

No. 11-1179

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IN THE  
**Supreme Court of the United States**

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AMERICAN TRADITION PARTNERSHIP, INC., *ET AL.*,  
*Petitioners*,  
v.

STEVE BULLOCK, ATTORNEY GENERAL  
OF MONTANA, *ET AL.*,  
*Respondents*.

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

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BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR  
JUSTICE AT N.Y.U. SCHOOL OF LAW AND  
CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF  
RESPONDENTS

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## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* include the Brennan Center for Justice at N.Y.U. School of Law, a nonpartisan public policy and law institute focused on the fundamental issues of democracy and justice, and law professors with expertise in constitutional and election law.<sup>2</sup> Although *amici* hold divergent views on many issues, they share a common concern with the real and perceived influence of special interest money on American elections.

## **SUMMARY OF ARGUMENT**

In a long and unbroken chain of cases, this Court has held that the need to curb real and perceived corruption justifies the regulation of money in politics. In *Buckley v. Valeo*,<sup>3</sup> it made clear that assessing whether any given rule adequately promotes these interests is an inherently fact-bound inquiry. Since then, this Court has repeatedly confirmed that whether, and in what

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<sup>1</sup> The parties have consented to the filing of this brief, and letters of consent have been submitted to the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, made a monetary contribution to its preparation or submission.

<sup>2</sup> A list of *amici* law professors is found in the Appendix. This brief does not purport to convey the position of N.Y.U. School of Law.

<sup>3</sup> 424 U.S. 1 (1976).

ways, corruption or perceived corruption flow from spending that is uncoordinated with a candidate are questions of fact, not law.

For the reasons detailed by the Montana Supreme Court and Respondents, the unique facts of this case amply support the constitutionality of Montana’s Corrupt Practices Act and its restrictions on corporate electioneering. Accordingly, the Court should deny the petition and let the Montana court’s decision stand.

Should the Court grant *certiorari*, however, it should give this matter plenary review and reject Petitioners’ request for summary disposition. To the extent that the Montana court’s decision is deemed in conflict with any portion of *Citizens United v. FEC*,<sup>4</sup> the Court should clarify that a developed factual record is essential in resolving such an issue. Plenary review here would allow the Court to consider new and unprecedented developments in the realm of money in politics that have taken shape since it decided *Citizens United*. These ongoing developments—publicly chronicled and highlighted below—lead inexorably to the conclusion that fundraising and spending by independent expenditure committees can, in fact, give rise to corruption and the appearance thereof.

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<sup>4</sup> 130 S. Ct. 876 (2010).

## ARGUMENT

### I. WHETHER UNCOORDINATED POLITICAL SPENDING CAN GIVE RISE TO REAL OR APPARENT CORRUPTION IS A QUESTION OF FACT, NOT LAW.

#### A. Montana has dual compelling interests in preventing corruption and the appearance of corruption.

As this Court recently affirmed, States have “compelling interest[s] in combating corruption and the appearance of corruption” by regulating money in politics,<sup>5</sup> and courts must “give weight” to governmental efforts to “dispel either the appearance *or* the reality of [improper] influences.”<sup>6</sup> Preventing the appearance of corruption is an interest “of almost equal concern”<sup>7</sup> because if government lacks the “authority to regulate the appearance of undue influence[,] [] ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”<sup>8</sup> Simply put, avoiding the

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<sup>5</sup> *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011). See also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347-73 (2009).

<sup>6</sup> *Citizens United*, 130 S. Ct. at 911 (emphasis added).

<sup>7</sup> *Buckley*, 424 U.S. at 27; accord *McConnell v. FEC*, 540 U.S. 93, 143 (2003), overruled in part by *Citizens United*, 130 S. Ct. at 913.

<sup>8</sup> *McConnell*, 540 U.S. at 144 (citation omitted).

appearance of corruption is “critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”<sup>9</sup>

When campaign finance laws are carefully tailored to combat real and perceived corruption, this Court has upheld them, even when they burden protected activity.<sup>10</sup> Outside the campaign finance context, too, the Court has relied on the interest in safeguarding public confidence in government to sustain a range of election laws that burden speech and associational rights—even in the absence of direct evidence that electoral integrity has been compromised.<sup>11</sup> Thus, Montana’s interest in

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<sup>9</sup> *Buckley*, 424 U.S. at 27 (citation omitted).

<sup>10</sup> See, e.g., *McConnell*, 540 U.S. at 142- 184 (upholding restrictions on solicitation, receipt and use of so-called “soft money”); *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding corporate contribution ban); *Buckley*, 424 U.S. at 29 (upholding candidate contribution limits). Cf. *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (finding that ban on foreign political spending was justified by compelling interest in curbing foreign influence over U.S. elections), *aff’d*, 132 S. Ct. 1087 (2012).

<sup>11</sup> In *Purcell v. Gonzalez*, for example, the Court deemed it appropriate to consider voters’ “fear” of voter fraud, even in the absence of evidence of such fraud, because “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” 549 U.S. 1, 4 (2006). Similarly, in *Crawford v. Marion County Election Board*, the Court credited the “independent significance” of ensuring public confidence in elections in upholding an Indiana voter identification law, despite the lack of evidence of impersonation fraud. 553 U.S. 181, 197 (2008). See also *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010); *U. S. Civil*

ensuring public confidence in government—by avoiding even the appearance of corruption—provides compelling justification for the sensible regulation of political spending.

