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 MONTANA

BRIEF *AMICI CURIAE* OF FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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April 27, 2012

QUESTION PRESENTED

Should a writ of certiorari issue to the Montana Supreme Court enabling this Court to consider the application of the Montana statute at issue to electoral spending by multi-shareholder business corporations?

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AMERICAN TRADITION PARTNERSHIP, INC., *et al.*,

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STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA, *et al.*,

Respondents

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

Brief *Amici Curiae* of Former Officials of the American Civil Liberties Union in Support of Neither Party[1]

[1] *Amici* support petitioners' application for certiorari, oppose petitioners' application for summary reversal, and oppose respondent's anticipated request for denial of certiorari.

Interest of *Amici Curiae*[2]

Amici are former officials of the American Civil Liberties Union (ACLU) who have devoted much of their professional lives to the defense of the First Amendment and the advancement of American democracy. Norman Dorsen is the Frederick I. and Grace A. Stokes Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at New York University Law School. He served as General Counsel of the ACLU from 1969-76, and as President of the ACLU from 1976-91. Aryeh Neier is President of the Open Society Foundations. He served as ACLU Executive Director from 1970-78, and as Executive Director of Human Rights Watch from 1978-90. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at New York University Law School. He served as ACLU Legal Director from 1981-86, and as a member of the New York City Human Rights Commission from 1988-92. John Shattuck is the President and Rector of Central European University in Budapest. He served as ACLU Legislative Director from 1976-84, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000. Morton H. Halperin is Senior Advisor to the Open Society Institute. He

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[2] Petitioners' written consent to the filing of this brief has been lodged with the Court. Respondent has filed a blanket consent to the filing of briefs *amici curiae* herein. Notice of intent to submit this brief was provided to both parties in accordance with Supreme Court Rule 37 §2(a). No party has provided financial support or otherwise participated in the preparation or filing of this brief.

served from 1984-92 as ACLU Legislative Director, and as Director of Policy Planning at the State Department under President Clinton.

Amici respectfully submit this brief, prepared with the valuable assistance of members of the 2012 Seminar on the United States Supreme Court at New York University Law School,[3] urging the Court to issue a writ of certiorari in this case to permit plenary consideration of whether multi-shareholder business corporations enjoy First Amendment rights to expend unlimited funds in connection with federal, state and local elections.

Dicta in the majority opinion in *Citizens United v. FEC*, 130 S. Ct. 876, 911, 919 (2010), appears to grant identically broad First Amendment electoral spending rights to every category of corporate entity, regardless of structure, purpose, size and composition. The only form of corporate entity actually before the Court in *Citizens United* was, however, a non-profit "grassroots" entity that had already been found to enjoy First Amendment electoral spending protection in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). The *Citizens United* majority elected, nevertheless, to opine on the electoral spending rights of other types of corporations, including multi-shareholder business corporations, because the majority assumed that all corporate entities (ranging from grassroots ideological non-profits, to single-shareholder corporations, to multi-national,

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[3] The brief does not purport to convey the position of New York University Law School.

multi-shareholder behemoths) inherently enjoy the same electoral spending rights. 130 S. Ct. at 899–900; *id.* at 918, 921-22 (Roberts, C.J., concurring, joined by Alito, J.).

With respect, such an assumption is subject to serious question, especially as applied to multi-shareholder business corporations. Massive legal and factual differences exist between and among ideological grassroots non-profits, single-shareholder businesses, and multi-shareholder business corporations that call for separate analyses of the constitutional rights of each corporate category. *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting, joined by Brennan, Marshall, & Scalia, JJ.) (distinguishing between single-shareholder and multi-shareholder corporations for purposes of Fifth Amendment self-incrimination analysis).

