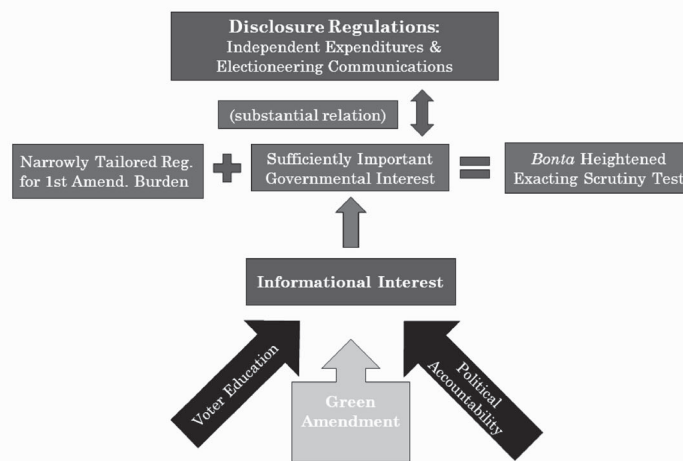
See also Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence> [<https://perma.cc/X7H9-CVFL>] ("77% of the public says 'there should be limits on the amount of money individuals and organizations' can spend on political campaigns; just 20% say they should be able to spend as much as they want.").

<sup>139</sup> See Massoglia, *supra* note 15.



These organizations have left virtually no state disclosure regime unchallenged, a point clearly illustrated in the state of Montana.<sup>140</sup> Defenses of Montana’s Disclose Act and related state disclosure regulations have relied on the bulwark of the last-standing compelling interest: the informational interest.<sup>141</sup> In the face of the Court’s decision in *Bonta* and future challenges by dark money organizations, Montana has an additional compelling informational interest stemming from its green amendment.

The information provided by campaign finance disclosures is essential not only to democracy<sup>142</sup> but to the safeguarding of fundamental rights under state constitutions, such as those contained in green amendments. Thus, the state has a compelling interest in the information provided by disclosures to ensure “a clean and healthful environment,” which has yet to be used in defense of its disclosure regime.



**Figure 3. Green Amendment Support for the Informational Interest, Supporting Montana’s Compelling Interest in Disclosure**

During the height of the national environmental movement in the 1970s, several states enshrined environmental protections into their state

<sup>140</sup> See generally *Montanans for Cmty. Dev. v. Mangan*, 735 F. App’x 280, 282 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1165 (2019); *Nat’l Ass’n for Gun Rts. v. Motl*, 279 F. Supp. 3d 1100, 1103 (D. Mont. 2017); *Nat’l Ass’n for Gun Rts. v. Mangan*, 933 F.3d 1102, 1107 (9th Cir. 2019); *Butcher v. Knudsen*, 38 F.4th 1163, 1165 (9th Cir. 2022).

<sup>141</sup> See, e.g., *Mangan*, 735 Fed. App’x at 284.

<sup>142</sup> See *Gaspee Project v. Mederos*, 13 F.4th 79, 95–96 (1st Cir. 2021).

constitutions.<sup>143</sup> Pennsylvania in 1971<sup>144</sup> and Montana in 1972<sup>145</sup> amended their constitutions to include fundamental rights to clean environments,<sup>146</sup> which were then ratified by popular referendum.<sup>147</sup> Both states' supreme courts found that the right was self-executing, and thus legal challenges could ensue without further legislative implementation.<sup>148</sup> New York is

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<sup>143</sup> See Samuel Brown, *Green Amendments*, 36 NAT. RES. & ENV'T 64, 64 (2021); *New York's Green Amendment: How Guidance from Other States Can Shape the Development of New York's Newest Constitutional Right*, DECHERT LLP (Nov. 11, 2021), <https://www.dechert.com/knowledge/onpoint/2021/11/new-york-s-green-amendment-how-guidance-from-other-states-can-s.html> [<https://perma.cc/47W7-JF2T>] (explaining the Hawaii, Massachusetts, Illinois, and Rhode Island Constitutions contain broad grants of environmental protection for their citizens).

<sup>144</sup> PA. CONST. art. 1, § 27.

<sup>145</sup> Jack R. Tuholske, *The Legislature Shall Make No Law . . . Abridging Montanans' Constitutional Rights to a Clean and Healthful Environment*, 15 SE. ENV'T L.J. 311, 316 (2007).

<sup>146</sup> In the same convention that established the right to a clean and healthful environment, Montanans were guaranteed the "right to know." MONT. CONST. art. 2, § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."). Delegate Elk supported the amendment:

By creating an atmosphere of openness in government, the [Editing and Publishing Committee] believes that confidence in government will increase and governmental operations will be facilitated. Such a provision, far from limiting the effectiveness of governmental operation, establishes the prerequisite to the effective exercise of citizenship in a democratic society.

MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1670 (1981). The provision was motivated in part by state history of public corruption on the environment. *Id.*

Currently, the "right to know" stops at the water's edge of government in providing citizens information about policymaking in their state. See Mara Silvers, *Fifty Years Later, Is Montana's 'Right to Know' Working?*, MONT. FREE PRESS (Mar. 22, 2022), <https://montanafreepress.org/2022/03/22/montana-constitution-right-to-know> [<https://perma.cc/A9BT-4YUD>]. Montanans have the "right to know" candidates' policy decisions once in office but not when they campaign, or when organizations engage in electioneering communications. *Id.* In 2018, Governor Bullock issued an order furthering the right, requiring new state government contractors to report political contributions, including those to dark money groups. Mont. Exec. Order No. 15-2018. Though it survived a challenge in federal court, Republican Governor Gianforte repealed it upon taking office in 2021. *Ill. Opportunity Project v. Bullock*, 482 F. Supp. 3d 1097, 1104 (D. Mont. 2020); Mont. Exec. Order No. 3-2021. Thus, Montanans are denied information that will impact their right to a clean and healthful environment at the most critical stage of forming a government.

<sup>147</sup> Wendy Kerner, *Making Environmental Wrongs Environmental Rights: A Constitutional Approach*, 41 STAN. ENV'T L.J. 83, 84–85, 90 (2022) (explaining three U.S. states recognize environmental rights as fundamental, but Delaware, New Jersey, New Mexico, and Oregon are pursuing similar amendments).

<sup>148</sup> Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution:*

the latest state to include an affirmative right to a clean environment in its state constitution.<sup>149</sup>

Montana’s green amendment has recently reemerged at the forefront of climate litigation. In 2023, youth plaintiffs in Montana successfully sued the state for failing to consider climate change when approving fossil fuel projects.<sup>150</sup> The district court found that the statute under review prevented the “availability of vital information that would allow [Montana] to comply with the Montana Constitution and prevent the infringement of [the youths’] rights.”<sup>151</sup> Accordingly, restricting information with a potential environmental impact violated Montana’s green amendment.<sup>152</sup>

In Montana, citizens are granted fundamental environmental rights through two constitutional provisions, article II, section 3, and article IX, section 1. The intent and aspirations of the drafters during the 1972 Constitutional Convention were clear from the start; even the preamble states:

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*Twenty Years Later and Largely Untested*, 1 VILL. ENV’T L.J. 123, 125 (1990); Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 631–32 (2004); Samuel L. Brown, *Green Amendments: A Fundamental Right to a Healthy Environment?*, HUNTON ANDREWS KURTH: NICKEL REP. (Mar. 30, 2021), <https://www.huntonnickelreportblog.com/2021/03/green-amendments-a-fundamental-right-to-a-healthy-environment> [<https://perma.cc/PQ2H-5MFZ>] (“The Green Amendment movement seeks to elevate the right to clean air and water and a stable climate . . . to the same level as other constitutional rights (e.g., free speech, equal protection).”).

<sup>149</sup> Stacey Halliday, Dan Krainin, Julius Redd, Jose Almanzar, Sarah Kettenmann & Anthony Papetti, *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, BEVERIDGE & DIAMOND (Dec. 10, 2021), <https://www.bdlaw.com/publications/new-york-becomes-the-third-state-to-adopt-a-constitutional-green-amendment> [<https://perma.cc/AV9X-2XS8>]. The authors note:

Hawaii, Illinois, Massachusetts and Rhode Island—have constitutional provisions regarding environmental protections, although not in their Bill of Rights. . . . [S]everal state legislatures have proposed green amendments, including Iowa, Kentucky, Maine, Maryland, New Jersey, New Mexico, Oregon, Vermont, Washington, and West Virginia. The amendment in New York most closely resembles [Environmental Rights Amendments] in Pennsylvania and Montana . . . .

<sup>150</sup> Amy Beth Hanson & Matthew Brown, *Young Environmental Activists Prevail in First-of-Its-Kind Climate Change Trial in Montana*, ASSOCIATED PRESS (Aug. 14, 2023), <https://apnews.com/article/climate-change-youth-montana-trial-c7fdc1d8759f55f60346b31c73397db0> [<https://perma.cc/86WH-LCUM>].

<sup>151</sup> *Held v. State*, No. CDV-2020-307, at 75, ¶ 260 (Mont. Dist. Ct. Aug. 14, 2023), <https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf> [<https://perma.cc/XBU5-E2KF>].

<sup>152</sup> *Id.* at 87, ¶ 12.

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.<sup>153</sup>

The delegates stressed “our intent was to permit no degradation from the present environment and affirmatively require enhancement of what we have now.”<sup>154</sup> Thus, the Montana Constitution would serve as the strongest source of protection because it

does not require that dead fish float on the surface of [the] state’s rivers and streams before its farsighted environmental protections can be invoked. The delegates repeatedly emphasized that the rights provided for in subparagraph (1) of Article IX, Section 1 was linked to the legislature’s obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.<sup>155</sup>

Article II, section 3, states Montanans’ inalienable rights:

All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.<sup>156</sup>

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<sup>153</sup> MONT. CONST. pmbl.; see Deborah Beaumont Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411, 446 (1990).

<sup>154</sup> Hallee C. Kansman, *Constitutional Teeth: Sharpening Montana’s Clean and Healthful Environment Provision*, 81 MONT. L. REV. 247, 249 (2020) (quoting Cameron Carter & Kyle Karmen, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RES. L. REV. 97, 110 (2001)).

<sup>155</sup> See *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1249 (Mont. 1999).

<sup>156</sup> MONT. CONST. art. II, § 3.

Delegates to Montana’s constitutional convention did not stop at a broad inalienable right that applies to state action<sup>157</sup> but extended it to private action, by private parties.<sup>158</sup> Pushing further than any other state constitution had,<sup>159</sup> they established an affirmative duty for the legislature<sup>160</sup> and every citizen to enhance the environment:

Article IX, Section 1. Protection and Improvement

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.<sup>161</sup>

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<sup>157</sup> See Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 165–66 (2003):

Only Montana . . . labels as “inalienable” the right to a clean and healthful environment. . . . [M]oreover, Montana is one of only two states to impose a duty on each and every citizen to protect that environment. Finally, Montana is one of only three states to recognize the environmental interests of not only the current population but “future generations.”