**B. Whether and how independent spending gives rise to corruption or its appearance are questions of fact, not law.**

The Court has repeatedly recognized that whether independent political spending gives rise to real or perceived corruption is a question of fact, not law. In *Buckley*, the Court examined the limited record evidence before concluding that “the independent advocacy restricted by [this] provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>12</sup> The Court left open the possibility that a sufficient factual showing could justify the regulation of outside spending. After *Buckley*, the Court repeatedly affirmed that evidence *could* establish that outside spending threatens to corrupt government or create a widespread belief in corruption.<sup>13</sup>

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*Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

<sup>12</sup> 424 U.S. at 46 (emphasis added).

<sup>13</sup> See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 787 n.26 (1978) (“Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures.”); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 498 (1985) (evaluating record evidence to determine whether “an exchange of political favors

A fact-bound examination of whether outside spending can raise corruption concerns is consistent with the Court’s evaluation of other campaign finance regulations. In *Randall v. Sorrell*, for example, the Court scrutinized the impact of Vermont’s contribution limits on the political process and First Amendment rights of voters, candidates and political organizations.<sup>14</sup> In *McConnell v. FEC*, the Court parsed over 100,000 pages of evidentiary record to assess whether the Bipartisan Campaign Reform Act (“BCRA”) was properly tailored to fight the practice of “peddling access to federal candidates and officeholders in exchange for large soft-money donations.”<sup>15</sup> These cases underscore that when government seeks to regulate money in politics, there must be specific factual support to justify any infringement on First Amendment rights. Courts, in turn, must assess the State’s asserted interests in light of the record presented.

In *Citizens United*, the Court relied on the lack of record evidence showing a need for the corporate electioneering restrictions it ultimately struck down.<sup>16</sup> But it reiterated the appropriateness of considering factual evidence of corruption arising from outside spending, observing that, “[i]f elected officials succumb to improper influences from

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for uncoordinated expenditures” was established or only a hypothetical possibility).

<sup>14</sup> See 548 U.S. 230, 248-62 (2006).

<sup>15</sup> 540 U.S. at 150.

<sup>16</sup> See 130 S. Ct. at 910.

independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”<sup>17</sup> The Court did not need to determine whether independent spending could ever pose corruption threats to resolve the question presented in the case—whether independent spending by corporate entities could be regulated differently than that same spending by natural persons.

Elsewhere in *Citizens United*, however, the Court stated that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>18</sup> Though the statement was a factual conclusion based on the record facts (or lack thereof), some lower courts—and Petitioners—have read this statement in isolation, and have improperly relied upon it to resolve this issue as a matter of law.<sup>19</sup> If the Court grants *certiorari*, it should clarify that issues of corruption and its appearance are questions of fact, not law.

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<sup>17</sup> *Id.* at 911.

<sup>18</sup> *Id.* at 909.

<sup>19</sup> See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (premising its holding upon this sentence).

## **II. SPENDING BY INDEPENDENT GROUPS CAN GIVE RISE TO CORRUPTION AND PUBLIC PERCEPTIONS OF CORRUPTION.**

In fact, outside groups can and do operate as vehicles to buy and sell access—and their fundraising and spending can raise concerns identical to those flowing from large campaign contributions and soft money. There is troubling evidence that spending by outside groups has long been used to coerce lawmakers into specific legislative results.<sup>20</sup> Officeholders are well aware which interests have threatened to spend large sums to defeat them—or which votes will trigger similarly vast expenditures in support. Such signaling itself poses risks of corruption and its appearance.

Now, new and rapidly unfolding developments since *Citizens United* have sharply worsened corruption risks. The degree of tacit coordination between candidates and nominally independent groups goes far beyond what this Court has previously considered when assessing regulations on third-party spending—and is analogous to the

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<sup>20</sup> See, e.g., *N.C. Right to Life v. Leake*, 525 F.3d 274, 335-36 (4th Cir. 2008) (Michael, J., dissenting) (describing independent group's threat of broadcasting negative campaign commercials to coerce lawmakers into particular legislative actions); THOMAS MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 79 (2012) (quoting U.S. Senator describing threat of outside independent groups "capable of spending a fortune to make anybody who disappoints them regret it" being used to coerce decision-making).

connections between candidates and party committees presented to the Court in *McConnell*. Because these closely intertwined entities now receive unlimited contributions, the new campaign landscape offers startling opportunities for corrupt dealings. Public confidence in our country's elections and government has been severely undermined.

Most notably, and as discussed below, this election season has been marked by a disturbing new phenomenon—billionaires seeming to sponsor presidential candidates like racehorses. In the most publicized example, a political committee dedicated to Newt Gingrich's election received almost all of its money from casino owner Sheldon Adelson and his family, who donated over \$20 million.<sup>21</sup> This means that one individual, under multiple federal investigations, effectively funded nearly the entirety of a presidential campaign. Just eighteen months after *Citizens United*, the new reality portends tremendous risks of corruption and its appearance in this election and those to come.

