No. 11-1179

In The Supreme Court of the United States

AMERICAN 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

BRIEF *AMICI CURIAE* OF AARP, CAMPAIGN LEGAL CENTER, CENTER FOR RESPONSIVE POLITICS, CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, COMMON CAUSE, ILLINOIS CAMPAIGN FOR POLITICAL REFORM, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MICHIGAN CAMPAIGN FINANCE NETWORK, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, PROGRESSIVES UNITED, SUNLIGHT FOUNDATION, U.S. PIRG EDUCATION FUND AND WISCONSIN DEMOCRACY CAMPAIGN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* brief is filed on behalf of 14 nonprofit, nonpartisan organizations that support effective campaign finance disclosure laws to ensure transparency and protect the integrity of government.[2]

SUMMARY OF ARGUMENT

In *Citizens United v. FEC*, this Court invalidated a longstanding federal law prohibition on corporate independent expenditures, concluding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. 876, 909, 913 (2010). The Court seemingly based its conclusion on at least two faulty assumptions. First, the Court assumed that so-called "independent" expenditures as defined in law require "[t]he absence of prearrangement and coordination" and, therefore, do not

[1] Pursuant to Rule 37.6, counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief.

Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

[2] A description of *amici curiae* is attached as an Appendix.

present the "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*. at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)). Second, the Court assumed that current disclosure laws would provide "citizens with the information needed" to "see whether elected officials are 'in the pocket' of so-called moneyed interests." *Id*. at 916 (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.)).

These assumptions are contrary to experience since *Citizens United*. First, the law accommodates close relationships between so-called "independent" spenders and candidates and the resulting expenditures do give rise to corruption and the appearance of corruption. Second, citizens do not have the "information needed" to "see whether elected officials are 'in the pocket' of so-called moneyed interests." *Id*. The Court has long recognized that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. The inevitable corollary is that undisclosed money in politics gives rise to corruption and the appearance of corruption.

Part I of *amici*'s argument details how current law accommodates close relationships between candidates and so-called "independent" spenders and how – particularly in the absence of effective disclosure – corporate funds used for so-called "independent"

expenditures could lead to corruption and the appearance of corruption.

Part II explains how more than $120 million in anonymous-source funds was spent to influence the 2010 elections, with far greater spending of anonymous funds projected for 2012. Specifically, Part II details how tax and campaign finance laws facilitate corporations' predictable desire to deny citizens the information needed to hold corporations and elected officials accountable and make informed decisions on Election Day.

Finally, Part III makes clear that even when campaign finance data is disclosed, the data too often is neither timely enough, nor accessible enough, to enable the electorate to make informed decisions on Election Day.

For these reasons, *amici* respectfully urge the Court to deny *certiorari* and leave standing Montana's law. If, however, the Court grants *certiorari*, the Court should grant plenary review, reconsider its holding in *Citizens United* that independent expenditures do not give rise to corruption or the appearance of corruption, and affirm the judgment of the Supreme Court of Montana.

ARGUMENT

I. Undisclosed Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption.

In *Citizens United*, this Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909. In a statement accompanying the Court's order staying this case, Justice Ginsburg, joined by Justice Breyer, called into question this holding:

> 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."

Am. Tradition P'ship v. Bullock, 132 S. Ct. 1307, 1307-08 (2012) (order granting stay) (internal citations omitted).

Amici respectfully submit that it is *impossible* to maintain that independent expenditures can never be corruptive. Existing law accommodates close relationships between so-called "independent" spenders and candidates, which gives rise to corruption and the appearance of corruption. This threat of corruption and the appearance of corruption is compounded by the fact that citizens do not have the "information needed" to "see whether elected officials are 'in the

pocket' of so-called moneyed interests." *Citizens United*, 130 S. Ct. at 916.

A. Current Law's Accommodation Of Close Relationships Between Candidates And So-Called "Independent" Spenders Gives Rise To Corruption And The Appearance Of Corruption.

Citizens United wrongly assumed that "[t]he absence of prearrangement and coordination . . . with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*. at 908 (quoting *Buckley*, 424 U.S. at 47). In *Buckley*, this quote follows a dubious presumption that expenditures meeting the legal definition of "independent expenditure" are in fact "made *totally independently* of the candidate and his campaign." 424 U.S. at 47 (emphasis added).

In *McConnell*, discussing the "dividing line" between "coordinated" and "independent" expenditures, the Court emphasized that the latter should be "expenditures that truly are independent" and quoted the *Buckley* Court's assertion that such expenditures should be made "totally independently of the candidate and his campaign." 540 U.S. at 221 (quoting *Buckley*, 424 U.S. at 47).

Perhaps it is this rhetoric regarding expenditures "that are truly independent" and made "totally independently" of candidates that led the *Citizens United*

Court to conclude that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909.

