IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0081

WESTERN TRADITION PARTNERSHIP, INC. a corporation, registered in the State of Montana, and CHAMPION PAINTING, INC., a Montana Corporation, MONTANA SHOOTING SPORTS ASSOCIATION, INC., a Montana Corporation,

Plaintiffs and Appellees,

v.

ATTORNEY GENERAL of the State of Montana, and COMMISSIONER OF POLITICAL PRACTICES,

Defendants and Appellants.

BRIEF OF APPELLANTS

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Jeffrey M. Sherlock, Presiding

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ISSUE PRESENTED

Whether the requirement that corporations make candidate campaign expenditures through individual funds voluntarily raised, first enacted as the Corrupt Practices Act of 1912 and now codified at Mont. Code Ann. § 13-35-227, abridges the freedom of speech guaranteed by U.S. Const. amends. I and XIV, or impairs the freedom of speech guaranteed by Mont. Const. art. II, § 7.

STATEMENT OF THE CASE

Plaintiffs are a voluntary political association (Montana Shooting Sports Association of Missoula, or "MSSA"), a sole proprietorship (Champion Painting of Bozeman, or "Champion"), and a foreign corporation (Western Tradition Partnership of Colorado, or "WTP"). They seek a declaratory judgment that the 1912 Corrupt Practices Act's corporate campaign expenditure provision, Mont. Code Ann. § 13-35-227, violates the freedom of speech, and an injunction against its enforcement. See 1st Amend. Compl. (Doc. 5), Prayer. Plaintiffs conducted no discovery, but instead relied exclusively on the United States Supreme Court's decision in Citizens United v. Federal Election Comm'n, 130 S. Ct. 876 (2010), which invalidated a different federal corporate electioneering law. On cross-motions for summary judgment, Plaintiffs presented two affidavits consisting of less than six double-spaced pages of conclusory testimony.

The State responded with an extensive record distinguishing this case from Citizens United. Then-Commissioner of Political Practices Dennis Unsworth described the application of campaign finance laws to the plaintiffs and how they enable an informed electorate. See State's S.J. Br. (Doc. 27), Unsworth Aff. The Commissioner's Program Supervisor Mary Baker explained the minimal burden of compliance with the political committee requirement, and detailed the hundreds of large and small committees including corporate committees that have registered with the Commissioner's Office. See State's S.J. Br. (Doc. 27), Baker Aff. The State also presented the Plaintiffs' own deposition testimony, which confirmed their ability to campaign freely on behalf of their corporations. Champion Dep. & Marbut Dep. (Doc. 27). The Commissioner's Investigator attested to WTP's efforts to use the corporate form to launder anonymous out-of-state donations into Montana campaigns. See State's S.J. Br. (Doc. 27), Hoffman Aff.

University of Montana Professor Emeritus of History Harry Fritz, a former Montana legislator, explained the origins of the Corrupt Practices Act in the early corporate domination of state government. See State's S.J. Br. (Doc. 27), Fritz Aff. Former Secretaries of State and gubernatorial candidates Bob Brown and Mike Cooney related their experience in the uniquely grassroots form of politics enabled by the Corrupt Practices Act, and jeopardized by its potential invalidation. See State's S.J. Br. (Doc. 27), Brown Aff. & Cooney Aff. Edwin Bender,

Executive Director of the National Institute on Money in State Politics, analyzed the particularly accessible character of Montana politics and the likely effect of unlimited corporate campaign expenditures based on the current corporate domination of the initiative process. See State's S.J. Br. (Doc. 27), Bender Aff.

Plaintiffs did not rebut these facts, and the District Court held that none of the material facts were disputed. S.J. Order (Doc. 47) App. A, at 4. However, neither the Plaintiffs nor the District Court addressed the facts concerning whether the law as enforced imposes any significant burden on free speech, whether the State or the People have compelling interests in the law, or how the law is tailored to those interests. Indeed, the District Court's only discussion of the record was its dismissal of Prof. Fritz's historical background because, in its words, "the Copper Kings are a long time gone to their tombs." S.J. Order (Doc. 47) at 10. Instead, in a brief analysis relying on the distinct legal and factual circumstances of Citizens United, the District Court held that the Corrupt Practices Act was a "ban on speech," S.J. Order at 7-8, and that there was no compelling interest supporting the Act, S.J. Order at 9-11. The District Court also rejected an "anti-distortion interest" that the State did not argue. S.J. Order at 10-11.

Therefore, the District Court granted summary judgment for Plaintiffs, denied it for the State, declared the Corrupt Practices Act as codified at Mont. Code Ann. § 13-35-227(1) unconstitutional, and permanently enjoined the State

from enforcing it. S.J. Order at 14. However, the District Court declined to award fees under the private attorney general doctrine because it was "not so sure" of "the number of people," as opposed to the Plaintiff corporations, who actually stood to benefit from its decision. S.J. Order at 13. After two months of delay following Plaintiffs' unexplained and unprecedented post-summary judgment motion to dismiss WTP as lead plaintiff after it had prevailed (Doc. 59), the District Court entered judgment and the State appealed. See Docs. 78-82.

STATEMENT OF THE FACTS

These material facts were genuinely undisputed on summary judgment.

The Corrupt Practices Act Helped to Rescue State Politics.

Nearly a century ago, Montanans acted to take back their state government after the Copper Kings' corporate interests had dominated the political sphere for decades. Fritz Aff. ¶¶ 4-5; 14-25, 28; Brown Aff. ¶ 21. No less than the United States Senate "expressed horror at the amount of money which had been poured into politics in Montana." Fritz Aff. ¶ 14. Foreign corporations extorted special interest favors from Montana lawmakers through "naked corporate blackmail of a sovereign state." Fritz Aff. ¶¶ 15-16, 21-23. These corporations expended as much as $1000 per vote to influence elections, "drowning out Montanans' own voices in the political process." Fritz Aff. ¶¶ 17-18. That influence bled into state campaigns with no federal analogues, such as those of local government officials

and judges who, notwithstanding their relatively small constituencies, possessed substantial authority over corporate interests. Fritz Aff. ¶¶ 19-20.

In the face of these uniquely compelling circumstances, the People passed the Corrupt Practices Act of 1912, which provided in relevant part: "No corporation . . . shall pay or contribute in order to aid, promote, or prevent the nomination or election of any person." Initiative Act Nov. 1912, § 25, 1913 Mont. Laws at 604. That has been the unquestioned law of this land ever since. See 1979 Mont. Laws ch. 404, § 1 ("A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."). The Corrupt Practices Act does not prohibit or restrict corporate speech. Instead, it regulates the manner in which corporate managers may finance campaign expenditures on the corporation's behalf by requiring the use of voluntarily raised and accurately disclosed contributions by the associated individual managers, employees, and shareholders who make an affirmative decision to support the corporation's political point of view. See Mont. Code Ann. § 13-35-227(3).