Amici believe that respect for the disciplined case-specific decision-making power of this Court, dating from Chief Justice Marshall's instructions in *Cohens v. Virginia*, 19 U.S. 264, 399 (1821), requires an opportunity for plenary consideration of the electoral spending rights of multi-shareholder business corporations prior to judicial promulgation of a First Amendment rule of law embedding those rights in constitutional cement.[4]

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[4] Chief Justice Marshall stated in *Cohens* that "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 19 U.S. at 399.

Statement of the Case

Like the petitioner in *Citizens United*, the three petitioners in this case—two grassroots non-profit corporations and a small single-shareholder business corporation—seek to establish constitutional protection for unlimited electoral spending by multi-shareholder business corporations without confronting the legal and factual issues posed by introducing such a dramatically different category of corporation into the First Amendment mix. In the lower courts, petitioners sought facial invalidation of Montana's century-old statutory ban on corporate electoral expenditures. The Montana Supreme Court upheld the statute on its face (thereby preserving its application to out-of-state multi-shareholder business corporations), while leaving petitioners free to seek narrower judicial relief limited to grassroots non-profit corporations and single-shareholder family corporations. *Western Tradition P'ship. v. Atty. Gen.*, 271 P.3d 1 (Mont. 2011).

In this Court, petitioners' application for summary reversal continues to seek facial invalidation of the challenged statute—an outcome that would subject Montana's statewide and local elections to unlimited spending by out-of-state multi-shareholder business corporations—without plenary consideration by any court of the unresolved legal and factual issues raised by such a consequential event.

If, despite the best efforts of its legislature, Montana's statewide and local elections are to be exposed, once again, to the risk of a barrage of corporate funds similar to barrages that have led,

in the past, to corrupt domination of Montana's government by out-of-state mining interests, surely it should be after full judicial consideration of the unresolved legal and factual issues posed by such a dramatic intrusion into Montana's democratic processes.

Reasons for Granting the Writ

Defining the Scope of First Amendment Electoral Spending Rights, if any, Enjoyed by Multi-Shareholder Business Corporations in Federal, State and Local Elections is an Important Unresolved Issue Meriting Plenary Consideration

In *Citizens United*, confronted with multiple First Amendment reasons why a grassroots nonprofit corporation was constitutionally entitled to distribute an electoral video to willing recipients in the context of a Presidential election, this Court invalidated the federal prohibition on its face. Since the majority assumed that all corporations, no matter how structured, must inherently enjoy identical First Amendment spending rights in all elections, the *Citizens United* Court did not consider whether the unique structural and legal aspects of multi-shareholder business corporations require a separate constitutional analysis. A grant of certiorari is necessary to permit consideration of four unresolved issues.

First, recognition by this Court of a multi-shareholder business corporation's right to spend unlimited sums to affect the outcome of an election would constitute a break with 150 years of precedent. Until now, this Court has recognized a

corporate constitutional right only to facilitate the enjoyment of commonly-shared rights and interests belonging to the natural persons who constitute the corporate enterprise. Where, as here, intra-corporate conflicts of interest exist between and among those natural persons concerning the exercise of a given constitutional right, the Court has declined to recognize a unitary corporate right. Compare *Santa Clara County v. South Pacific Railroad*, 118 U.S. 394 (1886) (recognizing a corporate right to equal protection of the laws), with *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) (declining to recognize a corporate Fifth Amendment right against self-incrimination). See also *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting) (agreeing with refusal to recognize self-incrimination rights for large corporations, but urging recognition of self-incrimination rights in context of singe-shareholder corporation). See *infra* at pp. 8-12.

Second, this Court's unanimous summary affirmance in *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (upholding the federal government's right to bar lawful resident aliens from making independent expenditures in connection with federal elections) is in conflict with the Court's *dicta* in *Citizens United* explaining that multi-shareholder business corporations enjoy unlimited electoral spending rights regardless of whether they qualify as protected speakers based solely on the useful nature of their speech. *Bluman*'s concentration on the identity of the speaker, as opposed to the alleged usefulness of the speech, seriously undermines the Court's only rationale for granting First Amendment protection to unlimited

electoral spending by multi-shareholder business corporations. See *infra* at pp. 12-16.

