No. 11-1179

In The

Supreme Court of the United States

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

v.

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

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

Reply Brief

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)
jboppjr@aol.com

Margot Barg Ogburn
WITTICH LAW FIRM, PC
602 Ferguson, Suite 5
Bozeman, MT 59718
406/585-5598
406/585-2811 (facsimile)

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Counsel for Petitioners

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Reasons to Grant Certiorari

I.

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

This Court held that government may not suppress speech based on corporate identity:

> We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (*citing Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

But Respondents ("Montana") insist that Montana may suppress political speech based on corporate identity. *See, e.g.*, Opp'n 1 (Ban text), 8 ("The Montana Supreme Court applied rather defied *Citizens United*.").

This Court held that (a) no antidistortion risk justifies banning corporate speech, *Citizens United*, 130 S. Ct. at 913, (b) the only cognizable interest for restricting core political activity is quid-pro-quo corruption, *id.* at 909-10, and (c) "'[t]he absence of . . . coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* . . . ,'" *id.* at 909

(*quoting Buckley*, 424 U.S. at 47).[1]

But the Montana Supreme Court *relied* on the antidistortion interest and held that independent expenditures *do* pose a corruption risk. Pet. 7-19. And Montana defends and continues that unconstitutional action. Opp'n 19-34.

This Court held that, whatever problems government may perceive, it "may not choose an unconstitutional remedy." *Id.* at 911. "An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy." *Id.*

But Montana and its amici recite numerous perceived problems that they insist justify the impermissible remedy of suppressing corporate political speech. If a problem is real,[2] government may seek to

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[1] The Court in *Citizens United* was not dealing with foreign nationals (as to which it expressly did not rule, *id.* at 911, nor terrorists, so that decision is not inconsistent with either *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *affirmed*, No. 11-275 (Jan. 9, 2012), or *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Rather, *Citizens United* was dealing with non-foreign, non-terrorist entities and stated a general rule accordingly. While Montana repeatedly refers to "foreign" corporations, meaning corporations from other states, *see* Opp'n 2, 7, 9, 16, 19-20, 22, the State by such subliminal recitals cannot justify banning corporate independent expenditures on the basis that corporations from other states might speak in Montana.

[2] More spending for increased political speech is not a cognizable problem, and if coordination rules are perceived as inadequate, the permissible remedy is to try to fix those, not to ban core political speech. *See* Pet. 30-31.

remedy it, but not with an impermissible remedy.

In opposing certiorari, Montana needed to show that this Court did *not* say that speech may not be banned based on corporate identity, that this Court did *not* reject the antidistortion interest, that independent expenditures *operate differently* in Montana, and that suppressing corporate political speech *is* a permissible remedy. Unsurprisingly, Montana fails.

Montana ignores these central, controlling holdings. It even fails to mention the arguments of the dissenters below—who highlighted the failure to follow these controlling holdings, App. 33-93a—except to cite a dissenter's statement, Opp'n 27 (*citing* App. 90a), that the dissenter acknowledged was *inconsistent* with *Citizens United*, *see* App. 87a ("While, . . . I am bound to follow *Citizens United*, I do not have to agree with [it].").

Montana and its amici try to divert attention away from these controlling holdings. For example, Montana turns from the proper constitutional issues to unwarranted slurs on Petitioner ATP. *See* Opp'n 5, 16-17, 20, 27, 30, 32-34.[3] This is the logical fallacy *argumentum ad hominem*, irrelevant to the real issues here.[4] And if there is any perceived problem

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[3] These are unwarranted as explained in Petitioners' Application for Stay. *Id.* at 32-39 (Montana fails to employ this Court's magic-word "express advocacy" test to define independent expenditures and this Court's "major purpose" test for determining "political committee" status).

[4] The trial court rejected this argument, App. 103a:

> The State . . . attempts to portray WTP as an unsavory entity up to no good. That may or may not be

with ATP *legally* offering donors anonymity (because it is not properly a "political committee" under this Court's "major purpose" test for PAC status, *Buckley*, 424 U.S. at 79), Montana may not impose an unconstitutional remedy.