However, federal campaign finance laws and the laws of most states *do not* require "true" or "total" independence between candidates and so-called independent spenders. Instead, "coordination" only occurs under federal law when an expenditure for a specific communication (i.e., political ad) meets *both* prongs of the "coordinated communication" regulation: (1) the ad contains specified content[3] *and* (2) the candidate suggests or requests the ad; is materially involved in the spender's decisions regarding the content of the ad, the intended audience, or the media outlet used; or otherwise meets one of the rule's narrow "conduct" standards.[4] *See* 11 C.F.R. §§ 109.21(c) (content standards) and 109.21(d) (conduct standards).

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[3] The "coordination" rule's "content" standards vary depending on the proximity of the ad to an election. If the ad is aired more than 120 days before a Presidential primary election, or more than 90 days before a House or Senate election, the ad only meets the "content" standard if it expressly advocates a candidate's election or defeat, or republishes a candidate's campaign materials. *See* 11 C.F.R. § 109.21(c).

[4] The "coordination" rule's "conduct" standards are also met by use of a "common vendor" absent a firewall, or involvement of a person or contractor who had been employed by the candidate in the previous 120 days, absent a firewall. *See* 11 C.F.R. §§ 109.21(d)(1)-(5) and 109.21(h).

Federal coordination rules are so narrow and limited in scope that an "independent" spender can be married to a candidate and share the same home without running afoul of federal coordination limits, so long as the spouses refrain from discussing the details of specific ad buys.

Some of the most prominent "independent expenditure" organizations – raising unlimited corporate, union and individual funds to finance their expenditures – have been set up by close associates and former employees of the candidates they support.

For example, the "independent expenditure-only political committee" (a.k.a. "super PAC") Restore Our Future, which is dedicated to the election of Mitt Romney as President of the United States, is run by several former Romney aides, including Charles R. Spies, who served as general counsel to Romney's 2008 Presidential campaign.[5] Super PAC American Crossroads was co-founded by Ed Gillespie,[6] who recently became a Senior Advisor to Mitt Romney's

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[5] *See* Dan Eggen and Chris Cillizza, *Romney backers launch 'super PAC' to raise and spend unlimited amounts*, Wash. Post, June 23, 2011, *available at* http://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html.

[6] *See* Chris Good, *Karl Rove's American Crossroads GPS Rakes in $76M*, ABC News, Apr. 17, 2012, http://abcnews.go.com/blogs/politics/2012/04/karl-roves-american-crossroads-gps-rakes-in-76m; *see also* http://www.crossroadsgps.org and http://www.americancrossroads.org.

2012 presidential campaign.[7] The super PAC Priorities USA Action, which supports the reelection of President Obama, was co-founded by former Obama White House aides Bill Burton and Sean Sweeney.[8]

Not only does the law permit close associates and former employees of candidates to set up "independent expenditure" committees, but the FEC has also interpreted federal law to permit candidates to "attend, speak at, and be featured guests at fundraisers for the Committees at which unlimited individual, corporate, and labor organization contributions are solicited, so long as they restrict any solicitation they make to funds subject to the [Federal Election Campaign Act's] limitations, prohibitions and reporting requirements." FEC Advisory Op. 2011-12, 2011 WL 2662413, at *1 (June 30, 2011). Super PACs and the candidates they support immediately capitalized on the FEC's blessing of coordinated fundraising.[9] The ability of candidates to be featured guests and speakers

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[7] *See* Jonathan Martin, *Ed Gillespie joins Team Romney*, Politico, Apr. 5, 2012, http://www.politico.com/news/stories/0412/74857.html.

[8] *See* Dave Levinthal and Kenneth P. Vogel, *Obama super PAC raises $2.5M*, Politico, Apr. 20, 2012, http://www.politico.com/news/stories/0412/75419.html.

[9] *See*, *e.g.*, Peter Stone, *Democrats and Republicans alike are exploiting new fundraising loophole*, iWatchNews, July 26, 2011, http://www.iwatchnews.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole; Kenneth P. Vogel, *Rick Santorum Speaks at super PAC fundraiser*, Politico, Feb. 24, 2012, http://www.politico.com/news/stories/0212/73262.html.

at the fundraising events of so-called "independent" spenders obliterates any notion of "true" or "total" independence.

The simple fact that the spending of unlimited corporate, union and individual dollars meets the legal definition of "independent expenditure" by no means "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 908 (quoting *Buckley*, 424 U.S. at 47).

Experience since *Citizens United* has taught that – with the law's ready accommodation of close relationships and coordinated fundraising activities between candidates and supposedly "independent" spenders – independent expenditures do give rise to corruption and the appearance of corruption.