<sup>158</sup> See *id.* at 159, 171.

<sup>159</sup> See *Park Cnty. Env’t Council v. Mont. Dep’t of Env’t Quality*, 477 P.3d 288, 303 (Mont. 2020) (recognizing “the framers of the Montana Constitution intended it to contain the strongest environmental protection provision [of] any state constitution”).

<sup>160</sup> Convention delegate Judge C.B. McNeil offered clear interpretative instructions during the Natural Resources Committee debate: “The committee recommends the strongest environmental section of any state constitution. It is the only constitutional provision with an affirmative duty to enhance the environment. It mandates the legislature to maintain and enhance the environment.” Kansman, *supra* note 154, at 277.

<sup>161</sup> MONT. CONST. art. IX, § 1. See Thompson, *supra* note 157, at 159, 171; *Montana Constitution: IX.1 Protection and Improvement*, UNIV. OF MONT., <https://www.umt.edu/montana-constitution/articles/article-ix/ix.1.php> [<https://perma.cc/QPR3-3D5E>] (last visited Feb. 8, 2024). Delegate McNeil stated:

Subsection 3 mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term “environmental life support system” is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded.

*Id.* (citing MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1201 (1981)).

Article IX was “designed to address natural resource and environmental protection including water use, reclamation of lands disturbed by resource extraction and environmental protection.”<sup>162</sup> The legislature must administer and meet its duty to maintain a clean and healthful environment, part of which is to promulgate regulations that support citizens’ informational interests related to the environment (e.g., disclosure regulations).<sup>163</sup>

Montana’s two constitutional provisions are “interrelated” and “interdependent” and “cannot be interpreted separately.”<sup>164</sup> The drafters purposely made no attempt to define the words “clean” and “healthful,”<sup>165</sup> entrusting the judiciary to interpret them in a manner consistent with their intent to “adopt the most protective constitutional provisions possible.”<sup>166</sup> Opponents of judicial interpretation worried “big industry” pressure would inevitably lead to a narrow construction of the provision,<sup>167</sup> while

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<sup>162</sup> Tuholske, *supra* note 145, at 316.

<sup>163</sup> See *Held v. State*, No. CDV-2020-307, at 91, ¶ 26 (Mont. Dist. Ct. Aug. 14, 2023).

<sup>164</sup> *Cape-Fr. Enters. v. Est. of Peed*, 29 P.3d 1011, 1017 (Mont. 2001).

<sup>165</sup> See Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans’ Inalienable Right to a Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV. 1, 16 (2022), explaining convention delegates

advocating for inclusion of the adjectives “clean and healthful” made no attempt to define the words. However, they were clear about what branch should: the judiciary. Delegate Robinson cut right to the point saying, “I’m not going to attempt to tell you . . . what these things [clean or healthful] mean; but *I can guarantee to you that the Supreme Court will certainly be able to tell you.*” For Delegate Robinson and others, including the adjectives was important to aid the Court in its inevitable interpretation of the provision. [Robinson]: “we need these qualifying adjectives to enable the Supreme Court to interpret what kind of environment we want. Without these qualifying adjectives, the court is going to have a very hard time.”

<sup>166</sup> *Id.* at 11.

<sup>167</sup> *Id.* at 14. See Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 121 (2015) (detailing how the rise of independent expenditures in judicial races allows outside actors to circumvent protections, like nonpartisan elections, against judicial politicization and corruption, raising heightened concerns in Montana where the framers entrusted the judiciary to interpret the right to a clean and healthful environment). Johnstone explained:

If a latter-day Copper King wanted to elect a latter-day Judge Clancy, there would be no need for direct contributions or even corporate independent expenditures. Instead, he could run his corporation’s treasury funds into a trade organization like America’s Natural Gas Alliance, through a like-minded national committee like the Republican State Leadership Committee, and into a state affiliate like the Judicial Fairness



proponents were more concerned with the legislature, who some blamed for the state’s environmental pollution.<sup>168</sup> “Clean and healthful” was ultimately a compromise to aid the judiciary in its interpretation.<sup>169</sup> The government was thereby vested with the responsibility of serving as the trustee of Montana’s environment,<sup>170</sup> ensuring its natural resources are preserved for future generations.<sup>171</sup>

*B. The Informational Component of a Green Amendment*

The international community has been a step ahead of green amendment states by explicitly recognizing the informational component of the right. The U.N. General Assembly recognized the universal human right to a clean and healthful environment in 2022 (the United States voted in favor of the resolution).<sup>172</sup> The resolution “[r]ecogniz[ed] that the exercise of human rights, including the rights to seek, receive and impart

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Initiative Montana PAC. Similarly, though more transparently, a trial lawyer with a major punitive damages award on its way to the Montana Supreme Court might write a big check to the Montana Trial Lawyers Association to fund its Montana Law PAC, knowing that most of his funds would transfer to an affiliate like Montanans for Liberty and Justice. Either the industrialist or the litigator could hedge his bets with more direct PAC contributions to a single-candidate super PAC, signaling his interest in the campaign to related committees that might then double down on the race, and also signaling his support to the candidate.

<sup>168</sup> See Bellinger & Sullivan, *supra* note 165, at 16.

<sup>169</sup> *Id.*

<sup>170</sup> See Gregory S. Munro, *Public Trusts Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123, 146 (2012).

<sup>171</sup> See Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Disclosure*, 25 VA. ENV’T. L.J. 243, 261–62 (2007):

Our government, as the only enduring institution with control over human actions, is a trustee of our natural resources. With every trust there is a core duty of protection. This means the trustee must take action to defend the corpus against injury, and where it has been damaged, the trustee must restore the corpus of the trust. The trustee is accountable to the beneficiary, for the beneficiary has a property interest in the corpus of the trust. As trustee, government is accountable to its citizens for handling natural resources that belong to the people.

<sup>172</sup> U.N. General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right, U.N. NEWS (July 28, 2022), <https://news.un.org/en/story/2022/07/1123482> [<https://perma.cc/PD3U-CG37>]; Kerner, *supra* note 147, at 84–85.

information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment.”<sup>173</sup> Before it was recognized as a universal right, the U.N. Economic Commission for Europe established that for citizens to assert “the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,” they “must have access to information.”<sup>174</sup> Thus, the right to a clean and healthful environment requires information about those that seek to be, or currently are, the stewards of the environment.

By passing the Montana Disclose Act (“MDA”), the state took a proactive, affirmative measure to provide information to its citizens about individuals and organizations that seek to influence or partake in elections. Elected officials then shape state government, which forms and maintains Montana’s environmental policies and regulations. The compelling informational interest supporting independent expenditures and electioneering disclosure regulations has largely been premised on the voter-education benefits.<sup>175</sup> In Montana, the informational benefits provided by disclosures support the preservation of citizens’ fundamental rights through not just relevant voter education but public education that fosters civic engagement beyond election day. Therefore, Montana’s government has a compelling interest in upholding disclosure regulations, not only because of various voter-education justifications, but because the affirmative duty of the government—and every Montanan—to the environment depends on access to information provided by such disclosures. In defending the MDA from First Amendment challenges, the state can assert its compelling governmental interests in safeguarding voter-education benefits *and* the information necessary to safeguard the right to a clean and healthful environment.

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<sup>173</sup> G.A. Res. 76/300, at 3 (July 28, 2022).

<sup>174</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters pmbl., art. 2, June 25, 1998, 2161 U.N.T.S. 447, <https://unece.org/DAM/env/pp/documents/cep43e.pdf> [<https://perma.cc/C7R2-XXCG>] (The Convention focused on “environmental information,” defined as “any information in written, visual, aural, electronic or any other material form on: The state of elements of the environment . . . substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment . . .”).

<sup>175</sup> See Jiang, *supra* note 15, at 496–97.

The Montana legislature could explicitly connect the MDA and article IX, section 1 of the Montana Constitution by amending<sup>176</sup> the MDA to include the authorizing language from section 1(3), stating that the MDA is part of the legislature’s constitutional duty to “provide adequate remedies” to protect environmental life and prevent “unreasonable depletion and degradation of natural resources.”<sup>177</sup> Even without explicit reference, Montana’s deeply intertwined history of dark money and the environment demonstrates that information derived from disclosures is inherently necessary to protect the fundamental right. Just as the Montana Supreme Court ruled that Montanans need not wait for “dead fish [to] float,”<sup>178</sup> Montanans should also not need to wait for a candidate to assume office before having access to the information that will indicate which interests a candidate is “most likely to be responsive to” regarding the environment.<sup>179</sup>

Legislation that enables information gathering is critical to ensuring the fundamental right to a clean and healthful environment.<sup>180</sup> While disclosure statutes in the environmental context have traditionally focused on pollution or environmental impact information from private

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<sup>176</sup> See Kansman, *supra* note 154, at 274–75, explaining:

A recent regional study alluded to the public policy behind the decision to include environmental rights provisions rather than exclude them and the impositions placed on the legislatures and the courts of those states. . . . “[I]t appears the framers of these amendments believed that even if the language in most cases would not support unilateral private action against serial environmental abusers, they would remind lawmakers, judges, political activists and the attentive public that the right to a clean and healthy environment is one of the most fundamental rights to which people are entitled. While these reminders might be considered merely hortatory, they also provide policy guidance to legislators, executives and courts who are encouraged to provide reasonable regulation and implementation by law in light of their public trust to take good care of the environment for future generations.”

. . . [T]he language in the rights may be moralistic in nature, however, it provides the legislature and the judiciary with a direction in terms of enforcement. Montana’s fundamental right does not include explicit language mandating the legislature or the courts to act like the Massachusetts and Pennsylvanian rights do. It does, however, include the phrase, “in enjoying these rights, all persons recognize corresponding responsibilities.” This phrase instills a mandate on the people, which includes the legislators within the state.

<sup>177</sup> MONT. CONST. art. IX, § 1(3).

<sup>178</sup> Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality, 988 P.2d 1236, 1249 (Mont. 1999).

<sup>179</sup> See Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

<sup>180</sup> See Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, 36 NAT. RES. & ENV’T 27, 28–29 (2021).

actors, the green amendment's informational requirements are not as limited in scope. Applying to both government and private actors,<sup>181</sup> green amendments similarly require information about how public and private actors impact the environment. Applying to officeholders and candidates who are still private citizens, green amendments therefore demand information not only from those currently in office but also those who seek it.