Montana's law ushered in a robust form of grassroots politics. Fritz Aff. ¶¶ 27-28. Our campaigns rely on person-to-person contact across vast distances supported by personal contributions. Brown Aff. ¶¶ 12-18; Cooney Aff. ¶¶ 9-15; Unsworth Aff. ¶¶ 19-20. Ninety percent of campaign contributions come from

individuals rather than interest groups. Bender Aff. ¶ 20. Those interest groups, which tend to favor incumbents who "have a seat at the table when policy questions are voted up or down," include corporate political committees. Bender Aff. ¶¶ 13, 20. Because campaigning is not costly in Montana, public office is extraordinarily accessible by any Montanan who is willing to hear from voters. Brown Aff. ¶ 12-14; Cooney Aff. ¶¶ 9-13. Montana's campaigns cost between half and one-tenth as much as the average campaign. Bender Aff. ¶ 20.

Corrupt Practices Remain a Threat to Montana Politics.

Unlimited direct corporate campaign expenditures would change this. Fritz Aff. ¶ 29; Brown Aff. ¶¶ 19-26; Cooney Aff. ¶¶ 16-25. In states that permit them, corporate independent expenditures swamp voter contributions. Bender Aff. ¶ 29. Montana's candidate campaigns would look more like ballot issue campaigns where corporate expenditures are permitted; individuals' share of support for candidates (now second-highest in the nation) drops to 5 percent when corporations spend. A small number of corporate and other special interests account for 95 percent of campaign spending in ballot issue elections, which were supposed to be the most democratic form of government. Bender Aff. ¶¶ 32, 22.

Such a corporate takeover of Montana candidate campaigns would "accomplish the same type of corruption of Montana politics" that existed before the Corrupt Practices Act. Brown Aff. ¶ 22; Cooney Aff. ¶ 25. Threatened

corporate expenditures cost nothing, but the threat of expenditures limited only by a corporation's legally mandated profit motive "may be far more effective than withholding a money contribution to the legislator or making a money contribution to the legislator's opponent." Cooney Aff. ¶¶ 21-23; Brown Aff. ¶ 24. Meanwhile, the use of the corporate form by groups like WTP would render disclosure laws unenforceable. Unsworth Aff. ¶ 20; Baker Aff. ¶¶ 13-15; Hoffman Aff. ¶¶ 4-5, Ex. A.

In short, "[u]nlimited independent corporate expenditures would have a negative and improper influence on the legislative process," through independent expenditure threats that "may be far more effective" at corruption than contributions. Cooney Aff. ¶¶ 21-22; Brown Aff. ¶ 23. In addition, "[c]orporations would have a very powerful weapon at their disposal through the use of unlimited independent expenditure[s]" to corrupt executive actions that are "less visible than decisions made in the legislature," which unequivocally "would have a negative effect on the deliberation" of state officers. Cooney Aff. ¶ 23. Unlike individuals, corporations disproportionately entrench incumbent candidates who can ensure "the investment will pay off in terms of benefits from public officials' decisions." Unsworth Aff. ¶ 19; Bender Aff. ¶¶ 20, 27.

"Montana state and local politics are more susceptible to corruption than federal campaigns." Brown Aff. ¶ 24. Because our campaigns are "less costly and

more open to citizen participation," today they "are not unduly influenced by large expenditures." Unsworth Aff. ¶ 8. Without the law the People of Montana enacted as the ***Corrupt*** Practices Act, the voters' concern about the appearance of corruption will become worse. Cooney Aff. ¶ 24. "Corporate expenditures pose a special threat of corrupting politics in Montana," and "accomplish the same type of corruption of Montana politics as that which led to the enactment of our citizens initiative." Brown Aff. ¶ 21; Cooney Aff. ¶ 25 (corporate expenditures "would corrupt our system that has worked very well for our citizens and our political heritage in Montana.").

Plaintiffs' Political Speech Is Unencumbered by the Act.

Plaintiffs are corporations with politically outspoken management that want to make independent expenditures in support of or opposition to candidates. Am. Compl. ¶¶ 3, 5, 7; Mont. Admin. R. 44.10.323(3) (defining "independent expenditure"). Each of them has engaged, or can engage, in campaign speech through their managers—the individuals who possess the voice through which corporations speak in campaigns if they speak at all.

MSSA has filed as a political committee for more than a decade. Its status as a voluntary association funded by individual members would not subject it to the law at issue. Baker Aff. ¶ 11; Unsworth Aff. ¶ 17. In 2008, not only did MSSA endorse multiple bills, but it also publicly supported or opposed candidates

in every statewide and legislative campaign using its corporate resources. Marbut Dep. 53:14-24, 54:25-55:16. This is precisely the sort of "voluntary association" speech that the Corrupt Practices Act does not regulate. Unsworth Aff. ¶ 15. MSSA therefore suffers no burden at all. In any event, MSSA already has complied with the far more burdensome federal PAC requirements as well as with the minimal state registration requirements at issue. Marbut Dep. 75:6-76:3; Baker Aff. ¶ 11.

Champion's one-person corporation is technically subject to the law. He seeks, however, to spend only his own money earned by his business on independent expenditures under his business's endorsement. He already can do that today without triggering any of Montana's campaign finance laws. Baker Aff. ¶ 10; Unsworth Aff. ¶ 17. Champion already speaks in support of or opposition to candidates "through blogs . . . through letters to the editor . . . through speeches . . . Whenever I'm given the opportunity," Champion Dep. 15:22-16:4, including through the Bozeman Tea Party (which is incorporating), and the Gallatin County Campaign for Liberty. Champion Dep. 33:19-34:1, 53:17-54:5. The only speech he claims he cannot make is an endorsement of his political messages by his own corporation. Champion Dep. 80:4-15. This mistakes the law, since he is free to lend his business's endorsement to any candidate with his own money. Unsworth Aff. ¶ 17.

Champion's only burden, then, is that he must make independent expenditures from his personal rather than his corporate checking account, both of which contain his money. Champion Dep. 26:15-26:17. Indeed, given that the political committee disclosure requirements would be triggered by his corporation but not by him as an individual, he would encounter a greater burden (minimal filing) spending through his corporation than he does now (no filing). See Mont. Code Ann. § 13-1-101(22) (political committee is "two or more individuals or a person other than an individual").