Third, the unanticipated post-*Citizens United* emergence of candidate-specific "Super PACs," staffed by close associates of particular candidates and capable of receiving donations of unlimited size from corporations and individuals, has eroded any meaningful distinction between campaign contributions and independent expenditures. From the perspective of the risk of actual or apparent *quid pro quo* corruption, no difference exists between a contribution to a candidate's campaign and an independent expenditure paid to a candidate-specific Super PAC staffed by a candidate's close associates. See *infra* at pp. 16-20.

Fourth, the post-*Citizens United* ability of business corporations to engage in unlimited electoral spending renders it impossible to enforce "effective" disclosure rules that are a *sine qua non* of unlimited electoral spending rights. See *infra* at pp. 21-22.

A.

As a Matter of Corporate Theory Embedded in 150 years of Precedent, Multi-Shareholder Business Corporations Should Not Enjoy a Centralized "Corporate" Free Speech Right to Expend Unlimited Funds to Affect the Outcome of an Election

For more than 150 years, corporations, viewed as "persons" under the Fourteenth Amendment or as "citizens" under Article III, have often been said by this Court to possess "corporate" constitutional rights—but not because a fictive legal

abstraction like a corporation is capable of enjoying constitutional rights in the same manner as a natural person. To the contrary, this Court has invoked the concept of a centrally-enforceable "corporate" constitutional right as a pragmatic device to protect the commonly-shared rights and interests of the decentralized natural persons who constitute the corporation, and who would experience difficulty enforcing their rights individually. Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract,* 89 Colum. L. Rev. 1416 (1989); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173 (1985). See generally John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655 (1926).

In each of the nineteenth and early-twentieth-century cases recognizing a corporate constitutional right, the Court acted to facilitate effective centralized enforcement of commonly shared rights and interests belonging to the corporation's human constituents. *See, e.g., Louisville, Cincinnati, & Charleston Railroad v. Letson*, 43 U.S. (2 How.) 497 (1844); (access to federal court); *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1853) (same); *Western Union Telephone Company v. Kansas,* 216 U.S. 1 (1910) (right to do business throughout the United States); *Santa Clara County v. South Pacific Railroad*, 118 U.S. 394 (1886) (right to equal treatment by regulatory laws); *Railroad Commission Cases*, 116 U.S. 307 (1886) (rights against unlawful taking of investment property); *Smyth v. Ames*, 169 U.S. 466 (1898) (rights against deprivation of investment property

without due process of law); *Hale v. Henkel*, 201 U.S. 43 (1906) (Fourth Amendment privacy rights affecting investment property).[5]

The Court's commercial speech, free press, and non-profit corporation First Amendment decisions similarly facilitate the centralized enforcement of speech rights held in common by a corporation's decentralized human constituents. For example, the commercial speech cases protect the commonly-shared interest of each corporate participant in assuring that accurate information about the corporate product is widely disseminated. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748, 765 (1976) (prescription drug price advertising); *Linmark, Assoc. v. Willingboro,* 431 U.S. 85, 96-97 (1977) (For Sale signs on residential property); *Carey v. Population Serv., Int'l.,* 431 U.S. 678, 700-01 (1977) (commercial information concerning contraceptives); and *44 Liquormart, Inc v. Rhode Island,* 517 U.S. 484, 501 (1996) (liquor price advertising).

The numerous corporate free press cases such as *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *New York Times v. United States*, 403 U.S. 713 (1971) protect and reinforce the commonly-shared rights and interests of each participant a corporate

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[5] The doctrine of associational standing similarly generates a centralized enforcement agent for rights held by participants in unincorporated and certain non-profit corporate settings. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In the corporate area, the shareholders' derivative action enables centralized enforcement of shareholders' rights against corporate management, while corporate constitutional rights enable the shareholders to enforce their shared rights effectively against the government.

press enterprise in preventing the government from dictating the content of the press enterprise's product, and restricting when, where and to whom the product may be sold.

