No. 15-A398

In the Supreme Court of the United States

MONTANANS FOR COMMUNITY DEVELOPMENT, *Petitioner/Appellant*

v.

MOTL et al., *Respondents/Appellees,*

Writ Petition and Appeal from No. 15-72772 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 6:14-CV-55 in the
U.S. District Court for the District of Montana

Emergency Application for Stay and Injunction

To the Honorable Anthony Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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October 14, 2015

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Introduction

To the Honorable Anthony Kennedy, Associate Justice of the United States Supreme Court and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

The United States Supreme Court in *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (*"WRTL-II"*) stated that free speech cases "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." 551 U.S. at 469. Chill will occur for Applicant Montanans for Community Development, Inc. ("MCD") unless this Court now intervenes.

In Montana, political committee status, with all of its attendant burdens, is triggered when two or more individuals or a person (such as a corporation) makes an contribution or an expenditure. MCA § 13-1-101(30). MCD, with its three member board, has challenged Montana's "political committee" definition (and in turn the "contribution" and "expenditure" definitions on which it relies) because the trigger for political committee status is not this Court's major purpose test, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Ninth Circuit's priority-incidental test, *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1011 (9th Cir. 2010), or even the Ninth Circuit's significant-participant test, *Yamada v. Snipes*, 786 F.3d 1182, 1200 (9th Cir. 2015), *cert. pet. filed* No. 15-215 (Aug. 18, 2015), but simply express advocacy and its functional equivalent. *See* MCA § 13-1-101(47). As plaintiff

Wisconsin Right to Life did in *WRTL-II*, MCD provided in its Verified Complaint a copy of its desired ads that it thinks will be construed to satisfy the appeal-to-vote test[1] and therefore trigger political committee burdens. It is now being compelled in discovery by court order to disclose information about internal strategies and associations. (*Order*, R. 77, attached as Ex. 1; *Comm'n Discovery Requests,* R. 55-1, attached as Ex. 2.) MCD sought a protective order and stay from the district court, and a stay and writ of mandamus from the Ninth Circuit, showing with board member declarations the expressive and association harm that will come to MCD if compelled to disclose information that ought to be irrelevant to MCD's political committee status. *See WRTL-II*, 551U.S. at 470. All have been denied. Without a stay from this Court, such irreparable harm is ensured.

Background and Proceedings Below

The instant application for stay arises out of a constitutional challenge by MCD of Montana's political committee, contribution, and expenditure definitions.[2] Under Montana law, political committee is defined as:

(a) . . . a combination of two or more individuals or a person other than an

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[1]Prior to litigation, MCD used Montana's advisory opinion process to ask whether its intended ads would constitute expenditures of Respondent-Defendant Commissioner of Political Practices Jonathan Motl, but he kept asking for additional information (which MCD provided) and ultimately refused to issue one. So MCD has argued that the appeal-to-vote test makes Montana's "political committee," "expenditure," and contribution" definitions unconstitutionally vague.

[2]MCD has also challenged the investigatory procedures employed by the Commissioner of Political Practices because they do not appear to adequately protect First Amendment rights of alleged campaign finance violators.

individual [ ] 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; or

(ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue;

(iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

(b) Political committees include ballot issue committees, incidental committees, independent committees, and political party committees.

(c) A candidate and the candidate's treasurer do not constitute a political committee.

(d) A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of $250 or less.[3]

MCA § 13-1-101(30). Expenditure is defined 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; or

(ii) used or intended for use in making independent expenditures or in producing electioneering communications.

MCA § 13-1-101(17)(a). Contribution is defined as:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee;

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[3]"Person" is defined as "an individual, corporation, association, firm, partnership, cooperative, committee, including a political committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (8)." *Id.* 13-1-101(28).

> (iv) the payment by a person other than a candidate or political committee other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

Id. at § 13-1-101(9)(a). "Support or oppose" is defined as:

> (a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or
> (b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

Id. at § 13-1-101(47).

