No. 11-1179

IN THE

Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE STATES OF NEW YORK, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, NEVADA, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

To safeguard their democratic processes, the sovereign States have for over a century been enacting and enforcing laws regulating corporations' expenditures in state and local political campaigns. Although the States' laws governing corporate campaign expenditures vary in important respects, they all seek to ensure that such expenditures do not undermine principles of accountability and integrity in state and local elections, while protecting residents' rights to participate in the electoral process.

Petitioners' challenge to Montana's election laws asks this Court to address the permissible limits of state regulation of independent corporate expenditures in state and local candidate elections under the First Amendment. Any decision by this Court here will have consequences for state laws across the country. The amici States therefore have a strong interest in the outcome of this case, and a particularly strong interest in opposing petitioners' request that the Court summarily reverse the decision of Montana's Supreme Court, based on the Court's decision two years ago in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).[2]

This brief is submitted not only to oppose certiorari, but also—and principally—to urge this Court not to grant

1. Amici States submit this brief pursuant to Supreme Court Rule 37.4. Counsel of record for all parties received timely notice of amici States' intent to file this brief.

2. Amicus the District of Columbia is not a State but has authority to enact laws governing its local elections. *See* D.C. Code § 1-203.02. The District of Columbia therefore also has a strong interest in the issues presented on this petition.

summary reversal on the basis of *Citizens United*. This case addresses state regulation of corporate spending in state and local elections, in contrast to *Citizens United,* which analyzed a federal statute governing only federal elections. To grant summary reversal in this case would deprive the States of the opportunity to be fully heard on the question of how to reconcile the free speech rights recognized in *Citizens United* with the special problems attendant on protecting the democratic character of state and local elections and institutions.

SUMMARY OF ARGUMENT

The amici States agree with the State of Montana that the petition for certiorari should be denied. The decision of the Montana Supreme Court does not squarely conflict with the rulings of this Court, including *Citizens United*, or the decisions of other federal courts of appeals. Instead, this case presents the question of how the principles articulated in *Citizens United* apply in the quite different context of state and local elections. This Court should allow this novel question to percolate in the lower courts. Alternatively, if this Court grants review, summary reversal would be inappropriate because petitioners' challenge raises issues that were not presented in *Citizens United*. This amicus brief focuses on those issues.

Montana's law regulating corporate independent expenditures in state and local elections differs in several important respects from the federal law governing federal elections that the Court struck down in *Citizens United*. First, the Court found that the federal law at issue in *Citizens United* constituted a ban on corporate speech, but the same cannot fairly be said of the Montana law at issue here. *Citizens United* does not articulate a

clear standard for determining whether a law requiring a corporation that makes campaign expenditures to register as a political action committee, or PAC, constitutes a ban on speech. But under any reasonable standard, Montana has not banned corporations from speaking as to state and local elections. Montana simply requires a corporation to register a political committee and make independent expenditures from a segregated fund consisting of voluntary contributions from owners, members, or employees. *See* Mont. Code. Ann. (MCA) § 13-35-227(3). A political committee under Montana law is not a separate association from the corporation that registers it, and Montana provides streamlined procedures for the designation of political committees to permit corporations to speak timely and effectively in support of or in opposition to candidates for state and local office.

Second, as a state law applying to state and local elections, Montana's law regulating corporate campaign expenditures is supported by compelling government interests that were not present in *Citizens United*. The federal law struck down in *Citizens United* applied only to elections for President and Congress. By contrast, Montana's law applies to a wide range of state and local offices, including judgeships and law enforcement positions such as sheriff and county prosecutor. This Court has recognized that maintaining impartiality and the appearance of impartiality in judicial decisions is critically important, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and analogous interests apply to quasi-judicial and law enforcement offices. This Court should not summarily extend its reasoning in *Citizens United* to state laws that apply not only to high executive and legislative offices, but also to numerous judicial, quasi-judicial, and

law enforcement positions, where government interests in impartiality and freedom from outside influence are the strongest.