B. The Absence Of Effective Disclosure Of Corporate Money In Elections Gives Rise To Corruption And The Appearance Of Corruption.

Justice Brandeis famously wrote nearly a century ago: "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933), *quoted in Buckley*, 424 U.S. at 67.

This Court has long agreed with Justice Brandeis, recognizing the importance of disclosure to preventing

political corruption. In *Burroughs v. United States*, 290 U.S. 534 (1934), the Court wrote that it "cannot be denied" that disclosure "would tend to prevent the corrupt use of money to affect elections[.]" *Id*. at 548.

Similarly, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court made clear that "informed public opinion is the most potent of all restraints upon misgovernment." *Id.* at 250.

Decades later, the *Buckley* Court reiterated:

> *[D]isclosure requirements deter actual corruption and avoid the appearance of corruption* by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

424 U.S. at 67 (footnotes omitted) (emphasis added). As this passage from *Buckley* makes clear, the corruption-preventing value of disclosure is inextricably linked to the broader necessity for a well-informed electorate – a "public armed with information" – in a democracy such as ours. *Id*. Furthermore,

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . The

> sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Id. at 66-67 (footnote omitted).

Again in *McConnell*, the Court recognized disclosure's vital role in "providing the electorate with information, *deterring actual corruption and avoiding any appearance thereof*, and gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196 (emphasis added). *McConnell* recognized the importance of the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id*. at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

The importance of effective disclosure to preventing corruption is thus well established. Without effective disclosure, corruption thrives and, in the words of Justice Scalia, "democracy is doomed." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

As *amici* explain in Section II, below, corporations freed by *Citizens United* to make unlimited political expenditures and, by extension, unlimited contributions to other corporations making political

expenditures,[10] are denying citizens the information needed to hold corporations and elected officials accountable and make informed decisions on Election Day. The close relationships between so-called "independent" spenders and candidates, combined with the lack of disclosure, give rise to corruption and the appearance of corruption.

II. Corporations Spending Money In Candidate Elections Deny Shareholders And Citizens The Information Needed To Hold Corporations And Elected Officials Accountable And Make Informed Decisions On Election Day.

Notwithstanding this Court's assurance that disclosure would "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters[,]" *Citizens United*, 130 S. Ct. at 916, corporations spending money to influence candidate elections have predictably denied shareholders and citizens such information. Corporations have clear incentives to avoid disclosure and accountability; federal tax and campaign finance laws, as well as state

[10] *See SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (applying *Citizens United*'s reasoning to invalidate limits on contributions to political committees that make only independent expenditures); *see also* FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010) (concluding that "independent expenditure-only political committees" may accept unlimited contributions from corporations and labor organizations).

campaign finance laws, have accommodated their desire to do so. Consequently, non-disclosing corporations spent more than $120 million to influence the 2010 federal midterm elections and far greater spending is predicted for 2012.

A. Corporations Have Clear Incentives To Avoid Disclosure And Accountability – Target As "Exhibit A."

Shortly after the *Citizens United* decision, the *Wall Street Journal* reported:

> Target Corp. sought to take advantage of new campaign-finance rules, but ended up putting a bull's eye on its back.
>
> The Minneapolis retailer recently donated $150,000 to a political group, Minnesota Forward, that backs pro-business candidates in statewide races, including a candidate for governor who opposes same-sex marriage. On Friday, hundreds of gay-rights supporters demonstrated outside Target stores in locations nationwide, and a petition promising a boycott, signed by more than 240,000, was delivered to Target.[11]

According to the report, the campaign against Target was orchestrated by MoveOn.org, whose director of

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[11] Brody Mullins and Ann Zimmerman, *Target Discovers Downside to Political Contributions*, Wall St. J., Aug. 7, 2010, *available at* http://online.wsj.com/article/SB10001424052748703988304575413650676561696.html.

public advocacy said "MoveOn and its members plan to gin up bad publicity for any company venturing into political campaigning."[12]

This is seemingly the optimal scenario envisioned by the *Citizens United* Court:

> [P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.

130 S. Ct. at 916.

Corporate managers around the nation, however, likely viewed this incident as a public relations nightmare. To understand why corporations wishing to influence elections would seek anonymity with respect to their political activities, Target's experience is "Exhibit A." Fortunately for corporate managers, evading disclosure laws is child's play. All a corporation needs to do to avoid publicity for its political spending is to give its funds to a nonprofit that can make political expenditures without disclosing its donors – making the money untraceable.

