No. 11-_____

In The
Supreme Court of the United States

American Tradition Partnership, Inc., f.k.a. Western Tradition Partnership, Inc., et al., *Petitioners*

v.

Steve Bullock, Attorney General of Montana et al., *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

Petition for a Writ of Certiorari

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Question Presented

In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), this Court held that a federal ban on corporate independent political expenditures was unconstitutional under the First Amendment. The Montana Supreme Court, however, upheld a ban on corporate independent political expenditures in Montana state elections because it said that "unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history." App.13a. This presents the following issue.

Whether Montana is bound by the holding of *Citizens United*, that a ban on corporate independent political expenditures is a violation of the First Amendment, when the ban applies to state, rather than federal, elections.

Parties to the Proceeding Below

Appellants listed by the court below were American Tradition Partnership, Inc., formerly known as Western Tradition Partnership, Inc.; Montana Shooting Sports Association, Inc.; and Champion Painting, Inc. Western Tradition Partnership did not file a notice of appeal with the other two corporations, but the Montana Supreme Court included it in the caption and the case opinion as if it were an appellee and it is bound by that court's decision.

Appellees below were the Attorney General of the State of Montana (currently Stephen C. "Steve" Bullock, *see* https://doj.mt.gov/) and the Commissioner of the Commission for Political Practices (currently James W. "Jim" Murry, *see* http://politicalpractices.mt.gov/default.mcpx).

Corporate Disclosure

No petitioner corporation has a parent corporation or any publicly held corporation owning 10% or more of any stock.

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Petition

Petitioners request review of *Western Tradition Partnership, Inc. v. Attorney General*, ___P.3d___, 363 Mont. 220 (Mont. 2011).

Opinions Below

The trial court's Order (App.94a) is unreported but available at 2010 WL 4257195. The Montana Supreme Court's Opinion (App.1a) is reported at 363 Mont. 220 (available at 2011 WL 6888567).

Jurisdiction

The decision and judgment below were filed on December 30, 2011. Jurisdiction is invoked under 28 U.S.C. 1257.

Constitutions, Statutes, and Rules

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Montana's corporate independent-expenditure ban ("Ban"), Mont. Code Ann. 13-35-227, follows:

> (1) A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.
>
> (2) A person, candidate or political committee may not accept or receive a corporate con-

tribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee or member of the corporation.

(4) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

The "expenditure" definition, Mont. Code Ann. 1-13-101(11), follows:

(a) "Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election.

(b) "Expenditure" does not mean:

(i) services, food, or lodging provided in a manner that they are not contributions under subsection (7);

(ii) payments by a candidate for a filing fee or for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family;

(iii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation; or

(iv) the cost of any communication by any

> membership organization or corporation to its members or stockholders or employees.

"Expenditure" includes "independent expenditures," defined as follows:

> "Independent expenditure" means an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee. . . .

Mont. Admin. R. 44.10.323(3).

"'Person' means an individual, corporation, association, firm, partnership, cooperative, committee, club, union, or other organization or group of individuals or a candidate as defined in subsection (6)." Mont. Code Ann. 13-1-101(20).

The penalty provision, Mont. Code Ann. 13-37-128(2), follows:

> A person who makes or receives a contribution or expenditure in violation of 13-35-227, 13-35-228, or this chapter or who violates 13-35-226 is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

Statement of the Case

Petitioners ("Corporations") are corporations. American Tradition Partnership, Inc. ("ATP") (previ-

ously Western Tradition Partnership, Inc. ("WTP")) is a nonprofit ideological corporation registered in Montana. Montana Shooting Sports Association, Inc. ("MSSA") is a nonprofit Montana corporation promoting issues related to shooting sports. Champion Painting, Inc. ("Champion Painting") is a small, family-owned painting and drywall business and Montana corporation, with no employees or members, whose sole shareholder is Kenneth Champion.

The Corporations want to make independent expenditures (communications expressly advocating the election or defeat of clearly identified candidates) but are barred by Montana's corporate independent-expenditures Ban, which they challenge as a violation of their free-speech rights under the First Amendment.

Respondents ("State"), Montana officials with authority to enforce the Ban, are sued in their official capacities as the Attorney General and the Commissioner of the Commission for Political Practices. Despite *Citizens United*, the Commissioner believes Montana may constitutionally enforce its Ban. *Compare* 1st Am. Comp. ¶ 18 (App.123a) *with* Answer ¶ 18 (admit).

The Corporations challenged the Ban as a free-speech violation under the First Amendment and Montana Constitution, and the First Amendment claim was argued and decided in both the state trial court and the Montana Supreme Court. Rule 14.1(g)(i). The initial complaint was filed on March 8, 2010. An amended complaint (App.115a) was filed on April 15, 2010. Count 1 sought a declaratory judgment of unconstitutionality under the First Amend-

ment (App.123a, ¶ 24), quoting *Citizens United*, "'[p]olitical speech does not lose its First Amendment protection "simply because its source is a corporation"'" (App.124a, ¶ 26, citations omitted), and asserting that the Ban "infringes upon the Plaintiffs' political speech freedoms under both the Montana and United States Constitution" for prohibiting corporate independent expenditures (App.124a, ¶ 27).