Moreover, the States, as compared with the federal government, face a much greater risk of domination of their elections by nonresident corporations. Recently, the Court summarily affirmed a district court decision upholding the federal law prohibiting independent expenditures by foreign nationals. *Bluman v. FEC*, 132 S. Ct. 1087 (Jan. 9, 2012) (Mem.), *aff'g*, 800 F. Supp. 2d 281 (D.D.C. 2011). States—particularly resource-rich States with small populations, like Montana—face the risk that nonresident corporations with discrete and well-defined interests will dominate campaign spending in state and local election contests. Laws regulating corporate campaign expenditures guard against and help prevent this outcome.

For all of these reasons, the Montana law at issue here, like many other state laws regulating corporate campaign expenditures in state and local elections, is sharply different from the federal law struck down in *Citizens United*, and the Court need not revise its ruling in *Citizens United* in order to sustain the challenged Montana law. In a thorough opinion applying *Citizens United*, the Montana Supreme Court correctly so held. There is no basis to summarily reverse that ruling.

While this case does not require the reconsideration of *Citizens United*, the amici States would support reconsideration of the matters addressed in *Citizens United*, whether in a future case or, if certiorari is granted here, in this case. *See American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012) (statement

of Ginsburg, J.). In particular, the amici States believe that the Court should reexamine the assertion in *Citizens United* that independent expenditures, no matter their size or circumstances, rarely cause corruption or the appearance of corruption of federal officeholders, as well as the holding that the federal law at issue in that case could not be supported, in whole or in part, by government interests in preventing distortion of political campaigns and protecting shareholders from the use of corporate funds for political communications they do not support. But the Court need not revisit those issues here. The petition should be denied, or in the alternative, the Court should order full briefing and oral argument.

BACKGROUND

The States have regulated corporate participation in politics for over a century. As corporations grew in size and economic importance near the end of the nineteenth century, control over corporate resources became concentrated in the hands of professional managers. The States recognized the economic benefits of separation of ownership and control, but also saw that it created the risk that managers would use shareholders' money to influence politicians for the managers' personal benefit or in other ways that the shareholders did not support.[3] Widespread legislative reform took hold after a 1905 scandal involving misuse of corporate funds by New York life insurance

3. *See* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Georgetown L. J. 871, 900-12 (2004); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis Into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 36 (2001).

executives "'shook the nation to its depths.'"[4] By 1916, over two-thirds of the States had enacted prohibitions on corporate contributions to candidates.[5]

These laws persisted and evolved over the ensuing decades. At the time *Citizens United* was decided, twenty-four States regulated corporate independent expenditures to varying degrees. *See* 130 S. Ct. at 908-09. A few States barred all expenditures by for-profit corporations, while many others provided an option for such corporations to designate a political committee for the purpose of making independent expenditures.[6]

After *Citizens United*, twelve States relaxed their laws regulating corporate independent expenditures.[7]

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4. Winkler, *supra*, 92 Georgetown L. J. at 889 (quoting Upton Sinclair, *The Brass Check: A Study of American Journalism* 228 (1920)); *see also United States v. UAW-CIO*, 352 U.S. 567, 572-73 (1957).

5. *See United States v. U.S. Brewers' Ass'n*, 239 F. 163, 168 (W.D. Pa. 1916); Robert E. Mutch, *Before and After* Bellotti: *The Corporate Political Contribution Cases*, 5 Election L.J. 293, 298 (2006). In 1916, of course, this Court's distinction between contributions and independent expenditures did not yet exist, and neither did the means for influencing voters through broadcast television.

6. *See* **Alaska** Stat. § 15.13.135(a) (Jan. 2010); **Kentucky** Rev. Stat. § 121.035 (2010); **Massachusetts** Gen. Laws, Ch. 55, § 8 (2010); **Minnesota** Stat. § 211B.15(3) (Jan. 2010).

