IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 11-0081

WESTERN TRADITION PARTNERSHIP, INC., a corporation registered in the State of Montana, CHAMPION PAINTING, INC., a Montana Corporation; and MONTANA SHOOTING SPORTS ASSOCIATION, INC., a Montana Corporation,

Plaintiffs/Appellees/Cross-Appellants,

v.

ATTORNEY GENERAL of the State of Montana, and COMMISSIONER OF POLITICAL PRACTICES,

Defendants/Appellants/Cross-Appellees.

MOTION FOR STAY PENDING U.S. SUPREME COURT RESOLUTION

Appellees ("Corporations") move for a stay of this Court's December 30, 2011 decision reversing the District Court and entering summary judgment for Appellants ("State")"(slip op. at 28) until the U.S. Supreme Court resolves all matters connected with the Corporations' planned petition for a writ of certiorari. Opposing counsel have been contacted and object to this Motion.

ARGUMENT

I. Applicable Test

Under Federal Rule of Appellate Procedure 41(d)(2), stays pending certiorari petitions are proper given "a substantial question and . . . good cause . . . ." Montana has no comparable rule, so it should be guided by that test and the U.S. Supreme Court's practice in granting stays. *See* Sup. Ct. R. 23 (Justice may grant stay pending certiorari review). Justice Brennan set forth the test for stays, which parallels the usual injunction standards[1]:

> First, . . . a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari . . . . Second, . . . a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, . . . that irreparable harm is likely to result from . . . denial . . . . Fourth, in a close case it may be appropriate to "balance the equities" . . . .

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice) (citations omitted) (granting stay pending appeal). This test also governs cases from state courts. *See In re Roche*, 448 U.S. 1312 (1980) (Brennan, Circuit Justice) (granting stay of decision of state court).

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[1] *Cf. Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) (reversing injunction against Navy activity) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

II. The Test Applied

Is there a "substantial question"? The issue is whether Montana and this Court are bound by *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010) ("*Citizens United*") (holding that corporations may not be banned from making "independent expenditures"[2] and "electioneering communications"[3] from general corporate funds). The District Court declared Montana's independent-expenditure ban unconstitutional under the First Amendment and *Citizens United*. This Court, over two dissents, reversed, granting summary judgment to the State. The question is substantial.

Is there "good cause for a stay"? Yes, under the factors listed by Justice Brennan. Under the first and second factors, there is (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari" and (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Rostker*, 448 U.S. at 1308 (Brennan, Circuit Justice).

These factors turn on what the U.S. Supreme Court Justices will think. *Citizens United* was decided just two years ago. It applied strict scrutiny to the

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[2] "Independent expenditures" are for communications "expressly advocating the election or defeat of a . . . candidate . . . ." 2 U.S.C. 431(17).

[3] "Electioneering communications" are essentially broadcast, targeted communications mentioning candidates in 30- and 60-day periods before primary and general elections. *See,* 2 U.S.C. 434(f)(3).

corporate independent-expenditure ban, 130 S.Ct. at 898, while this Court applied intermediate scrutiny to the ban (slip op. at 27-28). *Citizens United* held that a PAC-option does not save the corporate ban because it does not allow a corporation itself to speak, 130 S.Ct. at 897 ("A PAC is a separate association from the corporation. So the PAC exemption from [the] . . . ban . . . does not allow corporations to speak."), while this Court held that a PAC does allow a corporation itself to speak (slip op. at 28). *Citizens United* considered and rejected the interests on which this Court upheld Montana's corporate independent-expenditure ban, as explained in the Corporations' briefs, the amicus brief of the Center for Competitive Politics, and the dissenting opinions. This Court relied on corporate problems over a century old that are no longer the same (slip op. at 14-18, 22), even though "[a]n outright ban on corporate political speech . . . is not a permissible remedy," 130 S.Ct at 911. Under the proper standards, there is no possibility that a state could meet its heavy burden of showing that a corporate independent-expenditure ban is constitutional in that state. And there is no indication that the U.S. Supreme Court intended *Citizens United* to be subject to exceptions in the states. In fact, it overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld such a corporate ban in a state context.

So as Justice Powell wrote in granting a stay of a preliminary injunction in a school-prayer case, "Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them." *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314, 1316 (1983) (Powell, Circuit Justice). Thus, the Corporations have a strong likelihood of success on the merits.

Regarding the third factor, there is always irreparable harm when First Amendment rights are violated. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") "Given that First Amendment rights are at stake, the likelihood of irreparable harm is presumed." *Yamada v. Kuramoto*, 744 F.Supp.2d 1075, 1085 (D. Haw. 2010) (*citing Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (*quoting Elrod*)) (granting preliminary injunction allowing plaintiffs to make unlimited contributions to a PAC making only independent expenditures). So the fact that the Corporations are banned from making independent expenditures from general corporate funds is irreparable harm.

The fourth factor, "balanc[ing] the equities," applies only in a close case. This is not a close case, but the balance favors the Corporations. The Corporations

want to do what the U.S. Supreme Court said that Citizens United may do under the First Amendment, i.e., make independent expenditures from general corporate funds. Under a stay, Montana would be barred from preventing this while the U.S. Supreme Court considers this case. But Montana has no strong interest in enforcing a likely unconstitutional ban, *Citizens United* considered and dismissed the interests asserted in Montana as supporting this ban, and there can be no great burden on Montana if its citizens can do what is allowed in all other states. Moreover, "the court must consider the 'significant public interest' in upholding free speech principles." *Yamada*, 744 F.Supp.2d at 1086 (citation omitted; collecting Ninth Circuit authorities).

CONCLUSION

This Court should grant the Corporations a stay of its decision and judgment pending their application for a writ of certiorari in the U.S. Supreme Court and resolution of all matters relating to that certiorari petition, including any consideration on the merits.

Respectfully submitted this 12th day of January, 2012.

Margot E. Barg
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Stay Pending U.S. Supreme Court Resolution was faxed to the Clerk of the Montana Supreme Court on the 12th day of January at 12:05 a.m./(p.m.) I also certify that I caused a true and accurate copy of the foregoing to be mailed by first-class mail, postage prepaid, to:

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