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<sup>21</sup> Aaron Blake, *Adelsons Give Gingrich Super PAC Another \$5 Million*, WASH. POST, THE FIX (Apr. 23, 2012), [http://www.washingtonpost.com/blogs/the-fix/post/adelsons-give-gingrich-super-pac-another-5-million/2012/04/23/gIQAlqNmbT\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/adelsons-give-gingrich-super-pac-another-5-million/2012/04/23/gIQAlqNmbT_blog.html).

**A. *Citizens United* has been extended to create groups that are inextricably connected with candidate campaigns, but allowed to solicit and accept unlimited contributions.**

As noted, some lower courts have interpreted *Citizens United* as holding that spending by ostensibly outside groups is *per se* non-corrupting, and that record evidence to the contrary is irrelevant.<sup>22</sup> From this misunderstanding, these courts extended *Citizens United* to invalidate funding restrictions—including limits on the size of contributions—for allegedly independent groups. This result significantly expanded *Citizens United*—which expressly declined to address the constitutionality of campaign contribution limits.<sup>23</sup> It led to the creation of “super PACs”: federal political committees that can collect unlimited donations from individuals, corporations, and unions, so long as their expenditures do not meet the

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<sup>22</sup> See, e.g., *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Thalheimer v. San Diego*, 645 F.3d 1109, 1117-21 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *SpeechNow.org*, 599 F.3d at 694.

<sup>23</sup> As *Citizens United* left intact the law concerning contribution limits, *McConnell* is properly read as the controlling precedent on this issue. *McConnell* expressly affirmed the facial constitutionality of applying contribution limits to political action committees, without exception for committees engaged solely in uncoordinated spending. 540 U.S. at 152 n.48.

Federal Election Commission’s highly technical coordination definition.<sup>24</sup>

While super PACs were freed from contribution limits by simply declaring themselves “independent,” this new breed of political committee is anything but genuinely autonomous. Despite this Court’s repeated explanation that independent expenditures must be truly and wholly independent—made “without any candidate’s approval (*or wink or nod*)”<sup>25</sup>—the FEC has failed to promulgate regulations that “rationally separate[] election-related advocacy from other activity” since BCRA was enacted in 2002.<sup>26</sup> As a result, under longstanding regulations, federal candidates can closely cooperate with a supportive super PAC without producing any “coordinated communications” or otherwise “coordinating” with that candidate’s campaign.

Moreover, since *Citizens United*, the FEC has deadlocked on several opinions concerning the meaning of coordination and independence in specific circumstances. Most astonishingly, the FEC failed to reject a super PAC’s request that proposed television advertisements not be deemed “coordinated communications,” even though the ads

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<sup>24</sup> See FEC, Advisory Opinion, 2010-11, July 22, 2010, at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>.

<sup>25</sup> *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (1996) (emphasis added).

<sup>26</sup> *Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005). See also *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008).

would be “*fully coordinated* with incumbent Members of Congress facing re-election” insofar as candidates would help write the scripts and appear in the commercials.<sup>27</sup>

Today’s political committees are thus wholly distinct from the organizations this Court has seen in the past—such as Massachusetts Citizens for Life, the Michigan Chamber of Commerce, and Citizens United itself—which have truly independent issue agendas and have continued existence apart from any candidates they support. Modern political realities raise novel concerns of corruption that defy earlier regulatory assumptions.

The lack of any mechanism to ensure that groups claiming independence are actually operating “without any candidate’s approval (or wink or nod)”

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<sup>27</sup> See FEC, Request by American Crossroads, 2011-23 (2011), <http://saos.nictusa.com/aodocs/1188794.pdf> (emphasis added). TV commentator Stephen Colbert underscored the absurdity of this request:

We hope the Commission is able to begin with the Supreme Court’s definition of Non-Coordinated as “expenditures . . . made totally independently of the candidate and his campaign” . . . and end up with a ruling that allows outside groups to produce ads with the candidate’s cooperation, themes, and message. That will prove to our nation’s critics that America is a country that still makes something: strained rationalizations.

FEC, Comment by Americans for a Better Tomorrow, Tomorrow, 2011-23 (2011), <http://saos.nictusa.com/aodocs/1189017.pdf>

has led to the most egregious new development: the candidate-specific super PAC. Now, candidates for federal office, including every leading presidential candidate, have an affiliated super PAC acting as a *de facto* arm of their campaigns—an arm that accepts unlimited donations.