7. *See* **Alaska** Sess. Laws, Ch. 36 (2010) (S.B. 284); **Arizona** Sess. Laws, Ch. 4 (2010) (H.B. 2788); **Colorado** Sess. Laws, Ch. 269 (2010) (S.B. 10-203); **Connecticut** Sess. Laws, Public Act No. 10-187 (2010) (H.B. 5471); **Iowa** Sess. Laws, Ch. 1119 (2010) (S.F. 2354); **Minnesota** Sess. Laws, Ch. 397 (2010) (S.F. 2471); **North Carolina** Sess. Laws, Law 2010-170 (2010) (H.B. 748); **South**

The States' legislative responses, however, evidence their continuing interest in ensuring that corporate expenditures do not threaten the integrity of their democratic processes. For example, Iowa amended its laws to require a majority of the board of directors or comparable executive body to authorize independent expenditures. *See* Iowa Code § 68A.404(2) (2010); *see also* La. Rev. Stat. § 18:1505.2(F) (1980); Mo. Rev. Stat. § 130.029(1)(1) (1978). Wisconsin promulgated an emergency rule permitting corporations to make independent expenditures from a "designated depository account." Wis. Admin. Code, Emergency Rule GAB 1.91(3) (expired Feb. 2011); *see also* Wis. Gov't Accountability Bd., Guideline No. GAB-1284 (May 2012) (same); Alaska Stat. § 15.13.052(a) ("political activities account"); Colo. Rev. Stat. § 145107.5(7) ("separate account"). Minnesota amended its laws to allow corporations to make independent expenditures, subject to accounting and reporting requirements. Minn. Stat. §§ 10A.12(1a), 10A.20. And many States enacted additional disclosure laws to ensure that owners and members know when management is spending their money on politics, and that the public knows who stands behind the messages broadcast into their homes.[8]

Dakota Sess. Laws, Ch. 76 (2010) (H.B. 1053); **Tennessee** Sess. Laws, Public Act No. 1095 (2010) (S.B. 3198); **Texas** Sess. Laws, Ch. 1009 (2011) (H.B. 2359); **West Virginia** Sess. Laws, Ch. 76 (2010) (H.B. 4647); **Wyoming** Sess. Laws, Ch. 74 (2011) (S.F. 3). In Kentucky, Massachusetts, Michigan, Ohio, Pennsylvania, and Wisconsin, an executive official or agency declared that some portion of the State's laws regulating corporate independent expenditures was unenforceable.

8. *See, e.g.*, **Arizona** Rev. Stat. § 16-914.02; **Connecticut** Gen. Stat. Ann. § 9-621(h); **Maryland** Elec. Law § 13-306; **South Dakota** Codified Laws § 12-27-16; **West Virginia** Code § 3-8-2.

Today, twelve States require every corporation to register as or designate a "political committee"[9] or to otherwise register[10] if it makes independent expenditures in excess of statutory threshold amounts to support or oppose the election of a particular candidate. Many more States require corporations to register as political committees if they accept contributions[11] or have a primary or major purpose to influence elections.[12]

In the barely two years since *Citizens United* was decided, opponents of campaign finance laws have commenced attacks on longstanding and newly enacted

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9. **Colorado** Rev. Stat. §§ 1-45-103(11.5), 145-107.5(3)(a); **Hawaii** Rev. Stat. §§ 11-302, 11-321(a); 10 **Illinois** Comp. Stat. §§ 5/9-3, 5/9-8.6(b); 21-A **Maine** Rev. Stat. §§ 1052(5)(A)(5), 1053; **Michigan** Comp. Laws §§ 169.203(4), 169.224; **Montana** Code Ann. §§ 131-101(22); 1337201; **New Hampshire** Rev. Stat. §§ 664:2(III), 664:3; **New York** Elec. Law §§ 14-100(1), 14-118.

10. **Arizona** Rev. Stat. § 16-914.02(A); **Minnesota** Stat. § 10A.14; **Tennessee** Code Ann. §§ 2-10-105(c)(1), 2-10-132; **Wisconsin** Stat. Ann. § 11.05; Gov't Accountability Bd., Guideline No. GAB-1284 (May 2012).