Campaign finance disclosures provide high-value information on policy positions. They are as accurate at predicting floor votes of incumbents as the incumbents' prior votes.<sup>182</sup> Disclosure of information, such as anonymous or out-of-state funding (e.g., funding from a foreign mining corporation), also provide voters with high-value and impactful information about candidates.<sup>183</sup> In other words, disclosures provide information that enables Montana's citizens to elect a government that will protect their fundamental right before those government officials take office.<sup>184</sup> Just as regulation of industrial environmental risks is preconditioned on the availability of high-quality information,<sup>185</sup> a government committed to ensuring a right to a clean and healthful environment is dependent on high-quality information about those that seek to influence and make up the government. Without disclosure of the sources funding elections,

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<sup>181</sup> See Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239, 244 (2015) ("The court further explained that the constitutional duty to protect the environment includes not only private parties, but extends to all state officials, including judges, who would be abdicating their constitutional responsibilities by using their power to enforce a contract, otherwise legitimate, that portended harmful pollution of groundwater.").

<sup>182</sup> Wood, *supra* note 52, at 1104–05 (citing Adam Bonica, *Inferring Roll-Call Scores from Campaign Contributions Using Supervised Machine Learning*, 62 AM. J. POL. SCI. 830, 838 (2018)).

<sup>183</sup> See Conor M. Dowling & Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RSCH. 965, 976–78 (2013); Travis N. Ridout, Michael M. Franz & Erika Franklin Fowler, *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RSCH. Q. 154, 155 (2015); Conor M. Dowling & Michael G. Miller, *Experimental Evidence on the Relationship Between Candidate Funding Sources and Voter Evaluations*, 3 J. EXPERIMENTAL POL. SCI., 152, 152, 158–60 (2016).

<sup>184</sup> "[G]overnment officials" encompasses all officials elected to office, including the executive office, legislature, and in Montana, the judiciary. See *Brief History of the Montana Judicial Branch*, MONT. JUD. BRANCH, <https://courts.mt.gov/courts/supreme/about/history> [<https://perma.cc/7GX3-9H2M>] (last visited Feb. 8, 2024) (explaining the history of Montana judicial elections).

<sup>185</sup> See generally Bernard Sinclair-Desgagné & Estelle Gozlan, *A Theory of Environmental Risk Disclosure*, 45 J. ENV'T ECON. & MGMT. 377 (Mar. 2003), <https://www.sciencedirect.com/science/article/abs/pii/S0095069602000566> [<https://perma.cc/SQ8E-XJ84>] (exploring the relationship between environmental disclosures and environmental risks regulations and their impacts on stakeholders).

Montanans would be denied the information “needed to hold corporations and elected officials accountable” and the ability “to make informed decisions and give proper weight to different speakers and messages” in relation to the environment.<sup>186</sup>

#### IV. MONTANA’S FLOOD OF DARK “ORO Y PLATA”

##### A. *Dark Money in Montana*

Montana has been at the forefront of American campaign finance regulation since the inception of federal campaign finance regulation. Montana has a long history of fighting large, undisclosed sums of money from shaping its politics—specifically from corporations with large environmental footprints—through regulations and disclosures. The Montana Supreme Court clearly outlined this phenomenon in *Western Tradition Partnership v. Attorney General*.<sup>187</sup> Beginning in the early twentieth century, Montana’s “Copper King” era was

marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations. These disputes had profound long-term impacts on the entire State, including issues regarding the judiciary, the location of the state capitol, the procedure for election of U.S. Senators, and the ownership and control of virtually all media outlets in the State.<sup>188</sup>

The “Copper Kings” of the natural resource extraction industry, the Anaconda Company (then owned by the Standard Oil monopoly) and entrepreneur F. Augustus Heinze, vied fiercely for mineral rights, bribing state judges, legislators, and governors to benefit their mining operations.<sup>189</sup> When the Anaconda Company grew frustrated with Heinze before judges in Butte who were believed to be in Heinze’s pocket, it shut down operations, “(but not the many newspapers it controlled) throwing 4/5 of the labor force of Montana out of work,” until “the Governor call[ed] a special session of the Legislature to enact a measure that would allow Anaconda to avoid having to litigate in front of the Butte judges,” to

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<sup>186</sup> *Citizens United v. FEC*, 558 U.S. 310, 370–71 (2010).

<sup>187</sup> *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 6–12 (Mont. 2011).

<sup>188</sup> *Id.* at 8.

<sup>189</sup> *Id.*

which the legislature and governor eventually agreed.<sup>190</sup> In 1899, William A. Clark, one of the Copper Kings, famously bribed state legislators to appoint him to the U.S. Senate.<sup>191</sup>

“Naked corporate manipulation” during the Gilded Age helped spur local political reforms at the turn of the century, like amending Montana’s constitution to allow for voter initiatives, prohibiting corporate contributions to campaigns, and mandating public disclosure.<sup>192</sup> They also motivated the passage of some of the first federal campaign finance laws, such as the Tillman Act of 1907, which explicitly prohibited corporations and national banks from contributing money to federal campaigns,<sup>193</sup> and

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* Even after the investigating committee unseated Clark, “[i]n a demonstration of extraordinary boldness, Clark returned to Montana, caused the Governor to leave the state on a ruse and, with assistance of the supportive Lt. Governor, won appointment to the very U.S. Senate seat that had just been denied him.” *Id.* Threatened with being unseated a second time, he resigned, then “eventually won his Senate seat after spending enough on political campaigns to seat a Montana Legislature favorable to his candidacy.” *Id.*; see also Christa Case Bryant, *How Big Sky Country Became the Front Line in a Long Battle over Dark Money*, CHRISTIAN SCI. MONITOR (Oct. 29, 2018), <https://www.csmonitor.com/USA/Politics/2018/1029/How-Big-Sky-Country-became-the-front-line-in-a-long-battle-over-dark-money> [https://perma.cc/3Z2R-HKEZ]. Bryant states:

Clark and his agents tossed brown paper bags of cash into legislators’ hotel rooms, purchased ranches, and paid off mortgages and debts. The copper baron later admitted to spending more than \$272,000 in bribes for the seat—the equivalent of nearly \$8 million in today’s dollars.

It was blatant bribery—so blatant that it changed the way senatorial elections were conducted in America. Clark’s high-profile corruption was one of several cases that prompted Congress to pass the 17th Amendment, which put the election of senators directly in the hands of the people.

<sup>192</sup> *W. Tradition P’ship*, 271 P.3d at 9; *Commissioner of Political Practices: About Us*, MONTANA.GOV, <https://politicalpractices.mt.gov/Home/About-Us> [https://perma.cc/XH4B-NX37] (last visited Feb. 8, 2024) (explaining that in 1975 Montana amended its campaign finance laws again and established the Commissioner of Political Practices Commission to enforce them); Jeff Wiltse, *The Origins of Montana’s Corrupt Practices Act: A More Complete History*, 73 MONT. L. REV. 299, 300–02 (2013). Bryant, *supra* note 191:

The intent was not to replace Montana’s 1912 law but to augment it—and, crucially, create a way to enforce it. [Evan] Barrett [a Democratic operative who spearheaded the 1975 amendments] pushed hard to put that power in the hands of a single individual rather than establishing a board or commission like so many other states were doing. “If everyone’s in charge, no one’s in charge,” he says. So Montana entrusted a single commissioner—appointed by the governor but confirmed by the Legislature—to enforce its campaign finance laws. It remains the only state in America with such a structure, and it stands in stark contrast with the [FEC], which has been deadlocked for years along party lines.

<sup>193</sup> *Money-in-Politics Timeline*, OPENSECRETS, <https://www.opensecrets.org/resources/learn/timeline> [https://perma.cc/4CUE-Y2D9] (last visited Feb. 8, 2024).



the Federal Corrupt Practices Act in 1910.<sup>194</sup> After amendments in 1911, U.S. House and Senate candidates were required to disclose political spending before elections.<sup>195</sup> The 1911 amendments also introduced campaign spending limits.<sup>196</sup>

Montana’s compelling interest in promulgating campaign finance regulations, like disclosure requirements, was catalyzed historically not only by quid pro quo corruption but also by undisclosed sums of money perverting government policy to the detriment of citizens’ health and environment.<sup>197</sup> The post-*Citizens United* dark money age, and its perceived corrupting influence, once again propelled Montana to lead the nation in promulgating laws to curb the influence of undisclosed money in politics.<sup>198</sup>

#### *B. Modern Dark Money Cases in Montana Directly Impacting Montana’s Environment*

Before the MDA, Montana was wracked with campaign finance scandals and court cases from groups with anti-environmentalist, mining industry or climate-denial positions, revealing valuable information about how candidates and future policymakers supported by these otherwise-undisclosed sources may have voted and governed on environmental issues.<sup>199</sup> A few examples are detailed below.

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<sup>194</sup> Ciera Torres-Spelliscy, *Transparency for Democracy’s Sake*, BRENNAN CTR. FOR JUST. (Dec. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/transparency-democracys-sake> [https://perma.cc/8ZNL-9VJM] (“The first campaign finance disclosure law in the United States was the Publicity Act [Federal Corrupt Practices Act] of 1910”); Bryant, *supra* note 191.

<sup>195</sup> Paweł Laider & Maciej Turek, *The Publicity Act & the 1911 Amendments to the Publicity Act*, in BASIC DOCUMENTS IN U.S. FEDERAL CAMPAIGN FINANCE LAW 15, 15–17 (Andrzej Mania ed., 2015).

<sup>196</sup> *Id.*

<sup>197</sup> See *W. Tradition P’ship*, 271 P.3d at 11.

<sup>198</sup> See *infra* Part IV.

<sup>199</sup> See DARK MONEY (Big Sky Film Productions 2018). In the film, Commissioner of Political Practices Jonathan Motl said, “Montana being a sparsely populated state with a resource-rich base. We’ve had a history of corporate exploitation in our past and because of that the state is real sensitive to who is involved in and who funds our elections.” Former state senate president Jim Peterson decried the convergence of dark money politics and the Montana environment in Montana, stating, “[w]e’re a leading resource state, and if you control politics in Montana, you potentially control those resources.” And Edwin Bender, Executive Director of the National Institute on Money in State Politics, is quoted as saying:

[C]itizens can take data like ours, simply print out a list and walk into a committee hearing room and say: “Excuse me, you’re making a bill on water quality. You took all this money from polluters. Explain that to

# 1. Montana Growth Network

Dark money that seeks to influence environmental provisions is not limited to partisan legislative elections. Montanans' right to access their "clean and healthful environment" was almost restricted in 2012 following a nonpartisan judicial election. A 501(c)(4) named the Montana Growth Network ("MGN"), funded by undisclosed sources at the time of the election, spent \$900,000 on the state supreme court race.<sup>200</sup> An investigation into MGN by Montana Commissioner of Political Practices, Jonathan Motl, for failing to report and disclose independent expenditures and register as a political committee, revealed the true sources of MGN's funds, including two of America's richest men: Charles Schwab (founder of the eponymous discount brokerage firm) and James Cox Kennedy (chairman of media giant Cox Enterprises), as well as several oil and gas companies operating in Montana.<sup>201</sup> Schwab and Kennedy

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me, please." Everything we do here . . . we can do because we have transparency, because we have disclosure. If you do not have disclosure, you do not understand who's playing in the process and why they're playing.