The result is a remarkable new world of campaign finance, in which large contributions from legislatively-interested parties—gifts that would plainly raise corruption concerns if directly handed to a candidate—are instead handed to “his” super PAC. Public concerns have mounted with each example of the close connections between candidates and “their” super PACs. At least four disturbing trends are clear:

***First***, candidate-specific super PACs exist for the sole purpose of aiding a candidate’s campaign and are operated by the candidate’s close friends and most trusted political advisors. Mike Toomey, co-founder and chief principal of Governor Rick Perry’s super PAC, Make Us Great Again, is Perry’s former chief of staff and co-owns a private island with a chief strategist for Perry’s campaign. Our Destiny PAC was created to support John Huntsman by the vice president of the family-owned Huntsman Corporation, and a former campaign official became principal strategist there—alongside Huntsman’s father and the family’s lawyer. Comparable connections exist within every candidate-specific super PAC.<sup>28</sup>

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<sup>28</sup> Priorities USA Action was formed by high-ranking White House staffers to support Obama. Charles Spies,

*Second*, candidates and their campaign staff appear at their super PACs' fundraising events and solicit funds for them. David Plouffe, a senior aide to President Obama's campaign, has repeatedly attended fundraisers for Priorities USA Action; members of Obama's cabinet have also said they will appear.<sup>29</sup> Similarly, on July 19, 2011,

Mitt Romney strode into a dining room above Central Park that was packed with dozens of his wealthiest supporters . . . . The event was not a fund-raiser for Mr. Romney's campaign, however, but for Restore Our Future . . . . [O]nly when Mr. Romney left the room did [a super PAC official] brief the donors on their plans: to raise and spend millions of dollars in unrestricted campaign donations—something

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Romney's CFO and chief counsel during his 2008 campaign, helped found Restore Our Future. Nick Ryan, one of the founders of Red, White and Blue Fund, is a former Santorum advisor. Rick Tyler, one of the principals of Newt Gingrich's super PAC, Winning the Future, was previously Gingrich's campaign press secretary. See Andy Kroll, *Candidates and the Totally Unrelated Super-PACs That Love Them*, MOTHER JONES (Jan. 20, 2012), <http://www.motherjones.com/mojo/2012/01/stephen-colbert-citizens-united-super-pac>.

<sup>29</sup> Michael Luo & Nicholas Confessore, *Top Obama Adviser to Appear at 'Super PAC' Meeting*, N.Y. TIMES, Mar. 2, 2012; Michael Beckel, *Fundraising Activities Are Limited, But Star Power Brings in the Bucks*, iWATCHNEWS.ORG (Feb. 13, 2012), <http://www.iwatchnews.org/2012/02/13/8139/four-cabinet-members-willing-help-democratic-super-pacs>.

presidential candidates are forbidden to do themselves—to help elect Mr. Romney president.<sup>30</sup>

Romney later sent senior campaign officials to serve as his surrogate at other super PAC fundraisers.<sup>31</sup> As he candidly stated: “We raise money for super PACs. We encourage super PACs. Each candidate has done that.”<sup>32</sup>

**Third**, candidates and their super PACs share vendors, consultants, messages, ad footage, and even airplanes. Romney’s campaign and Restore Our Future retained the same political consulting firm, hired the same event-planning company, and depended heavily upon the same New York City fundraiser.<sup>33</sup> Candidates’ campaigns and super PACs swap video footage for campaign advertisements: Perry used video clips from a commercial first aired by his super PAC,<sup>34</sup> while

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<sup>30</sup> Nicholas Confessore, *Lines Blur Between Candidates and PACs With Unlimited Cash*, N.Y. TIMES, Aug. 27, 2011.

<sup>31</sup> Jack Gillum, *Mitt Romney Aides To Speak at Super PAC Events*, HUFFINGTONPOST.COM (Feb. 10, 2012), [http://www.huffingtonpost.com/2012/02/10/mitt-romney-aides-super-pacs\\_n\\_1268936.html](http://www.huffingtonpost.com/2012/02/10/mitt-romney-aides-super-pacs_n_1268936.html).

<sup>32</sup> Phillip Rucker, *Mitt Romney Backs Super PACs, But Says Ads Should Be Accurate*, WASH. POST, Jan. 17, 2012.

<sup>33</sup> Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES, Feb. 26, 2012.

<sup>34</sup> Fredreka Schouten, *Outsider Campaign Spending Linked to GOP Candidate Surges*, USA TODAY, Dec. 19, 2011; Eliza Newlin Carney, *Close Super PAC Ties Draw Ire*, ROLL

Restore Our Future recycled a commercial from Romney's 2008 campaign.

Before Santorum suspended his presidential campaign, Foster Friess—the largest donor to Santorum’s super PAC—frequently traveled with the candidate on the campaign trail.<sup>35</sup> Given the close connections, Santorum’s suggestion that he had “no idea what Foster Friess [was] doing to *my super PAC*”<sup>36</sup> strained credulity. His use of the possessive in referencing the group more accurately reflected reality. Shortly after Santorum declared his candidacy over, the group announced that it was reorganizing to function in part as a “leadership PAC”—with Santorum at the helm.<sup>37</sup> Whatever semblance of independence Santorum and his super PAC once asserted instantly disappeared.

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CALL (Dec. 15, 2011), [http://www.rollcall.com/issues/57\\_75/Close-Super-PAC-Ties-Draw-Ire-211067-1.html](http://www.rollcall.com/issues/57_75/Close-Super-PAC-Ties-Draw-Ire-211067-1.html).

<sup>35</sup> Trevor Potter, *Five Myths About Super PACs*, WASH. POST, Apr. 15, 2012.