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[12] *Id.*

B. Federal Tax Laws Accommodate Corporate Anonymity.

Following the *Citizens United* decision and Target's public relations nightmare, nonprofit corporations organized as tax-exempt "social welfare" organizations under the Internal Revenue Code (IRC), 26 U.S.C. § 501(c)(4), have engaged in an unprecedented amount of campaign spending to influence candidate elections. According to *amicus* Center for Responsive Politics (CRP), spending by all section 501(c) groups in the 2010 election is estimated to have exceeded $120 million.[13] Virtually all of the money used for these campaign expenditures came from sources kept secret from the American people. The 2010 campaign thus witnessed the return of huge amounts of secret money to federal elections, to a degree not seen since Watergate. Candidate election-related spending by these nonprofit groups in this year's elections is predicted to far exceed 2010 spending.

Section 501(c)(4) of the IRC establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare. . . ." 26 U.S.C. § 501(c)(4). IRS regulations make clear that spending to intervene or participate in candidate elections does not

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[13] CRP, *2010 Outside Spending, by Groups*, May 16, 2012, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U.

constitute "promotion of social welfare." 26 C.F.R. § 1.501(c)(4)–1(a)(2)(ii). Nevertheless, IRS regulations authorize section 501(c)(4) organizations to intervene and participate in candidate campaigns as long as such campaign activities do not constitute the organization's "primary" activity, which must be the promotion of social welfare. 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i).

The IRS has not further defined the regulation's "primary activity" standard. Instead, a revenue ruling explains that "all facts and circumstances are taken into account in determining a § 501(c)(4) organization's primary activity."[14] According to a Congressional Research Service report, "some have suggested that primary simply means more than 50%. . . ." The report notes that "others have called for a more stringent standard," but explains that even this "more stringent" standard would still permit substantial campaign expenditures of up to 40% of total program expenditures.[15]

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[14] Rev. Rul. 68-45, 1968-1 C.B. 259.

[15] Erika Lunder and L. Paige Whitaker, Cong. Research Serv., R40183, *501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Law* 2 (2009), *available at* http://electionlawblog.org/archives/R40183.pdf; *see also Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics* 44 (2004), *available at* http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf.

Section 501(c)(5) labor unions and section 501(c)(6) trade associations are treated similarly under tax law, *see* 26 U.S.C. §§ 501(c)(5), 501(c)(6), making these organizations additional appealing options to hide the sources of money. The U.S. Chamber of Commerce, a trade association exempt from federal income tax under section 501(c)(6), spent almost $33 million in the 2010 midterm elections and is predicted to spend more than $50 million in this year's elections – funds raised over and above its normal dues.[16]

Federal tax law permits section 501(c) tax-exempt organizations to raise unlimited sums from any source – and *does not require such organizations to disclose the sources of their funding to the public*.[17] Consequently, these nonprofit corporations present attractive vehicles for business corporations and others to influence candidate elections unhindered by the transparency and accountability envisioned in *Citizens United*.

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[16] *See* Eliza Newlin Carney, *U.S. Chamber of Commerce Faces Changing Times*, Roll Call, Apr. 24, 2012, *available at* http://www.rollcall.com/issues/57_126/US-Chamber-of-Commerce-Faces-Changing-Times-214020-1.html?pos=hftxt.

[17] Section 501(c)(4), (c)(5), and (c)(6) organizations must report to the IRS the names and addresses of significant donors, but this information *is not publicly disclosed*. *See* IRS Form 990, Sched. B, Sched. of Contributors (OMB No. 1545-0047).

C. Federal Campaign Finance Laws Accommodate Corporate Anonymity.

Although federal campaign finance law requires every "political committee" to disclose the name of any person who contributes more than $200 to the committee, only groups with the "major purpose" of influencing elections qualify as "political committees." *See Buckley*, 424 U.S. at 79; *see also* Pol. Comm. Status, Supp. Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). Consequently, business corporations and 501(c) nonprofit corporations generally are not regulated as "political committees" and, instead, are subject to far less rigorous disclosure requirements.[18]

When a business corporation or 501(c) nonprofit corporation makes an "independent expenditure" in excess of $250, such spender is only required to disclose the name of a "person who made a contribution in excess of $200 . . . *for the purpose of furthering* an

[18] As registered political committees, super PACs are required to disclose contributors who give more than $200. However, super PACs may also receive contributions from corporations – which themselves have been used to hide the true source of funds. Last year, for example, the super PAC Restore Our Future reported its receipt of three $1 million contributions of questionable legality from mysterious corporate donors – W Spann LLC, F8 LLC and Eli Publishing, L.C. These corporate donors had no discernible business activities and, therefore, appear to have been used specifically for the purpose of hiding the true donors' identities. *See* Michael Isikoff, *Firm gives $1 million to pro-Romney group, then dissolves*, NBC News, Aug. 4, 2011, http://today.msnbc.msn.com/id/44011308/ns/politics-decision_2012.

independent expenditure." 2 U.S.C. § 434(c)(2)(C) (emphasis added).[19]