In 2013, MCD was incorporated and decided it wanted to run ads that, while mentioning the names of candidates, advocated job creation and growth to residents of the Billings, Montana, area, prior to the November 5, 2013, general election. Unsure if its spending on its ads would trigger political committee status (with its many attendant burdens under Montana law), MCD sought an advisory opinion from the Commissioner of Political Practices in October, 2013, attaching its desired ads to its request. (*2013 Ads,* R. 64-5, attached as Ex. 3.) The Commissioner requested additional information, which MCD provided, but ultimately the Commissioner refused to provide the opinion and so MCD abandoned its 2013 ads.[4]

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[4]MCD filed a federal lawsuit on the day of the election. *See Montanans for Community Development v. Motl,* No. 13-cv-70, 2014 WL 977999 at *1 (D. Mont. 2014). That lawsuit was dismissed on Article III grounds, in part because the court

In September 2014, it again decided it wanted to run ads substantially similar to its 2013 ads, mentioning the names of candidates and advocating job creation and growth, to be circulated to Billings, Montana residents prior to the general election. (*2014 Ads*, R. 64-6, attached as Ex. 4.)

So on October 3, 2014, MCD filed this lawsuit, challenging on federal First and Fourteenth Amendment grounds Montana's political committee, expenditure, and contribution definitions as overbroad, vague, and failing scrutiny review. (R. 1.) It sought a preliminary injunction, which was denied on October 22, 2014, because Respondents-Defendants (the "Commission") asserted they interpreted the definitions consistent with *WRTL-II,* that is, that contributions and expenditures—and in turn, political committee status—turned on whether donations and spending were for express advocacy or its functional equivalent (i.e., satisfied the appeal-to-vote test). *Montanans for Community Development v. Motl,* 54 F. Supp.2d 1153 (D. Mont. 2014).

Discovery commenced December 18, 2014, with a deadline of July 30, 2015. the Commission served MCD with 18 Interrogatories and 15 Document Requests on March 27, 2015. (*Comm'n Discovery Requests,* R. 55-1, attached as Ex. 2.) On May 7, 2015, MCD filed its responses, asserting, in relevant part here, First Amendment privilege. On May 21, 2015, the Commission filed a Motion to Compel. Because the Commission intended to depose MCD's board members and was still free to make

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could not provide an adequate remedy to MCD since it wanted to run its ads prior to the election. *Id.* at *2.

other discovery requests that infringed on MCD's First Amendment rights, MCD responded with a Motion for Protective Order on June 4, 2015. (R. 56.) Included with the motion were declarations of two board members—President Coate and Mr. Walker—which attested that both board members would change how they communicated and associated, with diminished willingness to participate in MCD-related activities. (Coate Decl., R. 59, attached as Ex. 5; Walker Decl., R. 60, attached as Ex. 6.) On July 21, 2015, the discovery deadline was extended until October 30, 2015. (R. 74.) On August 7, 2015, the district court granted in part the Commission's Motion to Compel, directing MCD to respond to Interrogatories 7-9, 12 and 15 and Document Requests 1, 4-6, 8-11, and 13-15. (*Order,* R. 77, attached as Ex. 1, at 8.) It denied MCD a protective order. (*Id.*)

On August 20, 2015, MCD filed a motion to reconsider and, alternatively, a motion to stay the district court's order pending a writ of mandamus with the district court, which that court denied. (R. 85, 87, 89.) MCD then filed a mandamus petition and a motion to stay pending its review with the Ninth Circuit on September 8, 2015. (Doc. 1-2). On September 28, 2015, the Commission notified MCD of their intent to file a motion to compel with sanctions against MCD if it did not produce responses by October 2, 2015. (*Risken Letter,* Doc. 2-2, attached as Ex. 7.) So MCD promptly filed a motion to expedite with the Ninth Circuit on September 29, 2015, to which the Commission objected. (Doc. 2-1.) On September 30, 2015, the Commission informed MCD that if a stay was denied, it would expect responses within five business days of denial or would seek to compel. (*Risken*

Email, Doc. 4-3, attached as Ex. 8.) On October 9, 2015, the motion to expedite was granted, but the Ninth Circuit denied MCD's mandamus petition, rendering its stay motion moot. (*Decision,* attached as Ex. 9.) On October 12, 2015, the Commission asked MCD to produce its responses by October 16, 2015, and confirmed its intention to depose MCD's board members on October 23, 2015. (*Second Risken Email,* attached as Ex. 10.)

Applicant MCD intends to seek review of the panel's decision by filing a petition for rehearing en banc and/or writ of mandamus and certiorari from the United States Supreme Court.