<sup>36</sup> Jackie Koszczuk, *Super PAC? What Super PAC?*, NAT'L JOURNAL (Feb. 9, 2012), <http://decoded.nationaljournal.com/2012/02/campaign-2012-weve-memorized-t.php> (emphasis added).

<sup>37</sup> Shushannah Walshe, *End of Campaign Means Rick Santorum Could Grab Hold of Super PAC*, ABC NEWS (May 10, 2012), <http://abcnews.go.com/blogs/politics/2012/05/end-of-campaign-means-rick-santorum-could-grab-hold-of-super-pac/>. A “leadership PAC” is a committee controlled by a politician but used to pay for political activity other than that politician's own election campaigns.

**Finally**, candidates and their super PACs plainly coordinate campaign strategies in order to maximize their returns. Winning Our Future officials acknowledged Gingrich signaled to them through public statements.<sup>38</sup> When Santorum's campaign ran out of cash in early February, his super PAC quickly bought campaign ads in states with upcoming primaries.<sup>39</sup> Repeatedly, as presidential hopefuls extinguished their own campaign war chests, they stood aside and let their super PACs take up the fight: "Republican presidential candidates . . . running low on campaign cash as a series of expensive primaries . . . loom[ed], [were left] increasingly reliant on a small group of supporters funneling millions of dollars in unlimited contributions into 'super PACs.'"<sup>40</sup>

In short, essentially every facet of these super PACs' operations is intertwined with the candidates' campaigns. Huge, multi-million dollar contributions from interested parties are legally given to a candidate's super PAC with the candidate's full knowledge, approval, and encouragement. Even if these groups fulfill a legalistic definition of

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<sup>38</sup> Peter Overby, *Super PACs, Candidates: Dancing Solo or Together*, NPR.ORG (Jan. 6, 2012), <http://www.npr.org/2012/01/06/144801659/a-look-at-super-pacs-and-political-coordination>.

<sup>39</sup> Dan Hartranft, *Super PAC Spending Boosts Santorum*, OPENSECRETS.ORG (Feb. 16, 2012), <http://www.opensecrets.org/news/2012/02/super-pac-spending-boosts-santorum.html>.

<sup>40</sup> Nicholas Confessore, *'Super PACs' Supply Millions as G.O.P. Race Drains Field*, N.Y. TIMES, Mar. 21, 2012.

independence, it is impossible to believe that their strategic plans—as well as countless specific decisions—are made without the candidates’ express or implicit consent. Certainly they create gratitude for the future. Super PAC contributions are therefore just as valuable to a candidate as a direct contribution: both directly advance the candidate’s chances of winning his election. In the words of Judge Richard Posner:

It . . . is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint. A super PAC is a valuable weapon for a campaign . . . ; the donors to it are known; and it is unclear why they should expect less *quid pro quo* from their favored candidate if he’s successful than a direct donor to the candidate’s campaign would be.<sup>41</sup>

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<sup>41</sup> Richard Posner, *Unlimited Campaign Spending—A Good Thing?*, The BECKER-POSNER BLOG (April 8, 2012), <http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spendinga-good-thing-posner.html>.

**B. Disproportionate spending by independent groups has given rise to concerns about corruption and its appearance.**

Perhaps the best evidence of the value to candidates of super PAC spending is the sheer amount of money these groups have raised and spent on their behalf. As of May 8, 2012, super PACs had raised over \$204 million and had spent over \$98.8 million to influence federal election results—six months from the general election.<sup>42</sup> In total, outside groups had already spent roughly \$121.2 million on federal campaigns, double the amount spent in the same period in 2008.<sup>43</sup>

In some months, candidate-specific super PACs collected more funds than the corresponding candidate's campaign.<sup>44</sup> In January of this year, for instance, donors gave Gingrich's campaign just \$5.5 million while Winning Our Future received over \$11 million. The same month, Romney's campaign

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<sup>42</sup> Ctr. for Responsive Politics, *2012 Outside Spending, by Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> (last visited May 8, 2012).

<sup>43</sup> Ctr. for Responsive Politics, *Outside Spending, Summary*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (last visited May 8, 2012).

<sup>44</sup> See, e.g., Peter Overby & Robert Benincasa, *2012 Money Race: Battling for the Bottom Line*, NPR.ORG, <http://www.npr.org/2011/10/16/141362972/the-money-race-romney-and-perry-top-gop-pack?ps=rs> (last updated April 20, 2012).

collected about \$6.5 million; Restore Our Future raised \$6.6 million.<sup>45</sup>

Super PAC spending has been credited as the deciding factor in several races, and has frequently eclipsed the amount spent by the campaigns themselves. In the Alabama and Mississippi primaries, for example, more than 90% of the television ads promoting presidential contenders were paid for by the candidates' super PACs.<sup>46</sup> Despite Gingrich's reliance on super PAC spending to win the South Carolina primary, Gingrich lambasted Romney for relying on super PAC spending in his subsequent victory over Gingrich in Florida—complaining that the pro-Romney super PAC outspent him five to one.<sup>47</sup>

These huge sums deployed to buy candidates' allegiance are threatening our democracy. There is ample evidence that such nominally independent spending is creating the appearance of corruption—

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<sup>45</sup> See *id.* at "January 2012."