<sup>200</sup> See Blumenthal, *supra* note 3; Hamlett v. Mont. Growth Network, No. COPP-2012-CFP-053, 19–20 (Mont. Comm'r of Pol. Pracs. Dec. 17, 2015), [https://politicalpractices.mt.gov/\\_docs/2recentdecisions/HamlettvMontanaGrowthNetworkDecision.pdf](https://politicalpractices.mt.gov/_docs/2recentdecisions/HamlettvMontanaGrowthNetworkDecision.pdf) [<https://perma.cc/UYB5-RK7E>] ("Beginning in late 2011 and throughout 2012 MGN took in \$878,000 from thirteen individual and corporate donors in amounts ranging from \$8,000 to \$200,000 per donor.").

<sup>201</sup> See Blumenthal, *supra* note 3. MGN argued in part that their campaign ads were issue advocacy, and therefore did not need to be reported. *Hamlett*, COPP-2012-CFP-053, at 13–14. Commissioner Motl disagreed, finding MGN's radio ads constituted the functional equivalent of express advocacy. *Id.* at 14. Motl further noted the value of the 2015 Montana Disclose Act in closing the incidental committee loophole MGN used to circumvent disclosure laws for political committees. *Id.* at 18.

Montana's approach to, and definition of, a political committee was substantially changed by a law passed by the 2015 Montana legislature and subsequent regulations adopted by the COPP. An examination of MGN shows why these new laws were needed.

... Reporting and disclosure is the principal form of campaign practice control left for Montanans by *Citizens United*. Montana has long recognized that an established corporate entity, with a non-campaign oriented source of funds, can contribute to a political campaign out of its corporate treasury and simply report its own funds as the source of the corporate expenditure. MGN's campaign finance reports list only expenditures and disclose no contributions of any sort to the MGN political committee. . . .

... MGN, however, claimed incidental committee status and reported no contributors for MGN's election expenditures.

had brought repeated court challenges before the Montana Supreme Court concerning their land, including an active case.<sup>202</sup>

Montana allows public access to the environment, including rivers and streams, for recreational purposes up to the ordinary high-water mark.<sup>203</sup> Schwab and Kennedy wanted the law (or at least its application by the court to their land) changed, but failed to convince the justices on three occasions.<sup>204</sup> After pouring money into the state supreme court race, MGN’s preferred candidate, Justice McKinnon, won the judicial election to the Montana Supreme Court.<sup>205</sup> Although she voted in favor of Kennedy’s position on stream access, the court ultimately still upheld the stream access law by a 5–2 vote.<sup>206</sup>

In sum, a few billionaires’ efforts to change the public’s access to the environment by secretly funding election ads for their judicial candidate of choice yielded a vote supporting their position. These ties were only revealed after the election because of Montana’s individual enforcement efforts.<sup>207</sup> However, relying on rigorous case-by-case enforcement on a post-hoc basis without closing loopholes was not cost-effective for Montana. The case of MGN is one drop of the dark money and independent expenditures that have “flooded Montana’s relatively small supreme court campaigns with exactly the sort of out-of-state corporate influence Montanans had fought against for the last 150 years.”<sup>208</sup>

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MGN’s financial data does not support MGN’s claim of incidental committee status.

*Id.* at 17–19.

<sup>202</sup> Blumenthal, *supra* note 3.

<sup>203</sup> *Stream Access in Montana*, MONT. FISH, WILDLIFE & PARKS, <https://fwp.mt.gov/fish/stream-access> [<https://perma.cc/R3SM-Q9PN>] (last visited Feb. 8, 2024).

<sup>204</sup> Blumenthal, *supra* note 3.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See Jimmy Tobias, *Montana’s Dark Money Detective*, PAC. STANDARD MAG. (Jan. 9, 2019), <https://psmag.com/magazine/montanas-dark-money-detective-jonathan-motl-election-spending> [<https://perma.cc/8GBZ-NN4R>]. Tobias notes the scheme was partly illegal since some of the Montana Growth Network’s ad[s] had explicitly advocated for McKinnon, and the group had failed to disclose these expenditures as required by law. The scheme was also an example of the new power of the ultra-rich in the post-*Citizens United* era. Though McKinnon’s electoral victory was ultimately not enough to sway the court’s stance on public stream access, it was still an example of how very rich people could anonymously funnel money into front groups in order to purchase political power.

<sup>208</sup> See Johnstone, *supra* note 167, at 131.

## 2. Western Tradition Partnership

While MGN was created and funded to influence a Montanan judicial election, nationally focused dark money groups operate across states, often using local shell organizations to spend in state races. Former Montana senate majority leader Art Wittich was found guilty of illegally coordinating with dark money groups while campaigning in his 2010 primary election.<sup>209</sup> Wittich, a former lawyer who represented Western Tradition Partnership against the Montana attorney general,<sup>210</sup> was one of nine candidates from the 2010 election cycle who improperly benefited from, and coordinated with, WTP and the Coalition for Energy and Environment.<sup>211</sup> Rebranded later as American Tradition Partnership, the WTP website explains its primary purpose is issue advocacy and combating radical environmentalists, whom it sometimes calls “gang green.”<sup>212</sup> Unrebutted evidence shows WTP’s purpose was to “solicit and anonymously spend the funds of other corporations, individuals and entities to influence the outcome of Montana elections.”<sup>213</sup> WTP promised prospective donors that if they “decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible.”<sup>214</sup> “A target list . . . of potential donors included an executive at a talc mine, the Montana representative of an international mining group, and a Colorado executive for a global gold-mining

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<sup>209</sup> John S. Adams, *JURY: WITTICH ILLEGALLY COORDINATED*, MONT. FREE PRESS (Apr. 1, 2016), <https://montanafreepress.org/2016/04/01/jury-wittich-illegally-coordinated> [https://perma.cc/H7Q3-KRK6]. The Montana Supreme Court later upheld the verdict. John S. Adams, *High Court Upholds Verdict in Wittich Corruption Case*, MONT. FREE PRESS (Aug. 23, 2017), <https://montanafreepress.org/2017/08/23/high-court-upholds-verdict-in-wittich-corruption-case> [https://perma.cc/RC6J-9DVJ].

<sup>210</sup> *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1 (Mont. 2011).

<sup>211</sup> John S. Adams, *Record Penalties Levied in Dark Money Lawsuit*, MONT. FREE PRESS (Oct. 2, 2020), <https://montanafreepress.org/2020/10/02/record-penalties-levied-in-dark-money-lawsuit> [https://perma.cc/582M-K4TK]. Both groups have the same federal employment identification number. *Graybill v. WTP*, No. COPP-2010-CFP-0016 (Mont. Comm’r Pol. Pracs. Oct. 21, 2010), [https://politicalpractices.mt.gov/\\_docs/2recentdecisions/GraybillvWTPandCoalitionforEnergyandEnvironmentDecision.pdf](https://politicalpractices.mt.gov/_docs/2recentdecisions/GraybillvWTPandCoalitionforEnergyandEnvironmentDecision.pdf) [https://perma.cc/4SQY-MRRC].

<sup>212</sup> Kim Barker, *Documents Found in Meth House Bare Inner Workings of Dark Money Group*, PROPUBLICA (Oct. 29, 2012), <https://www.propublica.org/article/documents-found-in-meth-house-bare-inner-workings-of-dark-money-group> [https://perma.cc/F236-CJYJ].

<sup>213</sup> *W. Tradition P’ship*, 271 P.3d at 7.

<sup>214</sup> *Id.*; *Graybill*, No. COPP-2010-CFP-0016, at 24 (quoting letters to potential donors: “I’ve seen WTP completely change the political climate where they decide to get involved. They make a habit of defeating special interests who use ‘environmentalism’ as a cover for political attacks on business.”).

company.”<sup>215</sup> WTP then ran ads, sometimes through shell organizations like Alliance of Montana Taxpayers, Montana Conservative Victory Fund, Mothers Against Child Predators, and Montana Committee to Protect the Unborn.<sup>216</sup>

Although WTP was originally thought to be an independent group, including when it litigated before the Montana and U.S. Supreme Courts, evidence uncovered in a Colorado meth house revealed it was actually an entity at least partially controlled by the National Right to Work Committee (“NRTWC”).<sup>217</sup> The NRTWC and its sister organization, the NRTW Foundation, are national anti-union organizations that have been funded by industrialists and climate denialists<sup>218</sup> such as Koch affiliated entities,<sup>219</sup> the Searle Freedom Trust,<sup>220</sup> DonorsTrust,<sup>221</sup> the

<sup>215</sup> Barker, *supra* note 212.

<sup>216</sup> *Graybill*, No. COPP-2010-CFP-0016, at 27.

<sup>217</sup> See John S. Adams, *Documents Detail Right to Work’s Involvement in Montana Elections*, MONT. FREE PRESS (Jan. 26, 2016), <https://montanafreepress.org/2016/01/26/documents-detail-right-to-works-involvement-in-montana-elections> [<https://perma.cc/T25Z-J74F>].

<sup>218</sup> See Alex Kotch, *The Dirty Dozen: The Biggest Nonprofit Funders of Climate Denial*, CTR. FOR MEDIA & DEMOCRACY (Mar. 21, 2022), <https://www.exposedbycmd.org/2022/03/21/the-dirty-dozen-the-biggest-nonprofit-funders-of-climate-denial> [<https://perma.cc/ESD6-J7EX>].

<sup>219</sup> See Lisa Graves, *Inside the Koch Family’s 60-Year Anti-Union Campaign That Gave Us Janus*, IN THESE TIMES (July 12, 2018), <https://inthesetimes.com/article/koch-anti-union-janus-supreme-court> [<https://perma.cc/5ZK3-5ZHK>]; Jay Riestenberg & Mary Bottari, *Who Is Behind the National Right to Work Committee and Its Anti-Union Crusade?*, PR WATCH (June 3, 2014), <https://www.prwatch.org/news/2014/06/12498/who-behind-national-right-work-committee-and-its-anti-union-crusade> [<https://perma.cc/8E8H-E7EH>]. The authors reveal:

Reed Larson, who led the NRTW groups for over three decades . . . became an early leader of the radical right-wing John Birch Society in Kansas, which Fred Koch . . . helped found. Several other founders and early leaders of the NRTWC were members and leaders of the [Society], specifically the Wichita chapter of which Fred Koch was an active member.