WTP, on the other hand, represents precisely the kind of covert corporate influence the Corrupt Practices Act is intended to regulate. This foreign corporation spends freely on attacking candidates in Montana, and it has plans to do much more. Hoffman Aff. ¶¶ 4-6, Exs. A, B. Standing alone, such campaign activity is subject only to the same undisputed disclosure laws applicable to MSSA and other political committees. What distinguishes WTP is its use of the corporate form primarily to evade disclosure of its funding sources, sources that are themselves out-of-state business corporations that seek to influence Montana elections anonymously. Hoffman Aff. ¶¶ 4-5, Ex. A; Baker Aff. ¶ 12. Plaintiffs did not dispute that WTP can serve as a conduit for foreign corporate funds. See Hoffman Aff. ¶ 5. Plaintiffs did not dispute that WTP has not complied with laws it does not challenge. See Baker Aff. ¶ 12. Plaintiffs did not dispute that WTP

sold itself to corporate campaign donors as a corporate shell used to circumvent disclosure laws. See Hoffman Aff., Ex. A at 33. In short, WTP and its ilk are arguments for, not against, the law at issue.

Corporations Are Active Participants in Montana Politics.

Corporations can and do speak freely in Montana elections under current law. Cooney Aff. ¶ 20. They also speak accountably. Like every other "person other than an individual who makes a contribution or expenditure" to influence an election, Mont. Code Ann. § 13-1-101(22), corporations file a couple of short forms with the Commissioner to disclose who they are, what they stand for, and where their money comes from. Baker Aff. ¶¶ 3-9; Unsworth Aff. ¶¶ 8-13. Corporations do so by establishing a "segregated fund," consisting "of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation." Mont. Code Ann. § 13-35-227. These filings, which Plaintiffs would be required to make regardless of their corporate form, impose no more than a trivial burden. Baker Aff. ¶¶ 3, 7-8; Unsworth Aff. ¶ 10, Exs. A-C. Plaintiffs themselves established that it takes all of two minutes to "create a PAC" under the law at issue. Champion Dep. 9:22 - 12:9 (asking the questions required on Form C-2 political committee registration). Yet Plaintiffs have made no attempt to understand or comply with these basic requirements. Champion Dep. 69:14-21; Marbut Dep. 78:8-22.

Nearly 200 political committees, or PACs, have been active in Montana politics over the past decade. Baker Aff. ¶ 9. Among them, corporate campaign funds range all the way from Northwestern Energy and Blue Cross Blue Shield to the Dawson-Wibaux Farm Bureau and the Tri-County Beverage Hospitality association of businesses. Baker Aff. Exs. A, B. Additionally, hundreds of corporate lobbyists both lobby for and contribute to candidates on behalf of corporate clients. Bender Aff. ¶¶ 26-27.

Under these laws, Montana's politics is as accessible and transparent as any state in the nation. Unlike in most other states, Montana citizens--the voters themselves--play a leading role in campaign finance. Brown Aff. ¶¶ 14-18; Cooney Aff. ¶¶ 9-15; Bender Aff. ¶¶ 17-20. As a result, Montana's public officials are accountable to their constituents. Brown Aff. ¶¶ 16-20; Cooney Aff. ¶ 10. This system of self-governance has worked well for Montanans, and Plaintiffs can and do participate fully in it. They only need to play by the rules, and be willing to put their names where their mouths and their money are.

STANDARD OF REVIEW

An order granting summary judgment is reviewed de novo, using the same standards applied by the lower court under Mont. R. Civ. P. 56. Bud-Kal v. City of Kalispell, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738. Summary judgment is proper when there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. Town and Country Foods v. City of Bozeman, 2009 MT 72, ¶ 12, 349 Mont. 453, 203 P.3d 1283. The constitutionality of a statute is a question of law subject to plenary review. City of Billings v. Albert, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. A facial challenge, such as the challenge Plaintiffs bring here, must fail where the statute has a "plainly legitimate sweep." Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008); see also State v. Lilburn, 265 Mont. 258, 270, 875 P.2d 1036, 1044 (1994) (potential constitutional infirmities should "be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally").

SUMMARY OF THE ARGUMENT

This case is distinguishable from Citizens United on both the facts and the law. The Corrupt Practices Act does not restrict corporate speech, but only regulates the manner of financing corporate speech by requiring managers, shareholders, and employees who wish to campaign on behalf of the corporation to do so from funds voluntarily contributed. Thus, corporate speech has remained a fixture of Montana politics for nearly a century; hundreds of corporate political committees, and the Plaintiffs themselves, freely engage in political campaigns under current law.

To the extent corporations may claim any more constitutional protection than the associated individuals that compose them, and through whom they speak, the Corrupt Practices Act satisfies constitutional scrutiny. Montana's past shows that the Corrupt Practices Act aims at the truly corrupting effects of unaccountable corporate domination in the political process. Montana's present shows the uniquely democratic, but fragile, accessibility of politics to voters at all levels. Additionally, the accountability of corporate campaign spending under the Corrupt Practices Act is essential to the enforcement of broader and equally compelling disclosure laws, and the integrity of the corporation's duties to shareholders under state corporate law. Finally, as Plaintiffs themselves have established, the People who adopted and the official who enforces the Corrupt Practices Act have properly tailored it to its anti-corruption purposes, while leaving unaffected the core political speech of advocacy groups and other voluntary political associations that incidentally have adopted the corporate form.

ARGUMENT

Plaintiffs' claim presumes this Court should invalidate the Corrupt Practices Act, despite a wholly one-sided record favoring the State, due solely to the United States Supreme Court's recent invalidation of a distinct federal statute in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010). A constitutional

principle unknown to the Montana (and American) legal tradition for nearly a century, Plaintiffs insist, is now so obvious as to require this Court's broad injunction against a cornerstone of democracy in Montana based on little more than the Plaintiffs' say-so and a citation.

The State disagrees. The Supreme Court in Citizens United considered the constitutional law of campaign finance to be determined by the strength of the particular claims at issue rather than the citations that purport to support them. A claim that is "not well reasoned" or "undermined by experience," id. at 912, or that is supported by "[n]o serious reliance interests," or so controversial as to undermine the claim's "ability to contribute to the stable and orderly development of the law," id. at 922 (Roberts, C.J., concurring), is due no special deference whatever its legal pedigree. Thus, even with respect to the federal law at issue in Citizens United, new arguments may support the laws the People enact. Id. at 924 (Roberts, C.J., concurring).

A law the People of Montana enacted in 1912 should not be lumped in with a law Congress enacted 90 years later under a one-size-fits-all federal rule. For example, several justices in the Citizens United majority suspected "an incumbency protection plan" in the federal law. Id. at 968 (Stevens, J., dissenting). But Montanans, not their elected representatives, conceived of and enacted the Corrupt Practices Act against the incumbent politics, as "part of the incomplete

effort to cast aside the 'copper collar.'" Montana Consumer Fin. Ass'n v. State, 2010 MT 185, ¶ 20, 357 Mont. 237, 238 P.3d 765. (Morris, J., specially concurring). Even the author of the First Amendment acknowledged the possibility that the dangers of corruption are heightened at the state rather than the federal level. James Madison, concerned about corruption by factions, observed that in the "large republic" at the federal level "it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried," while small republics like states would still be susceptible to "[t]he influence of factious leaders." "Publius," The Federalist No. 10 (Madison).