The court granted the Corporations summary judgment on October 18, 2010 (App.94a), holding the Ban unconstitutional under the First Amendment and enjoining its enforcement:

> Therefore, the Court declares that Section 13-35-227(1), MCA, as it pertains to independent corporate expenditures, is unconstitutional and unenforceable due to the operation of the First Amendment to the United States Constitution. Since Section 227 violates the First Amendment to the United States Constitution, this Court sees no need to decide whether Section 227 violates the Montana Constitution.

App.107a. Judgment was filed on January 31, 2011. App.111a.

The State appealed (Corporations cross-appealed the denial of attorneys fees) this issue:

> Whether the requirement that corporations make candidate campaign expenditures through individual funds voluntarily raised, first enacted as the Corrupt Practices Act of 1912 and now codified at Mont. Code Ann. § 13-35-227, abridges the freedom of speech guaranteed by U.S. Const. amends. I and XIV, or impairs the freedom of speech guaranteed

by Mont. Const. art. II, § 7.

Br. of Appellants at 1 (available at http://supremecourtdocket.mt.gov/search/case?case=14335).

The Montana Supreme court decided that *Citizens United* did not control this case, upholding the Ban against the First Amendment challenge:

> The Dissents assert that *Citizens United* holds unequivocally that no sufficient government interest justifies limits on political speech. We disagree. The Supreme Court held that laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court, citing *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464 . . . (2007), clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest. *Citizens United*, 130 S.Ct. at 898. Here the government met that burden.

App.12-13a. The court found a compelling interest:

> *Citizens United* does not compel a conclusion that Montana's law prohibiting independent political expenditures by a corporation related to a candidate is unconstitutional. Rather, applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions. We reverse the District Court . . . .

App.32a. Though the Montana Supreme Court dis-

cussed certain aspects of Montana constitutional law (App. 24-25a), it did not reach the Montana constitutional claim (App.8a).

This Court stayed the decision of the Montana Supreme Court pending certiorari consideration and any merits consideration. *See American Tradition Partnership, Inc. v. Bullock*, No. 11A762, 2012 WL 521107 (U.S. Feb. 17, 2012).

Reasons to Grant Certiorari

Certiorari should be granted because (I) the decision below conflicts with the holding of *Citizens United*, (II) the decision below conflicts with the reasoning of *Citizens United*, (III) the decision below creates splits with federal circuit courts, and (IV) this case presents an important federal question.[1]

I.

The Decision Below Conflicts with the Holding of *Citizens United*.

In this Court's order staying the decision below, Justice Ginsburg, joined by Justice Breyer, issued a statement concluding: "Because lower courts are bound to follow this Court's decisions until they are withdrawn or modified . . . , *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), I vote to grant the stay." (No. 11A762.) This is well established law—*see, e.g.*, *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1202 (2012) (per curiam) ("When this Court has fulfilled

[1] The reasons for granting certiorari are also reasons to summarily reverse the Montana Supreme Court. This is discussed more specifically in Part IV.

its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. V, cl.2.")—that the Montana Supreme Court failed to apply.

The unjustified refusal of the court below to follow *Citizens United* was noted by the two dissenters to the Montana Supreme Court's decision. Justice Nelson wrote an extended dissent explaining in detail why the majority was wrong in not following *Citizens United* (App.40-93a), beginning by saying that *Citizens United* left no option:

> The Supreme Court could not have been more clear in *Citizens United* . . . : corporations have broad rights under the First Amendment . . . to engage in political speech, and corporations cannot be prohibited from using general treasury funds for this purpose based on antidistortion, anti-corruption, or shareholder-protection interests. The language of the *Citizens United* majority opinion is remarkably sweeping and leaves virtually no conceivable basis for . . . restricting corporate . . . independent expenditures.

App.40-41a. In considering whether "Montana identified a compelling state interest, not already rejected by the Supreme Court, that would justify the outright ban," he noted that "the Supreme Court has already rebuffed each and every one of them." App.41a. He reminded the state justices of their oaths to abide by the U.S. Constitution, as interpreted by this Court:

> [W]hen the highest court in the country has spoken clearly on a matter of federal constitu-

> tional law, as it did in *Citizens United*, . . . this Court . . . is not at liberty to disregard or parse that decision in order to uphold a state law that, while politically popular, is clearly at odds with the Supreme Court's decision. This is the rule of law and is part and parcel of every judge's and justice's oath of office to "support, protect and defend the constitution of the United States." In my view, this Court's decision today fails to do so.

App.47a.

Justice Baker also dissented, agreeing

> with Justice Nelson that we are constrained by *Citizens United* to declare [the Ban] unconstitutional . . . . [T]he State of Montana made no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in *Citizens United*."

App.33a.