The groups remain tied to the Kochs. In 2012, the Kochs’ Freedom Partners group [now known as Stand Together] funneled \$1 million to the [NRTW] Committee, while the Charles G. Koch Charitable Foundation gave a \$15,000 grant to the NRTWLDF, which has also received significant funding from the Koch-connected DonorsTrust and Donors Capital Fund.

<sup>220</sup> See Scott Waldman, *Meet the ‘Dead Industrialists’ Funding Climate Denialism*, CLIMATEWIRE (June 26, 2020), <https://www.eenews.net/articles/meet-the-dead-industrialists-funding-climate-denialism> [<https://perma.cc/S8JS-6KWG>] (“The trust was founded by Daniel C. Searle, who died in 2007 and was a fourth-generation CEO of a family pharmaceutical company that was sold to Monsanto.”).

<sup>221</sup> See Douglas Fischer, “Dark Money” Funds Climate Change Denial, SCI. AM. (Dec. 23,

Bradley Foundation,<sup>222</sup> among others.<sup>223</sup> From original funds to the physical mailer delivered to someone's mailbox with the label "Alliance for Montana Taxpayers," at least part of the funds used could have emanated from a mega funding source like Americans for Prosperity, as demonstrated by the graphic below. However, because of the elaborate scheme to shield each organization from disclosure, a voter receiving the flyer would never know the true source of the advertisement or even the affiliations between organizations. Ultimately, in *American Tradition Partnership v. Bullock*, the U.S. Supreme Court reaffirmed its declaration that independent expenditures cannot corrupt,<sup>224</sup> in a case in which such expenditures did, according to a state court, in fact corrupt or give the appearance thereof.<sup>225</sup>

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2013), <https://www.scientificamerican.com/article/dark-money-funds-climate-change-denial-effort> [<https://perma.cc/2Z9J-7GN6>]:

Coinciding with a decline in traceable funding, Brulle found a dramatic rise in the cash flowing to denial organizations from DonorsTrust, a donor-directed foundation whose funders cannot be traced. This one foundation, the assessment found, now accounts for 25 percent of all traceable foundation funding used by organizations promoting the systematic denial of climate change.

<sup>222</sup> See Riestenberg & Bottari, *supra* note 219.

<sup>223</sup> *Id.*

<sup>224</sup> See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

<sup>225</sup> *Frontline: Big Sky, Big Money* (PBS television broadcast Oct. 30, 2012). Former FEC Chairman Trevor Potter stated:

[W]hat the majority of the justices said is, "We don't have any evidence that there's anything corrupting about independent spending. We have no reason to change our mind based on the Montana case." . . . Here you're looking at something that may, in fact, not be independent at all. And this is exactly the sort of thing that people have been trying to argue to the Supreme Court that this so called independent spending is not really independent.





**Figure 4. Dark Money Flow from Source Org. to Political Flyer**

### 3. Americans for Prosperity

Americans for Prosperity, the Koch network 501(c)(4) organization and one of the largest dark money organizations nationally,<sup>226</sup> is a source of revile from disclosure advocates for its lack of transparency<sup>227</sup> and out-sized influence in elections since *Citizens United*.<sup>228</sup> The Kochs constructed a vast nonprofit network,<sup>229</sup> with AFP at the center, that pools hundreds of millions of dollars from a wealthy donor network.<sup>230</sup>

Koch Industries is a conglomerate with holdings in oil and gas exploration,<sup>231</sup> pipelines and refining, and chemical and fertilizer production, trading both physical fossil fuel products as well as commodity futures and derivatives, cattle and game ranching, forestry and timber products, electronics, industrial glass, and various consumer products.<sup>232</sup>

<sup>226</sup> See Barker, *supra* note 86.

<sup>227</sup> See ‘Hidden History’ of Koch Brothers Traces Their Childhood and Political Rise, *supra* note 83:

[The Kochs] routinely refuse to disclose the names of the donors who come to these events, but at one point a guest list got left behind, which has provided the one full guest list of one of these events. What you can see from it is that there are about somewhere between 400 and 450 of the wealthiest conservatives in America getting together to plan how to use their fortunes to influence American politics.

<sup>228</sup> See Barker, *supra* note 86; McFadden, *supra* note 83 (explaining the Kochs are credited with being the launching force behind the Tea Party).

<sup>229</sup> See *The Koch Network: A Cartological Guide*, OPENSECRETS, <https://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide> [<https://perma.cc/95Q8-LQXC>] (last visited Feb. 8, 2024).

<sup>230</sup> See Hertel-Fernandez et al., *supra* note 85.

<sup>231</sup> *Id.*

<sup>232</sup> See *Summary of Koch Industries’ United States Presence*, SEC, <https://www.sec.gov/Archives/edgar/containers/fix066/923338/000119312505225697/dex995.htm> [<https://perma.cc/V8C2-CHYZ>] (last visited Feb. 8, 2024); *Koch Industries: Company Facts*, GREENPEACE,

According to the University of Massachusetts Amherst's Political Economy Research Institute, Koch Industries is one of only three companies that rank among the top thirty polluters of U.S. air, water, and climate, a designation shared with ExxonMobil and American Electric Power.<sup>233</sup> Their affiliated organizations advocate vehemently against environmental regulation and efforts to combat climate change.<sup>234</sup> For example, AFP lobbied members of Congress to sign a pledge to vote against legislation relating to climate change unless it was accompanied by an equivalent

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<https://www.greenpeace.org/usa/issues/koch-industries-company-facts> [<https://perma.cc/2M9V-4FF6>] (last visited Feb. 8, 2024).

<sup>233</sup> See Tim Dickinson, *Inside the Koch Brothers' Toxic Empire*, ROLLING STONE (Sept. 24, 2014), <https://www.rollingstone.com/politics/politics-news/inside-the-koch-brothers-toxic-empire-164403> [<https://perma.cc/9GH9-RA3J>].

<sup>234</sup> See McFadden, *supra* note 83:

Jane Mayer . . . said in her book "Dark Money["] . . . the libertarian policies they embraced benefited Koch chemical and fossil fuel businesses . . . and paid millions in fines and court judgments for hazardous-waste violations.

"Lowering taxes and rolling back regulations, slashing the welfare state and obliterating the limits on campaign spending might or might not have helped others," Ms. Mayer wrote, "but they most certainly strengthened the hand of extreme donors with extreme wealth." The Koch[s] rejected the allegations.

Koch money also funded initiatives to undercut climate science and to counter efforts to address climate change. As Ms. Mayer put it . . . "The Kochs vehemently opposed the government taking any action on climate change that would hurt their fossil fuel profits."

See also *Americans for Prosperity Foundation (AFP)*, GREENPEACE, <https://www.greenpeace.org/usa/fighting-climate-chaos/climate-deniers/front-groups/americans-for-prosperity-foundation-afp> [<https://perma.cc/Z8TN-569F>] (last visited Feb. 8, 2024); *Americans for Prosperity: Distorting Climate Change Science and Economics in Well-Funded Campaign*, GOV. ACCOUNTABILITY PROJECT (Mar. 18, 2010), <https://whistleblower.org/politization-of-climate-science/global-warming-denial-machine/americans-for-prosperity-distorting-climate-change-science-and-economics-in-well-funded-campaign> [<https://perma.cc/ERA9-L77H>]; Jane Mayer, *Koch Pledge Tied to Congressional Climate Inaction*, NEW YORKER (June 30, 2013), <https://www.newyorker.com/news/news-desk/koch-pledge-tied-to-congressional-climate-inaction> [<https://perma.cc/76H9-59VL>]; Andrew Koppelman, *How Charles Koch Successfully Peddled the Snake Oil of Climate Change Denial*, DAILY BEAST (Oct. 24, 2022), <https://www.thedailybeast.com/how-charles-koch-successfully-peddled-the-snake-oil-of-climate-change-denial> [<https://perma.cc/YSU7-ZYZ9>]. AFP held a national hot air balloon tour denouncing what the foundation called "global warming alarmism," cap-and-trade legislation, and other climate change legislation. Aldo Nahed, *Balloon Tour Condemns Global Warming Solution*, SAVANNAH MORNING NEWS (June 18, 2008), <https://www.savannahnow.com/story/news/2008/06/19/balloon-tour-condemns-global-warming-solution/13354153007> [<https://perma.cc/P2XQ-7PS8>].

amount of tax cuts, essentially blocking any meaningful bill regarding global warming.<sup>235</sup> Members of the Koch network,<sup>236</sup> like Corbin Robertson, owner of the country’s largest private cache of coal,<sup>237</sup> ran ads in Montana using a 501(c)(4) named “CO<sub>2</sub> is Green,” claiming “This will cost us jobs” and: “There is no scientific evidence that CO<sub>2</sub> is a pollutant. In fact, higher CO<sub>2</sub> levels than we have today would help the Earth’s ecosystems.”<sup>238</sup>

The Kochs’ personal public ties to Montana’s environment are less direct,<sup>239</sup> having recently sold the most valuable cattle ranch in state history.<sup>240</sup> Yet their national environmental policy positions and activities across the nation are of great relevance to Montana voters.

Disclosures about the associational ties between the aforementioned dark money groups with policy positions on the environment and candidates allow Montanans to “place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”<sup>241</sup> This information can be especially helpful in nonpartisan elections, primaries, local elections, and ballot

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<sup>235</sup> See Mayer, *supra* note 234.

<sup>236</sup> See Mackenzie Weinger, *Report: Koch Bros. \$1M Club Revealed*, POLITICO (Sept. 6, 2011), <https://www.politico.com/story/2011/09/report-koch-bros-1m-club-revealed-062732> [<https://perma.cc/7AG2-C6DA>].

<sup>237</sup> JANE MAYER, DARK MONEY 21 (2016).

<sup>238</sup> Steven Mufson, *New Groups Revive the Debate over Causes of Climate Change*, WASH. POST (Sept. 25, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/09/24/AR209092404797.html> [<https://perma.cc/6TDQ-CLQ7>].