Montana's campaign finance laws are straightforward and used mostly by small business and nonprofit groups. Baker Aff. ¶¶ 7-9. In contrast, the Federal Election Commission had "adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since l975." Citizens United, 130 S. Ct. at 895. This complicated regulatory scheme "force[d] speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." Id. at 889. As a result, "smaller or nonprofit corporations cannot raise a voice" under the federal regime. Id. 907. This is demonstrably false in Montana. The federal law in Citizens United also constituted "an outright ban, backed by criminal sanctions" as a felony. Id. The

Commissioner's priority, as reflected by Montana laws, is disclosure and not sanctions. Unsworth Aff. ¶ 6.

Nor should the parodies of a political movie studio like Citizens United be lumped with the grave corruption of the political process by the corporate Copper Kings and those who would take their place today. Citizens United itself was a nonprofit corporation, but small only by the standards of national presidential politics. Citizens United's $12 million annual budget is nearly double the total amount raised for every Montana state office in 2008. Compare Citizens United, 130 S. Ct. at 887, with Bender Aff. ¶ 20. Yet, unlike the Copper Kings' expenditure of $1000 per vote, Fritz Aff. ¶ 18, Citizens United accepted "a small portion of its funds from for-profit corporations," Citizens United, 130 S. Ct. at 887, contributing just $2000 dollars of corporate treasury funds to a billion-dollar presidential campaign. Id., App. at 252a. Moreover, unlike any of the Plaintiffs here, "Citizens United has been disclosing its donors for years." Id. at 916. Indeed, the Citizens United decision was premised, in large measure, upon the notion that the transparency facilitated by "effective disclosure . . . enables the electorate to make informed decisions and give proper weight to different speakers and messages." Id. at 916. Montana's law is necessary to effective disclosure.

The Supreme Court's inquiry in Citizens United into the specific federal law at issue was founded in an "extensive record, which was over 100,000 pages long"

and already considered by the Court in an earlier case. Plaintiffs' record, in a constitutional challenge to a law that no court has previously addressed, was six pages long (double-spaced). Plaintiffs did not mention, let alone controvert, the material facts in the State's case. Their sweeping references to a single decision addressing a different law under different facts in a different context "cannot provide sufficient support" to defeat the State's motion for summary judgment, or defend their own, where they "did not offer any fact-based or expert-based refutation in the manner the rules provide." See Beard v. Banks, 548 U.S. 521, 534 (2006) (rejecting reliance on facts and expert views expressed in other cases but not before the court); see also Smith v. Burlington Northern & Santa Fe Ry., 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639 (reliance upon "conclusory statements" lacking specific factual support is not sufficient to raise a genuine issue of material fact). Montana's law deserves to be considered on its own terms.

I. MONTANA LAW IMPOSES NO SIGNIFICANT BURDEN ON PLAINTIFFS.

Plaintiffs must prove, in the first instance, that a constitutional right is implicated and that the statute in question infringes upon that right. Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 1999 MT 248, ¶ 56, 296 Mont. 207, 988 P.2d 1236. Plaintiffs failed to do so.

As the Supreme Court has held, "informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." Citizens United, 130 S. Ct. at 912. Yet, the "onerous restrictions" the Court identified were administrative burdens that far exceed the simple forms for registering a political committee in Montana. Citizens United, 130 S. Ct. at 897-98. In fact, these are forms that a corporation must file anyway as part of the disclosure requirements Plaintiffs do not contest here.[1] Unsworth Aff. ¶¶ 16.

In operation, Montana's law imposes no such restrictions, onerous or otherwise. More than 100 PACs are registered last year alone, and dozens of others have registered recently. Baker Aff., Exs. A-B. While it may be true in Washington that "the Government prevents [corporations'] voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests" with the result "that smaller or nonprofit corporations cannot raise a voice," Citizens United, 130 S. Ct. at 907, this is untrue in Helena. It is equally untrue in the case of each of the named Plaintiffs.

A. MSSA Already Can and Does Campaign As a Political Committee.

MSSA's presence in this action is founded on its mistaken understanding of laws that it has complied with since at least 1999. While MSSA is incorporated, it

[1] After prevailing below, Plaintiff WTP did challenge these disclosure requirements on constitutional grounds. See Western Tradition Partnership v. Hensley, BDV 2010-1120 (Mont. 1st Dist.).

also is the kind of voluntary association formed for political advocacy that meets the definition of a "political committee" under Montana law. It has claimed and campaigned under such status for more than a decade. Baker Aff. ¶ 11.

The law at issue does not apply to voluntary associations that are only incidentally incorporated. See Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S 238, 263 (1986); Unsworth Aff. ¶ 15. The disclosure forms themselves contemplate corporate political committees, as indicated by the check box for "incorporated." Unsworth Aff. ¶ 15 & Ex. A. In other words, Montana law already allows MSSA to use its "members' dues to speak politically for or against candidates," Marbut Aff. ¶ 8, by filing the same forms it has been filing under disclosure requirements it does not challenge.

MSSA's real complaint appears to be its inability to spend money in Montana elections unaccountably, a legal claim it does not raise here. Like many voluntary associations, MSSA has chosen in the past to use a segregated fund of separate donations that are earmarked for campaign purposes, and therefore reportable as to their source. MSSA is free to use its member dues for the same purpose, but it still must disclose the source of donations earmarked for campaign purposes. Mont. Admin. R. 44.10.519. Alternatively, MSSA can use its general member dues for campaign purposes, but if at any time campaigning becomes the association's primary purpose it is no longer an incidental committee and must

report all member dues over $35 as contributions. Mont. Admin. R. 44.10.327(3); Mont. Code Ann. § 13-37-229; see also Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990, 1011 (9th Cir. 2010) (upholding disclosure for "primary purpose" political advocacy groups). What it cannot do, however, is use the corporate form to conceal the sources of its campaign spending.

B. Champion Suffers No Burden.

Mr. Champion's corporation also established no cognizable burden on free speech rights. He is the corporation's sole shareholder, free to speak every word he claims is censored, using every dollar he claims is off-limits. As a sole proprietor, the segregated corporate campaign fund is meaningless. As a person spending only his own money, the political committee requirements are inapplicable. Mr. Champion has nothing to complain about under Montana's campaign finance laws.