The Montana Supreme Court tried to distinguish *Citizens United*, saying that *Citizens United* did not decide that corporations may make independent expenditures as a matter of law, but based on that case's unique facts: "*Citizens United* was decided under its facts or lack of facts." App.12a. The Court claimed that "the District Court failed to give adequate consideration to the record," but said "[w]e do so now, because, unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history." App.13a.

However, while a Montana state law, rather than

a federal one, is at issue, Montana is bound by this Court's holding in *Citizens United* that a corporate ban on independent political speech is unconstitutional under the First Amendment, and Montana's courts are obligated to apply it. This petition should be granted to correct this error.

II.

The Decision Below Conflicts with the Reasoning of *Citizens United*.

Furthermore, the Montana Supreme Court's analysis of the *federal* constitution and *Citizens United,* upon which the court's refusal to adhere to *Citizens United* was justified, was also erroneous on all controlling analytical points. These are considered in turn.

A. The State Court Rejected this Court's Holding that a PAC-Option Is a Ban Because PACs Do Not Speak for Corporations.

The Montana Supreme Court refused to follow this Court's clear holding that a corporation's political committee ("PAC") does not speak for a corporation. This Court held that "[a] PAC is a separate association from the corporation. So the PAC . . . does not allow corporations to speak." *Citizens United*, 130 S.Ct. at 897. But the court below found the Ban "narrowly tailored," because "WTP can still speak through its own political committee/PAC." App.32a.

The Montana Supreme Court also said that "the [Ban] only minimally affects . . . MSSF [sic] and Champion" (App.32a), because "Mr. Marbut, on behalf of MSSF [sic], has been an active fixture in Montana politics" and "the burden upon Kenneth Cham-

pion . . . to establish a political committee . . . are [sic] particularly minimal" (App.14-15a). But Mr. Marbut and Mr. Champion are not the plaintiff *corporations*, which are separate legal entities and which *Citizens United* held have their own right to make independent expenditures. The Montana Supreme Court refused to apply this foundational holding of *Citizens United*, attempting to evade it by transparent misdirection.

The Montana Supreme Court also argued that *Citizens United* turned instead on the difficulties of federal PAC compliance. It argued that *Citizens United* does not control because "Montana . . . political committees are easy to establish and easy to use to make independent expenditures . . . ." App.32a. But *Citizens United* held that "*[e]ven if a PAC could somehow allow a corporation to speak—and it does not*—the option to form PACs does not alleviate the First Amendment problems with [a ban]. PACs are burdensome alternatives." 130 S.Ct. at 897 (emphasis added). The court below ignored the italicized part of this quote, pretending that *Citizens United* just held that PACs are burdensome, and then argued that Montana PACs are less burdensome, so the Ban is "narrowly tailored." App.31-32a. Putting aside the fact that Montana PAC burdens remain onerous,[2] Montana's Ban is a *ban* and therefore "not a permissible remedy." *Citizens United*, 130 S.Ct. at 911.

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[2] *See Montana Chamber of Commerce v. Argenbright*, 266 F.3d 1049 (9th Cir. 2000) ("requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression").

B. The State Court Rejected this Court's Holding that Strict Scrutiny Applies to the Corporate Ban.

The Montana Supreme Court also refused to apply this Court's First Amendment strict-scrutiny analysis to Montana's Ban. *Citizens United* was unequivocal in requiring strict scrutiny of both the corporate ban and the PAC-option: "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" 130 S.Ct. at 898 (citation omitted).

But the Montana Supreme Court held that, even though the MSSA and Champion Painting *corporations* could not make independent expenditures, the availability of other speech options (PAC or individual) meant that "the statute has no or minimal impact" on them so "the State is not required to demonstrate a compelling interest to support [the Ban]." App.31a. The State "is required only to demonstrate the less exacting sufficiently important interest." App.31a.

Regarding WTP, the state court held that the Ban was "narrowly tailored," because "WTP can still speak through its own . . . PAC" (App.32a), and that Montana has "compelling interests" (App.32a). This terminology makes it *seem* that the lower court applied this Court's First Amendment strict scrutiny, but it did not. True, the decision below recited that this Court requires "strict scrutiny" of "[l]aws that place severe burdens on fully protected speech" and "intermediate scrutiny" of "laws that place only a

minimal burden or that apply to speech that is not fully protected." App.24a. But at every opportunity, the state court downplayed the burden on the Corporations (because they had a PAC-option and an individual-speech option and because Montana PAC burdens are purportedly non-onerous), so *First Amendment* strict scrutiny was never applied. And the state court never even said that it was actually applying First Amendment strict scrutiny, nor did its analysis reflect the strictness of this Court's First Amendment strict scrutiny. Rather, the state court employed complaisant scrutiny, whatever the court called it.[3]

C. The State Court Rejected this Court's Holding that No Cognizable Interest Justifies Banning Corporate Independent Expenditures.