11. *See, e.g.*, **Alabama** Code §§ 17-5-2(11), 17-5-5(a); **Florida** Stat. § 106.011(1)(a), (b)(2); **Georgia** Code §§ 21-5-3(15), 21-5-34(e), (f); **Kentucky** Rev. Stat. §§ 121.015(3)(a), 121.170(1); **Massachusetts** Gen. Laws ch. 55, §§ 1, 5; **Missouri** Rev. Stat. §§ 130.011(9), 130.021(5); **Nebraska** Rev. Stat. §§ 49-1469(3), 49-1469.05(1), 49-1469.07; **Oregon** Rev. Stat. §§ 260.005(18), 260.044(3); **Vermont** Stat. Ann. tit. 17 §§ 2801(4), 2831.

12. *See, e.g.*, **Kansas** Stat. § 25-4143(k); **Louisiana** Rev. Stat. § 18:1483(14)(a)(i); **New Jersey** Elec. Law Enforcement Comm'n, Advisory Op. No. 01-2011 (Apr. 27, 2011); **New Mexico** Stat. § 1-19-26(L); **Utah** Code § 20A-11-101(29)(c)(v); **Virginia** Code § 24.2-945.1.

state laws alike, arguing that "PAC-style" requirements are unconstitutional *per se*. Most courts have rejected this argument,[13] but some have accepted it.[14] As this divide shows, *Citizens United* leaves unanswered questions as to how, if at all, its interpretation of federal PAC rules might affect the States' various PAC requirements.[15] Thus, after many decades of state regulation of corporate expenditures in state and local elections, this petition for certiorari arrives at a moment of intense and percolating litigation concerning the constitutionality of States' PAC requirements. *Citizens United* does not resolve these challenges, and, in particular, does not resolve the challenge presented in this case.

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13. *See National Organization for Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 314 n.4 (8th Cir. 2011), *reh'g en banc granted, opinion vacated*; *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1009 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *Iowa Right to Life Committee, Inc. v. Tooker*, 795 F. Supp. 2d 852, 865 (S.D. Iowa 2011) (appeal filed Mar. 8, 2012, Dkt. No. 12-1605). *Cf. also National Organization for Marriage, Inc. v. Walsh*, No. 10-CV-751A, 2010 WL 4174664 (W.D.N.Y. Oct. 25, 2010) (dismissing pre-enforcement challenge to definition of "political committee" for lack of jurisdiction) (appeal pending); *Vermont Right to Life Committee, Inc. v. Sorrell*, No. 2:09-cv-188 (D. Vt.) (pending challenge).

14. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677-79 (10th Cir. 2010); *see also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008).

15. *See Yamada v. Weaver*, No. 10-cv-497, --F. Supp. 2d --, 2012 WL 983559, at *20 (D. Haw. Mar. 21, 2012); *South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 720 (D.S.C. 2010).

ARGUMENT

THE COURT SHOULD DENY PETITIONERS' APPLICATION FOR SUMMARY REVERSAL

This Court rarely reverses the judgment of a State's highest court on summary review, and almost never does so to invalidate a duly enacted state statute. Nearly all of the summary reversals of state courts have corrected a court's clearly erroneous application of constitutional rules of criminal procedure,[16] and have not struck down a statute enacted by the State's legislature or by the State's citizens through ballot initiative.

This Court has summarily reversed to strike down a state statute only in truly exceptional circumstances, such as where the state court, in upholding the statute, openly disagreed with a prior ruling of this Court,[17] or where this Court had already invalidated the same statute or a virtually identical statute of another *State*.[18]

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16. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam) (effective assistance of counsel); *Presley v. Georgia*, 130 S. Ct. 721 (2010) (per curiam) (Sixth Amendment right to public trial); *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam) (Fourth Amendment suppression order); *see also* the majority of cases cited at Pet. 33.

17. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

18. *See El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (per curiam); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (per curiam); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (per curiam). *But cf. Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam); *Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (per curiam).

Neither circumstance is present here. First, the Montana Supreme Court carefully applied *Citizens United*; it did not disregard or express disagreement with that decision. Second, this Court has not yet addressed the question presented by this petition—namely, the effect of *Citizens United* on the validity of a *state* statute regulating corporate independent expenditures in state and local candidate elections.