<sup>46</sup> Greg Giroux, *Super-PAC Ads Dominate Republican Race in Alabama, Mississippi*, BLOOMBERG BUSINESSWEEK (March 13, 2012), <http://www.businessweek.com/news/2012-03-12/super-pacs-dominate-republican-ads-aired-in-alabama-mississippi-primaries>.

<sup>47</sup> See, e.g., Paul Blumenthal, *Newt Gingrich South Carolina Surge Boosted By Super PAC Spending Spree*, HUFFINGTONPOST.COM (Jan. 20, 2012), [http://www.huffingtonpost.com/2012/01/20/newt-gingrich-south-carolina-super-pac-spending\\_n\\_1219093.html](http://www.huffingtonpost.com/2012/01/20/newt-gingrich-south-carolina-super-pac-spending_n_1219093.html); Ashley Killough, *Gingrich: Romney Didn't Deserve Congrats*, CNN.COM (Feb. 3, 2012), <http://politicalticker.blogs.cnn.com/2012/02/03/gingrich-romney-didnt-deserve-congrats/>.

as well as the opportunity for improper dealings after Election Day.

*i. Super PACs have rendered campaign contribution limits meaningless.*

The Court has never questioned the compelling interest in fighting perceived and actual corruption through limits on direct contributions to candidates.<sup>48</sup> Campaign contribution limits—including a longstanding ban on corporate contributions—are thus an established aspect of federal campaign finance regulation. By giving donors an outlet to contribute *unlimited* sums in support of their favored candidate, super PACs have rendered these restrictions meaningless.

First, super PACs mock the ban on corporate and union campaign contributions. Months away from the general election, numerous corporations and unions have already donated more than \$1 million to candidate-specific super PACs; many more have made valuable, albeit lesser, contributions.<sup>49</sup> As of March, for example, Rooney Holdings—which has a \$53 million federal contract through a subsidiary business—had donated \$1 million to

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<sup>48</sup> See, e.g., *Citizens United*, 130 S. Ct. at 901-02.

<sup>49</sup> See Phil Hirschorn, *Super PAC Donors by the Numbers*, CBS NEWS (Mar. 22, 2012), [http://www.cbsnews.com/8301-503544\\_162-57402073-503544/super-pac-donors-by-the-numbers](http://www.cbsnews.com/8301-503544_162-57402073-503544/super-pac-donors-by-the-numbers).

Restore Our Future.<sup>50</sup> Other companies with federal contracts also learned to circumvent the ban on election spending by government contractors by donating millions to a candidate's super PAC.<sup>51</sup> Likewise, the Service Employees International Union, the nation's fastest growing labor union, gave \$1 million to Priorities USA Action.<sup>52</sup>

Moreover, super PACs have rendered illusory longstanding limits on individuals' contributions to candidates. Now, individuals who donate the legal maximum to their favored candidate can circumvent contribution limits by giving unlimited amounts to that candidate's super PAC. Wealthy donors have pounced upon this contribution limit work-around. For example, in 2011, 84% of Restore Our Future's donors had given the maximum donation to Romney's primary campaign—including five donors who each gave the super PAC \$1 million or more.<sup>53</sup>

President Obama has also benefitted from the largesse of big donors who maxed out with his

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<sup>50</sup> Ian Duncan & Matea Gold, *Federal Contractors' Parent Companies Donate to 'Super PACs'*, L.A. TIMES, Mar. 19, 2012.

<sup>51</sup> Jeremy Roebuck, *Super PAC Backing Romney Accepting Federal Contractors' Funds*, PHILA. INQUIRER, May 8, 2012.

<sup>52</sup> Ctr. for Responsive Politics, *Donors to Priorities USA Action, 2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/outspending/contrib.php?cmte=C00495861&type=A&cycle=2012> (last visited May 8, 2012).

<sup>53</sup> Paul Harris, *Super PAC Donors Often Max Out on Individual Donations, Study Finds*, GUARDIAN, Feb. 21, 2012.

campaign. An April 2012 analysis by the Sunlight Foundation identified multiple donors who contributed the maximum to Obama's campaign and then turned to giving to his super PAC; it concluded that "donors to both Obama and . . . Romney [are] beginning to move to super PACs as they hit their ceiling for giving to the White House hopefuls."<sup>54</sup>

*ii. Super PACs enable a small number of donors to wield corrupting influence over candidates.*

By enabling the circumvention of contribution limits, Super PACs allow a few wealthy donors to wield influence over candidates that raises serious corruption concerns. For instance:

- Over \$50 million in contributions to Republican super PACs during the current election came from "[a]bout two dozen individuals, couples or corporations."<sup>55</sup>
- More than 78% of the money donated to the super PACs active in the presidential election came from just 90 donors who each gave more than

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<sup>54</sup> Anupama Narayanswamy, *Presidential Campaign Donors Moving to Super PACs*, SUNLIGHT FOUND. BLOG (Apr. 26, 2012), <http://reporting.sunlightfoundation.com/2012/maxed-out-donors/>.