Standards for Issuing a Stay and Injunction

MCD seeks to stay the district court's order compelling discovery responses. Title 28, United States Code, Section 2101(f) provides that "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." For a stay to be granted, the moving party must show "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 510 U.S. 1309, 1310 (1994).

MCD also seeks to enjoin Defendants from pursuing discovery that exceeds the scope of litigation and intrudes on MCD's First Amendment expressive and associational rights. The authority of this Court to grant a writ of injunction is found in the All Writs Act, 28 U.S.C. § 1651(a), which reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The grant of a writ of injunction, unlike a stay, "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., Circuit Justice). For this reason, a motion for injunctive relief typically "demands a significantly higher justification than that described in . . . stay cases." *Id.* The most significant difference is that rather than having to make a "strong showing" of likelihood of success on the merits (the standard in stay cases), the Court will not issue an injunction unless the legal rights at issue are "indisputably clear." *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., Circuit Justice) (citation and internal quotation marks omitted). However, while an injunction may be generally an "extraordinary remedy," it is not "extraordinary" where free speech is at issue, *see, e.g.*, *Ashcroft v. ACLU*, 524 U.S. 656 (2004) (finding no abuse of discretion in granting preliminary injunction against enforcement of Child Online Protection Act). The requirements for both a stay and an injunction are met in this case.

Argument

I. Applicant MCD Will Suffer Immediate and Irreparable Injury If the District Court's Order Is Not Stayed and Defendants Are Not Enjoined From Discovery Beyond the Content of the Ads.

MCD will suffer irreparable harm absent a stay of the district court's order and an injunction preventing the Commission from engaging in discovery beyond the content of MCD's ads, as disclosure cannot be undone once it occurs. *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) ("compliance with [a] discovery order against a claim of privilege destroys [the] right sought to be protected"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (where "sweeping" subpoena served on political association called for "all documents" and "internal communications" relating to a political campaign, "heightened judicial concern" is warranted because "the release of such information . . . carries with it a real potential for chilling the free exercise of political speech and association.") Loss of First Amendment rights is automatically considered irreparable harm: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Supreme Court's recent order in *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010), is instructive in this regard. *Hollingsworth* involved a petition for mandamus to prevent a federal district court from allowing broadcasting of a trial on the constitutionality of California's Proposition 8 referendum, which involved same-sex marriage. The Court held that the petitioners in *Hollingsworth* had

established "that irreparable harm will likely result" absent relief, and that they "may not be able to obtain adequate relief through an appeal" because by that point "[t]he trial will have already been broadcast." *Id.* at 712-13. Similarly, irreparable harm will likely result absent a stay as the information at issue here would be required to be disclosed before the appeal could be resolved.

The necessity of a prompt stay of the district court's order is highlighted by the Commission's request for discovery responses by October 16, 2015, with an intent to file a motion to compel with sanctions against MCD if it does not comply.[5] Without a stay of the district court order, MCD could be sanctioned before it has the opportunity to seek review via a petition for rehearing en banc, or writ of mandamus or certiorari.

Likewise, a prompt injunction against the Commission is necessary because it intends to depose MCD's board members on October 23, 2015. (*Second Risken Email*, attached as Ex. 10.) Without an injunction against the Commission, irreparable harm can come to MCD's First Amendment expressive and associational rights despite MCD's counsel's best efforts to prevent it through objections during

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[5]Respondents-Defendants have employed this approach successfully against Montana corporation American Tradition Partnership ("ATP") in state court for failure to comply with discovery orders despite First Amendment objections, resulting in default facts presuming express advocacy and a punitive, $261,000 fine entered against it simply for failing to comply with political committee burdens and attribute its mailers. (*See State Court Order*, R. 63-5, attached as Ex. 11; *id.* at 3 (quoting the state court's prior finding that summary judgment was not appropriate because under the appeal-to-vote test, "one could certainly make a reasonable argument that th[e ad] advocates the defeat of Hamlett in the upcoming election.")).

deposition. *See WRTL-II*, 551 U.S. at 469 (discussing how onerous standards lead to complex litigation that do not give the benefit of the doubt to protecting speech).