Finally, the non-profit corporation cases such as *Citizens United* and *MCFL* protect the commonly-shared rights and interests of individuals who have joined together in non-profit corporate form to advance certain values in maximizing their collective ability to communicate in aid of those values.

Where, however, the individual constituents of a corporate community do not share common interests in connection with the exercise of a given constitutional right, this Court has rejected the idea of a unitary "corporate" constitutional right. For example, in a long line of cases beginning with *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906), this Court declined to recognize a corporate Fifth Amendment right against self-incrimination, thereby denying corporate management the unilateral power to keep information concerning possible criminal behavior from the wider corporate community. See also *California Bankers Association v. Shultz*, 416 U.S. 21 (1974) (no exemption from bank reporting requirements); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (limited Fourth Amendment protection for multi-shareholder corporations in the alcohol industry); *United States v. Biswell*, 406 U.S. 311, 314-15 (1972) (limited Fourth Amendment protection for multi-shareholder corporations in the firearms industry.

If this Court remains true to its precedents, it should follow *Hale v. Henkel* and Justice Kennedy's

dissent in *Braswell v. United States*, 487 U.S. 99, 119 (1988) by declining to vest multi-shareholder business corporations with a unitary, centrally-enforceable First Amendment electoral spending right. As in the Fifth Amendment self-incrimination setting, serious intra-corporate conflicts over the exercise of such a First Amendment right are a virtual certainty.[6] Given the virtual certainty of intra-corporate conflicts over whether to engage in electoral spending and, if so, which candidates to support or oppose, the Court's precedents which recognize a "corporate" constitutional right only when it enables centralized enforcement of the commonly-shared rights and interests of the individual corporate participants, argue strongly against recognizing a unitary multi-shareholder corporate electoral spending right.

At a minimum, the issue warrants plenary consideration.

B.

Bluman v. FEC Calls Into Question the Court's Principal Rationale for Granting First Amendment Electoral Spending Rights to Multi-Shareholder Corporations

In his dissent in *Braswell*,[7] Justice Kennedy agreed that multi-shareholder corporations are not

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[6] The Court has demonstrated a similar reluctance to license a centralized enforcement agent in class action settings where conflicts exist between and among segments of a proposed class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 864-65 (1999).

[7] In *Braswell*, Justice Kennedy, joined by Justices Brennan, Marshall and Scalia, argued unsuccessfully, that, unlike a

sufficiently engaged in "the realm of human thought and expression" to warrant Fifth Amendment protection against self-incrimination. 487 U.S. at 119 ("[The Fifth Amendment] is an explicit right of a natural person, protecting the realm of human thought and expression[.]") (Kennedy, J., dissenting); *see also United States vs. White*, 322 U.S. 694, 698-701 (1944).

In *Citizens United*, however, Justice Kennedy, writing for the majority, upheld a corporation's First Amendment right to spend unlimited corporate funds to affect the outcome of an election. *See* 130 S. Ct. at 900.

Although the two opinions may appear inconsistent, each, viewed on its facts, is faithful to this Court's historic practice of recognizing a corporate constitutional right to protect the commonly-shared rights and interests of individual corporate constituents—the sole-shareholder in *Braswell*; and the individual members of the ideological non-profit entity in *Citizens United*.