Several amici attempt the diversion of relying on events *since* the Montana Supreme Court's decision to justify that decision. *See, e.g.*, Br. Amici Curiae Brennan Ctr. et al. But events since that court's decision are not part of the record of this case and played no role in that court's decision. These amici essentially want this Court to host a trial, to allow creation of a new record, and to rely on new arguments not considered below or even asserted by *Montana*.[5]

> the case, but it is clear to this Court that Section 227 applies to WTP. Whatever one might think of WTP, this Court does not have the power to take away its First Amendment right to support or oppose political candidates of its choice.

[5] For example, some *amici* urge reconsideration of *Citizens United*, *see, e.g.*, Br. Amici Curiae Free Speech for People et al., but *Montana* says that "[t]here is no need to read [*Citizens United*] so broadly, and therefore no need to reconsider it in light of the . . . distinctions between the federal and Montana laws." Opp'n 35. Because *Montana* neither calls for reconsideration nor makes a case for it, reconsideration is not at issue. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and in judgment) ("Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here . . . . ."). Moreover, the doomsday portrayals by amici are overblown. *See, e.g.*, Raymond J. La Raja & Brian F. Schaffner, *The (Non-)Effects of Campaign Finance Spending Bans on Macro Political Outcomes: Evi-*

That is not this Court's role.

Such diversions fail because they do not overcome this Court's holdings that political speech may not be rejected based on corporate identity, no anti-distortion interest is cognizable, independent expenditures pose no quid-pro-quo-corruption risk, and government may not choose unconstitutional remedies.

These holdings received substantial briefing, with specific rebriefing on whether to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and are constitutionally sound. For example, the holding that independent expenditures pose no quid-pro-quo-corruption risk because of their independence goes back to *Buckley*. *See Citizens United*, 130 S. Ct. at 909 (*quoting Buckley*, 424 U.S. at 47). Petitioners argue that this holding was made as a matter of law. Pet. 15-17. Montana disputes this. Opp'n 18. But this Court noted that it was closing a factual-analysis door that some perceived to be open:

> A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S., at 788, n. 26. *For the reasons explained above*, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.

Citizens United, 130 S. Ct. at 909 (emphasis added). "For the reasons explained above" referenced the preceding legal arguments in Part III(B)(2), *id.* at 908, which discussed *Buckley*'s statement that the

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dence From the States, http://ssrn.com/abstract=2017056.

independence of independent expenditures eliminated the quid-pro-quo risk, and which discussed no facts. This legal conclusion applies to all independent expenditure by all corporations. It closed the door on possible factual considerations and covers all independent expenditures as a matter of law.

That this is true is clear from the definitions of "corruption" and "coordination." First, "corruption" is limited to quid-pro-quo corruption, i.e., "'dollars for political favors.'" *Id.* at 909 (*quoting FEC v. National Conservative PAC*, 470 U.S. 480, 498 (1985)). Second, this exchange of a campaign contribution for a promise of a vote can only arise in the context of a conversation about the independent expenditure or the candidate's needs and plans, as the "coordinated communication" definition makes clear. *See* 11 C.F.R. § 109. 21 ("communication is coordinated" if it meets specific "content" and "conduct" requirements). This is critical for two reasons. First, the conversation insures that the independent expenditure is beneficial to the candidate. Independent expenditures without such a conversation might not benefit a candidate. Second, the conversation provides a context in which an explicit or implicit promise can be made. Without the conversation, the link is broken. Furthermore, since this is a prophylactic measure, the court needs to consider the effect of the adoption of the counter viewpoint, which would be devastating to free speech and citizens' involvement in our democratic Republic. Under that viewpoint, anything and everything that one does that might influence an election would need to be analyzed to see if it benefitted a candidate's election. If it does, it is subject to contribution

limits. Citizens' involvement in our democracy would then be limited by contribution limits. Furthermore, that means that absolutely everything that influences an election could be limited. This is actually an expenditure limit in the guise of a contribution limit. All of this Court's holdings that expenditures cannot be limited would be circumvented.