Similarly, the FEC regulation implementing the "electioneering communication" donor disclosure requirement of 2 U.S.C. § 434(f)(2) provides that a corporation or labor union that spends more than $10,000 on "electioneering communications" need only disclose the name of each person who made a donation of $1,000 or more "*for the purpose of furthering* electioneering communications." 11 C.F.R. § 104.20(c)(9) (emphasis added). "For the purpose of furthering" means "specifically designated for [electioneering communications] by the donor." Electioneering Commc'ns, Supp. Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).[20] This regulation was

[19] The FEC has further undermined this donor disclosure requirement by promulgating a rule requiring disclosure only when the person contributes "for the purpose of furthering *the reported* independent expenditure." *See* 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). Under the statute, a contribution for the purpose of furthering independent expenditures, generally, would trigger disclosure, whereas triggering disclosure under the FEC rule requires a person to contribute *for the purpose of furthering a specific ad*.

[20] Three members of the six-member FEC blocked an investigation into whether the 501(c)(4) corporation Freedom's Watch violated the law by failing to disclose a major donor after making "electioneering communications." The three Commissioners interpreted the regulation even more narrowly than its plain language requires, stating that donor disclosure is required "only if such donations are made for the purpose of furthering the electioneering communication *that is the subject of the report*." *See* Statement of Reasons of Chairman Matthew S.

(Continued on following page)

recently invalidated by a D.C. district court, although an appeal is pending. *See Van Hollen v. FEC*, ___ F. Supp. 2d ___, 2012 WL 1066717 (D.D.C. Mar. 30, 2012), *appeal docketed*, No. 12-5117 (D.C. Cir. Apr. 18, 2012).

Under these "independent expenditure" and "electioneering communication" donor disclosure requirements, corporate and other donors to 501(c) organizations simply refrain from designating contributions specifically for the purpose of funding election ads and, by doing so, avoid federal campaign finance law disclosure requirements.

D. States' Campaign Finance Laws Accommodate Corporate Anonymity.

Amicus National Institute on Money in State Politics (NIMSP) recently conducted a two-part study of all 50 states' disclosure requirements for independent spending (both "independent expenditures" and "electioneering communications").[21] Unfortunately, NIMSP's report paints a bleak picture of disclosure in the states; state disclosure requirements are, for the

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Pettersen and Comm'rs Caroline C. Hunter and Donald F. McGahn, FEC Matter Under Review 6002, at 5 (Aug. 2010) (emphasis added), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf.

[21] *See* Anne Bauer, *Best Practices for Independent Spending: Part One*, NIMSP, July 14, 2011, http://www.followthemoney.org/press/ReportView.phtml?r=453.

most part, even less robust than their ineffective federal counterparts.

> In most states, disclosure of independent spending is either significantly flawed or nonexistent. 43 states require disclosure of independent spending to some degree, but only 19 of them require the reporting of both types of independent spending: electioneering communications and independent expenditures. Not only is the disclosure of independent spending limited, many states do not require the disclosure of who funded these expenditures. *Of the states studied, only nine require the disclosure of contributions to independent spenders, making it difficult to know who is actually behind these independent political advertisements.*
>
> The inadequate or nonexistent disclosure in the states results in millions of dollars of political spending going unreported. In Michigan, for example, at least $22.9 million of televised electioneering communications went unreported in the 2010 elections, which far exceeds the $7.9 million of reported independent spending. Unfortunately, Michigan is not an outlier. Thirty other states fail to require disclosure of the money spent on electioneering communications, making it

> impossible to know the full extent of independent spending at the state level.[22]

Just as federal laws readily accommodate corporations wanting to spend millions to influence candidate elections while maintaining anonymity, so too do most states' laws. Because most states do not require independent spenders to disclose their contributors, corporations can indirectly fund election ads by routing contributions through non-disclosing 501(c) organizations. NIMSP's report detailed one such example, in Iowa: "[T]hree justices up for retention [as state supreme court justices] in 2010 had signed a unanimous decision in 2009 that legalized gay marriage in Iowa. In response, several conservative Christian organizations used independent expenditures to oppose the justices' retention."[23] According to NIMSP's report, one of these organizations was the 501(c)(4) American Family Association Action ("AFA Action"), which created an Iowa state political committee called Iowa for Freedom for the sole purpose of funding independent expenditures targeting the three justices.[24] AFA Action routed more than $170,000 in expenditures through Iowa for Freedom, but neither

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[22] Kevin McNellis, *Best Practices for Independent Spending: Part Two*, NIMSP, Mar. 15, 2012, http://www.followthemoney.org/press/ReportView.phtml?r=480 (emphasis added).