<sup>55</sup> Nicholas Confessore et al., *In G.O.P. Race, a New Breed of Superdonor*, N.Y. TIMES, Feb. 22, 2012.

\$100,000.<sup>56</sup> Over two-thirds of the money donated to super PACs came from donors who gave \$500,000 or more.<sup>57</sup>

- Donors giving \$1 million or more gave more than half of the money collected by super PACs since the beginning of 2011—almost \$110 million.<sup>58</sup> As of April, about 45 corporations, unions and individuals had donated more than \$1 million to their chosen super PAC.<sup>59</sup>

As noted, Sheldon Adelson and his wife gave Gingrich's super PAC more than \$20 million—4,000 times the legally allowable campaign contribution. Investor Foster Friess provided \$1.6 million to the Red, White and Blue Fund, including a donation immediately before Santorum's unexpected win in the Iowa caucuses.<sup>60</sup> Harold Simmons and his wife

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<sup>56</sup> Lee Drutman, *The Presidential Super PACs: Five Takeaways*, SUNLIGHT FOUND. BLOG (Feb. 1, 2012), <http://sunlightfoundation.com/blog/2012/02/01/superpac-takeaways>.

<sup>57</sup> Fredreka Schouten et al., *Big-bucks Donations to Super PACs Keep the GOP Race Going*, USA TODAY, Mar. 22, 2012.

<sup>58</sup> Fredreka Schouten & Christopher Schnaars, *Reports Show Hard-to-Track Donors Dominate Outside Giving*, USA TODAY, Apr. 22, 2012.

<sup>59</sup> *Id.*

<sup>60</sup> Hirschorn, *supra* note 49; Naureen Khan, *Santorum Donor in the Spotlight*, CBS NEWS (Feb. 10, 2012), [http://www.cbsnews.com/8301-503544\\_162-57374695-503544/santorum-donor-in-the-spotlight](http://www.cbsnews.com/8301-503544_162-57374695-503544/santorum-donor-in-the-spotlight).

have given astronomical amounts—including donations of between \$700,000 and \$1.1 million each—to four different super PACs supporting rival Republican presidential candidates, and Simmons and his holding company Contran Corporation gave a combined \$12 million to the Republican-supporting American Crossroads super PAC.<sup>61</sup>

There is little doubt that many of these big-dollar donors have specific interests that they hope to advance through their political influence. While Adelson pumped millions into Winning Our Future—and publicly expressed his willingness to contribute as much as \$100 million in total—his business was under investigation by multiple federal agencies.<sup>62</sup> Just as one might ask what motivated a litigant who spent \$3 million to elect a judge presiding over his case,<sup>63</sup> here observers might ask what it suggests “when a man under three federal investigations can plan on spending up to \$100 million . . . to elect the man with authority over the agencies conducting those investigations?”<sup>64</sup>

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<sup>61</sup> Julie Bikowicz, *Republican Donor Simmons Seeks Rule to Fill Texas Dump*, BLOOMBERG.COM (Apr. 5, 2012), <http://www.bloomberg.com/news/2012-04-05/republican-donor-simmons-seeks-rule-to-fill-texas-dump.html>.

<sup>62</sup> Albert R. Hunt, *Super PACs Fuel a Race to the Bottom*, INT'L HERALD TRIB., Mar. 5, 2012.

<sup>63</sup> See *Caperton*, 556 U.S. at 884.

<sup>64</sup> Rick Perlstein, *Why GOP Mega-Donor Sheldon Adelson Is Mad, Bad and a Danger to the Republic*, ROLLINGSTONE.COM (Apr. 10, 2012), <http://www.rollingstone.com/politics/blogs/national-affairs/why-gop-mega-donor-sheldon-adelson-is-mad-bad-and-a-danger-to-the-republic-20120410>.

Some potential donors have signaled they are withholding contributions to push specific policy outcomes. Earlier this month, major progressive donors, unhappy with the President's refusal to sign an executive order they supported, declared they would not donate to President Obama's super PAC. But they dangled the possibility that "big donations" to the super PAC—some "in the seven digits"—could be forthcoming if he changed his position.<sup>65</sup>

The risks of *quid pro quo* corruption stemming from these new campaign finance trends have seriously undermined public confidence in elections and democracy. There has been thunderous opposition to the opportunities for corruption created by super PACs in every type of media outlet, from network news programming to popular blogs.<sup>66</sup> Indeed, in the last year, the editorial boards of the country's major newspapers have repeatedly voiced

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<sup>65</sup> Greg Sargent, *Top Obama Donors Withholding Money Over Executive Order Punt*, WASH. POST, THE PLUM LINE (May 7, 2012), [http://www.washingtonpost.com/blogs/plum-line/post/top-obama-donors-withholding-money-over-executive-order-punt/2012/05/07/gIQAPKsl8T\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/top-obama-donors-withholding-money-over-executive-order-punt/2012/05/07/gIQAPKsl8T_blog.html).