Petitioners here ask the Court to strike down Montana's law on summary review, based on a comparison to a quite different *federal* law. Petitioners and their amici cite no case in which this Court has summarily invalidated a state statute based on a prior decision involving an allegedly analogous federal statute. The Court does not reverse summarily under these circumstances for good reason. The Constitution grants enumerated powers to the federal government and reserves the remainder to the States, and as a result, the States can and do enact legislation based on authority and interests that are distinct from those possessed by the federal government. And the States' interests are at their greatest as to the regulation of their own democratic processes of self-government.

For all of these reasons, even if the challenged Montana law were identical to the federal statute struck down in *Citizens United*—and, as shown below, it is far from identical—disposing of this case on the merits would require a fully considered analysis that takes these constitutional distinctions into account. And because petitioners' proffered authority does not address several critical issues arising under the State's law, summary reversal would be especially inappropriate here.

A. The Montana Law at Issue Here Does Not Operate as a Ban on Corporate Speech.

The decision in *Citizens United* rested on the Court's conclusion, at the outset of its analysis, that the federal statute at issue operated as a ban on corporate speech.[19] The Court held that a federal statute authorizing a corporation to form and administer a federal PAC for the purpose of making independent campaign expenditures did not permit the corporation itself to speak. *See* 130 S. Ct. at 897 (citing 2 U.S.C. § 441b(b)(2)). The Court reasoned that (1) a federal "PAC is a separate association from the corporation," and (2) even if it were not, federal PACs are "burdensome" and "expensive," given the extensive body of federal statutes and regulations that apply to them. *Id.* The Court further emphasized that a corporation had to run the administrative gauntlet required to form a federal PAC before the PAC could speak. *Id.* at 898.

But none of these things is true as to Montana's laws permitting the designation of "political committees" and allowing corporations to make independent expenditures from a "segregated fund." *See* MCA §§ 13-1-101(22), 13-35-227(3); *see also* Mont. Admin. R. § 44.10.327 (types of committees). First, in Montana, political committees are not separate associations or entities from the corporations that register them. Second, Montana's rules governing the registration of political committees are far less burdensome than the federal regulations governing

19. Like the plaintiff in *Citizens United*, petitioners in this case do not challenge any limit on corporate contributions or coordinated expenditures that a corporation makes in concert with or at the request of any political candidate or party. *See* 130 S. Ct. at 909.

federal PACs. Consequently, there is no foundation for petitioners' repeated characterizations (*e.g.*, Pet. at 10-11) of the Montana law as a ban on corporate speech comparable to the federal law addressed in *Citizens United*.

Citizens United did not describe a test for determining whether a "political committee" or "segregated fund" is separate and distinct from the corporation that sponsors and administers it. The Court did cite Justice Kennedy's dissenting opinion in *McConnell* on this point, however, *see* 130 S. Ct. at 897-98 (citing *McConnell v. FEC*, 540 U.S. 93, 330-33 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)), and that opinion provides some guidance in this area. Justice Kennedy's opinion in *McConnell* suggests that an appropriate test for determining whether a corporation is able to speak through its PAC would consider (1) the degree of control that the corporation has over the PAC, (2) whether the statute permits attribution of political communications to the corporation, and (3) whether the PAC is a distinct legal entity. *See McConnell*, 540 U.S. at 330-33. If the corporation controls the content of the communication and is identified as the speaker, the corporation is undoubtedly making a statement, regardless of whether the PAC is a distinct legal entity, and regardless of who pays for the statement. *Cf. Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (holding that, under securities laws, "the maker of a statement is the person or entity with ultimate authority over the statement"). And if the PAC or segregated fund is *not* a distinct legal entity, but instead merely a label or designation for regulating certain corporate activities, the conclusion that the corporation is speaking follows

only more strongly. *See McKee*, 649 F.3d at 56; *Swanson*, 640 F.3d at 313.

Montana's laws concerning "political committees" meet these tests. First, the corporation controls a political committee that it registers under Montana law because the committee's decision-making authority is vested in an employee or employees of the corporation.