[23] *Id.*

[24] *Id*. *See also* Iowa Ethics & Campaign Disclosure Bd. Advisory Op. 2010-07, *available at* http://www.iowa.gov/ethics/legal/adv_opn/2010/10fao07.htm.

entity disclosed the money's origin because, like federal law, Iowa law requires spenders to disclose only those donors who have provided funds "for the purpose of furthering the independent expenditure."[25]

Like most states, Montana's independent expenditure disclosure laws fail to provide citizens the information needed to hold corporations and elected officials accountable and to make informed decisions on Election Day. Indeed, although Montana requires groups making independent expenditures to file disclosure reports and to disclose the sources of "contributions" exceeding $35, state law defines "contribution" as money given "to influence an election," meaning funds given to such groups without a stated purpose go undisclosed. *See* Mont. Code Ann. §§ 13-1-101(c)(a)(i) (defining "contribution"), 13-1-101(22) (defining "political committee"), 13-37-225 (establishing reporting requirements) and 13-37-229 (requiring itemization for contributions of $35 or more). By contrast, the "segregated fund" requirement of the statute at issue in this case resolves this disclosure problem as to corporations by requiring campaign funds (including any contributions so used regardless of stated purpose) to be held separately from every other source of income. *See* Mont. Code Ann. § 13-35-227(3).

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[25] *See* Iowa Code § 68A.404(3)(a)(2). *See also* Iowa Ethics & Campaign Disclosure Bd. Advisory Op. 2010-07, *supra* note 24.

If this Court does not affirm the Montana Supreme Court's decision upholding Montana's prohibition on corporate political expenditures, corporations will undoubtedly deny shareholders and citizens the information needed to hold corporations and elected officials accountable and to make informed decisions on Election Day.

E. More Than $120 Million In Anonymous Funds Was Spent To Influence 2010 Elections, With Far Greater Spending Predicted For 2012.

Amicus CRP's analysis of publicly available data shows that section 501(c) groups spent more than $120 million on candidate-election related ads during the 2010 midterm elections. The 501(c)(6) U.S. Chamber of Commerce spent nearly $33 million, raised above and beyond normal dues, without disclosing the sources of its funding – undoubtedly business corporations denying "shareholders and citizens . . . the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizens United*, 130 S. Ct. at 916. The 501(c)(4) group American Action Network spent more than $26 million on election-related ads in 2010 without disclosing the sources of its funding. According to *amicus* CRP, more than twenty 501(c) nonprofit corporations spent more than a half-million

dollars each on 2010 election ads without disclosing the sources of their funding.[26]

Not surprisingly, since this Court opened the door to unlimited 501(c) spending by corporations with its 2010 decision in *Citizens United*, the percentage of federal election-related spending by groups that do not disclose their donors rose from 1 percent to 47 percent from the 2006 midterm elections to the 2010 midterm elections.[27]

Non-disclosing 501(c) groups are just getting started in the 2012 elections, as most big spenders wait out the primary election season and prepare for the general elections. On April 24, 2012, the *Washington Post* reported:

> Nearly all of the independent advertising being aired for the 2012 general-election campaign has come from interest groups that do not disclose their donors, suggesting that much of the political spending over the next six months will come from sources invisible to the public.
>
> Politically active nonprofit groups that do not reveal their funding sources have spent $28.5 million on advertising related to the

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[26] *See* CRP, *supra* note 13.

[27] Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, Open Secrets Blog, May 5, 2011, http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

> November presidential matchup, or about 90 percent of the total through Sunday, a Washington Post analysis shows.[28]

The American Crossroads/Crossroads GPS operation perhaps best illustrates how dearly major funders of election ads wish to avoid disclosure. American Crossroads is a super PAC that discloses its donors to the FEC, while Crossroads GPS is a 501(c)(4) corporation that does not disclose its donors. Both were co-founded in 2010 by Republican Party strategists Ed Gillespie[29] and Karl Rove,[30] and both are operated by Steven Law, who serves as the president of both organizations.[31] Supporters of this operation have a choice: contribute to the super PAC and be disclosed or contribute to the 501(c)(4) and remain hidden from public view. According to American Crossroads' political director Carl Forti, the

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[28] Dan Eggen, *Most independent ads for 2012 election are from groups that don't disclose donors*, Wash. Post, Apr. 24, 2012, *available at* http://www.washingtonpost.com/politics/most-independent-ads-for-2012-election-are-from-groups-that-dont-disclose-donors/2012/04/24/gIQACKkpfT_story.html.

[29] Mr. Gillespie is former Chairman of the Republican National Committee, former Counselor to President George W. Bush and recently became a Senior Advisor to Mitt Romney's 2012 presidential campaign. *See* Jonathan Martin, *Ed Gillespie joins Team Romney*, Politico, Apr. 5, 2012, http://www.politico.com/news/stories/0412/74857.html.

[30] Mr. Rove served as Senior Advisor and Deputy Chief of Staff to President George W. Bush. *See* http://www.rove.com/bio.