In sum, the Montana Supreme Court and Montana, in its Opposition, have failed to follow these controlling holdings of *Citizens United*.[6]

II.

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

Montana insists that its Ban on corporate independent expenditures is not really a ban because corporations can make independent expenditures through a separate segregated fund that they can administer. Opp'n 11-12. Montana misunderstands *Citizens United*, which held such a fund requirement impermissible. As this Court explained, under the federal ban corporations could make independent expenditures only by

establish[ing] . . . a "*separate segregated fund*"

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[6] Montana Governor Brian Schweitzer is reported to have signed Montana initiative, I-166, to "boost a national effort to overturn [*Citizens United*]" by stating that corporations are not people and lack constitutional rights. Charles S. Johnson, *Schweitzer signs initiative opposing corporate donations*, Billings Gazette, May 3, 2012, http://billingsgazette.com/news/state-and-regional/montana/schweitzer-signs-initiative-opposing-corporate-donations/article_5181dd8f-91c4-5b42-b3bc-b17d2c57281b.html.

> (known as a political action committee, or *PAC*) . . . . 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

130 S. Ct. at 888-89 (emphasis added). The federal ban barred using "general treasury funds to make . . . independent expenditures." *Id.* at 887. This Court held that corporations are free to use general-treasury funds for independent expenditures. *Id.* at 911.

Since Montana imposes a similar separate-segregated-fund ("SSF") requirement (also with source restrictions), instead of allowing corporate independent expenditures from general-treasury funds, Montana's Ban imposes the same sort of PAC that this Court held (a) is a separate legal entity, (b) does not allow a corporation itself to speak, and (c) constitutes a ban. *Id.* at 897-98. Montana's recital of how Montana's scheme works does nothing to prove its assertion that "it is, at best, empty formalism to regard the political committee designation as a 'separate legal entity.'" Opp'n 13. Montana's SSF (a PAC) is a separate legal entity just as the federal SSF was deemed to be so in *Citizens United*. Petitioners do not "misunderstand[] Montana law," Opp'n 13; Montana misunderstands *Citizens United*.

Montana says Montana PACs have up to 5 days to establish an SSF after qualifying, while federal SSFs must be established before speaking. Opp'n 15. But federal PACs must register *10 days* after qualifying as PACs. 2 U.S.C. § 433(a). So both effectively

require registration before doing much speech, a type of prior restraint.

Montana argues that it is easy to become a PAC in Montana by filing a form. Opp'n 13. It is also easy to become a federal PAC by filing a form. But for a corporation to be unable to use non-source-restricted money from its general fund is an onerous burden under either Montana's Ban or the now-overturned federal ban on corporate independent expenditures. And imposed PAC-status is a cognizable constitutional burden as a matter of law. *See Citizens United*, 130 S. Ct. at 897; *Montana Chamber of Commerce v. Argenbright*, 266 F.3d 1049, 1057 (9th Cir. 2000) ("There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression.").

Given this burden, the Montana Supreme Court was required to apply this Court's First Amendment strict scrutiny. Montana claims that "Petitioners concede that the decision below acknowledged the proper levels of scrutiny." Opp'n 11. This is surprising because the Court only "acknowledged" strict scrutiny as applicable to *one* of the three corporate plaintiffs and because the caption of Petitioners' recited discussion states that "the state court *rejected* this Court's holding that strict scrutiny applies to the corporate ban." Pet. 12 (emphasis added; caps altered). The Montana Supreme Court actually applied intermediate scrutiny to MSSA and Champion Painting, even though they could not speak *as corporations*. App. 31a. And though the court claimed to apply strict scrutiny to ATP, its scrutiny was com-

plaisant because it claimed that ATP could speak through a PAC (contrary to *Citizens United*, *supra*), App. 32a, and that Montana had interests (essentially forbidden anti-distortion interests) justifying its Ban. Pet. 12-13.