<sup>239</sup> See John S. Adams, *Complaint: Dark Money Right to Work Group Engaged in Illegal Political Activities*, MONT. FREE PRESS (Mar. 3, 2018), <https://montanafreepress.org/2018/03/12/right-to-work-shady-activities> [<https://perma.cc/9ABT-3H8J>]; DARK MONEY, *supra* note 199. AFP drew ire in Montana as an out-of-state group that sought to pour funds into local races in 2015. Tristan Scott, *Conservative Group Targets Kalispell Lawmaker over Medicaid*, FLATHEAD BEACON (Feb. 6, 2015), <https://flatheadbeacon.com/2015/02/06/conservative-group-targets-kalispell-lawmaker-medicaid> [<https://perma.cc/R63D-GPS6>]. The group held “town halls” in a Republican state legislator’s district who didn’t sign the “pledge cards” to oppose President Obama’s Medicare reforms, encouraging Montanans to do things such as “Tell Frank Garner to stand with us and vote no on Obamacare’s expansion in Montana,” without inviting him. *Id.* In another district where AFP held a similar town hall, state senator Jeff Welborn arrived at the town hall but was prevented from attending. *Id.*

<sup>240</sup> See E.B. Solomont & Candace Taylor, *Rupert Murdoch Buys \$200 Million Montana Ranch from the Koch Family*, WALL ST. J. (Dec. 9, 2021), <https://www.wsj.com/articles/rupert-murdoch-buys-200-million-montana-ranch-from-the-koch-family-11639065752> [<https://perma.cc/QZ52-YND4>]; *Ranching*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/ranching> [<https://perma.cc/3XLL-TM5T>] (last visited Feb. 8, 2024) (“[T]he livestock industry has major, disruptive effects on the environment.”).

<sup>241</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

initiatives where informational shortcuts are less prevalent.<sup>242</sup> With an effective disclosure regime, Montanans could have learned before the election that parties who sought to restrict their access to their environment supported a particular judicial candidate. They could have learned a dark money group with close ties to national climate change denialists solicited funds from local mining companies and sought to attack “gang green.” Last but not least, they could have learned about the donors and the environmental policy positions and pledges of an out-of-state, Koch-affiliated group pouring money into local races. Each piece of information would have provided Montanans with high-value information on a candidate’s environmental policies once in office, providing them the opportunity to elect government officials faithful to articles II and IX and hold incumbent officials accountable for their affirmative duties. The 2015 Montana Disclose Act sought to deliver that regime to its citizens.

#### V. THE MONTANA DISCLOSE ACT’S CURRENT & FUTURE BATTLE WITH DARK MONEY

##### A. *Montana’s Answer to Post–Citizens United Dark Money: The Montana Disclose Act*

Post–*Citizens United*, even states like Montana with exceptional histories of corruption have been confined to increasing disclosure in their elections through state law.<sup>243</sup> Seeking to deliver on his campaign promise to root out dark money in Montana after failing to defend the state’s independent expenditure limits before the U.S. Supreme Court,<sup>244</sup> then-Governor Bullock, a Democrat, and the Republican-led state legislature sought passage of a bill allowing sunlight to reach dark money groups. Republican senator Duane Ankney sponsored state senate bill 289, later known as the Montana Disclose Act.<sup>245</sup> The MDA reintroduced

<sup>242</sup> See Wood, *supra* note 52, at 1129–30.

<sup>243</sup> *Disclosure*, CAMPAIGN FIN. INST., <https://cfinst.github.io/#disclosure?question=ElxnrgCategory&year=2018> [<https://perma.cc/JR7S-LMTM>] (last visited Feb. 8, 2024) (mapping states with enacted disclosure laws); *State Campaign Finance Disclosure Requirements*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/state-campaign-finance-disclosure-requirements> [<https://perma.cc/5JVN-LDUR>]; see Wood, *supra* note 52, at 1122 (explaining campaign finance information is most beneficial where heuristics like party affiliation are less available, which is especially prevalent in local and nonpartisan elections).

<sup>244</sup> See *Am. Tradition P’ship v. Bullock*, 567 U.S. 516, 516–17 (2012) (per curiam).

<sup>245</sup> S.B. 289, 64th Leg., Reg. Sess. (Mont. 2015), <https://leg.mt.gov/bills/2015/billpdf/SB0>

the concept of electioneering communications regulations,<sup>246</sup> which covers some issue advocacy and “independent expenditures,”<sup>247</sup> occurring within

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289.pdf [https://perma.cc/GHS5-PRKE]; *Revise Campaign Finance Laws: Hearing Before the S. Comm. on State Admin.*, 2015 Leg., 64th Sess. (Mont. 2015) [hereinafter *Mont. S. Comm. Hearing*], https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221-1/15470?agendaId=51393 [https://perma.cc/4LE3-629J] (statement of Sen. Duane Ankney).

[T]hat’s where the problem lies, the dark money. These are organizations that have some other purpose. So, incidentally, they’re gonna work on campaigns today. So these organizations that have some other purpose for their existence but get involved in politics and elections. Corporations and unions are also incidental committees. These groups currently get to self-identify as incidental committees. This bill has the commissioner create rules to determine if a group is incidental. Incidental committees will have to report contributions they receive that are earmarked for a political party or political activity. They will also have to report all contributions received in response to a fundraising appeal that uses the need to be involved in a political party or political activity as part of that appeal.

*Id.*; Ed. Bd., *Campaign Disclosure Law Is Working Well So Far*, GREAT FALLS TRIB. (June 1, 2016), https://www.greatfalls Tribune.com/story/opinion/tribune-editorials/2016/06/01/campaign-disclosure-law-working-far/85257054 [https://perma.cc/7ZAB-NKJ7]. The article states:

The 2015 Montana Legislature passed a bill called the Montana Disclosure [sic] Act, which squeaked through the Montana House 51–49 and passed the Senate 32–18 on second reading. The bill aimed to get dark-money groups attempting to influence Montana voters to at least say who they are and who is giving them money.

*Id.*; Charles S. Johnson, *Bullock Signs Montana Campaign Finance Bill into Law*, BILLINGS GAZETTE (Apr. 22, 2015), https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-signs-montana-campaign-finance-bill-into-law/article\_c8a0cc59-a7bf-5381-9136-ae118d9a13ff.html [https://perma.cc/DZY4-TNT3].

<sup>246</sup> Montana Code § 13-1-101(19)(a) defines “electioneering communication” as a paid communication publicly distributed within sixty days of voting that

does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:

- (i) refers to one or more clearly identified candidates in that election;
- (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or
- (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.

<sup>247</sup> *Id.* § 13-1-101(21)(a), defining “expenditure” as

a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value:

- (i) made by a candidate or political committee to support or oppose a candidate or a ballot issue;

a sixty-day window of an election.<sup>248</sup> The proactive reporting requirements afforded by electioneering communications regulations avoid the dilemmas with organizations that tread the issue-advocacy–express-advocacy line, like in the case of MGN.<sup>249</sup> When a case-by-case determination of express versus issue advocacy is adopted, organizations that venture into express advocacy are not held accountable until a complaint is received and adjudicated, often long after the election.<sup>250</sup> The broader

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- (ii) made by a candidate while the candidate is engaging in campaign activity to pay child-care expenses as provided in 13-37-220; or
  - (iii) used or intended for use in making independent expenditures or in producing electioneering communications.

<sup>248</sup> *Id.* § 13-1-101(19)(a). Exceptions exist to prevent the statute from being overly broad. See *Butcher v. Knudsen*, 38 F.4th 1163, 1171 (9th Cir. 2022) (“After *Canyon Ferry [Baptist Church v. Unsworth]*, 556 F.3d 1021 (9th Cir. 2009), Montana amended its definition of an ‘expenditure’ that triggers the creation of a political committee, adding a \$250 threshold and an exception for de minimis activities.”).

<sup>249</sup> See *Mont. S. Comm. Hearing*, *supra* note 245 (statement of Andrew Huff, Chief Legal Couns., Off. of the Mont. Gov.). Huff explained

what these dark money groups are essentially arguing when they send out these mailers is that they’re educational mailers not meant to influence elections. And their argument is that they’re educational because they don’t have specific words on the mailers like [support, vote for, reject] or oppose so-and-so. And they argue that without those specific words on those mailers, those mailers are therefore not political, they’re educational and can’t be regulated. So what I have here is a kind of standard political mailer. . . . [I]t says “vote for Kennedy.” This is a classic express advocacy mailer. Everybody recognizes that as something that’s meant to influence the outcome of an election.

Alright, this mailer is . . . different. It mentions the candidates’ names as trying to trick us on taxes. And then says a bunch of other things that are essentially negative about the candidate. Now, the purpose of this mailer is to attack this candidate and influence the election in which this candidate is running. So essentially, it serves the same purpose as this mailer. These two are essentially equivalent. What dark money groups argue is that by dropping the “don’t vote for” or “oppose” language, this is educational, and they don’t need to pay attention to the state’s disclosure framework.

<sup>250</sup> *Id.* Huff explained dark money groups will argue that a mailer isn’t [political], and they send them out during the election. They influence the election. They do not register, report, and disclose as they’re required to. Now it may be that somebody makes a complaint, and that complaint gets to the commissioner and the commissioner decides, yes, they violated the campaign’s statutes, then perhaps that goes to district court. District court perhaps says yes, they violated the campaign finance disclosure statutes. But by that time, the damage has been done, the mailer has gone out. It’s a substantial amount of time later



electioneering communications approach closes this exploited loophole, requiring all groups engaged in election spending to disclose the source of their funds.<sup>251</sup>

Among the most robust campaign finance laws in the country,<sup>252</sup> the bipartisan act was explicitly passed to stymie the effects of *Citizens United*.<sup>253</sup> The MDA had the purpose of “increasing transparency, informing Montanans about who is behind the messages vying for their attention, and decreasing circumvention” of campaign finance laws.<sup>254</sup>

Key to the regulatory scheme was the scope of “incidental committees.”<sup>255</sup> An incidental committee is “a political committee”<sup>256</sup> that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.<sup>257</sup> Thus, 501(c)(4)s and similar organizations that claim their “primary purpose” is not to engage in election-related activities are still captured by Montana’s disclosure regime.<sup>258</sup> The “primary purpose” is

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after the election. The mailer has influenced the election in however way it’s going to happen. So it’s too late. It’s too late for the candidate that was impacted by the mailer.

<sup>251</sup> LEE ET AL., *supra* note 132, at 24–25 (noting Montana’s more limited law “requires disclosure only of donors who earmark their contributions for the electioneering ad in question . . . [with] some risk of evasion, by spenders or donors who take care to keep fundraising solicitations and contributions unspecified while still intending the money for election ads.”).

<sup>252</sup> *Disclose Act of 2021: Hearing on S.433 Before the S. Comm. on Rules & Admin.*, 117th Cong. (2021) (statement of Jeff Mangan, Mont. Comm’r of Pol. Pracs.), [https://www.rules.senate.gov/imo/media/doc/Testimony\\_Mangan.pdf](https://www.rules.senate.gov/imo/media/doc/Testimony_Mangan.pdf) [<https://perma.cc/BM5V-8APS>].