The Montana Supreme Court refused to abide by this Court's holding—as a matter of law—that *no*

[3] Confusingly, the Montana Supreme Court discussed the scrutiny required by *Montana* law (App.24-25a), while deciding the First Amendment claim. Since the state court never reached the state constitutional claim, the scrutiny required by *Montana* law was irrelevant. In so doing, the court never said that Montana law requires "strict scrutiny," saying only that a "compelling interest" is required: "Under Montana law the government must demonstrate a compelling interest when it intrudes on a fundamental right, and determination of a compelling interest is a question of law." App.25a (citation omitted). The state court did hold that the Ban "is narrowly tailored" (App.31-32a), though it never said that Montana law required that. But it is not the labels that the court below used that are determinative, but the substance of its analysis.

interest was sufficiently compelling to justify banning corporate independent expenditures. *See Citizens United*, 130 S.Ct. at 904-11. As Justice Nelson declared in dissent: "The Supreme Court in *Citizens United* . . . rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a 'Made in Montana' sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute." App.84a. Justice Nelson then moved systematically through proffered and possible interests, showing the majority how each failed as a matter of law. App.41-49a, 54-62a.

1. Preserving the Integrity of the Electoral Process.

The Montana Supreme Court asserted that Montana has a compelling interest in preventing corruption or its appearance, i.e., "a clear interest in preserving the integrity of its electoral process" (App. 16a), for which it cited Montana's history of "corrupt practices and heavy-handed influence asserted by the special interests controlling Montana's political institutions" (App.44a). The state court acknowledged that the Anaconda Company, which the court said had dominated Montana politics in the late 1800s and early 1900s, was no longer in control. App.21a. But it tried to show that the threat later endured because "the Anaconda Company maintained controlling ownership of all but one of Montana's major newspapers until 1959." App.20a. However, Montana specifically excludes from the Ban "the cost of any bona fide news story, commentary, or editorial dis-

tributed through . . . any . . . newspaper," Mont. Code Ann. 13-1-101(11)(b), so it cannot now claim that corporate newspaper expenditures is a form of corruption the Ban seeks to prevent.

This is not the first time that Montana has tried to use events of over a century ago to justify its corporate ban. In *Citizens United* itself, Montana presented the Anaconda scare through an *amicus* brief. The Montana Attorney General (a party in the present case) filed an amici curiae brief for several states arguing that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should not be overruled based, in part, on Montana's history with Anaconda. Br. Amici Curiae of Montana et al. at 7, *Citizens United*, 130 S.Ct. 876. This Court cited the brief for demonstrating, however, that coupling legal corporate lobbying with a corporate independent-expenditure ban led to "the result . . . that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government." 130 S. Ct. at 907. This Court, therefore, found that Montana's law actually caused problems rather than correcting them.

Notably missing from the Montana Supreme Court's opinion is application of this Court's holding that *independent* expenditures pose *no* quid-pro-quo corruption risk. The state court recited that this Court "concluded that 'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.'" App.11a (*quoting Citizens United*, 130 S.Ct. at 909). But the court erroneously declared that this remains

an open question that could be resolved differently based on Montana's facts. App.13a.

However, this Court decided this issue *as a matter of law*, dismissing any possibility that it remained an open question. As this Court put it:

> A single footnote in [*First National Bank of Boston v.*] *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S.[765,] 788, n. 26 [(1978)]. 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."

Citizens United, 130 S.Ct. at 909. The final resolution of the issue as a matter of law was based on the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), that

> "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

Citizens United, 130 S.Ct. at 909 (*quoting Buckley*, 424 U.S. at 47).

And thus the Ban is unconstitutional:

> The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. *An outright ban on corporate political speech during the critical*

> *preelection period is not a permissible remedy*. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

130 S.Ct. at 911 (emphasis added).

Citizens United also expressly foreclosed broad theories of corruption as legitimate interests to limit corporate independent expenditures, limiting cognizable corruption to quid-pro-quo corruption. 130 S. Ct. at 909. In the process, it rejected other theories of corruption—antidistortion, leveling-the playing-field, gratitude, access, circumvention, and shareholder-protection. *Id.* at 905-12. The Montana Supreme Court, however, relied on broad theories of corruption, including problems with *contributions*, to justify the Ban.

2. Encouraging Voter Participation.

The Montana Supreme Court also found "an interest in encouraging the full participation of the Montana electorate" to support the Ban (App.16-27a), claiming that, if corporations are allowed to make independent expenditures, "the average citizen candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens . . . would be effectively shut out of the process" (App.27a). Not only is this asserted interest *not* cognizable quid-pro-quo corruption, it *is* a noncognizable level-the-playing-field interest that this Court has consistently rejected. *Buckley*, 424 U.S. at 48; *Citizens United*, 130 S.Ct. at 904; *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2825-26 (2011).

3. Protecting and Preserving a System of Elected Judges.

And finally, the Montana Supreme Court justified the Ban because of "a compelling interest in protecting and preserving its system of elected judges" and "a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence." App.27-31a. While judges are elected in Montana, and protecting the judicial system is vitally important, Montana's argument is a rehash of interests already rejected—antidistortion and equalizing interests. *See* App.27-31a. And Justice Stevens raised concerns about corporate and union independent expenditures in judicial elections in *Citizens United*, 130 S.Ct. at 968 (Stevens, J., dissenting), but this Court made no exception for judicial elections, nor any indication that the question remained open. In any event, *Citizens United* held that silencing speakers is not a permissible remedy for any perceived problems. *Id.* at 911.