Like MSSA, Mr. Champion misdirects his constitutional claims. What he really wants is a corporate tax break for campaign spending. Champion Aff. ¶ 6. This is something neither the federal nor state governments allow. See I.R.C. § 162(e); see also Mont. Code Ann. § 15-31-114(1)(a) (corporate deduction for "ordinary and necessary" business expenses); Baker Bancorporation v. Department of Revenue, 202 Mont. 94, 657 P.2d 89, 90 (1983) (net and gross income definition "is dependent upon and incorporates by reference the Federal Internal Revenue

Code, except where Montana law expressly provides otherwise"). These policies have been in place, and upheld under constitutional challenge, for decades. See Cammarano v. United States, 358 U.S. 498, 512-13 (1959) (rejecting First Amendment challenge to exclusion of political expenses from business deduction), superseded by I.R.C. § 162(e). In short, Mr. Champion has every right to speak on behalf of his corporation, but he has no right to a taxpayer subsidy under Montana or federal law for that speech.

C. WTP Is Appropriately Subject to the Law.

Plaintiffs make no factual claims concerning their lead plaintiff, Western Tradition Partnership. Unlike the other Plaintiffs, the law applies to WTP due to its corporate funding, as it should. WTP itself is in the same position as MSSA concerning segregated fund disclosure. However, it has made clear its intent to use corporate status primarily as a means to assist other corporations in evading campaign finance disclosure laws, rather than to associate for political speech through legitimate means. See generally Hoffman Aff. Ex. A. It is this shell game of one voluntary association in corporate form (WTP) spending the money of another, hidden, business corporation (unknown), that requires a segregated fund to prevent WTP and similar groups "from serving as conduits for the type of direct spending that creates a threat to the political marketplace." Massachusetts Citizens, 479 U.S. at 264.

WTP's stated plan, without regard for whether or not it prevails before this Court, is to launder out-of-state corporate money into Montana candidate elections. Its strategy is to "flood" campaigns with hundreds of thousands of dollars of independent expenditures in targeted campaigns, opposing candidates that do not pledge support for their policies. Hoffman Aff. ¶ 2, Ex. A. It touts to a roster of foreign corporations, including affiliates of corporations based outside of the United States, that "[c]orporate contributions are completely legal," and "we're not required to report the name or the amount of any contribution that we receive." Hoffman Aff., Ex. A at 33. Instead, it claims no one "will ever know" where the independent expenditure funding came from, and "[y]ou can just sit back on election night and see what a difference you've made." Id.

These veiled communications hardly convey the "valuable expertise" of WTP's hidden corporate funders, who supposedly are "the best equipped to point out errors or fallacies in speech of all sorts." Citizens United, 130 S. Ct. at 912; cf. Hoffman Aff., Ex. B (Partnership-affiliated flier associating candidate with serial murderers). If these corporations want to contribute their expertise in the public sphere, they should show "civic courage" to "stand up in public for their political acts" subject to "the accountability of criticism." Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring). But that is not what WTP wants.

Instead, it would use the corporate form to commit fraud in the marketplace of ideas.

II. MONTANA LAW WITHSTANDS CONSTITUTIONAL SCRUTINY.

The stakes of this case demand particularly close attention to the presumption of constitutionality due a century-old law that, until now, has not been seriously questioned. As the district court conceded, "[n]o one in this case is suggesting that Section 227 was unconstitutional when it passed," but only that it became so upon the pronouncement of Citizens United. S.J. Order at 11. "The constitutionality of an enacted legislative statute is prima facie presumed." Ravalli County v. Erickson, 2004 MT 35, ¶ 17, 320 Mont. 31, 85 P.3d 772. "The party challenging a statute bears the burden of establishing the statute's unconstitutionality beyond a reasonable doubt." Disability Rights Montana v. State, 2009 MT 100, ¶ 18, 350 Mont. 101, 207 P.3d 1092. "It is the duty of the Court to avoid an unconstitutional interpretation if possible." Montanans for the Responsible Use of the School Trust v. State Board of Land Comm'rs, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800.

A. Corporations' Free Speech Rights Are Derivative of Their Citizen Members.

The First Amendment provides in part that "***Congress*** shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I

(emphasis added). The Bill of Rights applies to the States, where it does, through the Fourteenth Amendment's command of "[n]o state shall . . . ." U.S. Const. amend. XIV; Pls.' Br. at 12. However, while the incorporation of the First Amendment against the States on behalf of natural persons is well-established, the applicability of that doctrine on behalf of corporations is uncertain.

It is, at least, a close question as to whether corporations can or do possess all of the First Amendment rights of individuals. Compare Citizens United, 130 S. Ct. at 925 (Scalia, J., concurring) ("at least," a corporation "cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'") with id. at 951 (Stevens, J., dissenting) ("members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights," and "they conceptualized speech in individualistic terms."). For example, none of the Plaintiffs, so far, claim a right to vote as corporations.

But it is not at all clear that these much-debated corporate rights may be asserted against the States in the same manner as they may be asserted against Congress. Justice Thomas, whose vote was necessary to the narrow majority in Citizens United, rejects incorporation of the Bill of Rights against the States as a matter of "substantive due process" accorded "persons" (including corporations). McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (Thomas, J., concurring). Instead, he holds that Americans bear their fundamental constitutional rights into

states under the Fourteenth Amendment's prohibition that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," such citizens defined as "persons born or naturalized in the United States." U.S. Const. amend. XIV, § 1. This is not susceptible to a construction protecting the corporation in itself, since "[t]he group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, 'citizens.'" McDonald, 130 S. Ct. at 3064 (Thomas, J., concurring). Importantly for present purposes, he further writes that "[t]he nature of a privilege or immunity thus varied depending on the person, group, or entity to whom those rights were assigned." Id. (Thomas, J., concurring).

The State does not argue that citizens who associate in the corporate form have no rights to free speech. Indeed, the State recognizes the right of corporations like MSSA to speak as freely as any other voluntary association, Mont. Code Ann. § 13-35-227(3), with the important qualification that a corporation's free speech rights are derivative of a citizen's free speech rights. The First Amendment's application to associations does not protect "corporate speech" in the abstract; it "protects the right of associations to engage in advocacy ***on behalf of their members***." See Montana Auto. Ass'n v. Greely, 193 Mont. 378, 386, 632 P. 2d 300, 305 (1981) (emphasis added). The Montana Constitution recognizes the difference between corporations and natural persons. Compare art. XIII, § 1

(requiring laws governing "nonmunicipal corporations") with art. II, § 3 ("All persons are born free and have certain inalienable rights.").

Recognizing this distinction at the state constitutional level is consistent with the States' reserved powers. See U.S. Const. amend. X. Under our federal system, where the States are not mere subsidiaries of the national government, "[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens." Printz v. United States, 521 U.S. 898, 920 (1997). How a State does so must be entitled to some latitude. The power to regulate elections reserved under the Tenth Amendment "inheres in the State by virtue of its obligation, already noted above, to preserve the basic conception of a political community." Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (citations and quotations omitted). This is all the more true where, as here, it is the citizens themselves, and not the government, that have enacted the law that imposes accountability.