II. There Is A Reasonable Probability That The Court Will Grant A Writ of Mandamus.

A. The Writ Will Be In Aid of This Court's Appellate Jurisdiction.

Granting mandamus review will aid this Court's appellate jurisdiction by allowing it to resolve First Amendment discovery issues when they are ripe and before any harm, though imminent, has occurred. Indeed, the only opportunity this Court will have to address First Amendment protections during discovery is in the context of a mandamus petition. Because discovery orders are not otherwise appealable, First Amendment discovery disputes cannot be remedied through the typical appellate process. While an appellant can inform the Court of the irreparable harm they have already endured as a result of unconstitutional compelled disclosure, the appellant will be forever denied its First Amendment protections. At most, this Court could offer prospective relief under the mootness doctrine. *See WRTL-II*, 551 U.S. at 462. Mandamus review would ensure that any constitutional issues are timely addressed.

B. Exceptional Circumstances Warrant the Exercise of the Court's Discretionary Powers.

In general, the procedurally elusive nature of First Amendment discovery disputes also creates exceptional circumstances warranting this Court's mandamus review. But more specifically, Montana is developing a pattern of inadequately addressing these disputes.

The district court's denial of a protective order on First Amendment privilege grounds is not the first in Montana. In *Western Tradition Partnership v. Murray,* No. BDV-2010-1120 (1st Jud. Dist. 2012)—a case involving an organization whom the Commission alleged failed to comply with political committee burdens, including expenditure disclosures—a Montana district court applied *Perry* to the disclosure of financial records only to conclude the harm alleged was "speculation," and that Montana's "right to know" provisions sufficiently justified disclosure, precluding a protective order. (*State Court Opinion*, Doc. 1-2, AD-44, attached as Ex. 12.) Financial records are irrelevant to express advocacy analysis, which was at the core of the claims there, too. Without guidance from this Court, inconsistent and improper resolution of First Amendment discovery disputes are likely to occur, with substantial financial and litigation burdens placed those whose seek to defend their rights. Such burdens will inevitably deter those who wish to vindicate their constitutional rights through the courts. A writ of mandamus correcting these errors would be of benefit to Montana and offer greater protection to litigants.

C. Adequate Relief Cannot Be Obtained In Any Other Form or From Any Other Court.

MCD has pursued every avenue it has available to defend its First Amendment rights: it sought a protective order, reconsideration, and stay from the district court, which were denied. (*Order*, R. 77, attached as Ex. 1; R. 89.) It sought a stay and writ of mandamus from the Ninth Circuit, which were denied. (*Decision,* attached as Ex. 9.) All that remains for MCD is an Ninth Circuit en banc petition,

which are rarely granted, and mandamus or certiorari review of this Court. Without review of this Court, MCD's defense of its First Amendment rights concludes and irreparable harm occurs. Mandamus review would be warranted.

III. There Is A Reasonable Probably That the Court Will Grant Certiorari.

Since *Buckley v. Valeo*, 421 U.S. 1 (1976), the Supreme Court has repeatedly entertained cases dealing with the compelled disclosure of political speech. Currently pending before the Supreme Court, for example, is *Yamada v. Snipes*, 786 F.3d 11782 (9th Cir. 2015), *cert. pet. filed* No. 15-215 (Aug. 18, 2015), which, like this case, deals with the imposition of political committee burdens, including compelled disclosure, on those engaging in First Amendment protected speech. *Yamada*, however, is only the latest in a long line of Supreme Court cases that have dealt with numerous issues specifically with respect to compelled disclosure. *See Brown v. Socialist Workers*, 459 U.S. 87 (1982) (compelled disclosure of members of a minor political party); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (numerous challenges to disclosure of petition circulator information); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (compelled disclosure of author of pamphlets regarding a ballot measure).The specific issues dealt with here add a new layer to compelled disclosure that has not yet been addressed by the Supreme Court. Though the Court has dealt with the issue of First Amendment protections against disclosure, it has not dealt with the issue of whether those who engage in express advocacy—even only $251 worth of it—are

entitled to First Amendment protections against excessive government intrusion into facts beyond the scope of a lawsuit when they seek to vindicate their constitutional rights through litigation. The issue of compelled disclosure of internal strategies and associations is a significant problem in which the government uses an extensive and intrusive discovery process. As the Supreme Court noted in *WRTL-II*, it risks "chilling speech through the threat of burdensome litigation," 551 U.S. at 469, because, as is true here, it is used to search for *any* legal violations (e.g., corporate, IRS, or campaign finance related) and publicly disparage speakers. (*See, e.g., Commissioner Article*, R. 64-16, attached as Ex. 13) (quoting Commissioner Motl as disparaging American Tradition Partnership as "non-legitimate" and that "everything that anyone gets from WTP should be regarded as a suspect email."). Thus, there is a reasonable probability that the Court will grant certiorari.