The state court also quoted *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2266-67 (2009), for the proposition that "'Judicial integrity is . . . a state interest of the highest order.'" App.29a. But in *Citizens United*, this Court expressly addressed *Caperton* and held that it did not support a ban on corporate independent expenditures. 130 S.Ct. at 910 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").[4]

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[4] Moreover, this Court already addressed judicial elec-

(continued...)

The Montana Supreme Court's analysis conflicts with *Citizens United* at every vital analytical point and, as a result, its refusal to comply with the holding of *Citizens United* is not justified. This petition should be granted to correct this error.

III.

The Decision Below Creates Splits with Federal Circuit Courts.

The Montana Supreme Court's decision creates circuit splits on the controlling analytical issues in this case—that (1) only quid-pro-quo corruption can justify restricting core political speech and (2) independent expenditures pose no such cognizable corruption risk—with the Fourth, Seventh, Ninth, and D.C. Circuits.[5] These federal appellate courts simply

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[4] (...continued)
tions in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *White* held that "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Id.* at 781. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* at 787-88. *See also id.* at 794-95 (Kennedy, J., concurring) ("What [a state] may not do . . . is censor what the people hear as they undertake to decide . . . . The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.").

[5] *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 212-93 (4th Cir. 2008); *Wisconsin Right to Life State* (continued...)

followed *Citizens United* as precedent without trying to erroneously distinguish it, as the Montana Supreme Court did. This petition should be granted to resolve this circuit split.

IV.

This Case Presents an Important Federal Question that Should Be Decided Summarily.

This is a case of great public importance concerning four vital federal issues that should be decided summarily.

A. The Case Is of Great Public Importance Because It Involves Four Vital Federal Issues.

This case involves the vital federal issues of protection of core political speech protected by the First Amendment, respect for the rule of law, respect for stare decisis, and conservation of judicial resources.

First, this case involves the suppression of core

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[5] (...continued)
PAC v. Barland, 664 F.3d 139, 153-54 (7th Cir. 2011); *Long Beach Chamber of Commerce v. Long Beach*, 603 F.3d 684, 694-98 (9th Cir. 2010); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-19 (9th Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010); *EMILY's List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009). *Accord Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 WL 850744, *3-4 (N.D. Ill. Mar. 13, 2012); *Republican Party of New Mexico v. King*, No. 11-CV-900, 2012 WL 219422, *7 (D.N.M. Jan. 5, 2012); *Yamada v. Kuramoto*, 744 F.Supp.2d 1075 (D. Haw. 2010); South Carolina State Ethics Commission, SEC AO2011-004. Moreover, as Justice Nelson noted in dissent below, "'[I]n 17 of the 24 states with laws affected by *Citizens United* decision, legislation has been introduced to amend the law.'" App.48a n.4 (citation omitted).

political speech protected by the First Amendment. If this Court had not granted a stay, Montana corporations would not enjoy the right to make independent political expenditures that corporations in federal elections and in other states enjoy. And absent a grant of certiorari and reversal of the decision below, they will not be able to exercise their free-speech rights guaranteed by the First Amendment. *See Citizens United*, 130 S.Ct. 876.

Second, this case involves disrespect for the Constitution, the rule of law, and this Court. If Montana is allowed to flout this Court's holdings in *Citizens United*, in such a willful and transparent fashion, respect for these important interests will be eroded. While parties to litigation may ask for reversal of precedent, and lower courts may invite reversal in dictum, lower courts must not be allowed to force reconsideration of precedent by refusing to follow the decisions of this Court.

Third, this case involves a failure to respect precedent and stare decisis. The Montana Supreme Court simply disagreed with the holdings of *Citizens United*, which it felt justified in disregarding it. But only this Court can overturn its own precedent and then only when permitted under the doctrine of stare decisis.

Finally, this case poses the prospect of considerable litigation if Montana is allowed assert an as-applied exception to First Amendment protection for corporate political speech. Frankly, every State thinks it is as "special" as Montana does. But this Court, in *Citizens United*, rejected "case-by-case determinations," where "archetypical political speech

would be chilled in the meantime." 130 S.Ct. at 892. And if Montana's argument—that independent expenditures somehow operate differently in Montana because of Montana's history—were countenanced, there would be a flood of cases with states arguing how horribly corrupt they have been, or are, how big or small they are, and how rural or urban they are in an effort to stifle speech in their own realms.