Any analysis of Montana's efforts as a state to preserve "the basic conception of a political community," particularly one so crucial to that conception as the Corrupt Practices Act, therefore must begin with the distinctions the Constitution itself draws between citizens and corporations, and between state and federal sovereigns. Together with the unique factual and legal circumstances surrounding the Corrupt Practices Act, a finer analysis that takes account of these

distinctions provides ample grounds to depart from the rote application of Citizens United to Montana.

B. Montana Has A Compelling Interest In Requiring Business Corporations to Use Segregated Funds For Campaign Expenditures.

Laws that "do not prevent anyone from speaking" are subject to exacting scrutiny under the First Amendment, "which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." Citizens United, 130 U.S. at 914 (quotations and citations omitted). Laws that ban speech, on the other hand, are subject to strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Id. at 898. Unlike Citizens United, which relied on the latter standard, the record in this case lacks a single instance of censored speech. To the contrary, the record here contains ample evidence of corporate speech. Therefore, the former "exacting scrutiny" standard applies. Regardless, the law also meets strict scrutiny.

1. Corporate Independent Expenditures Can Corrupt.

It "has never been doubted" that the people through their legislatures may prevent "the problem of corruption of elected representatives through the creation of political debts." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978); see also Montana Auto. Ass'n v. Greely, 193 Mont. 378, 382, 632 P. 2d

300, 303 (1981). Corruption occurs "not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001).

Thus, more than individuals' campaign spending, corporate spending disproportionately favors incumbent officeholders, who unlike challengers can easily return the favor, or simply entrench the status quo. Bender Aff. ¶¶ 20, 27; see also Val Burris, The Two Faces of Capitalism: Corporations and Individual Capitalists as Political Actors, 66 Am. Soc. Rev. 361 (2001). Corporate electioneering regulation also helps "protect society from the purchase of special-interest regulation by corporations and their shareholders." Robert Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1118; cf. id. at 1152-53 (noting corporations' support of new campaign regulations).

Most importantly, however, corporate independent expenditures allow "implicit threats" against officeholders, using the prospect of corporate funds to unduly influence policy decisions, which is a far less expensive (and less detectable) means of corruption than holding out the prospect of campaign contributions. Marcos Chamon & Ethan Kaplan, The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior (April 2007)

available at http://people.su.se/~ekapl/jmp_final.pdf; cf. Hoffman Aff. Ex. A at 29 ("politicians . . . usually improve their stance on the issues they felt the most heat on"); see also Robert Hall, Free Speech and Free Elections, 3 First Amend. L. Rev. 173, 178 n.17, 188-90 (2004) (describing hog industry executives threatening legislators for votes against their industry, then outspending political parties to defeat targeted legislators). Such threats are even more pernicious than quid pro quo corruption. Brown Aff. ¶ 24; Cooney Aff. ¶ 21-23.

The Supreme Court could not, and did not, make factual findings about corporate expenditures in Montana campaigns, or any other campaigns at the state level. Instead, the Court's only basis for its conclusion that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," Citizens United, 130 S. Ct. 909, was a record from a case involving only federal congressional and presidential candidates in federal campaigns, id. at 910. While the Supreme Court knew the purpose and development of federal campaign finance laws under its watch, "[e]ach state has its own political traditions, structures, and exigencies, and these differences can have profound effects on campaign finance concerns." William P. Marshall, The Last Best Chance for Campaign Finance Reform, 94 NW. U. L. Rev. 335, 383 (2000).

State political campaigns in Montana are different in kind, not just degree, from federal campaigns. Montana has a unique history of corporate political

corruption that gave rise to the law at issue. Our elections are many orders of magnitude smaller than federal elections, even though our policies may be no less consequential financially to corporations. And voters choose many more public officials in Montana, including judges in heretofore nonpartisan elections. Allowing corporations to spend in Montana candidate elections would take us back to the days of the Copper Kings as out-of-state capital moves in to crowd out the voters themselves, with individual participation in campaign finance dropping from nearly 90 percent today to just 5 percent of the total, as happened with ballot issue campaigns. Bender Aff. ¶¶ 20, 22; see also Caperton v. A.T. Massey Coal, 159 S. Ct. 2252, 2257 (2009) (finding that $3 million in contributions including "$500,000 on independent expenditures," more than the total amount spent by individuals or either candidate, could "corrupt [a candidate's] integrity" as a matter of due process). These facts, none of which were present in Citizens United, are material distinctions between this case and that one.

a. Montana Has a History of Corporate Corruption of Politics.

The corruption threat posed by corporate electioneering does not arise from any partisan viewpoint, or inequality of wealth or economic scale alone. Nor is it new. Indeed, the Framers aptly described the paramount threat of corruption not as theft or bribery, but as "the use of government power and assets to benefit localities or other special interests ('factions')." Robert G. Natelson, The General

Welfare Clause and the Public Trust: An Essay in Original Understanding, 52 Kan. L. Rev. 1, 48 (2003).

Corporate electioneering corrupts the relationship between public officials and the public interest by encouraging political dependence on narrowly concentrated private interests embodied in the corporate form, backed only by "the economically motivated decisions of investors and customers," Massachusetts Citizens, 479 U.S. at 258, at the expense of the broader and more dispersed interests represented by the people themselves. See generally Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 393 n.245, 406 (2009); see also Bender Aff. ¶ 25; Cooney Aff. 20.

In Montana, these factional dynamics were ferocious at the turn of the Twentieth Century. The Madisonian balance of faction checking faction, cf. Citizens United, 130 S. Ct. at 907, was a fantasy at best because of the enormous natural resource wealth that drew foreign corporate interests to the Treasure State. Fritz Aff. ¶¶ 15, 21, 29. It is undisputed that WTP plans to revive this out-of-state corporate interference. Hoffman Aff. ¶ 5. In a small state like Montana, these outside corporations' campaign expenditures have no connection with our electorate other than the price they put on each vote. Brown Aff. ¶¶ 25-26; Cooney ¶ 20. Even the Cooper King Senator William Clark feared how "[m]any people

have become so indifferent to voting [in Montana] by reason of the large sums of money that have been expended in the State." Fritz Aff. ¶ 19.

In this way, Montana has much in common with Alaska, where that Supreme Court held that "elected officials can be subjected to purchased or coerced influence" despite the views of citizens "most intimately affected by elections":

> Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests. More than 100 years of experience, stemming from days when Alaska was only a district and later a territory without an elected governor or voting representation in Congress, have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies for dealing with social or resource issues. Outside influence plays a legitimate part in Alaska politics, but it is not one that Alaskans embrace without reservation.

State v. Alaska Civil Liberties Union, 978 P. 2d 597, 617 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000).

b. Montana's Governance Structure Is More Dependent on Elections.