It was, however, impossible for Justice Kennedy in *Citizens United* to defend a multi-shareholder corporate right of unlimited electoral spending as a traditional device to protect the commonly-shared interests of the corporations' individual participants. Instead, he reasoned that unlimited multi-shareholder corporate electoral spending is entitled to First Amendment protection because it generates speech that

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multi-shareholder corporation, a single-shareholder entity should enjoy Fifth Amendment self incrimination rights as the *alter ego* of the sole-shareholder. 487 U.S. at 119-130 (Kennedy, J., dissenting).

is useful to citizens, without regard to whether the multi-shareholder corporation would itself qualify as a protected speaker. *Id.* at 898-99, 916. In short, when multi-shareholder corporate electoral spending was concerned, Justice Kennedy, like W.B. Yeats, declined to separate the speaker from the speech.[8]

The Court's reluctance to separate corporate speakers from corporate speech is the principal—indeed, the only—legal rationale in *Citizens United* for extending electoral spending protection to multi-shareholder business corporations. *Id.* at 899 ("The First Amendment protects speech and speaker, and the ideas that flow from each."). It was also the only rationale put forth in *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (upholding spending of bank's corporate funds in opposition to referendum on taxation). See *Sierra Club v. Morton*, 405 U.S. 727, 749 (Douglas, J. dissenting) (1972) (arguing that the environment itself should be viewed as a judicially-protected value that exists independently of the litigants).

This Court's unanimous rejection of the First Amendment claim in *Bluman v. FEC*, 132 S. Ct. 1087 (2012), cannot, however, be harmonized with the rationale of *Citizens United* and *Bellotti*. In *Bluman*, two lawful resident aliens, a Canadian graduate of an American law school working for a Wall Street law firm, and an Israeli medical resident at Mt. Sinai Hospital, challenged the

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[8] O body swayed to music, O brightening glance,
How can we know the dancer from the dance?
W.B. Yeats, *Among School Children* (1928)

statutory ban on independent electoral spending in federal elections by lawful resident aliens.

This Court unanimously summarily affirmed a three-judge court decision rejecting the resident aliens' First Amendment claim. 132 S. Ct. 1087 (2012), summarily aff'ing 800 F. Supp.2d 281 (D.D.C. 2011). Since the proposed electoral spending in *Bluman* was functionally indistinguishable from the electoral spending before the Court in *Citizens United*, the Court's decision to protect multi-shareholder corporate speakers in *Citizens United*, but to decline to protect lawful resident aliens in *Bluman,* cannot rest on differences in the content of their speech. If a principled distinction exists, it must rest on differences between the two categories of speakers. If, however, after *Bluman*, the identity of the speaker (and not merely the usefulness of the speech) is an important factor in deciding whether electoral spending is protected by the First Amendment, the Court's reasoning in *Citizens United* justifying unlimited spending by multi-shareholder business corporations has been seriously eroded.

Given the importance of the issue, this Court should grant plenary review to consider whether multi-shareholder business corporations, lacking attributes of conscience and human dignity, are, nevertheless, protected electoral speakers based solely on the allegedly useful nature of their speech.

Moreover, since *Bluman* necessarily recognizes a compelling national governmental interest in preventing lawful resident aliens from

spending money to influence federal elections, surely Montana may protect its statewide and local elections from the prospect of massive electoral expenditures by the very out-of-state mining corporations that once corruptly dominated Montana's political life.[9]

C.

The Unanticipated Impact of *Citizens United* on Campaign Financing Calls for Reconsideration of This Court's Assumption That Independent Expenditures Cannot Pose a Risk of Actual or Perceived Corruption

Buckley v. Valeo, 424 U.S. 1 (1976) held that while contributions made directly to a candidate may be regulated as to size and source because they present a risk of actual or apparent *quid pro quo* corruption, independent electoral expenditures, occurring without coordination between donor and candidate, are incapable of raising even the appearance of such a risk. *Id* at 47. ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate). The *Citizens United* majority reiterated the bright-line

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[9] The history of Montana's efforts to shield its democracy from domination by out-of-state mining interests is set forth at *Western Tradition P'ship, Inc. v. Atty. Gen.*, 271 P.3d 1, 8-9 (Mont. 2011)..

distinction between contributions and independent expenditures. 130 S. Ct. at 883.