Illinois recently made just such an as-applied argument. *Personal PAC*, No. 12-CV-1043, 2012 WL 850744 (N.D. Ill. Mar. 13, 2012). In defending limits on contributions to independent-expenditure-only political committees, Illinois argued that its experience with corruption meant that independent expenditures could cause corruption there. *Id.* at *4.[6] The *Personal PAC* court, however, refused "to study Illinois' political history," because "'this is a legal issue, and resolving it does not require an evidentiary record.'" 2012 WL 850744, at *4 (*quoting Wisconsin Right to Life State PAC*, 664 F.3d at 151). The court said it could not "modify the rulings of the Supreme Court or the Seventh Circuit." *Id.* (*citing* Justice Ginsburg's statement in the stay order in the present case that the opinion below did not follow *Citizens United*). It concluded on a note that addresses the scope of this Court's consideration of this case:

> As Defendants acknowledge, "If the Supreme Court grants a writ of *certiorari* in the Mon-

[6] *See also* Jon Hinck, "Maine Bill Would Challenge *Citizens United* Ruling," The Huffington Post (Jan. 24, 2012) (available at http://www.huffingtonpost.com/jon-hinck/maine -bill-would-challeng_b_1228186.html (author introduced bill to follow Montana Supreme Court).

> tana case, the parameters of *Citizens United* as applied to political climates of individual states may be explained." Until that time, we, like the Montana Supreme Court, are bound to follow the Supreme Court's decisions and repeat that, even in Illinois, independent expenditures do not lead to corruption.

Id.

As a result, this petition should be granted.

B. The Decision of the Montana Supreme Court Should Be Summarily Reversed.

Furthermore, the decision of the Montana Supreme Court should be summary reversed.

First, just last term, *Citizens United* was twice-briefed and twice-argued because this Court asked for supplemental briefs addressing "whether [this Court] should overrule either or both *Austin*[, 494 U.S. 652,] and the part of *McConnell*[*v. FEC*, 540 U.S. 93 (2003),] which addresses the facial validity of 2 U.S.C. § 441b." *Citizens United*, 130 S. Ct. at 888. Montana filed an amici curiae brief with other states arguing that the ban on corporate independent expenditures should be upheld. *See supra* at 15. Given that special care, there is no reason to replow this recently, heavily plowed ground.

Second, a state court must not be allowed to force this Court into yet another round of briefing and oral argument on a recently decided issue by refusing to follow controlling precedent. This Court, not inferior courts, should decide when reconsideration of a decision is warranted.

Third, stare decisis has an especially strong effect

here in light of the antiquity of the precedent which supports *Citizens United*'s core analysis and the controversy that the decision has engendered. "[T]he antiquity of the precedent" counsels against overruling a precedent, *Citizens United*, 130 S.Ct. at 912, and that criterion is met by the antiquity of the precedent that supports *Citizens United* core analysis—that the independence of independent expenditures makes any quid-pro-quo-corruption risk noncognizable—which dates back to *Buckley*. *Citizens United* at 908-09 (*citing Buckley*, 424 U.S. at 47).

Furthermore, the considerable controversy regarding *Citizens United* and the public pressure to overturn it bring into play another doctrine, explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992):

> [W]hen the Court decides a case . . . to resolve [an] intensely divisive controversy[,] . . . its decision requires . . . precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [O]nly the most convincing justification . . . could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

Id. at 866-67.

Among those who have been critical is the Presi-

dent. See, for example, the President's 2010 State of the Union Address:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.[7] (Applause.) I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. (Applause.) They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.

http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

However, this Court has already taken the course advocated here regarding this controversy by subsequently summarily affirming *Bluman v. FEC*, 800 F.Supp.2d 281 (D.D.C. 2011), which held that foreign nationals legally in the United States could be

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[7] Though the President decried the corporate speech liberty that now allows corporations to contribute unlimited sums to super PACs, *see, e.g.*, FEC, Advisory Opinion 2010-11 (Commonsense Ten) (independent-expenditures-only PACs may receive unlimited contributions, including from corporations and unions), he is now reported to be encouraging support for a super PAC supporting him. *See* Dan Eggen, "Obama gives blessing to a super PAC," The Washington Post (Feb. 6, 2012) (available at http://www.washingtonpost.com/politics/obama-in-a-switch-endorses-pro-democratic-super-pac/2012/02/06/gIQAVqnWvQ_story.html).

banned from making political contributions and independent expenditures. *Bluman v. FEC*, 132 S.Ct. 1087 (2012).

Fourth, there is nothing in the lower court's refusal to be bound by this Court's decision in *Citizens United* that establishes any of this Court's criteria for overruling precedent, some of which are discussed above and which also include workability, the antiquity of the precedent, the reliance interests at stake, whether the decision was well reasoned, and whether "experience has pointed up the precedent's shortcomings." *Citizens United*, 130 S.Ct. at 912. That should not be surprising since these elements were just considered by this Court in deciding *Citizens United* itself. However, these factors are considered briefly in turn.

Citizens United has not proven unworkable, as evidenced by those who have exercised their liberty under it. Lower courts, except for the decision below, have uniformly followed this Court's holding, and legislatures and government agencies, with few exceptions, have implemented the protections of *Citizens United*.