Little has changed about Montana's natural resource wealth in the past century, but much has changed in its politics thanks to the Corrupt Practices Act. That law's spirit of accountability eventually led to a new Montana Constitution. That Constitution makes paramount the rights of public participation in and public information about government proceedings. Mont. Const. art. II, §§ 8, 9.

Consistent with this democratization of the state government, the Constitution also provides for direct election of many more officials than are present at the federal level. See art. V, § 3 (election of legislators); art. VI, § 2 (election of statewide offices); art. VII, § 8 (election of judiciary); art. XI, § 3 (election of local government). Each of these offices presents a different set of policy decisions susceptible to "improper influences from independent expenditures," from legal actions, licensing, contracting, and land use decisions, to the administration of elections themselves. Brown Aff. ¶¶ 24-26; Cooney Aff. ¶¶ 21-23.

Of particular concern is Montana's elected judiciary. In Caperton v. A.T. Massey Coal, 129 S. Ct. 2252 (2009), the Supreme Court reiterated the threat of "significant and disproportionate influence" posed by campaign spending. Id. at 2264-65. It is not enough to rely on a public servant's good faith to not be corrupted by $1000 in campaign contributions, $2.5 million in spending for a political organization supporting the candidate, and $500,000 in independent expenditures. Id. at 2257. Indeed, in Caperton the Supreme Court recognized no difference between independent expenditures and contributions in terms of undue influence on the judiciary. Id. at 2264. Montana's law ensures that such influence remains the "extraordinary" acts of a single individual, see id. at 2265, rather than business as usual. See Bender Aff. Ex. C. Not even Plaintiffs claim a right to

influence judicial campaigns through corporate expenditures, yet their arguments sweep broadly enough to undermine the integrity of the judicial system as much as the political system.

c. Montana's Grassroots Elections Remain Susceptible to Corporate Corruption.

Across all of these state and local races, corporate expenditures would quickly swamp citizens' support for their chosen candidates. Today, Montana has some of the most accessible public offices in the country due to the remarkably low costs of reaching a small electorate despite the vast areas to cover. Brown Aff. ¶¶ 14-17; Bender Aff. ¶¶ 14-17. These make for relatively competitive races, where officeholders must remain responsive to their constituents if they seek to hold their seats. Bender Aff. ¶ 14.

The evidence suggests that this accessibility and competitiveness would be short-lived should corporations be authorized to spend treasury funds in Montana campaigns. In the only campaigns where corporate managers have been allowed to amass their shareholders' money for political purposes, they have dwarfed the democratic process in Montana. Bender Aff. ¶¶ 11, 22.

What enables these attempts to monopolize the marketplace of ideas in political campaigns, today as it did under the Copper Kings, is the foreign corporation. Bender Aff. ¶ 11; Fritz Aff. ¶¶ 14-15, 29. Where a corporation cannot generate enough voluntary interest among Montana employees and

shareholders in a political committee, its managers can simply tap into foreign funds--out-of-state and out-of-country--accumulated through corporate revenues. Foreign corporate management, then, can exploit Montana's economy in the name of a foreign corporate interest that few or no Montana citizens share. See Alaska Civil Liberties Union, 978 P. 2d at 617; Fritz Aff. ¶ 29. The Supreme Court recognized this danger when it refused to extend the logic of its decision--it is only the speech and not the speaker that matters--to foreign speakers that were not recognized members of "our political process." Citizens United, 130 S. Ct. at 911.

2. Voters Have a Compelling Interest in Enforcement of Disclosure Laws.

"[T]he public has an interest in knowing who is speaking about a candidate shortly before an election." Citizens United, 130 S. Ct. at 915. That interest is sufficiently compelling to uphold Montana's law. "Judicial notice may be taken of the compelling need for disclosure laws which have as their purpose the deterrence of actual corruption and the avoidance of appearances of corruption." Montana Auto. Ass'n v. Greely, 632 P.2d 300, 303 (1981), citing Buckley v. Valeo, 424 U.S. 1, 67 (1976); see also California Pro-Life Council v. Randolph, 507 F. 3d 1172, 1178 (9th Cir. 2007) (state "has a compelling interest in requiring disclosure of contributions to groups who seek to influence voters.").

The only significant burden Plaintiffs claim is disclosure of their funding sources through reporting, see Am. Compl. ¶¶ 7, even though the law requires

filing only basic disclosure forms. Even this burden is insignificant constitutionally. See Citizens United, 130 S. Ct. at 916 (upholding disclosure requirements). Plaintiffs' objection to disclosure explains why associations of corporate managers that already can spend their own money through corporate political committees would rather spend other people's money from behind the corporate veil: it avoids disclosure, particularly where the money comes from other corporations seeking to influence elections anonymously. Thus, the corporate form is critical to at least one Plaintiff's (WTP's) plan to launder foreign corporate money through to Montana campaigns. Hoffman Aff., Ex A.

"Certain restrictions on corporate electoral involvement permissibly hedge against" circumvention of other valid campaign spending regulations. McConnell, 540 U.S. at 205. Corporate officers "diverting money" for campaign expenditures through the corporate treasury could transform the corporation itself into an informal political committee while avoiding disclosure of funding sources. Federal Election Comm'n v. Beaumont, 539 U.S. 146, 155 (2003) (citation and quotation marks omitted); see also Federal Election Comm'n v. Colorado Republican Campaign Comm., 533 U.S. 431, 456 (2001) ("all Members of the Court agree that circumvention is a valid theory of corruption"). A segregated fund protects against such diversions.

Moreover, disclosure of independent expenditures already falls short of what the public demands. Bender Aff. Ex. A. Corporate independent expenditures are notorious for the "wolf masquerading in sheep's clothing," to mislead voters into thinking a corporate campaign has grassroots support. California Pro-Life Council v. Getman, 328 F.3d 1088, 1106 n.24 (9th Cir. 2003); see also McConnell, 540 U.S. at 128 ("The Coalition--Americans Working for Real Change" funded by corporations opposing organized labor); id. at 197 ("Citizens for Better Medicare" funded by the pharmaceutical industry); Randolph, 507 F.3d at 1179 n.8 (describing big tobacco corporations masquerading as small businesses).

Complex corporate structures enable evasion of disclosure requirements, coordinated expenditure restrictions, and other unchallenged campaign laws, and demand an added level of regulatory complexity to rival securities and corporate tax law. Unsworth Aff. ¶ 20; Baker Aff. ¶¶ 13-16. "Unlike voluntary associations that may be incorporated but can easily account for the member dues and donations that fund their campaign activities, the volume of transactions and complexity of accounting of business corporations facilitates evasion of campaign finance disclosure requirements." Unsworth Aff. ¶ 20. However, "[t]he segregated fund prevents this evasion by establishing within the corporation something like a voluntary association where the funding is accountable." Id. The segregated fund requirement ensures simplified disclosure of only, and more importantly all,

money intended for campaign purposes. For Plaintiffs that complain about filling out even a couple of pages of disclosure forms, the regulation of business corporations as political actors *per se,* rather than through segregated funds, heightens rather than resolves their concern about the complexity of campaign finance laws.