IV. It Is Undisputedly Clear That MCD Will Ultimately Prevail on the Merits.

Finally, MCD has a fair probability of ultimately prevailing on the merits of their claim. The Ninth Circuit framework for establishing a claim of First Amendment privilege in the discovery context involves a two-step process. First, MCD "must demonstrate . . . a prima facie showing of arguable first amendment infringement." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009). If MCD can make this showing, the burden then shifts to the Commission to show that "the information sought is highly relevant to the claims or defenses in the

litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1), "be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id* at 1161. Both elements are met here.

A. MCD Has Established a Prima Facie Case of First Amendment Infringment.

In its August 7, 2015, order, the district court found that MCD had demonstrated a prima facie showing of chill as to all of the Commission's discovery requests. (*Order*, R. 77, attached as Ex. 1, at 5.) Declarations of MCD President Bill Coate and board member Ed Walker, (R. 59 and 60, attached as Ex. 5 and 6), formed the basis of this conclusion, demonstrating First Amendment harm will come if MCD must answer the Commission's discovery requests. As in *Perry,* both Mr. Coate and Mr. Walker state that:

> if th[e district] court compels MCD to divulge—either by responding to questions or by producing documents—non-public communications and associations and that it has had either internally or with donors, volunteers, candidates, and third party groups or entities, [they] will drastically alter how [they] communicate and associate as president and board member in the future.

(Coate Decl., R. 59, attached as Ex. 5, ¶ 5; Walker Decl., R. 60, attached as Ex. 6, ¶ 5.) They also both asserted that "[i]f such communications and associations can be publicly known," they "will be less willing to associate or engage in communications at board meetings, during phone calls, in emails, and in any other contact with other MCD board members, volunteers, donors, candidates, or outside individuals or groups," and "less likely to serve on another board or be involved with another

committee." (Coate Decl., R. 59, attached as Ex. 5, ¶¶ 5-6; Walker Decl., R. 60, attached as Ex. 6, ¶¶ 5-6.) First Amendment expressive and associational rights will be harmed by disclosure.

B. The Commission's Discovery Requests Do Not Further A Compelling Governmental Interest.

Since MCD has established a prima facie case of harassment, the burden shifts to the Commission to show that "the information sought through the discovery is rationally related to a compelling governmental interest and the least restrictive means of obtaining the desired information." *Perry*, 591 F.3d at 1161. The Commission has not articulated any compelling government interest that is furthered by the disclosure of this information, nor can it do so.

1. The Facts Show The Requests Are Not Even Relevant.

The information the district court found was not subject to First Amendment privilege— information[6] about **1)** MCD's formation[7] (Doc. Req. 1, 4-5), **2)** internal operating procedures, both generally (Interrogatories 12, 15), and specific to the ads (Doc. Req. 9), and **3)** MCD's, its directors', and other associated individuals' associations with either MCD, other entities, candidates, and donors

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[6]The Commission's discovery requests are attached as Exhibit 2.

[7]MCD has already furnished copies of its Articles of Incorporation, (R. 26-1), and its Bylaws. (R. 1-4.) It did so while seeking expedited preliminary injunction review in an effort to foreclose the Commission's inexplicable preoccupation with MCD's corporate nature and focus the district court on the actual criteria involved for political committee status and the constitutional problems such criteria (or lack thereof) pose.

(Interrogatories 7-9; Doc. Req. 6, 8, 10, 11)—has little to do with MCD's claims that Montana's political committee definition, contribution definition, and expenditure definition are unconstitutional.