Regarding antiquity, the long history of this Court's holdings on this core issue, *see Buckley*, 424 U.S. at 47, makes the analytical essence of *Citizens United* old, though its reaffirmation in *Citizens United* is recent, which, coupled with the high controversy over the case, raises the bar for reconsideration.

Regarding reliance, many corporations and labor unions have already relied on *Citizens United* and engaged in core political speech protected by the

First Amendment.

Regarding sound reasoning, on the core issue in *Citizens United*—whether independent expenditures can cause quid-pro-quo corruption—this Court has consistently said that they do not. *See Buckley*, 424 U.S. at 47; *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 615 (1996) (plurality); *McConnell*, 540 U.S. at 121 ("we were not persuaded [in *Buckley*] that independent expenditures posed the same risk of real or apparent corruption as coordinated expenditures."); *id.* at 191 n.74 (same).

Nor has experience pointed up any shortcomings with *Citizens United*. Justice Ginsburg, joined by Justice Breyer, however, suggests there is:

> Montana's experience, and experience elsewhere since this Court's decision in *Citizens United* . . . make it exceedingly difficult to maintain that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption." . . . A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway.

American Tradition Partnership v. Bullock, No. 11A762, 2012 WL 521107, at *1 (U.S. Feb. 17, 2012) (statement appended to order granting stay).

The Montana Supreme Court's decision was not based on whether "experience has pointed up the precedent's shortcomings." It claimed that Montana's history before *Citizens United* justified ignoring the

holding of that case. Justices Ginsburg and Breyer do not refer to Montana's as-applied argument based on the old Anaconda experience. They at least refer to the relevant experience, "since" *Citizens United*.

However, this experience cannot provide a justification to overturn *Citizens United*. This Court rejected first in *Buckley* the notion that political spending, even if "huge," is inherently corrupting 424 U.S. at 48-49 (no equalizing interest), 57 ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."). And certainly this Court in *Citizens United* expected more political spending because it overturned a Ban on political spending by thousands upon thousands of corporations and labor unions in federal election.

In addition, most of the "huge sums" being spent by super PACs are not from corporations but from individuals, so it cannot be tied to *Citizens United*. A *Time* article reports that the predictions of campaign-finance reformers have not materialized:

> [T]he disclosure reflects a broader post-*Citizens United* development. Campaign finance-reform advocates have warned that unlimited donations from corporations, newly empowered to give limitless sums, would have a corrupting influence on American democracy. In many ways, their worst fears have not materialized: the overwhelming majority of donations to super PACs disclosed so far have come from a new class of celebrity super-donor.

Adam Sorensen, "Among Romney Super PAC's Corporate Donors, Big Names Not All Easy to Spot,"

Time (Feb. 22, 2012) (available at http://swampland.time.com/2012/02/22/among-romney-super-pacs-corporate-donors-big-names-not-all-easy-to-spot/). The *Washington Times* makes the same point: "The onslaught of million-dollar checks from major corporations feared by the critics of the Supreme Court's Citizens United ruling largely has never materialized." Luke Rosiak, "Corporations make first political donations—and it's not through checks," The Washington Times (Feb. 20, 2012) (available at http://www.washingtontimes.com/news/2012/feb/20/corporations-first-political-donations-in-kind/?page=all).[8] So any "huge sums" are not from corpo

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[8] *See also* Anna Palmer & Abby Phillip, "Corporations don't pony up for super PACs," POLITICO (Mar. 8, 2012) ('[P]ublicly traded companies have shied away from outside groups—giving less than one half of a percent of all the contributions raised by the most active super PACs.") (available at http://www.politico.com/news/stories/0312/73804.html); Paul Blumenthal, "Super PACs $500,000-Plus Donors Account For Majority Of Money," The Huffington Post (Mar. 14, 2012) (Of "the 51 donors who have given at least $500,000," there were 41 individuals, 9 corporations, 7 unions, 1 trade group, and 2 were "a trade group and a nonprofit funding their own super PACs.") (available at http://www.huffingtonpost.com/2012/03/14/super-pacs-donors-500000-dollars_n_1339169.html). Corporate reticence to contribute to super PACs may be explained by the wish to avoid a backlash. *See* "Coalition Takes Aim at Corporate Donors to Super PACs," The Wall Street Journal (Mar. 12, 2012) ("[A]n influential cross-section of groups including Common Cause and labor unions" formed coalition "to apply pressure on companies that use corporate money.") (available at http://blogs.wsj.com/washwire/2012/03/12/coalition-

rations but from individuals, making those sums irrelevant to reconsideration of *Citizens United*, which was about *corporate* independent expenditures. Individuals could already expend unlimited sums on independent expenditures before *Citizens United*, *see, e.g.*, *Leake*, 525 F.3d at 292-96, and basing the constitutionality of corporations' free speech on what individuals do would be illogical and unconstitutional.