3. States Are Masters of the Corporate Form They Create.

In 1898, mining company shareholders brought a derivative suit alleging misappropriation of corporate funds for political expenditures to promote "the silver cause" and lobby for the formation of a new county. McConnell v. Combination Mining & Milling, 30 Mont. 239, 76 P. 194, 198 (1904), modified on other grounds, 31 Mont. 563, 79 P. 248 (1905). This Court held that the expenditures, made "for strictly political purposes," were *ultra vires,* noting that "[t]he stockholders of the company . . . were not unanimous in their political beliefs." Id. at 199. This doctrine predated, and previewed the underlying concerns of, the Corrupt Practices Act. For the enforceability reasons discussed in the prior section, however, the Corrupt Practices Act displaced *ultra vires* liability for corporate independent expenditures as a practical matter.

Rejecting a general shareholder protection rationale at the federal level, the Court in Citizens United recognized that any abuse could "be corrected by shareholders 'through the procedures of corporate democracy.'" Id. at 911,

quoting Bellotti, 435 U.S., at 794, 98 S. Ct. 1407. Yet those procedures, standing alone, proved inadequate to the task as a matter of state law. Where states allow corporate campaigning, "[p]olitical contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls." See Jill E. Fisch, The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty, 75 Fordham L. Rev. 1593, 1613 (2006).

In this light, Montana's *ultra vires* doctrine, as codified in a more robust form through the Corrupt Practices Act, is exactly the kind of "procedure of corporate democracy" contemplated in Citizens United. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." Santa Fe Indus. v. Green, 430 U.S. 462, 479 (1977), quoting Cort v. Ash, 422 U.S. 66, 84 (1975); see also Kirkup v. Anaconda Amusement Co., 59 Mont. 469, 486, 197 P. 1005, 1011 (Mont. 1921) ("Corporations are creatures of the state, intangible things, incapable of thought or action, except in the fiction of the law, and courts must scrutinize the conduct of those who manage them"). It is the State that provides for incorporation, and the State is in the best position to determine whether and how these procedures "can be

more effective today" in helping shareholders "determine whether their corporation's political speech advances the corporation's interest in making profits." Citizens United, at 916.

C. Montana Law Is Narrowly Tailored To Its Interests.

Plaintiffs' challenge ignores the fact that most corporate political speech occurs through ***speech*** "such as lobbying, testimony, and other direct contacts" rather than "naked corporate money expenditures" to or for candidates. Jill E. Fisch, How Do Corporations Play Politics: The FedEx Story, 58 Vand. L. Rev. 1495, 1566 (2005). The law at issue leaves these well-used alternative channels of political communication untouched.

1. The Law Excludes Voluntary Associations.

Consistent with the original text and purpose of the Corrupt Practices Act, Montana's current law has been interpreted and applied to exclude voluntary associations organized for political advocacy. Unsworth Aff. ¶ 15. This policy recognizes that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," while other corporations may "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." Massachusetts Citizens, 479 U.S. at 263-64.

In other words, unlike voluntary associations, business corporations speak in someone else's name with someone else's money. When Justice Scalia, concurring in Citizens United, described "the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf," he described voluntary associations, not business corporations. Id. at 928 (Scalia, concurring). The compelling interest in effective disclosure reinforces the narrow scope of the law over business corporations, while excluding voluntary associations that only incidentally incorporate.

2. The Law Includes Business Corporations.

If the Court were to find that the current version of the Corrupt Practices Act does not survive constitutional scrutiny in some of its applications, any potential constitutional infirmity should "be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally." State v. Lilburn, 265 Mont. 258, 270, 875 P.2d 1036, 1044 (1994). Moreover, an unconstitutional amendment to a law "leav[es] the section intact as it had been before the attempted amendment." State ex rel. Woodahl v. District Court, 162 Mont. 283, 290, 511 P.2d 318, 322 (1973).

The original form of § 227 applied to the same kind of corporations that enjoyed "the state-granted monopoly privileges" the Founders resented. Id. at 926

(Scalia, concurring); see Init. Act. Nov. 1912, § 25, 1913 Mont. Laws at 604. Not incidentally, these may be the same kind of corporations WTP is serving. Hoffman Aff. ¶ 5 & Ex. A; see also Mont. Code Ann. § 70-30-102 (enumeration of public uses).

Thus, beyond addressing corporate campaign expenditures more generally, Part II.A-B above, the Corrupt Practices Act originally focused on those corporations that have "interfere[d] with governmental functions." Citizens United, 130 S. Ct. at 899. One form of that interference may have been the corporate exercise of eminent domain for questionable "public uses," or other special solicitude shown by the government to major corporations. See, e.g., Kelo v. New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting). Plaintiffs seem to expect that making public officials more accountable to business corporations with treasuries filled with other peoples' money, and less accountable to citizens and voluntary associations that must pay for speech out of their own pockets, will serve their political ends of less government interference. See Am. Compl. ¶¶ 3, 5, 7. They may be disappointed. See Sitkoff, 69 U. Chi. L. Rev. at 1113 (the corporate form is an efficient means for rent-seeking in the market for government action).

CONCLUSION

If the Court believes that its only role is to mechanistically apply the holding of Citizens United--without consideration of the history of our state, the Corrupt Practices Act, the differences between federal and state elections, the government interests at stake, or even the Plaintiffs bringing this action--there is little if any ground to cover in this appeal. This is the Plaintiffs' position. In the district court, they cited a case, not proved one. They did not even feign an attempt to rebut any of the facts the State presents.

The State respectfully submits that the Court's duty is not simply to cite other cases, but to render judgment on this case based on the record. This is not Citizens United: the parties are different, the laws are different, and the facts are different. Those differences, never before the United States Supreme Court and omitted entirely from the Plaintiffs' case below, require that this Court uphold Montana's law.

Respectfully submitted this 15th day of April, 2011.

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I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,998 words, excluding certificate of service and certificate of compliance.

_____
ANTHONY JOHNSTONE

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0081

WESTERN TRADITION PARTNERSHIP, INC., a corporation, Registered in the State of Montana, and CHAMPION PAINTING, INC., a Montana Corporation, MONTANA SHOOTING SPORTS ASSOCIATION, INC., a Montana Corporation,

Plaintiffs and Appellees,

v.

ATTORNEY GENERAL of the State of Montana, and COMMISSIONER OF POLITICAL PRACTICES,

Defendants and Appellants.

APPENDIX