[31] *See* Good, *supra* note 6; *see also* http://www.crossroadsgps.org and http://www.americancrossroads.org.

501(c)(4) was formed precisely because "some donors didn't want to be disclosed" and were "more comfortable" giving to an entity that keeps donors' names secret.[32] Indeed, Crossroads GPS's purpose as a vehicle for donor anonymity is so blatant that it has become folder for late night television, with Stephen Colbert, Comedy Central's faux newsman, creating his own mock 501(c)(4) group, Colbert Super PAC S.H.H.[33]

The *Washington Post* reported that Crossroads GPS "raised nearly $40 million from unidentified donors" in the first quarter of 2012, "compared with less than $10 million taken in by its affiliated super PAC, American Crossroads."[34] In other words, the non-disclosing 501(c)(4) Crossroads GPS out-fundraised its disclosing super PAC counterpart American Crossroads by a ratio of 4-to-1.

Similarly, Petitioner American Tradition Partnership's (ATP) "purpose, according to un-rebutted evidence submitted to the District Court by the State, is to solicit and anonymously spend the funds of other corporations, individuals and entities to influence the

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[32] Brooks Jackson, *American Crossroads/Crossroads GPS*, Factcheck.org, Sept. 18, 2011, http://www.factcheck.org/2011/09/american-crossroadscrossroads-gps.

[33] *See The Colbert Report* (Comedy Central television broadcast Apr. 3, 2012), *available at* http://www.colbertnation.com/the-colbert-report-videos/411673/april-03-2012/colbert-super-pac-shh----501c4-disclosure.

[34] *See* Eggen, *supra* note 28.

outcome of Montana elections." *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1, 7 (Mont. 2011). ATP explained to its prospective donors:

> [W]e're not required to report the name or the amount of any contribution that we receive. So, if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible. *The only thing we plan on reporting is our success to contributors like you.*

Id.

The American Crossroads/Crossroads GPS operation, as well as petitioner ATP, make clear that, contrary to this Court's assurances in *Citizens United*, there exists inadequate disclosure to "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." 130 S. Ct. at 916. While *Citizens United* did indeed protect corporate political speech, the disclosure expected to "permit[ ] citizens and shareholders to react to the speech of corporate entities in a proper way" never materialized. *Id.*

III. Data That Is Disclosed Is Neither Timely Enough, Nor Accessible Enough, To Enable The Electorate To Make Informed Decisions On Election Day.

The electorate's ability to make informed decisions on Election Day is hindered not only by a lack of disclosure, but also by delayed disclosure and poor access to needed information.

For example, though super PACs must disclose the identity of contributors who give them more than $200, numerous high-profile super PACs raising and spending unlimited funds to influence this year's January presidential caucuses and primaries did not file disclosure reports with the FEC until *after* the caucuses and primaries had taken place.[35]

Additionally, super PACs are permitted to accept contributions from 501(c) corporations and, when they do so, need only disclose the fact that they received a contribution from the 501(c) corporation. As explained in Part II(B), *supra*, these 501(c) corporations are not required to disclose to the public the sources of their funding. Consequently, even when a super PAC discloses its receipt of a contribution from

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[35] *See*, *e.g.*, Keenan Steiner, *Presidential Super PAC disclosures may leave voters in the dark*, Sunlight Foundation Reporting Group, Dec. 21, 2011, http://reporting.sunlightfoundation.com/2011/presidential-super-pac-disclosures-may-leave-voters-in-the-dark.

a 501(c) corporation, voters are nevertheless denied information regarding the money's true source.[36]

Finally, much of the independent spending data that *is* disclosed to campaign finance regulatory agencies is inaccessible to or unusable by the public. Effective access requires comprehensive, Internet-based, easily searchable and downloadable databases. Despite this Court's assurances in *Citizens United* that "modern technology makes disclosures rapid and informative" and that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters[,]" 130 S. Ct. at 916, such technology is not effectively employed in many states.[37] Private organizations such as *amici* CRP and NIMSP spend millions of dollars annually to clean up, fill in the gaps and release to the public useful information gleaned from government databases.

Just as undisclosed money in elections gives rise to corruption and the appearance of corruption, so too

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[36] *See*, *e.g.*, Kenneth P. Vogel and Abby Phillip, *Primer: How super PACs rake it in*, Politico, Feb. 8, 2012, http://www.politico.com/news/stories/0212/72611.html (reporting that non-disclosing groups gave $8 million to super PACs during the 2010 midterm elections).

[37] *See*, *e.g.*, McNellis, *supra* note 22.

does money disclosed too late, disclosed with insufficient detail or disclosed with inadequate public access.