<sup>66</sup> See, e.g., Richard Hasen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012), <http://www.politico.com/news/stories/0312/74336.html> ("Independent spending—and contributions funding independent spending—can indeed spawn corruption"); *Are Super PACs Living Up to Supreme Court's Intentions?*, PBS NEWSHOUR (Jan. 5, 2012), [http://www.pbs.org/newshour/bb/politics/jan-june12/superpac\\_01-05.html](http://www.pbs.org/newshour/bb/politics/jan-june12/superpac_01-05.html) (experts Bill Allison and Eliza Newlin Carney expressing concerns about corruption due to super PAC spending).

public concerns about super PACs' corrosive effects on our democracy.<sup>67</sup>

Public opinion polls, too, reveal widespread perceptions of corruption flowing from super PACs. An ABC News/Washington Post poll found that a bipartisan 69% of all Americans agree that super

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<sup>67</sup> See, e.g., *Corrupting Super PACs*, CHATTANOOGA TIMES FREE PRESS, Feb. 25, 2012 (“[G]ifts to super PACs . . . [are] corrupting our political system”); *Super PACs Are Overwhelming the Political Process*, FT. WORTH STAR-TELEGRAM, Jan. 28, 2012 (“Money doesn’t corrupt politicians or the political process? . . . History’s lesson is different.”); *The Power of Super PACs*, WASH. POST, Jan. 10, 2012 (“The risk of corruption in candidate-specific super PACs is as great as the size of supporters’ checkbooks.”); *The Broken System of Campaign Finance*, SAN DIEGO UNION-TRIBUNE, Dec. 6, 2011 (super PACs raise concerns about “the corrupting influence of money, or the appearance of such influence”); *Following the Money Won’t Be Easy in 2012*, PRESS DEMOCRAT (Santa Rosa, Calif.), Dec. 8, 2011 (“[T]he line has blurred to the point of irrelevance between candidates and so-called Super PACs.”); *Money Wins Elections*, PHILA. INQUIRER, Nov. 21, 2011 (citing pressure “to pay attention to big [super PAC] donors who want government contracts, approvals, or special legislation”); *The Campaign Jungle*, N.Y. TIMES, Nov. 13, 2011 (“Limits on spending used to prevent donations from becoming outright bribes, but now the limits are gone, and the path to corruption is clear.”); *Not So Super*, RALEIGH NEWS & OBSERVER, Oct. 14, 2011 (donors to super PACs are “betting on dividends” once candidates are elected); *Our View: Presidential Race Not the Place for Secret Donors*, USA TODAY, Aug. 22, 2011 (comparing use of super PACs and nonprofit corporations in election spending to organized crime); *Curbs on the ‘Super PACs,’* L.A. TIMES, July 23, 2011 (candidates appearing at super PAC fundraisers risks corruption).

PACs should be made illegal.<sup>68</sup> According to another, 67% of Americans—including majorities of Republicans, Democrats, and independents—said that there should be limits on the amount independent groups can spend on advertisements during a presidential campaign.<sup>69</sup>

A recent national survey found that 69% of Americans believe rules allowing “corporations, unions, and people to give unlimited money to Super PACs will lead to corruption.”<sup>70</sup> The public similarly believes that outside money can buy influence: 68% agreed that a company that spent \$100,000 to help elect a member of Congress would be able to later influence that member to change a vote on legislation, and 77% agreed that lawmakers are

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<sup>68</sup> Damla Ergun, *Seven in 10 Would Send Super PACs Packing*, ABC NEWS (Mar. 13, 2012), <http://abcnews.go.com/blogs/politics/2012/03/seven-in-10-would-send-super-pacs-packing>.

<sup>69</sup> Brian Montopoli, *Poll: Most Want Limits on Campaign Spending*, CBS NEWS (Jan. 18, 2012), [http://www.cbsnews.com/8301-503544\\_162-57361428-503544/poll-most-want-limits-on-campaign-spending](http://www.cbsnews.com/8301-503544_162-57361428-503544/poll-most-want-limits-on-campaign-spending). See also PEW RESEARCH CTR., SUPER PACS HAVING NEGATIVE IMPACT, SAY VOTERS AWARE OF ‘CITIZENS UNITED’ RULING 1 (2012), <http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf> (“Fully 65% of those who are aware of the new rules on independent expenditures say they are having a negative effect on the 2012 campaign.”).

<sup>70</sup> BRENNAN CENTER FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 2 (2012), [http://www.brennancenter.org/Super\\_PAC\\_survey](http://www.brennancenter.org/Super_PAC_survey).

more likely to act in the interest of big donors to super PACs than in the public interest.<sup>71</sup>

These deeply negative perceptions threaten democratic participation. One in four Americans say they are less likely to vote because of the outsized influence super PAC donors have on elected officials, and 41% say their votes do not matter very much because big super PAC donors have such greater influence.<sup>72</sup> Broad segments of the public believe the officials we elect in November will ignore the public interest to serve the few donors whose million-dollar contributions fueled the shadow campaigns that elected them.

## CONCLUSION

The Court should deny the petition for *certiorari*. If the Court grants *certiorari*, it should give this matter plenary review and clarify that, on a sufficient record, corruption concerns may justify regulating the campaign fundraising and spending of outside groups.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 3.

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