Facts that have become apparent since *Citizens United* have, however, seriously undermined the validity of such a bright-line distinction. When unlimited corporate electoral spending (made possible by *Citizens United*) was added to unlimited individual electoral spending (permissible under *Buckley*), the combination triggered the emergence of candidate-specific political entities—informally dubbed "Super PACs"—formally unconnected to a candidates' campaign, but often headed by the favored candidate's close political and personal associates. Since Super PACs are formally independent from a candidate's campaign, they accept financial support in unlimited amounts from corporations and wealthy individuals characterized as independent expenditures.

The emergence of candidate-specific entities, staffed by persons enjoying close ties to the candidate with the ability to accept unlimited sums from corporations and individuals, set off a campaign-finance feeding-frenzy that has eroded—and perhaps destroyed—the Court's attempt to distinguish between contributions and independent expenditures.

In the post-*Citizens United* world, no meaningful distinction exists concerning risk of actual or apparent *quid pro quo* corruption between contributions to a candidate and unlimited independent expenditures made to Super PACs staffed by a candidate's close associates. Given the intimate ties that exist between individuals at the helm of many Super PACs and their

preferred candidates,[10] the public cannot help but perceive a risk that massive payments to Super PACs may be accompanied by *quid pro quo* promises made on behalf of the candidate by a close associate with actual or apparent authority to make them.

Even before the post-*Citizens United* collapse of the distinction between campaign contributions and independent expenditures, the Court's assertion that independent expenditures are inherently incapable of generating an appearance of *quid pro quo* corruption had been called into serious question by *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Court ruled that a multi-million dollar independent expenditure in support of a judge facing an election created an unacceptable risk of actual or apparent post-election judicial favoritism,

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[10] *See, e.g.*, Bill Burton and Sean Sweeney, former aides to President Obama, who founded and direct the pro-Obama "Priorities USA Action"; Carl Forti, former political director for Governor Romney, who founded and directs the pro-Romney "Restore Our Future"; Rick Tyler, former aide to Speaker Gingrich, who founded and directs the pro-Gingrich Super PAC "Winning Our Future"; Mike Toomney, former Chief of Staff to Governor Perry, who directed the pro-Perry Super PAC "Make Us Great Again." *See Obama Campaign Blurs the Line With Super PAC*, CBS News (Apr. 15, 2012, 9:50 PM), http://www.cbsnews.com/8301-503544_162-57372723-503544/obama-campaign-blurs-the-line-with-super-pac/. Perhaps the closest relationship between a candidate and a Super PAC was achieved by Ambassador Jon Huntsman, whose father both headed the entity and contributed $2.2 million of the $3.2 million the Super PAC raised. *Committee Summary Reports—2011–2012 Cycle: Our Destiny PAC*, Fed. Election Comm'n (Feb. 29, 2012), http://query.nictusa.com/cgi-bin/ cancomsrs/? 12+ C00501098.

requiring the judge's recusal in cases involving the independent supporter.

Justice Kennedy, writing for the *Caperton* majority, found that $3 million in independent election expenditures, including a $2.5 million donation to a formally-independent entity pledged to support the judicial candidate, was "extraordinary." 556 U.S. *at* 884. Justice Kennedy's characterization of an "extraordinary" independent expenditure of $3 million in 2009 pales in comparison with the more than $169 million in contributions to Super PACs reported, thus far, in the 2012 election cycle, including at least 30 seven-figure donations to candidate-specific Super PACs headed by close associates of the candidate.[11] As Justices Ginsburg and Breyer have noted, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307, 1307–08 (2012), the emergence of a culture of multi-million dollar payments by corporations and wealthy individuals to political entities like Super PACs staffed by persons with close ties to the candidate, has already generated a significant appearance of *quid pro quo* corruption.

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[11] See *2012 Committee Summary*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/data/CommitteeSummary.do?format=html&election_yr=2012 (last visited April 15, 2012) (total contributions of $169 million from all sources to independent-expenditure only committees (Super PACs)). See also, *Who's Financing the 'Super PACs'*, NY Times (Apr. 7, 2012, 12:26 PM), http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html, reporting at least 30 contributions of $1 million or more to Super PACs, including the following that exceed the sums in *Caperton:* Harold Simmons ($10 million); Sheldon Adelson ($7.5 million); Miriam Adelson ($7.5 million); and Bob Perry ($4.0 million).