Second, the corporation may identify itself as the speaker in political communications, so long as the communications comply with other applicable disclosure requirements. *See* MCA § 13-37-210; Affidavit of Mary Baker, Sept. 10, 2010 ("Baker Aff."), ¶ 10 ("[T]here is nothing in Montana's campaign finance laws that would prohibit a political committee led by Mr. Champion from using his corporation's name to support or oppose political candidates, parties, or ballot measures."). A Montana corporation may broadcast a message stating that "ABC Corp. endorses Mr. X for Governor"—although in practice many corporations elect not to identify themselves as the speaker in this way, and others avoid direct association with a message by contributing to another group that makes independent expenditures, such as petitioner American Tradition Partnership. *Cf. Citizens United*, 130 S. Ct. at 914 (noting evidence in *McConnell* record "that independent groups were running election-related advertisements while hiding behind dubious and misleading names" (quotation marks omitted)).

Third, Montana law does not require that a political committee or its segregated fund be incorporated or have any separate legal existence. Montana law defines a political committee as a "combination of two or more

individuals or *a person*" that makes a contribution or expenditure to support or oppose a candidate, MCA § 13-1-101(22) (emphasis added), and further defines "person" to include a corporation, MCA § 13-1-101(20). This statutory scheme therefore enables a corporation to register *itself* as a political committee. For all these reasons, there is no basis to conclude that a political committee in Montana is a "separate association" from the corporation that registers and controls it. *Cf. Janus*, 131 S. Ct. at 2304 (investment manager not liable for statements made by mutual fund, which was "legally separate entit[y]" with independent board).

Nor are political committees in Montana "burdensome" and "expensive," as the Court found to be true of federal PACs organized and administered under the extensive regulatory regime of the FEC. Petitioners do not meaningfully dispute that administering a political committee under Montana law is far less burdensome and costly than administering a PAC under the federal regime considered in *Citizens United*. A political committee may register with the Montana Commissioner of Political Practices by completing a short form requesting basic information such as the committee's name and address, the name and address of the committee treasurer, whether the committee is incorporated, and the name of the candidate, party, or ballot issue that the committee supports or opposes. *See* Baker Aff. ¶ 3; Mont. Admin. R. § 44.10.405. And the corporation need not register as a PAC until *after* making a contribution or expenditure, *see* MCA § 13-37-201 (within five days), resolving the Court's objection in *Citizens United* that federal PACs "must exist before they can speak," 130 S. Ct. at 898. These reporting requirements are *de minimis*.

Montana's law does require corporations to make campaign expenditures from a segregated fund consisting of voluntary contributions from individuals associated with the corporation. MCA § 13-35-227(3). But, for the reasons outlined above, the Montana statute does not ban corporate speech. The Court's holding in *Citizens United* was premised on the conclusion that the federal law at issue there banned corporate speech. *Citizens United* should not be summarily expanded to cover the quite different Montana law involved here.

B. The States Have Compelling Interests in Regulating Corporate Independent Expenditures in State and Local Elections That Were Not Addressed in *Citizens United*.

1. Montana's law, like most if not all *state* campaign finance laws, covers elections for a range of state and local offices—including judicial, quasi-judicial, and law enforcement positions—that have no analogue in federal elections. The federal law addressed in *Citizens United* applied to elections for President, Vice President, Senator, and Representative, *see* 2 U.S.C. § 431(3), and the Court's analysis was accordingly rooted in norms specific to "representative politics," 130 S. Ct. at 910 (quotation marks omitted). But Montana's law applies not just to analogous state gubernatorial and legislative elections, but also to elections for judge, county attorney, sheriff, and public service commissioner, among many other offices.[20]

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20. Mont. Const. art. VII, § 8 (judges); MCA § 69-1-103 (public service commissioners); *id.* § 7-4-2203 (county attorney, clerk of the district court, county clerk, sheriff, treasurer, county superintendent of schools, county surveyor, assessor, coroner, public administrator, and justice of the peace).

Citizens United had no reason to consider, and did not consider, the States' interests in regulating elections for offices like these.

In striking down the federal statute restricting corporate expenditures in campaigns for presidential and congressional office, *Citizens United* stated that "quid pro quo" corruption is the only form of influence over federal elected officials that the government has a compelling interest in preventing, and concluded that the interest failed to support the statute at issue in that case. *See* 130 S. Ct. at 908-11. The Court rejected the notion that the federal statute could be sustained as a regulation of corporations' "influence over or access to elected officials," on the ground that influence, ingratiation, and access are unavoidable in "representative politics." *Id.* at 910 (quotation marks omitted).