<sup>253</sup> Alison Noon, *Bullock, Ankney Announce Bills to Disclose Campaign Money*, GREAT FALLS TRIB. (Feb. 5, 2015), [https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-ankney-announce-bills-to-disclose-campaign-money/article\\_8703fc97-049c-531f-a48b-39df43fd7e7d.html](https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-ankney-announce-bills-to-disclose-campaign-money/article_8703fc97-049c-531f-a48b-39df43fd7e7d.html) [<https://perma.cc/VM5W-8Q48>].

<sup>254</sup> Nat’l Ass’n for Gun Rts. v. Mangan, 933 F.3d 1102, 1108 (9th Cir. 2019).

<sup>255</sup> See MONT. CODE ANN. § 13-37-232 (2023).

<sup>256</sup> *Id.* § 13-1-101(34)(a). This section defines “political committee” as a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

- (i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;
- (ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
- (iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

<sup>257</sup> *Id.* § 13-1-101(24)(a).

<sup>258</sup> See Caleb B. Burns, “Montana Disclose Act” Signed into Law; Important Details to Be

“determined by the commissioner by rule and includes criteria such as the allocation of budget, staff, or members’ activity or the statement of purpose or goal of the person or individuals that form the committee.”<sup>259</sup>

In an attempt to pierce the veil of a front organization that shields the original funders from disclosure, political committees are required to report information about contributors who provided funds above a threshold amount “for a specified candidate, ballot issue, or petition for nomination” or donor contributions received in response to an organization’s own solicitations for support for particular candidates and ballot issues.<sup>260</sup>

For political committees that claim to be exempt from disclosing the name of a contributor, the MDA includes a fallback provision requiring they include a disclaimer stating: “This communication is funded by anonymous sources. The voter should determine the veracity of its content.”<sup>261</sup> Montana is the only state to utilize disclosure disclaimers in this fashion.<sup>262</sup> Lastly, the MDA helped make the information accessible to citizens by requiring committees to file online.<sup>263</sup>

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*Determined*, WILEY REIN LLP (May 2015), <https://www.wiley.law/newsletter-5299> [<https://perma.cc/V3AA-XQ4T>]; LEE ET AL., *supra* note 132, at 24, 26.

<sup>259</sup> S.B. 289, 64th Leg., Reg. Sess. (Mont. 2015), <https://leg.mt.gov/bills/2015/billpdf/SB0289.pdf> [<https://perma.cc/GHS5-PRKE>].

<sup>260</sup> See Burns, *supra* note 258; *State Campaign Finance Disclosure Requirements*, *supra* note 243 (the provision can be circumvented by making donations that are “general purpose”); MONT. CODE ANN. § 13-37-229, -232 (2023). An independent committee has more detailed disclosure and reporting requirements than an incidental committee. It must report the source and amount of its contributions, as well as expenditures, while an incidental committee need not disclose sources unless those contributions were solicited or earmarked for a particular candidate, ballot issue, or petition for nomination.

<sup>261</sup> See MONT. CODE ANN. § 13-35-237 (2023).

<sup>262</sup> See Wood, *supra* note 52, at 1095.

<sup>263</sup> See MONT. CODE ANN. § 13-37-225 (2023); *Revise Campaign Finance Laws: Hearing Before the H. Comm. on Bus. & Lab.*, 2015 Leg., 64th Sess. (Mont. 2015) (statement of Denise Roth Barber, Managing Dir., Nat’l Inst. on Money in State Pol.). Barber said:

You know, online PDFs and paper reports stuffed in file cabinets no longer meet muster in the 21st century. The electronic filing is today’s standard, and it allows the public for timely access to information. Right now, if you want to know about whether or not a donor is active in a given election here in Montana, you have to go to the Commissioner’s website. And you have to literally open up every single PDF report filed by every single candidate to find whether or not that donor is has given in our elections. That is ridiculous in 2015. Instead, you should be able to use the Office of Political Practices website and search for the donor by name, which you currently can do for statewide officials because they do have to file electronically—for legislative people you can come

The MDA’s overall effect was to shed light on groups that sought to influence state policies, including environmental policies.<sup>264</sup> While there are still loopholes associated with shell organizations that allow undisclosed money to enter local politics,<sup>265</sup> at a minimum, the MDA allows the state to have the chance of knowing the total sum of money being spent in its politics by capturing virtually all election communications within an election window.<sup>266</sup> Other states have attempted to trace the sources of electioneering funds further, including Arizona<sup>267</sup> and California.<sup>268</sup>

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to our website FollowTheMoney.org because we do key in all the data—but the government should be doing that.

<sup>264</sup> See Telephone Interview with Jonathan Motl, Former Comm’r of Pol. Pracs. (Feb. 9, 2023). However, as Motl noted, “disclosure regulations don’t mean a thing if they aren’t enforced.”

<sup>265</sup> See Charles S. Johnson, *Bullock, Ankney Announce Bills to Disclose Campaign Money*, BILLINGS GAZETTE, [https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-ankney-announce-bills-to-disclose-campaign-money/article\\_8703fc97-049c-531f-a48b-39df43fd7e7d.html](https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-ankney-announce-bills-to-disclose-campaign-money/article_8703fc97-049c-531f-a48b-39df43fd7e7d.html) [<https://perma.cc/W4T8-7NZW>] (Nov. 24, 2015).

<sup>266</sup> See *supra* Section I.A.

<sup>267</sup> See CAMPAIGN LEGAL CTR., ARIZONA’S VOTERS’ RIGHT TO KNOW ACT TO END SECRET SPENDING IN ARIZONA ELECTIONS (2022), <https://campaignlegal.org/sites/default/files/2022-11/AZ%20Proposition%20211%20White%20Paper%20-%202011.29.22.pdf> [<https://perma.cc/RG2M-YMMH>], explaining the successful initiative

focuses on . . . big campaign expenditures in Arizona elections—more than \$50,000 in statewide elections or more than \$25,000 for other elections. The original sources of large contributions used to pay for these big expenditures will no longer be kept secret. Instead, when persons make these big campaign expenditures, they must disclose the sources of “original monies” exceeding \$5,000 received in that election cycle, as well as any intermediaries who have passed along more than \$5,000 of these big contributions to the spenders.

<sup>268</sup> Andrew Garrahan, *California Legislature Passes “California DISCLOSE Act,” a Complex but Clarifying Update to the State’s Political Advertising Disclosure Rules*, COVINGTON: INSIDE POL. L. (Sept. 18, 2017), <https://www.insidepoliticallaw.com/2017/09/18/california-legislature-passes-california-disclose-act-complex-clarifying-update-states-political-advertising-disclosure-rules> [<https://perma.cc/WJ52-MTF2>]. As Garrahan reports, under the California statute

if contributions are given to one committee formed to support a candidate or ballot measure and earmarked for that candidate or ballot measure, and the recipient gives them to a second committee formed to support that candidate or measure, the second committee must report as the donor not the first committee but the original source of the earmarked money.

Chris Carson, *California League Wins Fight Against Dark Money in California*, LEAGUE OF WOMEN VOTERS BLOG (May 27, 2014), <https://www.lwv.org/blog/california-league-wins-fight-against-dark-money-california> [<https://perma.cc/JQQ4-WHME>]. The law “helps prevent large networks of nonprofits” used to conceal donors, “increases transparency by

AFP also challenged Arizona's dark money disclosure regime, known as the Voters' Right to Know Act.<sup>269</sup>

*B. Constitutional Challenges to the MDA*

The ink had yet to dry when the MDA was first challenged in the U.S. District Court of Montana. In 2016 and then 2019, the Ninth Circuit upheld the MDA, and the Supreme Court denied certiorari.<sup>270</sup> Although both cases were decided before *Bonta* and without invoking the state's green amendment, the cases exhibit provisions of the MDA that clearly survive exacting scrutiny.

In *Montanans for Community Development v. Motl*, a 501(c)(4) with the stated mission "to promote and encourage policies that create jobs and grow local economies throughout Montana" challenged the constitutionality of Montana's disclosure laws in the U.S. District Court of Montana.<sup>271</sup> The memberless organization with no email, telephone number or website sought to distribute mailers (issue advocacy advertisements mailed to individuals) during the sixty days preceding the 2014 elections attacking "environmental extremists" and "environmentalists," while promoting fracking and oil and coal extraction.<sup>272</sup> Montanans for Community Development ("MCD") claimed it was being silenced by the MDA, as it would not distribute mailers if it had to comply with Montana's political committee disclosure and reporting requirements as an "incidental committee."<sup>273</sup>

Responding to MCD's facial challenge, the Court rejected vagueness of the "statutory definitions of contribution, expenditure, and political committee" and the "support or oppose"<sup>274</sup> provisions found within

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requiring state committees that raise \$1 million" report top ten contributors to be posted on the state website, and requires similar reporting for ballot measures.

<sup>269</sup> *Ams. for Prosperity v. Meyer*, No. CV-23-00470-PHX-ROS, 2024 WL 1195467 (D. Ariz. Mar. 20, 2024).

<sup>270</sup> *Montanans for Cmty. Dev. v. Mangan*, 735 F. App'x 280, 282 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1165 (2019); *Nat'l Ass'n for Gun Rts. v. Motl*, 279 F. Supp. 3d 1100 (D. Mont. 2017); *Nat'l Ass'n for Gun Rts. v. Mangan*, 933 F.3d 1102 (9th Cir. 2019).

<sup>271</sup> *Montanans for Cmty. Dev. v. Motl*, 54 F. Supp. 3d 1128 (D. Mont. 2014); *see* Eve Byron, *Campaign-Disclosure Win in Montana Has Big Implications*, COURTHOUSE NEWS SERV. (Nov. 1, 2016), <https://www.courthousenews.com/campaign-disclosure-win-in-montana-has-big-implications> [<https://perma.cc/9B82-TA8Q>].

<sup>272</sup> 54 F. Supp. 3d at 1153, 1156.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1146.

these definitions, along with a host of additional vagueness challenges.<sup>275</sup> Instead the Court found Montana’s disclosure laws serve an “important, if not compelling, governmental interest,”<sup>276</sup> in that they “provide the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek . . . office.”<sup>277</sup> On the “substantial relationship” to the government interest end, the Court noted the low administrative reporting requirements, the narrow specificity of what needed to be disclosed, and the time window limitations for when reporting was necessary as proof of the substantial relationship.<sup>278</sup>

Montana’s disclosure requirements again withstood a 2019 challenge before the Ninth Circuit from another 501(c)(4).<sup>279</sup> The National Association for Gun Rights, like MCD, stipulated that it sought to distribute mailers but would not do so if the literature would be deemed an “electioneering communication,” subjecting the organization to disclosure requirements under Montana law.<sup>280</sup> Relying on two Ninth Circuit cases that similarly considered disclosure regulations on electioneering communications, the Court delineated five broad features of electioneering disclosure laws that survive exacting scrutiny.<sup>281</sup> First, such laws further the “important” interests of “providing the electorate with information,” touting the informational interest of knowing “shortly before an election who is speaking and how much they are spending enables ‘the electorate to make informed decisions and give proper weight to different speakers and messages.’”<sup>282</sup> Second, the amount of substantive disclosure should vary with type and level of an organization’s political advocacy to ensure a disclosure law doesn’t sweep in too much speech.<sup>283</sup> Third, the frequency of required reporting should be tailored to election periods or continued political spending, while not extending indefinitely to all advocacy conducted at any time.<sup>284</sup> Fourth, disclosure laws should have a monetary threshold before triggering reporting requirements to “ensure

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<sup>275</sup> *Id.* at 1144, 1149.