It is no answer to argue that *Caperton* involved recusal, not the imposition of limits on independent spending. The teaching of *Caperton* is that massive pre-election independent spending can present an unacceptable risk of post-election corruption, especially in light of the massive payments to candidate-specific Super PACs in the wake of *Citizens United*. Where recusal is possible, it provides one form of remedy. Where, however, recusal is not a practical option—as in most executive or legislative settings—American democracy should not be rendered powerless to defend itself.

Plenary review is needed to consider whether the changed factual reality in the wake of *Citizens United* calls for a re-examination of the Court's assumption that independent expenditures are not capable of generating a risk of actual or perceived *quid pro quo* corruption.[12]

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[12] The Court has altered constitutional doctrine when the Court's initial understanding of the doctrine's factual underpinnings no longer appeared to be accurate. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (recognizing both overestimation of state interest, and underestimation of factual impact of ruling in *Gobitis* on Jehovah's Witnesses); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) (recognizing underestimation of factual impact of legally-mandated segregation on minority race); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (recognizing factual need for minimum wage legislation).

D.

The Unanticipated Impact of *Citizens United* on Public Disclosure Warrants Plenary Review

This Court has repeatedly recognized the importance of effective disclosure to the proper functioning of any campaign finance system that permits unlimited spending. *Citizens*, 130 S. Ct. at 916. *Citizens United* opens two huge loopholes that render it all but impossible to maintain an effective system of disclosure.

After *Citizens United,* corporate or individual donors may shield their identities by the simple expedient of funneling election spending through shell corporations that fail to reveal their principals. No matter how stringent the rules may be requiring public disclosure of corporate principals, it is often impossible to identify the human beings behind a corporate screen. Witness the difficulty in identifying and prosecuting certain categories of tax fraud.[13] If the IRS has difficulty penetrating corporate smokescreens, the FEC doesn't have a chance.

Similarly, foreign nationals, barred after *Bluman* from spending money to influence a federal election, may now funnel their spending through shell American corporations, foreign-

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[13] U.S. Gov't Accountability Office, GAO-06-376, Company Formations: Minimal Ownership Information Is Collected and Available 46–50 (2006); *Failure to Identify Company Owners Impedes Law Enforcement: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov't Affairs*, 109th Cong. (2006).

controlled American corporations, or American subsidiaries of foreign corporations. The potential for evasion is virtually boundless

Since both *Buckley* and *Citizens United* rest on an assumption that "effective" public disclosure will mitigate the risk of corruption inherent in a regime of unlimited electoral spending, and since loopholes created and exacerbated by *Citizens United* render such "effective" disclosure impossible, this Court should re-examine whether unlimited independent expenditures pose a sufficient of risk of electoral fraud to warrant a prophylactic Congressional response.[14] If speculative concern over potential election fraud justified the imposition of prophylactic voter identification requirements that operate with particular severity against low-income voters, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the far more plausible fear of election fraud created by secret, untraceable corporate payments of unlimited size to candidate-specific Super PACs staffed by close associates of the candidate should also justify a prophylactic ban on untraceable corporate electoral spending.

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[14] For example, tax returns recently filed by Crossroads GPS, a Super PAC committed to the defeat of President Obama, reveal one donation of $10 million from an untraceable source, together with at least 26 seven-figure contributions, most of which were anonymous. *See* T.W. Farnam, *Mystery Donor Gives $10 Million for Attack Ads*, Wash. Post, Apr. 14, 2012, at A6.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to the Supreme Court of Montana permitting plenary review in this Court of the electoral spending rights, if any, of multi-shareholder business corporations.

Dated: April 27, 2012
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