Indeed, the Commission's primary contention is that "[t]he State has the right to test MCD's allegations of its status, purpose and intent throughout discovery," (R. 62 at 3), and that by filing this lawsuit, "MCD opened the door to inquiry about its business operation, accounting methods and records, its projects, strategic plan and its donors, income and expenses." (R. 62 at 8.) While "MCD's Status, Intent and Purpose Have Been Paramount Since The Complaint Was Filed" *for the Commission*, (R. 62 at 6), they have never been paramount to MCD's claims nor shown to have any relevance to the Commission's defenses. Federal Rule of Civil Procedure 26(1)(b) permits the discovery of matters relevant to claims and defenses, and only as to subject matter as authorized by a court after a showing of good cause. The Commission neither asked the district court to expand the scope of discovery to matters relevant to the subject matter of this case (which MCD thinks would still preclude the Commission's requests), nor has the Commission offered reasonable cause for doing so. Indeed, nowhere has it even explained how its discovery requests relate to MCD's claims or the Commission's defenses.[8]

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[8]Moreover, the Commission cannot credibly claim a right to test every fact asserted in a complaint. If the Complaint had mentioned that board members were married with children, the Commission could not then demand birth and wedding certificates or DNA samples showing the children are actually those of the board members. Complaints are often filled with facts that give background to provide the Court with context. Their inclusion does not, in and of themselves, make them

This is because they do not. For example, what does information about MCD's relationship with 21st Century Energy and, by extension, the U.S. Chamber of Commerce lend to MCD's claims or the Commission's defenses? The Commission never says, instead attempting to put the onus on MCD for "trott[ing] out its affiliation with 21st Century Energy and "energyxxi.com"." (*Protective Order Response,* R. 62 at 6.) Neither MCD's ads nor its Complaint profess nor allege affiliation of any kind, and indeed, MCD's Complaint expressly disavows any coordination with other political committees. (R. 1, ¶ 24; R. 64, ¶ 27.) Moreover, if MCD were "affiliated" with either entity, what claim or defense would it advance? Montana's political committee, expenditure, and contribution definitions do not turn on affiliation. It could not bolster or defeat any claims or defenses. The Commission has no need to ascertain MCD's affiliation with 21st Energy or the U.S. Chamber of Commerce.

Commissioner Motl's testimony supports this. The Commissioner makes clear in his testimony that Montana's political committee status does not turn on the purposes—whether major purpose or even primary purpose—of the individuals or organizations in question. Instead, it turns solely on the contributions and expenditures made by such individuals or organizations. (Motl Dep., R. 86-1, 110:1-9.) So, for example, Interrogatories 9, 12, and 15—which relate to the primary purpose of a political committee for purposes of categorizing a political committee as

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"testable" or relevant to the parties' claims or defenses.

an incidental committee or a PAC, (Motl Dep., R. 86-1, 118:17-120:7)—are not relevant to this litigation, which challenges the preliminary threshold categorizing individuals or an organization as a political committee *solely based on express advocacy*. What *type* of political committee MCD would be is irrelevant here, as it is the categorization as a political committee *at all* that forms its constitutional objection. (*Amended Verified Compl.*, R. 64, ¶ 44.)

Likewise, Document Requests 1, 4, 5, and 14 have nothing to do with whether MCD is a political committee—express advocacy, not its IRS or corporate status or its meeting minutes, govern that determination. (Motl Dep., R. 86-1, 110:1-22.) Similarly, Interrogatories 7 and 8 and Document Requests 10 and 11, inquiring about MCD's relationship to Energy 21 and the U.S. Chamber, would require "invent[ing] a set of facts," (Motl Dep., R. 86-1, 124:14-25), "it would be an unusual set of facts," with "Energy 21 and the incidental committee or the PAC be[ing] one and the same." (Motl Dep., R. 86-1, 125:3, 125:7-8). Indeed, Mr. Motl acknowledged that "I can't think of how that would work." (Motl Dep., R. 86-1, 125:24-25.) MCD in its Verified Amended Complaint has already disavowed coordination with any candidate or other political committee, (R. 64, ¶ 33), so the Commission's need for these facts is dubious at best.

Document Requests 6 and 8 inquire about communications with or about elected officials, candidates, political committees, or political parties. This, too, has no relevance to an express advocacy—and therefore political committee—determination. (Motl Dep., R. 86-1, 110:1-9.) Likewise, how MCD's ads came to be

does not have any relevance as to whether the ads are express advocacy.

But even if it were relevant, Defendants must still *additionally* show that they have a sufficient need for the information sought and that their requests have been tailored to that need. And the Commission nowhere made this showing. For example, the additional Montana Secretary of State filings the Commission seeks can be secured from those agencies if desired. *See Perry*, 591 F.3d at 1164 ("Plaintiffs can obtain much of the information they seek from other sources, without intruding on protected activities.").