<sup>276</sup> *Id.* at 1133, 1150.

<sup>277</sup> *Id.* at 1149 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam)).

<sup>278</sup> *See* 54 F. Supp. 3d at 1150–52.

<sup>279</sup> *Nat’l Ass’n for Gun Rts. v. Mangan*, 933 F.3d 1102, 1108 (9th Cir. 2019).

<sup>280</sup> *See id.* at 1112.

<sup>281</sup> *Id.* at 1116.

<sup>282</sup> *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 371 (2010)).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1117.

that the government does not burden minimal political advocacy.”<sup>285</sup> Fifth, “disclosure laws may impose certain adjunct requirements on political speakers, such as requiring record maintenance and designation of a treasurer, to enable gathering the data necessary to enforce more substantive electioneering restrictions.”<sup>286</sup>

The Court found the MDA clearly avoided one-size-fits-all approaches and its reporting requirements were “carefully” tailored to its interests.<sup>287</sup> Only the requirement that a political committee’s designated treasurer be a registered Montana voter was found to not clearly advance Montana’s interests in “identifying representatives of political committees who can be held accountable for violations of electioneering laws,” even if the burden was limited.<sup>288</sup>

### C. *Challenging the MDA After Bonta*

As one of the strongest state disclosure regimes in the country,<sup>289</sup> the MDA remains a legal target. The Supreme Court could use *Bonta* to reach into campaign finance and change disclosure laws targeting dark money nationwide, or the challenge could come through the Montana courts or federal district court. Recognizing the Montana Supreme Court’s jurisprudence on campaign finance and disclosure, a legal challenge would likely wind through the federal court system to the Ninth Circuit, which would look to the five criteria noted in *National Ass’n for Gun Rights v. Mangan*.<sup>290</sup> If the Supreme Court then granted certiorari, it would likely recognize an organization’s claimed burden even with scant evidence and impose at least exacting scrutiny,<sup>291</sup> because of the MDA’s perceived potential to “curtail[] the freedom to associate” or have a “possible deterrent effect.”<sup>292</sup> Assuming the burden, the Court would

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<sup>285</sup> 933 F.3d at 1118 (“The acceptable threshold for triggering reporting requirements need not be high. . . . [Once] triggered, states may constitutionally mandate disclosure of even small contributions.”).

<sup>286</sup> *Id.*

<sup>287</sup> *See id.*

<sup>288</sup> *Id.* at 1120–22.

<sup>289</sup> *See* Charles S. Johnson, *New Campaign Finance Law Praised, but Some Say It Needs to Be Toughened*, BILLINGS GAZETTE (May 26, 2015), [https://billingsgazette.com/news/state-and-regional/govt-and-politics/new-campaign-finance-law-praised-but-some-say-it-needs-to-be-toughened/article\\_2cf0fea4-a003-51da-b96a-6041c38e8fd8.html](https://billingsgazette.com/news/state-and-regional/govt-and-politics/new-campaign-finance-law-praised-but-some-say-it-needs-to-be-toughened/article_2cf0fea4-a003-51da-b96a-6041c38e8fd8.html) [https://perma.cc/99WU-H9GA].

<sup>290</sup> 933 F.3d at 1108.

<sup>291</sup> *See* Kang, *Rightward Lurch*, *supra* note 71, at 62.

<sup>292</sup> *AFP v. Bonta*, 141 S. Ct. 2373, 2388 (2021).



next evaluate the state’s interest. Unlike the context in *Bonta*, Montana could assert its full-throated defense of the informational interests provided by the MDA. Pointing to their history of exploitation by undisclosed sources of money, the Montana attorney general could seek to expand the informational interest beyond the ballot box, speaking to the many uses of the information from the MDA, including to support fundamental state rights in Montana like the right to a clean and healthful environment.

The Court would then question the fit of the MDA in being narrowly tailored. Examining the Ninth Circuit’s fourth factor, the Court could object that Montana’s trigger limits are too low<sup>293</sup> and “burden minimal political advocacy.”<sup>294</sup> The Court could also take issue with the definitions of political committees in the MDA, as it did in an as-applied vagueness challenge.<sup>295</sup> With a growing number of justices skeptical of all disclosure regulations, instead, arguing for a right to anonymous and unaccountable speech, the Court could take issue with a number of MDA provisions, or even bypass it entirely and reject the informational interest itself, subjecting all disclosures on dark money to strict scrutiny. What’s certain is dark money groups will continue to exploit disclosure loopholes to keep their donor sources in the dark and challenge legislative efforts to curb their existence and influence.

## CONCLUSION

The intersection of the MDA, Montana’s green amendment, and litigation that seeks to protect Montana’s environment will continue to make its way into the courts so long as competing interests and powers differ in their path forward for the state.<sup>296</sup> The MDA helps illuminate

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<sup>293</sup> See MONT. CODE ANN. § 13-1-101(11).

<sup>294</sup> Nat’l Ass’n for Gun Rts. v. Mangan, 933 F.3d at 1118.

<sup>295</sup> See *Butcher v. Knudsen*, 38 F.4th 1163, 1165 (9th Cir. 2022).

<sup>296</sup> Recently, an Australian mining company, Sandfire Resources, through its subsidiary, Tintina Holdings, spent hundreds of thousands of dollars through a front group called the Montana Mining Association to influence a ballot initiative on mining environmental regulations. This information was publicly available because of the MDA. Environmental groups then challenged the permit granted to Tintina in state district court, which found for the plaintiffs, citing Montana’s green amendment as support. However, the Montana Supreme Court reversed the decision in favor of Tintina. See Tom Kuglin, *State Will Appeal Black Butte Mine Decision*, INDEP. REC. (Apr. 12, 2022), [https://helenair.com/news/state-regional/crime-and-courts/state-will-appeal-black-butte-mine-decision/article\\_088ba847-94d0-54f2-b861-a8d308dabf26.html](https://helenair.com/news/state-regional/crime-and-courts/state-will-appeal-black-butte-mine-decision/article_088ba847-94d0-54f2-b861-a8d308dabf26.html) [<https://perma.cc/CM6Z-TXDM>]; *Mont. Trout Unlimited v. Tintina*, No. DV-20-10, at \*5–6 (Mont. Dist. Ct. Apr. 8, 2022); *Mont. Trout Unlimited v. Mont. Dep’t of Env’t Quality*, 2024 MT 36, 2024 WL 765074 (Mont. 2024).

the silent streams dark money groups like MGN use to influence environmental policy through legislative and judicial campaigns, as well as ballot referendums. If the MDA's disclosures were struck down by the heightened standard the U.S. Supreme Court applied in *Bonta*, these groups would be unfettered in secretly drowning the airwaves on the next environmental ballot issue, or even in the next judicial election as their case with direct effect on Montana's environment floats before the court.<sup>297</sup> The informational interest is the state's only compelling interest in defending the MDA from future challenges under the *Bonta* standard. Rather than rely solely on the traditional benefits a growing number of Justices openly question,<sup>298</sup> Montana's compelling interest can be bolstered by the informational requirements of its inalienable right to a clean and healthful environment.

The framers of Montana's 1972 Constitutional Convention granting this right was neither impulsive nor an appeal to flower power. Rather, the framers recognized the fundamental concept of the right to a clean and healthful environment as prerequisite to all rights.<sup>299</sup> This right confers responsibility on all Montanans to maintain and improve the environment, which can only be accomplished with transparent information about how Montana's environmental policies are formulated. Pertinent to how these policies are crafted is information on individuals and organizations that seek to influence or partake in the elections to fill Montana's public offices, as well as the ballot issues that shape Montana's laws.<sup>300</sup> The information produced by the MDA's disclosure provisions enables the transparency that the constitutional right demands. It empowers Montanans to elect a state government—the trustees of their environment—that will protect their right to hold officials accountable before “dead fish float.”<sup>301</sup>

Montana's history of campaign finance reform in the face of undisclosed sums influencing their environment and health from the early twentieth century to the MDA in 2015 establishes that Montanans' environmental rights, constitutionalized in 1972, have been at the heart of these reforms and should be at the heart of their defense.

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<sup>297</sup> See *supra* Section IV.A.

<sup>298</sup> See *supra* Section I.D.

<sup>299</sup> Kansman, *supra* note 154, at 274. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (recognizing the fundamental nature of the right to vote as being “preservative of other basic civil and political rights”).

<sup>300</sup> See *supra* Part III.

<sup>301</sup> See *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 988 P.2d 1236, 1249 (Mont. 1999).

Cynicism toward the ability of environmental rights to support reforms in campaign finance and disclosure, let alone safeguard the environment, is logical when reflecting on the success rate of such provisions since their enactment in the 1970s.<sup>302</sup> However, as global warming continues at alarming rates,<sup>303</sup> and pollution continues to denigrate the environment and have serious health consequences for humans, a natural conclusion is for people to look to their judicial systems (as Montana’s framers intended), as well as their constitutions, statutes, and case law, to extract protections.<sup>304</sup> Judges, regardless of ideology, will face pressure to interpret environmental provisions, like constitutional rights, more broadly than they have in the past and on par with other fundamental rights.<sup>305</sup> Novel fundamental rights, such as equal protection in the context of civil rights, take time to evolve.<sup>306</sup> They take time to reach the moral aspirations that proponents hold for them.<sup>307</sup> In reaching those aspirations, states that have constitutionalized green amendments will serve as the “laboratories of democracy” in which the inevitable collision of democratic governance and constitutional environmental rights may yield the protections their constitutional framers sought.<sup>308</sup>

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<sup>302</sup> See Kansman, *supra* note 154, at 276.

<sup>303</sup> Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 18, 2024), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature> [<https://perma.cc/55YX-J36S>].

<sup>304</sup> See Tuholske, *supra* note 145, at 312.

<sup>305</sup> See *id.*

<sup>306</sup> See *id.* at 341–42.

<sup>307</sup> See *id.*

<sup>308</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).