CONCLUSION

Certiorari should be denied. If, however, the Court grants *certiorari*, the Court should grant plenary review, reconsider its holding in *Citizens United* that independent expenditures do not give rise to corruption or the appearance of corruption, and affirm the judgment of the Supreme Court of Montana.

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APPENDIX

The following groups constitute the *amici curiae* who submit the foregoing brief:

- **AARP** is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP engages in advocacy to implement public policies of benefit to older Americans. AARP policy recognizes that the federal government should encourage disclosure by all who participate in supporting or opposing specific candidates and that all campaign funding and financing entities should provide timely and full disclosure of contributions to enable the electorate to make informed decisions and give proper weight to different speakers and messages.

- The **Campaign Legal Center** is a nonprofit, nonpartisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations that violate the law.

- The **Center for Responsive Politics (CRP)** is the nation's premier research group tracking money in U.S. politics and its effect on elections and public policy. Nonpartisan, independent and nonprofit, the organization aims to create a more educated voter, an involved citizenry and a more transparent and responsive government. CRP pursues its mission largely through its award-winning website, OpenSecrets.org, which is the most comprehensive resource for federal campaign contributions, lobbying data and analysis available anywhere.

- The **Chicago Lawyers' Committee for Civil Rights Under Law, Inc.** is the public interest law consortium of Chicago's leading law firms. From nineteen firms in 1969, the Chicago Lawyers' Committee has grown to more than fifty members today. Each year, almost 19,000 hours of donated professional legal services, with a value of over $8.5 million are directed to challenge discrimination and other violations of civil rights in both public and private sectors.

- **Citizens for Responsibility and Ethics in Washington (CREW)** is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among

its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints with Congress. CREW also prepares written reports, including a yearly report it disseminates publicly about the most unethical members of Congress.

- **Common Cause** is a nonprofit, nonpartisan organization with approximately 300,000 members and supporters nationwide. Common Cause has long supported efforts to reform campaign finance laws to reduce the potential for actual and apparent *quid pro quo* corruption. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

- **Illinois Campaign for Political Reform (ICPR)** is a nonprofit and nonpartisan public interest group focused on state and local elections in Illinois that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both government and the election process. Founded in 1997 by the late U.S. Senator Paul Simon and former Illinois Lieutenant Governor Bob Kustra, ICPR's guiding principles seek to restore honest, open, and accountable government and re-invigorate public confidence and civic involvement.

- The **League of Women Voters of the United States** is a nonpartisan, community-based organization that encourages the

informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

- The **Michigan Campaign Finance Network (MCFN)** is a nonprofit, nonpartisan organization that conducts research and provides public education on money in Michigan politics. MCFN has a particular research emphasis on undisclosed electioneering spending in Michigan political campaigns that was summarized in the 2011 report, "$70 Million Hidden in Plain View."

- The **National Institute on Money in State Politics (NIMSP)** is a nonprofit, nonpartisan organization created to provide the public accurate, comprehensive and highly credentialed information about the campaign finances of legislative and statewide candidates in all 50 states, as well as party committees and ballot measures, and

registered state-level lobbyists. It works with the 50 different state disclosure agencies to ensure it compiles complete information, and to advise those agencies on "best practices" for providing public access to political donor information and on donor-reporting requirements in other states. (www.followthemoney.org)

- **Progressives United** is a nonprofit, nonpartisan organization created to influence policymakers, opinion leaders, and the public about the corrupting influence of unlimited and corporate money in our political system. Progressives United was founded by former U.S. Senator Russ Feingold, co-author of the Bipartisan Campaign Reform Act of 2002.

- The **Sunlight Foundation** was founded in 2006 with the nonpartisan mission of using the revolutionary power of the Internet to make information about Congress and the federal government more meaningfully accessible to citizens. Through its projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since its founding, Sunlight has assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and Earmark Watch.org, that make millions of bits of

information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

- **U.S. PIRG Education Fund** is a federation of independent, state-based, citizen-funded organizations that advocate for the public interest. Since 1970, state PIRGs have delivered results-oriented citizen activism, stood up to powerful special interests, and used the time-tested tools of investigative research, media exposés, grassroots organizing, and litigation to win real results on issues that matter. Across the country, state PIRGs employ close to 400 organizers, policy analysts, scientists and attorneys, and are active in 47 states, with a federal office in Washington, D.C. On national issues, they also coordinate their efforts, pool resources, and share expertise so that they can have the biggest impact.
- The **Wisconsin Democracy Campaign (WDC)** is a nonprofit, nonpartisan citizen organization that specializes in tracking the money in Wisconsin politics. WDC manages an extensive online database of contributors to state campaigns and also monitors interest group electioneering. It has frequently filed complaints with the state Government

Accountability Board to prompt enforcement action, and is a regular participant in the GAB's rulemaking process relating to campaign finance regulation.