For another thing, "huge sums" being spent for *independent expenditures* do not involve any cognizable corruption. Only transactions involving a quid-pro-quo-corruption risk pose a cognizable corruption risk. *Citizens United*, 130 S.Ct. at 909-10. Influence, gratitude, or access are not corruption. *Id.* at 910-11. Nor is there any corruption—anti-distortion or other—inherent in the corporate form. *Id.* at 904-08. And there is no evidence that there is a problem with purportedly independent expenditures not actually being independent, as required under federal law and FEC rules.[9] If they were in fact not independent,

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[8] (...continued)
takes-aim-at-corporate-donors-to-super-pacs/).

[9] Whether an expenditure is for a "coordinated communication" is governed by 11 C.F.R. 109.21, which sets out precise content and conduct standards that must both be met for a communication to be deemed a coordinated communication. There are specific provisions governing the use of common vendors, former employees, or independent contractors, along with a "safe harbor" by use of a firewall to permit some of these entities to be used, for example, by candidates and advocacy groups without coordination of the
(continued...)

which is a factual and enforcement issue, then they would rightly be regulated as *contributions* subject to contribution limits to deal with any quid-pro-quo-corruption risk.

Finally, consider what the Montana Supreme Court relied on as justifying facts, and what Justices Ginsburg and Breyer suggested as relevant facts. Is this Court going to limit the right of speakers to engage in core political speech because they spend huge sums in doing so? Or because the state they happen to be in had corruption problems, or a corporation employed a lot of people, over a century ago? Or because the same corporation owned a lot of newspapers in the state in the 1950s? Or because the state they happen to be in has few people, a tradition of low-cost elections, or considerable candidate-voter contact?

Examining some of the implications of these arguments shows their problems and error. If free-speech rights depend on population density, then those in large urban areas have more First Amendment protection than those in suburban and rural areas. If free-speech rights depend on how much candidates spent to contact voters in the past, then would-be speakers are at the mercy of past candidate spending

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[9] (...continued)
communication. *Id.* Despite considerable speculation in the media about possible coordination between candidates and super PACs, there has not been evidence of actual violation of these rules that are complex and likely not understood by non-specialists. In any event, if a communication is coordinated under the cited provision, it is treated as an in-kind contribution.

for their speech rights. If free-speech rights depend on whether long-past governments have been corrupt, then present-day speakers are at the mercy of things they cannot change and deprived of rights for things they did not do. If engaging in legal, protected speech can be corrupting if one does a lot of it, what does it mean to have a right to speak, and who decides when core political speech becomes too much for the government to permit?

In sum, none of this Court's criteria for reconsidering precedents justifies reconsidering *Citizens United*. And reconsideration based on the facts proposed for limiting core political speech would pose grave constitutional dangers to free speech and association. Consequently, summary reversal is appropriate.

The State, in its Opposition to the Corporations' stay application, argued against summary reversal, based on "due respect for . . . sister supreme courts in the states, all of whom are also 'bound by Oath or Affirmation, to support this Constitution.'" Opp'n 9-10 (*quoting* U.S. Const. art. VI, ¶ 3). And the State argued that the Corporations' "claim that the decision below is 'an obvious, blatant disregard of [the court's] duty to follow this Court's decisions,'" "can only be true if the facts are irrelevant." Opp'n 10 (citation omitted).

That is precisely the point. The facts *are* irrelevant. The core holding of *Citizens United*, reaffirming *Buckley*, is that the independence of independent expenditures means that they pose no cognizable quid-pro-quo-corruption risk and no other cognizable governmental interest justifies banning corporate

independent expenditures. *See Citizens United*, 130 S.Ct. at 908-11. Thus, the Montana Supreme Court's decision constitutes an attempt to force the reconsideration of *Citizens United* simply because it disagrees with the opinion. That effort should be rejected summarily. "Summary reversal is a strong, clear statement of the majority's commitment to its prior ruling, and the impropriety of the Montana Supreme Court's failure to follow the decision's clear implications." Tom Goldstein, "The Supreme Court, Citizens United II, and the November Election," SCOTUSblog (Feb. 18, 2012) (available at http://www.scotusblog.com/2012/02/the-supreme-court-citizens-united-ii-and-the-november-election/). *See Kaup v. Texas*, 538 U.S. 626 (2003) (per curiam); *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam); *New Mexico v. Reed*, 524 U.S. 151 (1998) (per curiam); *Greene v. Georgia*, 519 U.S. 145 (1996) (per curiam); *Trevino v. Texas*, 503 U.S. 562 (1992) (per curiam). *See also Ashland Oil, Inc. v. Tax Commissioner of West Virginia*, 497 U.S. 916 (1990) (per curiam); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (per curiam); *Connaly v. Georgia*, 429 U.S. 245 (1977) (per curiam).

Thus, this case is one of great importance because it involves four vitally important issues. As a result, the petition should be granted and the decision below summarily reversed.

Conclusion

"[I]f the Supreme Court countenances [the Montana Supreme] Court's approach . . . there shortly will be nothing left of *Citizens United* at the state

level. . . . [T]he . . . decision will be 'state-lawed' into oblivion." App.48a (Nelson, J., dissenting). To avoid this result, the Court should grant this petition.

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