But any such norms accepting influence and access in "representative politics" do not necessarily apply to judicial, quasi-judicial, and law enforcement officials. The force of this point is clearest as to judicial office. Judges are not "representatives" with offices open to the public, and outside influence by major campaign spenders is not recognized as a legitimate factor in judicial decision-making. The Court confronted a variation on the point in *Caperton v. A.T. Massey Coal Co.*, where it held, as a matter of constitutional due process, that a businessman's independent expenditures supporting a candidate in a judicial campaign created an "objective risk of actual bias" sufficient to require recusal of the candidate as judge in litigation involving the business. 556 U.S. at 886. To be sure, as the Court observed in *Citizens United*, 130 S. Ct. at 910, the decision in *Caperton* held only that due

process principles required the judge's recusal in the case in question, and did not consider the permissibility of any state law restricting campaign expenditures in judicial elections. But *Caperton* nonetheless demonstrates that norms against influence and the appearance of influence in judicial decision-making, not limited to quid pro quo corruption, are so important as to be constitutionally enshrined.

Rules governing recusal may not suffice to prevent improper influence in judicial, quasi-judicial, and law enforcement matters for several reasons, including the fact that such influence is often not confined to a specific case in which a speaker is a party or otherwise directly interested. This Court has not yet addressed whether a State's interest in preventing improper influence and the appearance of such influence over judicial, quasi-judicial, and law enforcement officials may support a state law regulating campaign expenditures, particularly when, as in this case, the law does not ban anyone from speaking.[21]

2. State campaign finance laws like Montana's also implicate the government's interest in regulating campaign expenditures by nonresidents to a vastly greater degree than the federal law this Court considered

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21. Petitioners are incorrect in arguing (Pet. at 19 n.4) that the Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), forecloses any argument that elections for judicial, quasi-judicial, or law enforcement offices implicate broader governmental interests than are presented by elections solely for representative offices. To the contrary, *White* expressly disavowed any suggestion that the First Amendment permits no distinctions between "campaigns for judicial office" and "campaigns for legislative office." *Id.* at 783.

in *Citizens United*. For instance, petitioner American Tradition Partnership, a Colorado corporation, is a foreign corporation as to Montana. The States have a compelling interest in preventing domination of state and local elections by nonresident corporate interests. *See, e.g.*, *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000).

In *Citizens United*, the Court expressly reserved the question of the constitutionality of a federal law prohibiting independent campaign expenditures (as well as campaign contributions) by foreign nationals. *See* 130 S. Ct. at 911. Last year, a three-judge federal district court upheld the federal ban on independent expenditures by foreign nationals, *Bluman v. FEC*, 800 F. Supp. 2d 281, and, earlier this year, the Court summarily affirmed that ruling, 132 S. Ct. 1087. The district court held in *Bluman* that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government." 800 F. Supp. 2d at 288. The court further concluded that this interest supported the federal prohibition on expenditures by foreign nationals to influence U.S. elections. *Id.* at 289. As the court observed, foreign nationals "stand in a different relationship" to our political community than do domestic corporations or residents. *Id.* at 290.

Bluman therefore further demonstrates that—contrary to petitioners' claims (*see* Pet. at 32-33)—the anti-corruption interest is not the only cognizable government interest that can support restrictions on campaign expenditures: a polity also has a compelling interest in regulating electoral influence by nonresidents.