In sum, the Montana Supreme Court and Montana in its Opposition have failed to follow the controlling analysis of *Citizens United*.

III.

The Decision Below Creates Splits with Federal Circuit Courts.

Petitioners established that the decision below creates splits with federal circuit courts. Pet. 19-20. Montana argues that there is no real circuit split because it exempts *MCFL*-type corporations[7] from its corporate-independent-expenditure Ban. Opp'n 33. Complying with *MCFL* neither provides narrow tailoring, Opp'n 32-33, nor eliminates circuit splits.

This Court, in *Citizens United*, and the courts Petitioners cite, Pet. 19-20, did not rely on any distinction between *MCFL*-type corporations and business corporations, as Montana asserts. Opp'n 33. That some of the cases had nonprofit plaintiffs does not mean that they were *MCFL*-type corporations in any event. For example, Montana cites *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011), as involving a nonprofit's member-

[7] In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court created an exception to the federal ban for nonprofit, ideological, nonstock corporations that receive no corporate contributions. *Id.* at 263-64.

ship fund. Opp'n 33. But a PAC is not an *MCFL*-type corporation, and Wisconsin Right to Life is not an *MCFL*-type corporation because it receives corporate contributions. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 458 (2007) (WRTL was a "nonprofit, nonstock, ideological advocacy corporation" but not within the *MCFL* exception).[8]

In sum, Montana has failed to show that the decision below did not create splits with federal circuits on the controlling holdings of *Citizens United*.

IV.

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

The immense pressure to overturn this Court's resolution of a divisive controversy in *Citizens United*, raises the standard for overturning that precedent and counsels summary reversal. Pet. 24. The outpouring of amici briefs for Montana and overruling *Citizens United* increases this pressure and the need for summary reversal.

This is also true of other attacks on *Citizens United*. For example, fifty organizations sent a letter to Congress seeking hearings on a constitutional amendment overturning *Citizens United* (available at http://www.pfaw.org/issues/on-capitol-hill/letters/Hold-House-hearings-on-amending-the-Constitution-

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[8] Moreover, though Montana tries to establish that MSSA is an *MCFL*-type corporation (and thus unburdened by the Ban), Opp'n 14, 33, this is not so, as the dissent showed, App. 62-66a, and it need not be decided in any event because other Petitioners have standing.

to-remedy-Citizens-United). The Senate Judiciary Committee is reportedly planning hearings on overturning *Citizens United*. *See* http://www.pfaw.org/print/39916. And the *Washington Post* reports the mounting pressure on this Court. *See* Robert Barnes, *Supreme Court faces pressure to reconsider Citizens United ruling*, Washington Post, May 20, 2012, http://www.washingtonpost.com/politics/supreme-court-faces-pressure-to-reconsider-citizens-united-ruling/2012/05/20/gIQAOdoqdU_story.html. *See also supra* note 6 (Montana Governor signed anti-*Citizens United* initiative).

Montana argues that this case "is ill-suited to summary reversal given the lack of a record establishing any substantial burden on Petitioners' free speech rights." Opp'n 34. But Montana is simply wrong that requiring corporations to speak through an SSF (PAC) is not a substantial burden. *See supra* at 7-9. And despite Montana's obfuscation efforts, it has failed its burden of justifying Montana's Ban on the use of corporate general funds for independent expenditures, which Ban prevents Petitioners from making independent expenditures *as corporations*. Montana has simply refused to follow the central, controlling holdings and rationale of *Citizens United*. That sort of failure to abide by this Court's holdings and constitutional duty should not be rewarded with plenary review.

In sum, this case is best decided by granting certiorari and summarily reversing the decision below.

Conclusion

For the reasons stated, the Court should grant certiorari.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)
jboppjr@aol.com

Margot Barg Ogburn
WITTICH LAW FIRM, P.C.
602 Ferguson, Suite 5
Bozeman, MT 59718
406/585-5598
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