These remaining discovery requests that the district court directed MCD to respond do not satisfy the second *Perry* requirement. They seek First Amendment privileged information *before* any advocacy (whether express or not) has occurred and that the Commission would never need if it were investigating MCD if it had engaged in its desired speech. A protective order prohibiting discovery on these issues should have issued against these discovery requests. The district court erred by failing to do so and by compelling responses instead.

2. Constitutional Law Shows The Discovery Requests Are Irrelevant.

Whether MCD's planned ads constitute an "expenditure" under MCA § 13-1-101(19)(a), making MCD a political committee must be determined from the four corners of the ads themselves. Information about the strategies and associations of MCD have no bearing on this inquiry. *See WRTL-II*, 551 U.S. at 469. Indeed, the Commission's repeated claims of entitlement to investigate "the true nature of

[MCD's] proposed speech," (*Protective Order Response,* R. 62 at 11), make the posture of this dispute substantially similar to what Wisconsin Right to Life endured leading up to the *WRTL-II* decision.

Before the three-judge district court, the FEC alleged that the *McConnell v. FEC* decision approved an intent-and-effect test to determine functional equivalence and so a broad contextual investigation into WRTL's alleged true purpose for its ads was warranted. *Wis. Right to Life v. FEC,* 466 F. Supp. 2d 195, 204-5 (D.D.C. 2006). The district court disagreed, finding that functional equivalence analysis is limited to "consideration [of] language within the four corners of the . . . ads." *Id.* at 207. It said that an intent-and-effect test is "practically unacceptable because as-applied challenges . . . must be conducted during expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable." *Id.* at 205. "More importantly," the court added, "it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) . . . experts can *actually* project the "likely" impact of a given ad on the electoral process." *Id.* at 205-6. It wrote that the Supreme Court had already recognized that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." *Id.* At 206.[9]

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[9] Indeed, the approach treats the actual text of a communication as essentially irrelevant and serves as an empty vessel into which the government can pour

The *WRTL-II* court resoundingly agreed with the district court. It found that discovery in free speech cases "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *WRTL-II,* 551 U.S. at 469 (citing *Buckley,* 424 U.S. at 43-44). Otherwise, free speech is chilled by "open[ing] the door to a trial on every ad" and "blanket[ing] with uncertainty whatever may be said." *WRTL-II,* 551 U.S. at 468. Free speech cases must "entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* (citing *Hicks,* 539 U.S. at 119). It is for this reason that the *WRTL-II* adopted the appeal-to-vote test and assessed the content of the ads before it. *WRTL-II,* 551U.S. at 470 ("First, their content is consistent with that of a genuine issue ad. . . . Second, their content lack indicia of express advocacy. . . .").

The same analysis applies here. The Commission has asserted, and the district court has accepted, that the three definitions challenged here—"political committee," "contribution," and "expenditure"—have *WRTL-II*'s narrowing gloss of express advocacy and its functional equivalent that saves them from unconstitutional vagueness. (R. 28 at 15) ("[*WRTL-II*'s] functional equivalent of express advocacy is the test COPP has applied to the content of challenged

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discovered intent from an external context that is often beyond the speaker's control or even knowledge. If the application of Montana's campaign finance laws depend on the results of an external intent-and-effect investigation, then those laws are unconstitutionally vague as applied. No one can know when speech is being regulated.

communications in determining whether they are express advocacy."). To say, on the one hand, that this is the test for determining whether an expenditure has occurred and a political committee resulted, but then, on the other hand, demand additional information beyond what is necessary for the test is illogical. Either *WRTL-II* applies or it does not. The district court erred in finding the Commission's discovery requests highly relevant as a matter of law.

Conclusion

For the reasons indicated above, Applicant MCD respectfully requests that its Emergency Application to stay the enforcement the district court's August 7, 2015, order and enjoin the Commission from inquiring into MCD's constitutionally protected expressive and association activities during discovery, pending an opportunity for MCD to petition in the Ninth Circuit for rehearing, for rehearing *en banc*, or petition this Court for a writ of mandamus or certiorari.

Respectfully Submitted this 14th day of October, 2015,

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