The States are sovereign and self-governing, *see, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-41 & n.7 (1982), and have a strong interest in limiting participation in their political processes to those who reside within their borders, *see Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

As noted above, state campaign finance laws present the interest in regulating nonresidents' electoral influence in significantly stronger form than do federal laws, because a much larger proportion of potential corporate spenders are nonresidents of a particular State than they are nonresidents of the entire United States. *See* U.S. Census Bureau, Statistics of U.S. Businesses: 2008, All Industries – By State, *available at* http://www.census.gov/epcd/susb/latest/us/US--.htm (last visited May 14, 2012) (reporting that in 2008, only 32,570 out of nearly six million U.S. firms with payroll provided a Montana address). And nonresident *corporations*, due to their large aggregations of wealth and discrete economic interests, present the greatest risk of domination or distortion of state and local elections by nonresidents. The fact that spending levels and numbers of contributors are greatly lower in state and local elections, as compared with federal elections, heightens the susceptibility of state and local elections to domination by nonresident corporations. In 2008, for example, candidates for the Montana House of Representatives and Senate raised an average of about $8,000 and $13,000, respectively, whereas federal House and Senate candidates nationwide raised, on average, about *two hundred* times as much money.[22] And

22. *See* Affidavit of Edwin Bender, Sept. 10, 2010, ¶ 17 (state averages); Center for Responsive Politics, Price of Admission, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&type=M&display=A (last visited May 15, 2012).

independent expenditures in Montana also appear to be quite low in comparison with independent expenditures in federal campaigns.[23]

Recent history furnishes several instances in which nonresidents have dominated spending in state elections. In 2010, spending by out-of-state groups far exceeded local spending on communications for and against retention of three Iowa Supreme Court Justices. Foreign spending was heavily one-sided, with the vast majority of out-of-state funds spent in opposition to the Justices. Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct. Rev. 118, 120-21 (2011); Ian Bartrum, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 Wash. U. L. Rev. 1047, 1048 (2011). And because of independent expenditures made by foreign corporations, overall spending on the retention elections was also heavily one-sided. *See id.* All three Iowa Justices lost their seats. And in Wisconsin, spending on recall elections for Governor Scott Walker and certain state senators has already exceeded previous records based in large part on out-of-state spending. *See, e.g.*, Jason Stein, *Recall Cost to Government: $2.1 million; Amount Spent: A Record $44 million*, Milwaukee Journal Sentinel (Sept. 20, 2011). *See also* Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. Rev. 35, 46 (2010) (estimating that fifty to eighty percent of spending on abortion referendum came from out of state); Christopher R. Nolen, *Election Law*, 41 U. Rich. L. Rev.

23. *See* Affidavit of Mike Cooney, Sept. 9, 2010, ¶¶ 9-18; Affidavit of Bob Brown, Sept. 9, 2010, ¶¶ 12-25.

121, 139 (2006) (reporting that out-of-state organization contributed $2.1 million to candidate for attorney general, prompting reforms).

Before *Bluman*, courts had reached different conclusions as to the constitutionality of state statutes restricting nonresidents' spending in state campaigns. The Supreme Court of Alaska upheld a statute restricting contributions by nonresidents in state elections, *see Alaska Civil Liberties Union*, 978 P.2d at 614-17, whereas the Second Circuit invalidated a similar Vermont statute, *see Landell v. Sorrell*, 382 F.3d 91, 146-48 (2d Cir. 2004), *rev'd on other grounds*, 548 U.S. 230 (2006). In *VanNatta v. Keisling*, the Ninth Circuit, over a strong dissent, struck down an Oregon ballot measure that prohibited candidates for state office from using contributions from outside their electoral district. 151 F.3d 1215 (9th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).[24] *But see Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1091 n.2 (9th Cir. 2003) (stating that *VanNatta* has been superseded by *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), which sustained Missouri's contribution limits based on evidentiary record compiled by the State). Of course, this Court's decision in *Bluman*, summarily affirming the lower court's ruling upholding the federal prohibition on independent expenditures by foreign nationals, strongly suggests that States may permissibly restrict campaign expenditures by nonresidents, including

24. The state laws addressed in these cases, unlike the federal law upheld in *Bluman*, restricted nonresidents as to contributions and not expenditures. As the district court noted in *Bluman*, however, the differences between contributions and expenditures are not relevant to the validity of campaign finance restrictions on foreign entities. *See* 800 F. Supp. 2d at 288 n.3.

nonresident corporations. The fact that the Court did not address the question of nonresident expenditures in *Citizens United* is another reason that summary reversal would be inappropriate in this case.

CONCLUSION

The petition for certiorari should be denied. In the alternative, the Court should grant certiorari and order full briefing and oral argument.

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